The 1994 Edition of the MCM is a complete revision incorporating Executive Orders/Changes 1–6. Copies of each Executive Order can be found in Appendix 23.
## CONTENTS

### PART I. PREAMBLE

1. Sources of military jurisdiction .......................................................... I-1
2. Exercise of military jurisdiction ......................................................... I-1
   (a) Kinds ............................................................................. I-1
   (b) Agencies ......................................................................... I-1
3. Nature and purpose of military law ..................................................... I-1

### PART II. RULES FOR COURTS-MARTIAL

#### CHAPTER I. GENERAL PROVISIONS

Rule 101. Scope, title ............................................................................. II-1
   (a) In general ......................................................................... II-1
   (b) Title ................................................................................ II-1

Rule 102. Purpose and construction ..................................................... II-1
   (a) Purpose ............................................................................ II-1
   (b) Construction ..................................................................... II-1

Rule 103. Definitions and rules of construction ..................................... II-1

Rule 104. Unlawful command influence ............................................... II-5
   (a) General prohibitions .......................................................... II-5
   (b) Prohibitions concerning evaluations ...................................... II-5

Rule 105. Direct communications: convening authorities and staff judge advocates; among staff judge advocates ......................................................... II-5
   (a) Convening authorities and staff judge advocates ................ II-5
   (b) Among staff judge advocates and with the Judge Advocate General II-5

Rule 106. Delivery of military offenders to civilian authorities ............... II-6

Rule 107. Dismissed officer's right to request trial by court-martial ......... II-6

Rule 108. Rules of court ..................................................................... II-6

Rule 109. Professional supervision of military judges and counsel ......... II-6
   (a) In general ......................................................................... II-6
   (b) Action after suspension or disbarment ................................ II-6
   (c) Investigation of judges ...................................................... II-6

#### CHAPTER II. JURISDICTION

Rule 201. Jurisdiction in general ......................................................... II-9
   (a) Nature of courts-martial jurisdiction .................................... II-9
   (b) Requisites of court-martial jurisdiction.............................. II-9
   (c) Contempt .......................................................................... II-10
   (d) Exclusive and nonexclusive jurisdiction ............................ II-10
   (e) Reciprocal jurisdiction ..................................................... II-10
MCM 1994

(f) Types of courts-martial. .......................................................... II-11
(g) Concurrent jurisdiction of other military tribunals. ..................... II-12

Rule 202. Persons subject to the jurisdiction of courts-martial
(a) In general. ........................................................................ II-13
(b) Offenses under the law of war. ............................................. II-14
(c) Attachment of jurisdiction over the person. ............................. II-14
(2) Procedure. ...................................................................... II-15

Rule 203. Jurisdiction over the offense........................................ II-15

Rule 204. Jurisdiction over certain reserve component personnel .... II-16
(a) Service regulations. ............................................................ II-16
(c) Applicability. ..................................................................... II-17
(d) Changes in type of service. ................................................ II-17

CHAPTER III. INITIATION OF CHARGES; APPREHENSION; PRETRIAL RESTRAINT; RELATED MATTERS

Rule 301. Report of offense .......................................................... II-18
(a) Who may report. .............................................................. II-18
(b) To whom reports conveyed for disposition. ............................ II-18

Rule 302. Apprehension ............................................................. II-18
(a) Definition and scope. ........................................................ II-18
(b) Who may apprehend. ......................................................... II-19
(c) Grounds for apprehension. ................................................ II-19
(d) How an apprehension may be made. .................................. II-19
(e) Where an apprehension may be made. ................................ II-19

Rule 303. Preliminary inquiry into reported offenses. ................. II-20

Rule 304. Pretrial restraint ......................................................... II-20
(a) Types of pretrial restraint. .................................................. II-20
(b) Who may order pretrial restraint. ...................................... II-21
(c) When a person may be restrained. ..................................... II-21
(d) Procedures for ordering pretrial restraint. ......................... II-22
(e) Notice of basis for restraint. ........................................... II-22
(f) Punishment prohibited. ..................................................... II-22
(g) Release. ................................................................. II-22
(h) Administrative restraint. .................................................. II-22

Rule 305. Pretrial confinement .................................................... II-22
(a) In general. ................................................................. II-22
(b) Who may be confined. ..................................................... II-22
(c) Who may order confinement. .......................................... II-22
(d) When a person may be confined. ..................................... II-23
(e) Advice to the accused upon confinement. ....................... II-23
(f) Military counsel. .......................................................... II-23
(g) Who may direct release from confinement. ....................... II-23
(h) Notification and action by commander. ............................. II-23
(j) Review by military judge. ................................................. II-25

ii
(k) Remedy

(l) Confinement after release.

(m) Exceptions

Rule 306. Initial disposition

(a) Who may dispose of offenses.

(b) Policy.

(c) How offenses may be disposed of.

(d) National security matters.

Rule 307. Preferral of charges

(a) Who may prefer charges.

(b) How charges are preferred; oath.

(c) How to allege offenses.

(d) Harmless error in citation.

Rule 308. Notification to accused of charges

(a) Immediate commander.

(b) Commanders at higher echelons.

(c) Remedy

CHAPTER IV. FORWARDING AND DISPOSITION OF CHARGES

Rule 401. Forwarding and disposition of charges in general

(a) Who may dispose of charges.

(b) Prompt determination.

(c) How charges may be disposed of.

(d) National security matters.

Rule 402. Action by commander not authorized to convene courts-martial

Rule 403. Action by commander exercising summary court-martial jurisdiction

(a) Recording receipt.

(b) Disposition.

Rule 404. Action by commander exercising special court-martial jurisdiction

Rule 405. Pretrial investigation

(a) In general.

(b) Earlier investigation.

(c) Who may direct investigation.

(d) Personnel.

(e) Scope of investigation.

(f) Rights of the accused.

(g) Production of witnesses and evidence; alternatives.

(h) Procedure.

(i) Military Rules of Evidence.

(j) Report of investigation.

Rule 406. Pretrial advice

(a) In general.

(b) Contents.
Rule 407. Action by commander exercising general court-martial jurisdiction
(a) Disposition
(b) National security matters.
CHAPTER VI. REFERRAL, SERVICE, AMENDMENT, AND WITHDRAWAL OF CHARGES

Rule 601. Referral
(a) In general.
(b) Who may refer.
(c) Disqualification.
(d) When charges may be referred.
(e) How charges shall be referred.
(f) Superior convening authorities.

Rule 602. Service of charges

Rule 603. Changes to charges and specifications
(a) Minor changes defined.
(b) Minor changes before arraignment.
(c) Minor changes after arraignment.
(d) Major changes.

Rule 604. Withdrawal of charges
(a) Withdrawal.
(b) Referral of withdrawn charges.

CHAPTER VII. PRETRIAL MATTERS

Rule 701. Discovery
(a) Disclosure by the trial counsel.
(b) Disclosure by the defense.
(c) Failure to call witness.
(d) Continuing duty to disclose.
(e) Access to witnesses and evidence.
(f) Information not subject to disclosure.
(g) Regulation of discovery.
(h) Inspect.

Rule 702. Depositions
(a) In general.
(b) Who may order.
(c) Request to take deposition.
(e) Notice.
(f) Duties of the deposition officer.
(g) Procedure.
(h) Objections.

Rule 703. Production of witnesses and evidence
(a) In general.
(b) Right to witnesses.
(c) Determining which witness will be produced.
(d) Employment of expert witnesses.
(e) Procedures for production of witnesses.
(f) Right to evidence.
Rule 704. Immunity ................................................................. II-68
(a) Types of immunity. .................................................. II-68
(b) Scope. ................................................................... II-68
(c) Authority to grant immunity. ..................................... II-68
(d) Procedure. ............................................................. II-69
(e) Decision to grant immunity. ...................................... II-69

Rule 705. Pretrial agreements ................................................II-69
(a) In general. ............................................................. II-69
(b) Nature of agreement. ............................................... II-69
(c) Terms and conditions. ............................................ II-70
(d) Procedure. ............................................................. II-70
(e) Nondisclosure of existence of agreement. .................. II-71

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused ................................................ II-71
(a) Initial action. .......................................................... II-71
(b) Ordering an inquiry. ............................................... II-71
(c) Inquiry. ................................................................. II-72

Rule 707. Speedy trial ............................................................. II-72
(a) In general. ............................................................. II-72
(b) Accountability. ....................................................... II-73
(c) Excludable delay. ..................................................... II-73
(d) Remedy. ............................................................... II-74
(e) Waiver. ................................................................. II-74

CHAPTER VIII. TRIAL PROCEDURE GENERALLY

Rule 801. Military judge’s responsibilities; other matters ............................................................. II-75
(a) Responsibilities of military judge. ................................ II-75
(b) Rules of court; contempt. ......................................... II-75
(c) Obtaining evidence. ............................................... II-75
(d) Uncharged offenses. ............................................... II-75
(e) Interlocutory questions and questions of law. ............. II-76
(f) Rulings on record. .................................................. II-77
(g) Effect of failure to raise defenses or objections. ........... II-77

Rule 802. Conferences ............................................................. II-78
(a) In general. ............................................................. II-78
(b) Matters on record. ................................................. II-78
(c) Rights of parties. ..................................................... II-78
(d) Accused’s presence. ............................................... II-78
(e) Admission. ........................................................... II-78
(f) Limitations. .......................................................... II-78

Rule 803. Court-martial sessions without members under Article 39(a) ................................................ II-78

Rule 804. Presence of the accused at trial proceedings ............................................................. II-79
(a) Presence required. .................................................. II-79
(b) Continued presence not required. ............................. II-79
(c) Appearance and security of accused. ......................... II-80
Rule 805. Presence of military judge, members, and counsel ......................... II-80
(a) Military judge. .................................................................................. II-80
(b) Members. .......................................................................................... II-80
(c) Counsel. ............................................................................................. II-80
(d) Effect of replacement of member or military judge. ......................... II-80

Rule 806. Public trial .................................................................................. II-81
(a) In general. .......................................................................................... II-81
(b) Control of spectators. .......................................................................... II-81
(c) Photography and broadcasting prohibited. ......................................... II-82

Rule 807. Oaths ......................................................................................... II-82
(a) Definition. .......................................................................................... II-82
(b) Oaths in courts-martial. ...................................................................... II-82

Rule 808. Record of trial ............................................................................ II-83

Rule 809. Contempt proceedings ............................................................. II-83
(a) In general. .......................................................................................... II-83
(b) Method of disposition. ......................................................................... II-84
(d) Record; review. .................................................................................. II-84
(e) Sentence. ............................................................................................. II-84
(f) Informing person held in contempt. .................................................... II-84

Rule 810. Procedures for rehearings, new trials, and other trials ............... II-85
(a) In general. .......................................................................................... II-85
(c) Examination of record of former proceedings. ................................ II-85
(d) Sentence limitations. .......................................................................... II-86
(e) Definition. .......................................................................................... II-86

Rule 811. Stipulations ............................................................................... II-86
(a) In general. .......................................................................................... II-86
(b) Authority to reject. ............................................................................ II-86
(c) Requirements. .................................................................................... II-86
(d) Withdrawal. ....................................................................................... II-87
(e) Effect of stipulation. .......................................................................... II-87
(f) Procedure. .......................................................................................... II-87

Rule 812. Joint and common trials ............................................................ II-87

Rule 813. Announcing personnel of the court-martial and accused .......... II-87
(a) Opening sessions. .............................................................................. II-87
(b) Later proceedings. ............................................................................. II-88
(c) Additions, replacement, and absences of personnel. ....................... II-88

CHAPTER IX. TRIAL PROCEDURES THROUGH FINDINGS

Rule 901. Opening session ....................................................................... II-89
(a) Call to order. ..................................................................................... II-89
(b) Announcement of parties. .................................................................. II-89
(c) Swearing reporter and interpreter. ..................................................... II-89
(d) Counsel. ................................................................. II-89
(e) Presence of members. ............................................. II-90

Rule 902. Disqualification of military judge ..................... II-90
(a) In general. .............................................................. II-90
(b) Specific grounds. ................................................... II-90
(c) Definitions. ........................................................... II-90
(d) Procedure. ............................................................ II-91
(e) Waiver. ................................................................. II-91

Rule 903. Accused's elections on composition of court-martial II-91
(a) Time of elections. .................................................... II-91
(b) Form of election. ..................................................... II-91
(c) Action on election. .................................................. II-91
(d) Right to withdraw request. ...................................... II-92
(e) Untimely requests. .................................................. II-92

Rule 904. Arraignment ................................................... II-92

Rule 905. Motions generally ........................................... II-92
(a) Definitions and form. ............................................. II-92
(b) Pretrial motions. .................................................... II-93
(c) Burden of proof. ..................................................... II-93
(d) Ruling on motions. .................................................. II-93
(e) Effect of failure to raise defenses or objections. ........ II-94
(f) Reconsideration. .................................................... II-94
(g) Effect of final determinations. ................................. II-94
(h) Written motions. ..................................................... II-95
(i) Service. ................................................................. II-95
(j) Application to convening authority. .......................... II-95
(k) Production of statements on motion to suppress. ....... II-95

Rule 906. Motions for appropriate relief .......................... II-95
(a) In general. ............................................................. II-95
(b) Grounds for appropriate relief. ............................... II-95
(1) Continuances. ....................................................... II-95
(4) Amendment of charges or specifications. ................. II-96
(11) Change of place of trial. ....................................... II-97

Rule 907. Motions to dismiss .......................................... II-97
(a) In general. ............................................................. II-97
(b) Grounds for dismissal. .......................................... II-97

Rule 908. Appeal by the United States ............................. II-99
(a) In general. ............................................................. II-99
(b) Procedure. ........................................................... II-99
(c) Appellate proceedings. ......................................... II-100
(d) Military judge. ...................................................... II-100

Rule 909. Capacity of the accused to stand trial by court-martial II-100
(a) In general. ............................................................. II-100
(b) Presumption of capacity. ........................................ II-100
(c) Determination at trial. ................................................................. II-100

Rule 910. Pleas ........................................................................... II-101
(a) Alternatives. ................................................................. II-101
(b) Refusal to plead; irregular plea. ........................................ II-101
(c) Advice to accused. ............................................................. II-101
(d) Ensuring that the plea is voluntary. ................................. II-102
(e) Determining accuracy of plea. ........................................... II-102
(f) Plea agreement inquiry. ......................................................... II-102
(g) Findings. ............................................................................ II-102
(h) Later action. ....................................................................... II-103
(i) Record of proceedings. ....................................................... II-103
(j) Waiver. ................................................................................ II-103

Rule 911. Assembly of the court-martial ....................................... II-103

Rule 912. Challenge of selection of members; examination and challenges of members .......................................................... II-104
(a) Pretrial matters. ................................................................. II-104
(b) Challenge of selection of members. .................................... II-104
(c) Stating grounds for challenge. ............................................. II-104
(d) Examination of members. ................................................... II-104
(e) Evidence. ............................................................................ II-105
(f) Challenges and removal for cause. ..................................... II-105
(g) Peremptory challenges. ....................................................... II-106
(h) Special courts-martial without a military judge. ............... II-106
(i) Definitions. ........................................................................ II-106

Rule 913. Presentation of the case on the merits ................................ II-107
(a) Preliminary instructions. ..................................................... II-107
(b) Opening statements. ........................................................... II-107
(c) Presentation of evidence. .................................................... II-107

Rule 914. Production of statements of witnesses .......................... II-108
(a) Motion for production. ....................................................... II-108
(b) Production of entire statement. ........................................ II-108
(c) Production of excised statement. ....................................... II-108
(d) Recess for examination of the statement. ......................... II-108
(e) Remedy for failure to produce statement. ......................... II-108
(f) Definition. .......................................................................... II-108

Rule 915. Mistrial ....................................................................... II-109
(a) In general. .......................................................................... II-109
(b) Procedure. .......................................................................... II-109
(c) Effect of declaration of mistrial. ......................................... II-109

Rule 916. Defenses .................................................................... II-109
(a) In general. .......................................................................... II-109
(b) Burden of proof. ............................................................... II-110
(c) Justification. ...................................................................... II-110
(d) Obedience to orders. ........................................................... II-110
(e) Self-defense ................................................................. II-110
(f) Accident ................................................................. II-111
(g) Entrapment ............................................................. II-111
(h) Coercion or duress .................................................... II-111
(i) Inability ................................................................. II-112
(j) Ignorance or mistake of fact .............................. II-112
(k) Lack of mental responsibility ................................ II-112
(l) Not defenses generally ......................................... II-113

Rule 917. Motion for a finding of not guilty
(a) In general ................................................................. II-113
(b) Form of motion ..................................................... II-113
(c) Procedure ............................................................. II-113
(d) Standard ............................................................... II-113
(e) Motion as to greater offense .............................. II-113
(f) Effect of ruling .................................................... II-114
(g) Effect of denial on review ................................ II-114

Rule 918. Findings ........................................................ II-114
(a) General findings ................................................. II-114
(b) Special findings .................................................. II-114
(c) Basis of findings ................................................ II-115

Rule 919. Argument by counsel on findings
(a) In general ............................................................. II-115
(b) Contents ............................................................... II-115
(c) Waiver of objection to improper argument .... II-115

Rule 920. Instructions on findings
(a) In general ............................................................. II-116
(b) When given .......................................................... II-116
(c) Requests for instructions ................................... II-116
(d) How given ........................................................... II-116
(e) Required instructions ......................................... II-116
(f) Waiver ................................................................. II-117

Rule 921. Deliberations and voting on findings
(a) In general ............................................................. II-117
(b) Deliberations ........................................................ II-117
(c) Voting ................................................................. II-117
(d) Action after findings are reached ................ II-118

Rule 922. Announcement of findings
(a) In general ............................................................. II-118
(b) Findings by members ......................................... II-118
(c) Findings by military judge .............................. II-119
(d) Erroneous announcement ................................ II-119
(e) Polling prohibited ............................................. II-119

Rule 923. Impeachment of findings ...

Rule 924. Reconsideration of findings .......................... II-119
(a) Time for reconsideration .......................................................... II-119
(b) Procedure ............................................................................... II-119
(c) Military judge sitting alone ...................................................... II-119

CHAPTER X. SENTENCING

Rule 1001. Presentencing procedure ................................................ II-120
(a) In general ................................................................................. II-120
(b) Matter to be presented by the prosecution ................................... II-120
(c) Matter to be presented by the defense ......................................... II-121
(d) Rebuttal and surrebuttal .............................................................. II-121
(e) Production of witnesses ............................................................... II-122
(f) Additional matters to be considered ............................................ II-122
(g) Argument .................................................................................. II-122

Rule 1002. Sentence determination .................................................... II-122

Rule 1003. Punishments .................................................................. II-123
(a) In general ................................................................................... II-123
(b) Authorized punishments ............................................................. II-123
(c) Limits on punishments ............................................................... II-125
(d) Circumstances permitting increased punishments ..................... II-127

Rule 1004. Capital cases .................................................................. II-127
(a) In general ................................................................................... II-127
(b) Procedure .................................................................................. II-127
(c) Aggravating factors .................................................................... II-128
(d) Spying ......................................................................................... II-129
(e) Other penalties ........................................................................... II-129

Rule 1005. Instructions on sentence .................................................. II-130
(a) In general ................................................................................... II-130
(b) When given ................................................................................ II-130
(c) Requests for instructions ........................................................... II-130
(d) How given ................................................................................... II-130
(e) Required instructions .................................................................. II-130
(f) Waiver ......................................................................................... II-131

Rule 1006. Deliberations and voting on sentence ............................... II-131
(a) In general ................................................................................... II-131
(b) Deliberations .............................................................................. II-131
(c) Proposal of sentences ............................................................... II-131
(d) Voting ......................................................................................... II-131
(e) Action after a sentence is reached .............................................. II-132

Rule 1007. Announcement of sentence .............................................. II-132
(a) In general ................................................................................... II-132
(b) Erroneous announcement .......................................................... II-132
(c) Polling prohibited ....................................................................... II-132

Rule 1008. Impeachment of sentence ............................................... II-132
Rule 1009. Reconsideration of sentence .......................................................... II-133
  (a) Time for reconsideration. ................................................................. II-133
  (b) Limitations. ...................................................................................... II-133
  (c) Initiation of reconsideration. ............................................................ II-133
  (d) Procedure with members. ............................................................... II-133

Rule 1010. Notice concerning post-trial and appellate rights ......................... II-133

Rule 1011. Adjournment ............................................................................. II-134

CHAPTER XI. POST-TRIAL PROCEDURE

Rule 1101. Report of result of trial; post-trial restraint; deferment of confinement .. II-135
  (a) Report of the result of trial. ............................................................. II-135
  (b) Post-trial confinement. ................................................................. II-135
  (c) Deferment of confinement. ........................................................... II-135

Rule 1102. Post-trial sessions ..................................................................... II-136
  (a) In general. ..................................................................................... II-136
  (b) Purpose. ......................................................................................... II-136
  (c) Matters not subject to post-trial sessions. ....................................... II-137
  (d) When directed. ............................................................................... II-137
  (e) Procedure. ..................................................................................... II-137

Rule 1103. Preparation of record of trial ........................................................ II-137
  (a) In general. ..................................................................................... II-137
  (b) General courts-martial. ................................................................. II-137
  (c) Special courts-martial. ................................................................. II-138
  (d) Summary courts-martial. ............................................................ II-139
  (e) Acquittal; courts-martial resulting in findings of not guilty only by reason of lack of
      mental responsibility; termination prior to findings. ....................... II-139
  (f) Loss of notes or recordings of the proceedings. .............................. II-139
  (g) Copies of the record of trial. .......................................................... II-139
  (h) Security classification. ................................................................. II-139
  (i) Examination and correction before authentication. ......................... II-139
  (j) Videotape and similar records. ........................................................ II-140

Rule 1104. Records of trial: Authentication; service; loss; correction; forwarding ... II-141
  (a) Authentication. ............................................................................. II-141
  (b) Service. ......................................................................................... II-141
  (c) Loss of record. ............................................................................... II-142
  (d) Correction of record after authentication; certificate of correction. .... II-142
  (e) Forwarding. .................................................................................. II-143

Rule 1105. Matters submitted by the accused ............................................... II-143
  (a) In general. ..................................................................................... II-143
  (b) Matters which may be submitted. .................................................. II-143
  (c) Time periods. ................................................................................. II-143
  (d) Waiver. ......................................................................................... II-143

Rule 1106. Recommendation of the staff judge advocate or legal officer .......... II-144
  (a) In general. ..................................................................................... II-144
(b) Disqualification.
(c) When the convening authority has no staff judge advocate.
(d) Form and content of recommendation.
(e) No findings of guilty; findings of not guilty only by reason of lack of mental responsibility.

(f) Service of recommendation on defense counsel and accused; defense response.

Rule 1107. Action by convening authority
(a) Who may take action.
(b) General considerations.
(c) Action on findings.
(d) Action on the sentence.
(e) Ordering rehearing or other trial.
(f) Contents of action and related matters.
(g) Incomplete, ambiguous, or erroneous action.
(h) Service on accused.

Rule 1108. Suspension of execution of sentence; remission
(a) In general.
(b) Who may suspend and remit.
(c) Conditions of suspension.
(d) Limitations on suspension.
(e) Termination of suspension by remission.

Rule 1109. Vacation of suspension of sentence
(a) In general.
(b) Timeliness.
(c) Confinement of probationer pending vacation proceedings.

Rule 1110. Waiver or withdrawal of appellate review
(a) In general.
(b) Right to counsel.
(c) Compulsion, coercion, inducement prohibited.
(d) Form of waiver or withdrawal.
(e) To whom submitted.
(f) Time limit.

Rule 1111. Disposition of the record of trial after action
(a) General courts-martial.
(b) Special courts-martial.

Rule 1112. Review by a judge advocate
(a) In general.
(b) Exception.
(c) Disqualification.
(d) Form and content of review.
(e) Forwarding to officer exercising general court-martial jurisdiction.
(f) Action by officer exercising general court-martial jurisdiction.
(g) Forwarding following review under this rule.

Rule 1113. Execution of sentences
(a) In general ................................................................. II-158
(b) Punishments which the convening authority may order executed in the initial action. II-158
(c) Punishments which the convening authority may not order executed in the initial action. II-158
(d) Other considerations concerning the execution of certain sentences. .................... II-158

Rule 1114. Promulgating orders .................................................. II-160
(a) In general .................................................................. II-160
(b) By whom issued ........................................................... II-160
(c) Contents ................................................................... II-160
(d) Orders containing classified information ........................................ II-160
(e) Authentication ................................................................ II-160
(f) Distribution .................................................................. II-160

CHAPTER XII. APPEALS AND REVIEW

Rule 1201. Action by the Judge Advocate General ........................................ II-162
(a) Cases required to be referred to a Court of Military Review ......................... II-162
(b) Cases reviewed by the Judge Advocate General ........................................... II-162
(c) Remission and suspension .......................................................... II-163

Rule 1202. Appellate counsel ................................................................ II-163
(a) In general ..................................................................... II-163
(b) Duties ........................................................................... II-163

Rule 1203. Review by a Court of Military Review .............................................. II-164
(a) In general ..................................................................... II-164
(b) Cases reviewed by a Court of Military Review............................................. II-164
(c) Action on cases reviewed by a Court of Military Review ............................. II-164
(d) Notification to accused ........................................................................ II-165
(e) Cases not reviewed by the Court of Military Appeals ................................. II-166
(f) Scope ........................................................................... II-166

Rule 1204. Review by the Court of Military Appeals ............................................ II-166
(a) Cases reviewed by the Court of Military Appeals ........................................... II-166
(b) Petition by the accused for review by the Court of Military Appeals ............. II-166
(c) Action on decision by the Court of Military Appeals .................................. II-167

Rule 1205. Review by the Supreme Court ............................................................ II-167
(a) Cases subject to review by the Supreme Court ............................................. II-167
(b) Action by the Supreme Court ................................................................ II-167

Rule 1206. Powers and responsibilities of the Secretary ........................................ II-168
(a) Sentences requiring approval by the Secretary .......................................... II-168
(b) Remission and suspension ................................................................ II-168

Rule 1207. Sentences requiring approval by the President ..................................... II-168

Rule 1208. Restoration ............................................................................. II-168
(a) New trial ........................................................................ II-168
(b) Other cases .................................................................... II-168

Rule 1209. Finality of courts-martial ............................................................... II-168
(a) When a conviction is final .............................................. II-168
(b) Effect of finality .......................................................... II-169

Rule 1210. New trial .......................................................... II-169
(a) In general ................................................................. II-169
(b) Who may petition ........................................................ II-169
(c) Form of petition .......................................................... II-169
(d) Effect of petition .......................................................... II-169
(e) Who may act on petition ................................................ II-169
(f) Grounds for new trial ..................................................... II-170
(g) Action on the petition ..................................................... II-170
(h) Action when new trial is granted ..................................... II-170

CHAPTER XIII. SUMMARY COURTS-MARTIAL 
Rule 1301. Summary courts-martial generally ......................... II-172
(a) Composition ............................................................... II-172
(b) Function ................................................................. II-172
(c) Jurisdiction ............................................................... II-172
(d) Punishments .............................................................. II-172
(e) Counsel ................................................................. II-172
(f) Power to obtain witnesses and evidence ......................... II-173
(g) Secretarial limitations ................................................ II-173

Rule 1302. Convening a summary court-martial ...................... II-173
(a) Who may convene summary courts-martial ...................... II-173
(b) When convening authority is accuser ............................. II-173
(c) Procedure ............................................................... II-173

Rule 1303. Right to object to trial by summary court-martial .... II-173

Rule 1304. Trial procedure ............................................... II-173
(a) Pretrial duties ........................................................... II-173
(b) Summary court-martial procedure ................................ II-174

Rule 1305. Record of trial ................................................ II-175
(a) In general ............................................................... II-175
(b) Contents ................................................................. II-176
(c) Authentication .......................................................... II-176
(d) Medical certificate ..................................................... II-176
(e) Forwarding copies of the record ................................. II-176

Rule 1306. Post-trial procedure .......................................... II-176
(a) Matters submitted by the accused ................................. II-176
(b) Convening authority's action ....................................... II-176
(c) Review by a judge advocate ....................................... II-177
(d) Review by the Judge Advocate General ....................... II-177

PART III. MILITARY RULES OF EVIDENCE 
SECTION I GENERAL PROVISIONS
Rule 101. Scope
(a) Applicability.
(b) Secondary Sources.
(c) Rule of construction.

Rule 102. Purpose and construction

Rule 103. Ruling on evidence
(a) Effect of erroneous ruling.
(b) Record of offer and ruling.
(c) Hearing of members.
(d) Plain error.

Rule 104. Preliminary questions
(a) Questions of admissibility generally.
(b) Relevancy conditioned on fact.
(c) Hearing of members.
(d) Testimony by accused.
(e) Weight and credibility.

Rule 105. Limited admissibility

Rule 106. Remainder of or related writings or recorded statements

SECTION II JUDICIAL NOTICE
Rule 201. Judicial notice of adjudicative facts
(a) Scope of rule.
(b) Kinds of facts.
(c) When discretionary.
(d) When mandatory.
(e) Opportunity to be heard.
(f) Time of taking notice.
(g) Instructing members.

Rule 201A. Judicial notice of law
(a) Domestic law.
(b) Foreign law.

SECTION III EXCLUSIONARY RULES AND RELATED MATTERS CONCERNING SELF-INCrimINATION, SEARCH AND SEIZURE, AND EYEWITNESS IDENTIFICATION
Rule 301. Privilege concerning compulsory self-incrimination
(a) General rule.
(c) Exercise of the privilege.
(d) Waiver by a witness.
(e) Waiver by the accused.
(f) Effect of claiming the privilege.
(g) Instructions.

Rule 302. Privilege concerning mental examination of an accused
(a) General rule. ............................................................... III-4
(b) Exceptions. ............................................................... III-4
(c) Release of evidence. ................................................... III-4
(d) Noncompliance by the accused. ................................. III-4
(e) Procedure. ............................................................... III-4

Rule 303. Degrading questions ........................................ III-4

Rule 304. Confessions and admissions ............................ III-4
(a) General rule. ............................................................... III-4
(b) Exceptions. ............................................................... III-4
(c) Definitions. ............................................................... III-5
(d) Procedure. ............................................................... III-5
(e) Burden of proof. ......................................................... III-5
(f) Defense evidence. ....................................................... III-6
(g) Corroboration. .......................................................... III-6
(h) Miscellaneous. .......................................................... III-6

Rule 305. Warnings about rights ..................................... III-6
(a) General rule. ............................................................... III-6
(b) Definitions. ............................................................... III-6
(c) Warnings concerning the accusation, right to remain silent, and use of statements. ........................ III-7
(d) Counsel rights and warnings. ....................................... III-7
(e) Notice to Counsel. ....................................................... III-7
(f) Exercise of rights. ........................................................ III-7
(g) Waiver. .................................................................... III-7
(h) Nonmilitary interrogations. ........................................... III-7

Rule 306. Statements by one of several accused ............... III-8

Rule 311. Evidence obtained from unlawful searches and seizures ................................................ III-8
(a) General rule. ............................................................... III-8
(b) Exceptions. ............................................................... III-8
(c) Nature of search or seizure. .......................................... III-8
(d) Motions to suppress and objections. ............................ III-9
(e) Burden of proof. ........................................................ III-9
(f) Defense evidence. ....................................................... III-10
(g) Scope of motions and objections challenging probable cause. ...................................................... III-10
(h) Objections to evidence seized unlawfully. .................. III-10
(i) Effect of guilty plea. .................................................... III-10

Rule 312. Body views and intrusions ............................... III-10
(a) General rule. ............................................................... III-10
(b) Visual examination of the body. ................................... III-10
(c) Intrusion into body cavities. ......................................... III-10
(d) Extraction of body fluids. ............................................. III-11
(e) Other intrusive searches. ............................................. III-11
(f) Intrusions for valid medical purposes. ......................... III-11
(g) Medical qualifications. .............................................. III-11

Rule 313. Inspections and inventories in the armed forces .. III-11
(a) General rule. ........................................................................ III-11
(b) Inspections. ........................................................................ III-11
(c) Inventories. ......................................................................... III-12

**Rule 314. Searches not requiring probable cause**

(a) General rule. ........................................................................ III-12
(b) Border searches. ................................................................... III-12
(c) Searches upon entry to or exit from United States installations, aircraft, and vessels abroad. ........................................................................................................ III-12
(d) Searches of government property. ........................................ III-12
(e) Consent searches. ................................................................. III-12
(f) Searches incident to a lawful stop. ......................................... III-13
(g) Searches incident to a lawful apprehension. ......................... III-13
(h) Searches within jails, confinement facilities, or similar facilities. ........................................................................................................ III-13
(i) Emergency searches to save life or for related purposes. .... III-13
(j) Searches of open fields or woodlands. ................................. III-13
(k) Other searches. ..................................................................... III-13

**Rule 315. Probable cause searches**

(a) General rule. ......................................................................... III-13
(b) Definitions. .......................................................................... III-13
(c) Scope of authorization. ......................................................... III-13
(d) Power to authorize. ............................................................... III-14
(e) Power to search. ................................................................. III-14
(f) Basis for Search authorizations. ............................................. III-14
(g) Exigencies. .......................................................................... III-14
(h) Execution. .......................................................................... III-15

**Rule 316. Seizures**

(a) General rule. .......................................................................... III-15
(b) Seizure of property. .............................................................. III-15
(c) Apprehension. ....................................................................... III-15
(d) Seizure of property or evidence. ........................................... III-15
(e) Power to seize. ..................................................................... III-16
(f) Other seizures. ..................................................................... III-16

**Rule 317. Interception of wire and oral communications**

(a) General rule. .......................................................................... III-16
(b) Authorization for judicial applications in the United States. .................................................................. III-16
(c) Regulations. ......................................................................... III-16

**Rule 321. Eyewitness identification**

(a) General rule. .......................................................................... III-16
(b) Definition of “unlawful”. ....................................................... III-17
(c) Motions to suppress and objections. .................................... III-17
(d) Burden of proof. ................................................................... III-17
(e) Defense evidence. ............................................................... III-18
(f) Rulings. ............................................................................... III-18
(g) Effect of guilty pleas. ........................................................... III-18
SECTION IV RELEVANCY AND ITS LIMITS

Rule 401. Definition of “relevant evidence” ................................................................. III-18

Rule 402. Relevant evidence general admissible; irrelevant evidence inadmissible . . III-18

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time ................................................................................................. III-18

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes ........................................................................................................ III-18
  (a) Character evidence generally. ................................................................. III-18
  (b) Other crimes, wrongs, or acts. ............................................................. III-19

Rule 405. Methods of proving character ................................................................ III-19
  (a) Reputation or opinion. ......................................................................... III-19
  (b) Specific instances of conduct. ............................................................ III-19
  (c) Affidavits. ......................................................................................... III-19
  (d) Definitions. ....................................................................................... III-19

Rule 406. Habit; routine practice .......................................................................... III-19

Rule 407. Subsequent remedial measures ............................................................. III-19

Rule 408. Compromise and offer to compromise .................................................. III-19

Rule 409. Payment of medical and similar expenses ............................................. III-19

Rule 410. Inadmissibility of pleas, plea discussions, and related statements .... III-19
  (a) In general. ....................................................................................... III-19
  (b) Definitions. ..................................................................................... III-20

Rule 411. Liability insurance ............................................................................. III-20

Rule 412. Nonconsensual sexual offenses; relevance of victim’s past behavior . III-20

SECTION V PRIVILEGES

Rule 501. General rule .......................................................................................... III-21

Rule 502. Lawyer-client privilege ....................................................................... III-21
  (a) General rule of privilege. ................................................................. III-21
  (b) Definitions. ..................................................................................... III-21
  (c) Who may claim the privilege. ........................................................ III-21
  (d) Exceptions. ..................................................................................... III-22

Rule 503. Communications to clergy ................................................................. III-22
  (a) General rule of privilege. ................................................................. III-22
  (b) Definitions. ..................................................................................... III-22
  (c) Who may claim the privilege. ........................................................ III-22

Rule 504. Husband-wife privilege ..................................................................... III-22
  (a) Spousal incapacity. ........................................................................... III-22
  (b) Confidential communication made during marriage. ...................... III-22
  (c) Exceptions. ..................................................................................... III-22

Rule 505. Classified information ........................................................................ III-23
  (a) General rule of privilege. ................................................................. III-23
(b) Definitions. ................................................................. III-23
(c) Who may claim the privilege. ........................................ III-23
(d) Action prior to referral of charges. ............................. III-23
(e) Pretrial session. .............................................................. III-23
(f) Action after referral of charges. ................................. III-23
(g) Disclosure of classified information to the accused. .... III-24
(h) Notice of the accused's intention to disclose classified information. III-25
(i) In camera proceedings for cases involving classified information. III-25
(j) Introduction of classified information. ...................... III-26
(k) Security procedures to safeguard against compromise of classified information disclosed to courts-martial. III-26

Rule 506. Government information other than classified information ....................................................... III-27
(a) General rule of privilege. ................................................ III-27
(b) Scope. ........................................................................ III-27
(c) Who may claim the privilege. ........................................ III-27
(d) Action prior to referral of charges. ............................. III-27
(e) Action after referral of charges. ................................. III-27
(f) Pretrial session. .............................................................. III-27
(g) Disclosure of government information to the accused. ... III-27
(h) Prohibition against disclosure. ..................................... III-28
(i) In camera proceedings. ................................................ III-28
(j) Introduction of government information subject to a claim of privilege. ................................................ III-28
(k) Procedures to safeguard against compromise of government information disclosed to courts-martial. III-29

Rule 507. Identity of informant ........................................ III-29
(a) Rule of privilege. .......................................................... III-29
(b) Who may claim the privilege. ........................................ III-29
(c) Exceptions. .................................................................. III-29
(d) Procedures. ................................................................ III-29

Rule 508. Political vote ....................................................... III-30

Rule 509. Deliberations of courts and juries ......................... III-30

Rule 510. Waiver of privilege by voluntary disclosure ....... III-30

Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege. ........ III-30

Rule 512. Comment upon or inference from claim of privilege; instruction ........................................ III-30
(a) Comment or inference not permitted. ......................... III-30
(b) Claiming privilege without knowledge of members. .... III-30
(c) Instruction. ................................................................ III-30

SECTION VI WITNESSES

Rule 601. General rule of competency ................................ III-30
Rule 602. Lack of personal knowledge .............................. III-31
Rule 603. Oath or affirmation .............................................. III-31
Rule 604. Interpreters ................................................................. III-31
Rule 605. Competency of military judge as witness ......................... III-31
Rule 606. Competency of court member as witness ........................ III-31
(a) At the court-martial ......................................................... III-31
(b) Inquiry into validity of findings or sentence ............................ III-31
Rule 607. Who may impeach ..................................................... III-31
Rule 608. Evidence of character, conduct, and bias of witness .......... III-31
(a) Opinion and reputation evidence of character ...................... III-31
(b) Specific instances of conduct ........................................... III-31
(c) Evidence of bias ............................................................ III-31
Rule 609. Impeachment by evidence of conviction of crime ............... III-32
(a) General rule .................................................................. III-32
(b) Time limit ....................................................................... III-32
(c) Effect of pardon, annulment, or certificate of rehabilitation ...... III-32
(d) Juvenile adjudications ...................................................... III-32
(e) Pendency of appeal ........................................................ III-32
(f) Definition ........................................................................ III-32
Rule 610. Religious beliefs or opinions ......................................... III-32
Rule 611. Mode and order of interrogation and presentation ............. III-32
(a) Control by the military judge ............................................. III-32
(b) Scope of cross-examination .............................................. III-32
(c) Leading questions ........................................................... III-32
Rule 612. Writing used to refresh memory .................................. III-33
Rule 613. Prior statements of witnesses .................................... III-33
(a) Examining witness concerning prior statement .................... III-33
(b) Extrinsic evidence of prior inconsistent statement of witness. III-33
Rule 614. Calling and interrogation of witnesses by the court-martial III-33
(a) Calling by the court-martial .............................................. III-33
(b) Interrogation by the court-martial ..................................... III-33
(c) Objections ...................................................................... III-33
Rule 615. Exclusion of witnesses ................................................. III-33

SECTION VII  OPINIONS AND EXPERT TESTIMONY
Rule 701. Opinion testimony by lay witnesses .............................. III-34
Rule 702. Testimony by experts ................................................ III-34
Rule 703. Bases of opinion testimony by experts ........................... III-34
Rule 704. Opinion on ultimate issue ......................................... III-34
Rule 705. Disclosure of facts or data underlying expert opinion ...... III-34
Rule 706. Court appointed experts ........................................... III-34
(a) Appointment and compensation ....................................... III-34
(b) Disclosure of employment ............................................... III-34
(c) Accused’s experts of own selection. .................................................. III-34

Rule 707. Polygraph Examinations ..................................................... III-34

SECTION VIII HEARSAY

Rule 801. Definitions .................................................................. III-34
(a) Statement. ........................................................................ III-34
(b) Declarant. ........................................................................ III-34
(c) Hearsay ............................................................................. III-34
(d) Statements which are not hearsay. ....................................... III-34

Rule 802. Hearsay rule ................................................................. III-35

Rule 803. Hearsay exceptions; availability of declarant immaterial ........................................................................................................................................ III-35
(1) Present sense impression. ................................................... III-35
(2) Excited utterance. ............................................................. III-35
(3) Then existing mental, emotional, or physical condition. .......... III-35
(4) Statements for purposes of medical diagnosis or treatment. .... III-35
(5) Recorded recollection. ....................................................... III-35
(6) Records of regularly conducted activity. ............................ III-35
(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). ..... III-35
(8) Public records and reports. ................................................ III-36
(9) Records of vital statistics. .................................................. III-36
(10) Absence of public record or entry. .................................... III-36
(11) Records of religious organizations. .................................... III-36
(12) Marriage, baptismal, and similar certificates. ................. III-36
(13) Family records. ............................................................. III-36
(14) Records of documents affecting an interest in property. ...... III-36
(15) Statements in documents affecting an interest in property. .... III-36
(16) Statements in ancient documents. ..................................... III-36
(17) Market reports, commercial publications. ......................... III-36
(18) Learned treatises. .......................................................... III-36
(19) Reputation concerning personal or family history. ............ III-37
(20) Reputation concerning boundaries or general history. ....... III-37
(21) Reputation as to character. ............................................. III-37
(22) Judgment of previous conviction. .................................... III-37
(23) Judgment as to personal, family or general history, or boundaries. III-37
(24) Other exceptions. .......................................................... III-37

Rule 804. Hearsay exceptions; declarant unavailable .................. III-37
(a) Definitions of unavailability. .......................................... III-37
(b) Hearsay exceptions. ....................................................... III-37

Rule 805. Hearsay within hearsay ............................................... III-38

Rule 806. Attacking and supporting credibility of declarant .......... III-38

SECTION IX AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of authentication or identification .......... III-38
(a) General provision. .......................................................... III-38
(b) Illustrations. ................................................................. III-38

Rule 902. Self-authentication .................................................. III-39
(1) Domestic public documents under seal. ......................... III-39
(2) Domestic public documents not under seal. ................... III-39
(3) Foreign public documents. .............................................. III-39
(4) Certified copies of public records. ............................... III-39
(4a) Documents or records of the United States accompanied by attesting certificates. .......... III-40
(5) Official publications. ..................................................... III-40
(6) Newspapers and periodicals. .......................................... III-40
(7) Trade inscriptions and the like. ..................................... III-40
(8) Acknowledged documents. ............................................. III-40
(9) Commercial paper and related documents. ..................... III-40
(10) Presumptions under Acts of Congress and regulations. .... III-40

Rule 903. Subscribing witness' testimony unnecessary .......... III-40

SECTION X CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions ....................................................... III-40
(1) Writings and recordings. ............................................... III-40
(2) Photographs. ............................................................. III-40
(3) Original. ................................................................. III-40
(4) Duplicate. ............................................................... III-40

Rule 1002. Requirement of an original ............................... III-40

Rule 1003. Admissibility of duplicates ............................... III-40

Rule 1004. Admissibility of other evidence of contents ....... III-41
(1) Originals lost or destroyed. ........................................... III-41
(2) Original not obtainable. .............................................. III-41
(3) Original in possession of opponent. .............................. III-41
(4) Collateral matters. ..................................................... III-41

Rule 1005. Public records .................................................. III-41

Rule 1006. Summaries ....................................................... III-41

Rule 1007. Testimony or written admission of party ............. III-41

Rule 1008. Functions of military judge and members .......... III-41

SECTION XI MISCELLANEOUS RULES

Rule 1101. Applicability of rules ........................................ III-41
(a) Rules applicable. ..................................................... III-41
(b) Rules of privilege. .................................................... III-41
(c) Rules relaxed. ......................................................... III-41
(d) Rules inapplicable. ................................................... III-41

Rule 1102. Amendments ................................................... III-41

Rule 1103. Title ............................................................. III-42
PART IV. PUNITIVE ARTICLES

1. Article 77—Principals
   a. Text.
   b. Explanation.

2. Article 78—Accessory after the fact
   a. Text.
   b. Elements.
   c. Explanation.
   d. Lesser included offense.
   e. Maximum punishment.
   f. Sample specification.

3. Article 79—Conviction of lesser included offenses
   a. Text.
      (2) Multiple lesser included offenses.
      (3) Findings of guilty to a lesser included offense.
      (4) Specific lesser included offenses.

4. Article 80—Attempts
   a. Text.
   b. Elements.
   c. Explanation.
   d. Lesser included offenses.
   e. Maximum punishment.
   f. Sample specification.

5. Article 81—Conspiracy
   a. Text.
   b. Elements.
   c. Explanation.
   d. Lesser included offense.
   e. Maximum punishment.
   f. Sample specification.

6. Article 82—Solicitation
   a. Text.
   b. Elements.
   c. Explanation.
   d. Lesser included offense.
   e. Maximum punishment.
   f. Sample specifications.
      (1) For soliciting desertion (Article 85) or mutiny (Article 94).
      (2) For soliciting an act of misbehavior before the enemy (Article 99) or sedition (Article 94).

7. Article 83—Fraudulent enlistment, appointment, or separation
   a. Text.
   b. Elements.
      (1) Fraudulent enlistment or appointment.

xxiv
(2) Fraudulent separation. ........................................................... IV-8
c. Explanation. ........................................................................ IV-8
   (1) In general. ................................................................. IV-8
   (2) Receipt of pay or allowances. ..................................... IV-8
   (3) One offense. ............................................................. IV-8
d. Lesser included offense. ................................................... IV-8
e. Maximum punishment. ....................................................... IV-8
   (1) Fraudulent enlistment or appointment. .................... IV-9
   (2) Fraudulent separation. .............................................. IV-9
f. Sample specifications. ....................................................... IV-9
   (1) For fraudulent enlistment or appointment. ............... IV-9
   (2) For fraudulent separation. ...................................... IV-9

8. Article 84—Effecting unlawful enlistment, appointment, or separation

   a. Text. ................................................................................ IV-9
   b. Elements. ......................................................................... IV-9
c. Explanation. ........................................................................ IV-9
d. Lesser included offense. ................................................... IV-9
e. Maximum punishment. ....................................................... IV-9
f. Sample specifications. ....................................................... IV-9

9. Article 85—Desertion

   a. Text. ................................................................................ IV-9
   b. Elements. ......................................................................... IV-10
      (3) Desertion before notice of acceptance of resignation.
      (4) Attempted desertion. ................................................ IV-10
c. Explanation. ........................................................................ IV-10
      (1) Desertion with intent to remain away permanently.
         (a) In general. .......................................................... IV-10
         (c) Intent to remain away permanently. ................ IV-10
         (d) Effect of enlistment or appointment in the same or a different armed force. IV-11
      (2) Quitting unit, organization, or place of duty with intent to avoid hazardous duty or to
         shirk important service. ........................................ IV-11
         (a) Hazardous duty or important service. ............... IV-11
d. Lesser included offense. ................................................... IV-12
e. Maximum punishment. ....................................................... IV-12
f. Sample specifications. ....................................................... IV-12
      (1) Desertion with intent to remain away permanently.
      (2) Desertion with intent to avoid hazardous duty or shirk important service.
      (3) Desertion prior to acceptance of resignation.
      (4) Attempted desertion. ............................................. IV-12

10. Article 86—Absence without leave

    a. Text. ................................................................................ IV-12
    b. Elements. ......................................................................... IV-12
       (1) Failure to go to appointed place of duty. ................ IV-12
       (2) Going from appointed place of duty. ..................... IV-13
       (3) Absence from unit, organization, or place of duty.   IV-13
(4) Abandoning watch or guard. .......................................................... IV-13
(5) Absence from unit, organization, or place of duty with intent to avoid maneuvers or
    field exercises. ........................................................................ IV-13
c. Explanation. ............................................................................... IV-13
d. Lesser included offense. ............................................................... IV-15
e. Maximum punishment. ................................................................. IV-15
f. Sample specifications. ................................................................. IV-15

11. Article 87—Missing movement ...................................................... IV-15
   a. Text. ....................................................................................... IV-15
   b. Elements. ............................................................................... IV-15
c. Explanation. ............................................................................... IV-15
d. Lesser included offenses. ............................................................. IV-16
e. Maximum punishment. ................................................................. IV-16
f. Sample specification. ................................................................. IV-16

12. Article 88—Contempt toward officials .......................................... IV-16
   a. Text. ....................................................................................... IV-16
   b. Elements. ............................................................................... IV-16
c. Explanation. ............................................................................... IV-17
d. Lesser included offense. ............................................................. IV-17
e. Maximum punishment. ................................................................. IV-17
f. Sample specification. ................................................................. IV-17

13. Article 89—Disrespect toward a superior commissioned officer .... IV-17
   a. Text. ....................................................................................... IV-17
   b. Elements. ............................................................................... IV-17
c. Explanation. ............................................................................... IV-17
d. Lesser included offenses. ............................................................. IV-18
e. Maximum punishment. ................................................................. IV-18
f. Sample specification. ................................................................. IV-18

14. Article 90—Assaulting or willfully disobeying superior commissioned officer ... IV-18
   a. Text. ....................................................................................... IV-18
   b. Elements. ............................................................................... IV-18
c. Explanation. ............................................................................... IV-18
   (i) Superior commissioned officer. ............................................. IV-19
   (i) Inference of lawfulness. ....................................................... IV-19
d. Lesser included offenses. ............................................................. IV-20
   (2) Drawing or lifting up a weapon or offering violence to superior commissioned officer in
       execution of office. .............................................................. IV-20
e. Maximum punishment. ................................................................. IV-20
f. Sample specifications. ................................................................. IV-20

15. Article 91—Insubordinate conduct toward warrant officer, noncommissioned
    officer, or petty officer ............................................................... IV-21
   a. Text. ....................................................................................... IV-21
   b. Elements. ............................................................................... IV-21
   (1) Striking or assaulting warrant, noncommissioned, or petty officer. .... IV-21
16. Article 92—Failure to obey order or regulation
   a. Text. ................................................................. IV-23
   b. Elements. .......................................................... IV-23
   c. Explanation. ........................................................ IV-23
      (i) From a superior. .............................................. IV-24
   d. Lesser included offense. .................................... IV-24
   e. Maximum punishment. ....................................... IV-24
   f. Sample specifications. ...................................... IV-24

17. Article 93—Cruelty and maltreatment
   a. Text. ................................................................. IV-25
   b. Elements. .......................................................... IV-25
   c. Explanation. ........................................................ IV-25
   d. Lesser included offense. .................................... IV-25
   e. Maximum punishment. ....................................... IV-25
   f. Sample specification. ....................................... IV-25

18. Article 94—Mutiny and sedition
   a. Text. ................................................................. IV-26
   b. Elements. .......................................................... IV-26
   c. Explanation. ........................................................ IV-26
   d. Lesser included offenses. .................................. IV-27
   e. Maximum punishment. ....................................... IV-27
   f. Sample specifications. ...................................... IV-27

19. Article 95—Resistance, breach of arrest, and escape
   a. Text. ................................................................. IV-28
   b. Elements. .......................................................... IV-28
   c. Explanation. ........................................................ IV-28
   d. Lesser included offenses. .................................. IV-29
      (3) Escape from custody. ................................... IV-29
      (4) Escape from confinement. ............................. IV-30
   e. Maximum punishment. ....................................... IV-30
   f. Sample specifications. ...................................... IV-30

20. Article 96—Releasing prisoner without proper authority
   a. Text. ................................................................. IV-30
   b. Elements. .......................................................... IV-30
   c. Explanation. ........................................................ IV-30
   d. Lesser included offenses. .................................. IV-31
   e. Maximum punishment. ....................................... IV-31
21. Article 97—Unlawful detention
   a. Text ................................................................. IV-31
   b. Elements ....................................................... IV-31
   c. Explanation ................................................. IV-31
   d. Lesser included offense. ............................... IV-31
   e. Maximum punishment ................................. IV-31
   f. Sample specifications ................................... IV-31

22. Article 98—Noncompliance with procedural rules
   a. Text ................................................................. IV-31
   b. Elements ....................................................... IV-32
   c. Explanation ............................................... IV-32
   d. Lesser included offense. ............................... IV-32
   e. Maximum punishment ................................. IV-32
   f. Sample specifications ................................... IV-32

23. Article 99—Misbehavior before the enemy
   a. Text ................................................................. IV-32
   b. Elements ....................................................... IV-33
   c. Explanation ............................................... IV-33
   d. Lesser included offenses .............................. IV-34
   e. Maximum punishment ................................. IV-35
   f. Sample specifications ................................... IV-35

24. Article 100—Subordinate compelling surrender
   a. Text ................................................................. IV-36
   b. Elements ....................................................... IV-36
   c. Explanation ............................................... IV-36
   d. Lesser included offense. ............................... IV-37
   e. Maximum punishment ................................. IV-37
   f. Sample specifications ................................... IV-37

25. Article 101—Improper use of countersign
   a. Text ................................................................. IV-37
   b. Elements ....................................................... IV-37
   c. Explanation ............................................... IV-37
   d. Lesser included offense. ............................... IV-37
   e. Maximum punishment ................................. IV-37
   f. Sample specifications ................................... IV-37

26. Article 102—Forcing a safeguard
   a. Text ................................................................. IV-38
   b. Elements ....................................................... IV-38
   c. Explanation ............................................... IV-38
   d. Lesser included offense. ............................... IV-38
   e. Maximum punishment ................................. IV-38
   f. Sample specification .................................... IV-38

27. Article 103—Captured or abandoned property
28. Article 104—Aiding the enemy
   a. Text .................................................................................. IV-38
   b. Elements ........................................................................ IV-38
   c. Explanation ....................................................................... IV-39
      (a) Nature of property .................................................... IV-39
      (b) Nature of duty .......................................................... IV-39
   d. Lesser included offense .................................................. IV-39
   e. Maximum punishment .................................................... IV-39
   f. Sample specifications ...................................................... IV-39

29. Article 105—Misconduct as a prisoner
   a. Text .................................................................................. IV-40
   b. Elements ........................................................................ IV-40
   c. Explanation ....................................................................... IV-40
   d. Lesser included offense .................................................. IV-41
   e. Maximum punishment .................................................... IV-41
   f. Sample specifications ...................................................... IV-41

30. Article 106—Spies
   a. Text .................................................................................. IV-42
   b. Elements ........................................................................ IV-42
   c. Explanation ....................................................................... IV-42
   d. Lesser included offenses ............................................... IV-42
   e. Mandatory punishment ................................................ IV-42
   f. Sample specification ....................................................... IV-43

30a. Article 106a—Espionage
   a. Text .................................................................................. IV-44
   b. Elements ........................................................................ IV-44
   c. Explanation ....................................................................... IV-45
   d. Lesser included offense .................................................. IV-45
   e. Maximum punishment .................................................... IV-45
   f. Sample specification ....................................................... IV-45

31. Article 107—False official statements
   a. Text .................................................................................. IV-45
   b. Elements ........................................................................ IV-45
   c. Explanation ....................................................................... IV-45
   d. Lesser included offense .................................................. IV-46
   e. Maximum punishment .................................................... IV-46
   f. Sample specification ....................................................... IV-46
32. Article 108—Military property of the United States—sale, loss, damage, destruction, or wrongful disposition ................................................................. IV-46
   a. Text ........................................................................................................ IV-46
   b. Elements ................................................................................................ IV-46
   c. Explanation ............................................................................................ IV-47
   d. Lesser included offenses ....................................................................... IV-47
   e. Maximum punishment ........................................................................ IV-48
   f. Sample specifications ........................................................................... IV-48

33. Article 109—Property other than military property of the United States—waste, spoilage, or destruction ................................................................. IV-48
   a. Text ........................................................................................................ IV-48
   b. Elements ................................................................................................ IV-48
   c. Explanation ............................................................................................ IV-48
   d. Lesser included offense ........................................................................ IV-49
   e. Maximum punishment ........................................................................ IV-49
   f. Sample specification ........................................................................... IV-49

34. Article 110—Improper hazardous of vessel ................................................................ IV-49
   a. Text ........................................................................................................ IV-49
   b. Elements ................................................................................................ IV-49
   c. Explanation ............................................................................................ IV-49
   d. Lesser included offenses ....................................................................... IV-50
   e. Maximum punishment ........................................................................ IV-50
   f. Sample specifications ........................................................................... IV-50

35. Article 111—Drunken or reckless driving ................................................................ IV-51
   a. Text ........................................................................................................ IV-51
   b. Elements ................................................................................................ IV-51
   c. Explanation ............................................................................................ IV-51
   d. Lesser included offenses ....................................................................... IV-52
   e. Maximum punishment ........................................................................ IV-52
   f. Sample specification ........................................................................... IV-52

36. Article 112—Drunk on duty ........................................................................ IV-52
   a. Text ........................................................................................................ IV-52
   b. Elements ................................................................................................ IV-52
   c. Explanation ............................................................................................ IV-52
   d. Lesser included offense ....................................................................... IV-53
   e. Maximum punishment ........................................................................ IV-53
   f. Sample specification ........................................................................... IV-53

37. Article 112a—Wrongful use, possession, etc., of controlled substances ................ IV-53
   a. Text ........................................................................................................ IV-53
   b. Elements ................................................................................................ IV-53
   c. Explanation ............................................................................................ IV-53
   d. Lesser included offenses ....................................................................... IV-54
   e. Maximum punishments ....................................................................... IV-55
      (1) Wrongful use, possession, manufacture, or introduction of controlled substance. IV-55
(a) Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use of marijuana), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, III controlled substances............. IV-55
(b) Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances........................................ IV-55
(2) Wrongful distribution, possession, manufacture, or introduction of controlled substance with intent to distribute, or wrongful importation or exportation of a controlled substance. .................................................. IV-55
(a) Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances. .......................................................... IV-55
(b) Phenobarbital and Schedule IV and V controlled substances. ...................... IV-55
f. Sample specifications. ............................................................ IV-55

38. Article 113—Misbehavior of sentinel or lookout ........................................... IV-56
   a. Text. .............................................................................. IV-56
   b. Elements. ....................................................................... IV-56
   c. Explanation. ..................................................................... IV-56
   d. Lesser included offenses. .................................................. IV-56
   e. Maximum punishment. .................................................... IV-57
   f. Sample specification. ........................................................ IV-57

39. Article 114—Dueling .............................................................................. IV-57
   a. Text. .............................................................................. IV-57
   b. Elements. ....................................................................... IV-57
   c. Explanation. ..................................................................... IV-57
   d. Lesser included offense. .................................................... IV-57
   e. Maximum punishment. .................................................... IV-57
   f. Sample specifications. ........................................................ IV-57

40. Article 115—Malingering .......................................................... IV-58
   a. Text. .............................................................................. IV-58
   b. Elements. ....................................................................... IV-58
   c. Explanation. ..................................................................... IV-58
      (1) Nature of offense. ....................................................... IV-58
      (2) How injury inflicted. .................................................... IV-58
   d. Lesser included offenses. .................................................. IV-58
   e. Maximum punishment. .................................................... IV-58
   f. Sample specification. ........................................................ IV-58

41. Article 116—Riot or breach of peace ................................................ IV-59
   a. Text. .............................................................................. IV-59
   b. Elements. ....................................................................... IV-59
   c. Explanation. ..................................................................... IV-59
   d. Lesser included offenses. .................................................. IV-59
   e. Maximum punishment. .................................................... IV-59
   f. Sample specifications. ........................................................ IV-59

42. Article 117—Provoking speeches or gestures ........................................ IV-60
43. Article 118—Murder

44. Article 119—Manslaughter

45. Article 120—Rape and carnal knowledge

46. Article 121—Larceny and wrongful appropriation

47. Article 122—Robbery
48. Article 123—Forgery

a. Text. .............................................................................. IV-70
b. Elements. ........................................................................ IV-70
c. Explanation. ....................................................................... IV-71
d. Lesser included offenses. ....................................................... IV-72
e. Maximum punishment. .......................................................... IV-72
f. Sample specifications. ............................................................. IV-72

d. Lesser included offenses

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

a. Text. .............................................................................. IV-72
b. Elements. ........................................................................ IV-72
(1) For the procurement of any article or thing of value, with intent to defraud. .......... IV-73
(2) For the payment of any past due obligation, or for any other purpose, with intent to deceive. ............................................................................. IV-73
c. Explanation. ....................................................................... IV-73
d. Lesser included offenses. ....................................................... IV-74
e. Maximum punishment. .......................................................... IV-74
(1) For the procurement of any article or thing of value, with intent to defraud, in the face amount of: .............................................................. IV-75
(a) $100.00 or less. ................................................................... IV-75
(b) More than $100.00. ........................................................... IV-75
(2) For the payment of any past due obligation, or for any other purpose, with intent to deceive. .................................................................. IV-75
f. Sample specifications. ............................................................. IV-75

50. Article 124—Maiming

a. Text. .............................................................................. IV-75
b. Elements. ........................................................................ IV-75
c. Explanation. ....................................................................... IV-75
d. Lesser included offenses. ....................................................... IV-76
e. Maximum punishment. .......................................................... IV-76
f. Sample specification. ............................................................. IV-76

51. Article 125—Sodomy

a. Text. .............................................................................. IV-76
b. Elements. ........................................................................ IV-76
c. Explanation. ....................................................................... IV-76
d. Lesser included offenses. ....................................................... IV-76
e. Maximum punishment. .......................................................... IV-76
f. Sample specification. ............................................................. IV-76

52. Article 126—Arson
53. Article 127—Extortion
a. Text ................................................................. IV-77
b. Elements ........................................................... IV-77
c. Explanation ....................................................... IV-77
d. Lesser included offenses ................................. IV-77
e. Maximum punishment ...................................... IV-78
f. Sample specification ......................................... IV-78

54. Article 128—Assault
a. Text ................................................................. IV-79
b. Elements ........................................................... IV-79
c. Explanation ....................................................... IV-79
d. Lesser included offenses ................................. IV-82
e. Maximum punishment ...................................... IV-82
f. Sample specification ......................................... IV-82

55. Article 129—Burglary
a. Text ................................................................. IV-83
b. Elements ........................................................... IV-83
c. Explanation ....................................................... IV-84
d. Lesser included offenses ................................. IV-84
e. Maximum punishment ...................................... IV-84
f. Sample specification ......................................... IV-84

56. Article 130—Housebreaking
a. Text ................................................................. IV-85
b. Elements ........................................................... IV-85
c. Explanation ....................................................... IV-85
d. Lesser included offenses ................................. IV-85
e. Maximum punishment ...................................... IV-85
f. Sample specification ......................................... IV-85

57. Article 131—Perjury
a. Text ................................................................. IV-85
b. Elements ........................................................... IV-85
c. Explanation ....................................................... IV-86
d. Lesser included offense ................................. IV-86
<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>58.</td>
<td>Article 132—Frauds against the United States</td>
<td>IV-87</td>
</tr>
<tr>
<td></td>
<td>a. Text</td>
<td>IV-87</td>
</tr>
<tr>
<td></td>
<td>b. Elements</td>
<td>IV-87</td>
</tr>
<tr>
<td></td>
<td>c. Explanation</td>
<td>IV-88</td>
</tr>
<tr>
<td></td>
<td>d. Lesser included offense</td>
<td>IV-89</td>
</tr>
<tr>
<td></td>
<td>e. Maximum punishment</td>
<td>IV-89</td>
</tr>
<tr>
<td></td>
<td>f. Sample specifications</td>
<td>IV-89</td>
</tr>
<tr>
<td>59.</td>
<td>Article 133—Conduct unbecoming an officer and gentleman</td>
<td>IV-91</td>
</tr>
<tr>
<td></td>
<td>a. Text</td>
<td>IV-91</td>
</tr>
<tr>
<td></td>
<td>b. Elements</td>
<td>IV-91</td>
</tr>
<tr>
<td></td>
<td>c. Explanation</td>
<td>IV-91</td>
</tr>
<tr>
<td></td>
<td>d. Lesser included offense</td>
<td>IV-91</td>
</tr>
<tr>
<td></td>
<td>e. Maximum punishment</td>
<td>IV-91</td>
</tr>
<tr>
<td></td>
<td>f. Sample specifications</td>
<td>IV-91</td>
</tr>
<tr>
<td>60.</td>
<td>Article 134—General article</td>
<td>IV-91</td>
</tr>
<tr>
<td></td>
<td>a. Text</td>
<td>IV-92</td>
</tr>
<tr>
<td></td>
<td>b. Elements</td>
<td>IV-92</td>
</tr>
<tr>
<td></td>
<td>c. Explanation</td>
<td>IV-92</td>
</tr>
<tr>
<td>61.</td>
<td>Article 134—(Abusing public animal)</td>
<td>IV-93</td>
</tr>
<tr>
<td></td>
<td>a. Text</td>
<td>IV-93</td>
</tr>
<tr>
<td></td>
<td>b. Elements</td>
<td>IV-93</td>
</tr>
<tr>
<td></td>
<td>c. Explanation</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>d. Lesser included offenses</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>e. Maximum punishment</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>f. Sample specification</td>
<td>IV-94</td>
</tr>
<tr>
<td>62.</td>
<td>Article 134—(Adultery)</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>a. Text</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>b. Elements</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>c. Explanation</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>d. Lesser included offense</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>e. Maximum punishment</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>f. Sample specification</td>
<td>IV-94</td>
</tr>
<tr>
<td>63.</td>
<td>Article 134—(Assault—indecent)</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>a. Text</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>b. Elements</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>c. Explanation</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>d. Lesser included offenses</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>e. Maximum punishment</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>f. Sample specification</td>
<td>IV-94</td>
</tr>
<tr>
<td>64.</td>
<td>Article 134—(Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking)</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>a. Text</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>b. Elements</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>c. Explanation</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>d. Lesser included offenses</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>e. Maximum punishment</td>
<td>IV-94</td>
</tr>
<tr>
<td></td>
<td>f. Sample specification</td>
<td>IV-94</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>iv-86</td>
</tr>
<tr>
<td>iv-86</td>
</tr>
<tr>
<td>iv-87</td>
</tr>
<tr>
<td>iv-87</td>
</tr>
<tr>
<td>iv-87</td>
</tr>
<tr>
<td>iv-88</td>
</tr>
<tr>
<td>iv-89</td>
</tr>
<tr>
<td>iv-89</td>
</tr>
<tr>
<td>iv-91</td>
</tr>
<tr>
<td>iv-91</td>
</tr>
<tr>
<td>iv-91</td>
</tr>
<tr>
<td>iv-91</td>
</tr>
<tr>
<td>iv-91</td>
</tr>
<tr>
<td>iv-91</td>
</tr>
<tr>
<td>iv-91</td>
</tr>
<tr>
<td>iv-92</td>
</tr>
<tr>
<td>iv-92</td>
</tr>
<tr>
<td>iv-93</td>
</tr>
<tr>
<td>iv-93</td>
</tr>
<tr>
<td>iv-93</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>iv-94</td>
</tr>
<tr>
<td>xxxv</td>
</tr>
<tr>
<td>Section</td>
</tr>
<tr>
<td>---------</td>
</tr>
<tr>
<td>65. Article 134—(Bigamy)</td>
</tr>
<tr>
<td>a. Text</td>
</tr>
<tr>
<td>b. Elements</td>
</tr>
<tr>
<td>c. Explanation</td>
</tr>
<tr>
<td>d. Lesser included offense</td>
</tr>
<tr>
<td>e. Maximum punishment</td>
</tr>
<tr>
<td>f. Sample specification</td>
</tr>
<tr>
<td>66. Article 134—(Bribery and graft)</td>
</tr>
<tr>
<td>a. Text</td>
</tr>
<tr>
<td>b. Elements</td>
</tr>
<tr>
<td>c. Explanation</td>
</tr>
<tr>
<td>d. Lesser included offenses</td>
</tr>
<tr>
<td>(1) Bribery</td>
</tr>
<tr>
<td>(2) Bribery and graft</td>
</tr>
<tr>
<td>e. Maximum punishment</td>
</tr>
<tr>
<td>f. Sample specifications</td>
</tr>
<tr>
<td>67. Article 134—(Burning with intent to defraud)</td>
</tr>
<tr>
<td>a. Text</td>
</tr>
<tr>
<td>b. Elements</td>
</tr>
<tr>
<td>c. Explanation</td>
</tr>
<tr>
<td>d. Lesser included offense</td>
</tr>
<tr>
<td>e. Maximum punishment</td>
</tr>
<tr>
<td>f. Sample specification</td>
</tr>
<tr>
<td>68. Article 134—(Check, worthless, making and uttering—by dishonorably failing to maintain funds)</td>
</tr>
<tr>
<td>a. Text</td>
</tr>
<tr>
<td>b. Elements</td>
</tr>
<tr>
<td>c. Explanation</td>
</tr>
<tr>
<td>d. Lesser included offenses</td>
</tr>
<tr>
<td>e. Maximum punishment</td>
</tr>
<tr>
<td>f. Sample specification</td>
</tr>
<tr>
<td>69. Article 134—(Cohabitation, wrongful)</td>
</tr>
<tr>
<td>a. Text</td>
</tr>
<tr>
<td>b. Elements</td>
</tr>
<tr>
<td>c. Explanation</td>
</tr>
<tr>
<td>d. Lesser included offense</td>
</tr>
<tr>
<td>e. Maximum punishment</td>
</tr>
<tr>
<td>f. Sample specification</td>
</tr>
<tr>
<td>70. Article 134—(Correctional custody—offenses against)</td>
</tr>
<tr>
<td>Article</td>
</tr>
<tr>
<td>--------</td>
</tr>
<tr>
<td>71</td>
</tr>
<tr>
<td>72</td>
</tr>
<tr>
<td>73</td>
</tr>
<tr>
<td>74</td>
</tr>
<tr>
<td>75</td>
</tr>
<tr>
<td>76</td>
</tr>
</tbody>
</table>
### 77. Article 134—(False or unauthorized pass offenses)

- **a. Text.**
- **b. Elements.**
- **c. Explanation.**
- **d. Lesser included offense.**
- **e. Maximum punishment.**
- **f. Sample specifications.**

(3) Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card.

### 78. Article 134—(False pretenses, obtaining services under)

- **a. Text.**
- **b. Elements.**
- **c. Explanation.**
- **d. Lesser included offense.**
- **e. Maximum punishment.**
- **f. Sample specification.**

### 79. Article 134—(False swearing)

- **a. Text.**
- **b. Elements.**
- **c. Explanation.**
- **d. Lesser included offense.**
- **e. Maximum punishment.**
- **f. Sample specification.**

### 80. Article 134—(Firearm, discharging—through negligence)

- **a. Text.**
- **b. Elements.**
- **c. Explanation.**
- **d. Lesser included offenses.**
- **e. Maximum punishment.**
- **f. Sample specification.**

### 81. Article 134—(Firearm, discharging—willfully, under such circumstances as to endanger human life)

- **a. Text.**
- **b. Elements.**
- **c. Explanation.**
- **d. Lesser included offenses.**
- **e. Maximum punishment.**
- **f. Sample specification.**

### 82. Article 134—(Fleeing scene of accident)

...
a. Text. .............................................................. IV-105
b. Elements. ..................................................... IV-105
c. Explanation. ................................................... IV-105
d. Lesser included offense. ............................. IV-105
e. Maximum punishment. ................................. IV-105
f. Sample specification. .................................. IV-105

83. Article 134—(Fraternization) ........................ IV-105
a. Text. .............................................................. IV-105
b. Elements. ..................................................... IV-105
c. Explanation. ................................................... IV-105
d. Lesser included offense. ............................. IV-105
e. Maximum punishment. ................................. IV-105
f. Sample specification. .................................. IV-105

84. Article 134—(Gambling with subordinate) ...... IV-106
a. Text. .............................................................. IV-106
b. Elements. ..................................................... IV-106
c. Explanation. ................................................... IV-106
d. Lesser included offense. ............................. IV-106
e. Maximum punishment. ................................. IV-106
f. Sample specification. .................................. IV-106

85. Article 134—(Homicide, negligent) ............... IV-106
a. Text. .............................................................. IV-106
b. Elements. ..................................................... IV-106
c. Explanation. ................................................... IV-107
d. Lesser included offenses. ........................... IV-107
e. Maximum punishment. ................................. IV-107
f. Sample specification. .................................. IV-107

86. Article 134—(Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official) IV-107
a. Text. .............................................................. IV-107
b. Elements. ..................................................... IV-107
c. Explanation. ................................................... IV-107
d. Lesser included offense. ............................. IV-107
e. Maximum punishment. ................................. IV-107
f. Sample specification. .................................. IV-107

87. Article 134—(Indecent acts or liberties with a child) IV-108
a. Text. .............................................................. IV-108
b. Elements. ..................................................... IV-108
c. Explanation. ................................................... IV-108
d. Lesser included offense. ............................. IV-108
e. Maximum punishment. ................................. IV-108
f. Sample specification. .................................. IV-108

88. Article 134—(Indecent exposure) .................. IV-108
a. Text. .............................................................. IV-108
b. Elements ................................................................. IV-108

c. Explanation ........................................................... IV-108
d. Lesser included offense ........................................ IV-108
e. Maximum punishment ............................................ IV-108
f. Sample specification .............................................. IV-108

89. Article 134—(Indecent language) ................................ IV-109
a. Text ................................................................. IV-109
b. Elements ............................................................. IV-109
c. Explanation ........................................................... IV-109
d. Lesser included offenses ........................................ IV-109
e. Maximum punishment ............................................ IV-109
f. Sample specification .............................................. IV-109

90. Article 134—(Indecent acts with another) .................. IV-109
a. Text ................................................................. IV-109
b. Elements ............................................................. IV-109
c. Explanation ........................................................... IV-109
d. Lesser included offense ........................................ IV-109
e. Maximum punishment ............................................ IV-109
f. Sample specification .............................................. IV-109

91. Article 134—(Jumping from vessel into the water) ........ IV-109
a. Text ................................................................. IV-109
b. Elements ............................................................. IV-109
c. Explanation ........................................................... IV-109
d. Lesser included offense ........................................ IV-109
e. Maximum punishment ............................................ IV-109
f. Sample specification .............................................. IV-109

92. Article 134—(Kidnapping) ........................................ IV-110
a. Text ................................................................. IV-110
b. Elements ............................................................. IV-110
c. Explanation ........................................................... IV-110
d. Lesser included offense ........................................ IV-110
e. Maximum punishment ............................................ IV-110
f. Sample specification .............................................. IV-110

93. Article 134—(Mail: taking, opening, secreting, destroying, or stealing) ........................................ IV-110
a. Text ................................................................. IV-110
b. Elements ............................................................. IV-110
c. Explanation ........................................................... IV-111
d. Lesser included offenses ........................................ IV-111
e. Maximum punishment ............................................ IV-111
f. Sample specifications ............................................ IV-111

94. Article 134—(Mails: depositing or causing to be deposited obscene matters in) ........................ IV-111
a. Text ................................................................. IV-111
b. Elements ............................................................. IV-111
c. Explanation ........................................................... IV-111

xl
d. Lesser included offense. ................................................................. IV-111
e. Maximum punishment. ................................................................. IV-111
f. Sample specification. .................................................................... IV-111

95. Article 134—(Misprision of serious offense) ................................ IV-112
a. Text ................................................................................................ IV-112
b. Elements ....................................................................................... IV-112
c. Explanation ................................................................................... IV-112
d. Lesser included offense. ................................................................. IV-112
e. Maximum punishment. ................................................................. IV-112
f. Sample specification. ..................................................................... IV-112

96. Article 134—(Obstructing justice) ............................................... IV-112
a. Text ................................................................................................ IV-112
b. Elements ....................................................................................... IV-112
c. Explanation ................................................................................... IV-112
d. Lesser included offenses. .............................................................. IV-112
e. Maximum punishment. ................................................................. IV-112
f. Sample specification. ..................................................................... IV-112

96a. Art 134 (Wrongful interference with an adverse administrative proceeding) ........................................ IV-113
a. Text ................................................................................................ IV-113
b. Elements ....................................................................................... IV-113
c. Explanation ................................................................................... IV-113
d. Lesser included offenses. .............................................................. IV-113
e. Maximum punishment. ................................................................. IV-113
f. Sample specification. ..................................................................... IV-113

97. Article 134—(Pandering and prostitution) .................................... IV-113
a. Text ................................................................................................ IV-113
b. Elements ....................................................................................... IV-114
c. Explanation ................................................................................... IV-114
d. Lesser included offense. ................................................................. IV-114
e. Maximum punishment. ................................................................. IV-114
f. Sample specifications ....................................................................... IV-114

98. Article 134—(Perjury: subornation of) .......................................... IV-114
a. Text ................................................................................................ IV-114
b. Elements ....................................................................................... IV-114
c. Explanation ................................................................................... IV-115
d. Lesser included offense. ................................................................. IV-115
e. Maximum punishment. ................................................................. IV-115
f. Sample specification. ..................................................................... IV-115

99. Article 134—(Public record: altering, concealing, removing, mutilating, obliterating, or destroying) ........ IV-115
a. Text ................................................................................................ IV-115
b. Elements ....................................................................................... IV-115
c. Explanation ................................................................................... IV-115
d. Lesser included offense. ................................................................. IV-115
e. Maximum punishment. ............................................................ IV-115
f. Sample specification. .......................................................... IV-115

100. Article 134—(Quarantine: medical, breaking)
   a. Text. .............................................................................. IV-115
   b. Elements. ....................................................................... IV-115
   c. Explanation. ................................................................... IV-115
   d. Lesser included offenses. ............................................... IV-115
   e. Maximum punishment. .................................................. IV-115
   f. Sample specification. ....................................................... IV-115

101. Article 134—(Requesting commission of an offense)
   a. Text. .............................................................................. IV-116
   b. Elements. ....................................................................... IV-116
   c. Explanation. ................................................................... IV-116
   d. Lesser included offenses. ............................................... IV-116
   e. Maximum punishment. .................................................. IV-116
   f. Sample specification. ....................................................... IV-116

102. Article 134—(Restriction, breaking)
   a. Text. .............................................................................. IV-116
   b. Elements. ....................................................................... IV-116
   c. Explanation. ................................................................... IV-116
   d. Lesser included offenses. ............................................... IV-116
   e. Maximum punishment. .................................................. IV-116
   f. Sample specification. ....................................................... IV-116

103. Article 134—(Seizure: destruction, removal, or disposal of property to prevent)
   a. Text. .............................................................................. IV-116
   b. Elements. ....................................................................... IV-116
   c. Explanation. ................................................................... IV-117
   d. Lesser included offenses. ............................................... IV-117
   e. Maximum punishment. .................................................. IV-117
   f. Sample specification. ....................................................... IV-117

104. Article 134—(Sentinel or lookout: offenses against or by)
   a. Text. .............................................................................. IV-117
   b. Elements. ....................................................................... IV-117
   c. Explanation. ................................................................... IV-117
   d. Lesser included offenses. ............................................... IV-117
   e. Maximum punishment. .................................................. IV-117
   f. Sample specifications. ...................................................... IV-117

105. Article 134—(Soliciting another to commit an offense)
   a. Text. .............................................................................. IV-118
   b. Elements. ....................................................................... IV-118
   c. Explanation. ................................................................... IV-118
   d. Lesser included offenses. ............................................... IV-118
   e. Maximum punishment. .................................................. IV-118
106. Article 134—(Stolen property: knowingly receiving, buying, concealing)
   a. Text ................................................................. IV-118
   b. Elements ....................................................... IV-118
   c. Explanation ................................................... IV-118
   d. Lesser included offense ................................... IV-118
   e. Maximum punishment ..................................... IV-118
   f. Sample specification ....................................... IV-119

107. Article 134—(Straggling) .................................. IV-119
   a. Text ................................................................. IV-119
   b. Elements ....................................................... IV-119
   c. Explanation ................................................... IV-119
   d. Lesser included offense ................................... IV-119
   e. Maximum punishment ..................................... IV-119
   f. Sample specification ....................................... IV-119

108. Article 134—(Testify: wrongful refusal) ............... IV-119
   a. Text ................................................................. IV-119
   b. Elements ....................................................... IV-119
   c. Explanation ................................................... IV-119
   d. Lesser included offenses .................................. IV-119
   e. Maximum punishment ..................................... IV-119
   f. Sample specification ....................................... IV-119

109. Article 134—(Threat or hoax: bomb) ....................... IV-119
   a. Text ................................................................. IV-119
   b. Elements ....................................................... IV-119
   c. Explanation ................................................... IV-119
   d. Lesser included offenses .................................. IV-120
   e. Maximum punishment ..................................... IV-120
   f. Sample specifications ...................................... IV-120

110. Article 134—(Threat, communicating) .................... IV-120
   a. Text ................................................................. IV-120
   b. Elements ....................................................... IV-120
   c. Explanation ................................................... IV-120
   d. Lesser included offenses .................................. IV-120
   e. Maximum punishment ..................................... IV-121
   f. Sample specification ....................................... IV-121

111. Article 134—(Unlawful entry) ................................ IV-121
   a. Text ................................................................. IV-121
   b. Elements ....................................................... IV-121
   c. Explanation ................................................... IV-121
   d. Lesser included offenses .................................. IV-121
   e. Maximum punishment ..................................... IV-121
   f. Sample specification ....................................... IV-121

112. Article 134—(Weapon: concealed, carrying) .............. IV-121
113. Article 134—(Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button) ..............................................................

PART V. NONJUDICIAL PUNISHMENT PROCEDURE

1. General ........................................................................................................... V-1
   a. Authority .................................................................................................... V-1
   b. Nature ........................................................................................................ V-1
   c. Purpose ....................................................................................................... V-1
   d. Policy ........................................................................................................ V-1
   e. Minor offenses .......................................................................................... V-1
   f. Limitations on nonjudicial punishment ................................................... V-1
   g. Relationship of nonjudicial punishment to administrative corrective measures. V-2
   h. Effect of errors .......................................................................................... V-2

2. Who may impose nonjudicial punishment .................................................. V-2
   a. Commander ............................................................................................. V-2
   b. Officer in charge ....................................................................................... V-2
   c. Principal assistant ................................................................................... V-2

3. Right to demand trial ..................................................................................... V-2

4. Procedure ......................................................................................................... V-2
   a. Notice ........................................................................................................ V-2
   b. Decision by servicemember ..................................................................... V-3
      (1) Demand for trial by court-martial ...................................................... V-3
      (2) No demand for trial by court-martial ................................................. V-3
   c. Nonjudicial punishment accepted ........................................................... V-3
   d. Nonjudicial punishment based on record of court of inquiry or other investigative body. V-4

5. Punishments ..................................................................................................... V-4
   a. General limitations .................................................................................... V-4
   b. Authorized maximum punishments ......................................................... V-4
   c. Nature of punishment ............................................................................. V-5
   d. Limitations on combination of punishments ........................................... V-6
   e. Punishments imposed on reserve component personnel while on inactive-duty training. V-6
f. Punishments imposed on reserve component personnel when ordered to active duty for 
disciplinary purposes. .............................................................. V-7

g. Effective date and execution of punishments. .............................................................. V-7

6. Suspension, mitigation, remission, and setting aside ........................................ V-7
   a. Suspension. ........................................................................ V-7
   b. Mitigation. ......................................................................... V-7
   c. Remission. ......................................................................... V-8
   d. Setting aside. ...................................................................... V-8

7. Appeals .............................................................................. V-8
   a. In general. ........................................................................ V-8
   b. Who may act on appeal. ........................................................ V-8
   c. Format of appeal. ................................................................ V-8
   d. Time limit. .......................................................................... V-8
   e. Legal review. ...................................................................... V-8
   f. Action by superior authority. .................................................. V-9

8. Records of nonjudicial punishment. ................................................................. V-9

Appendices

1. Constitution of the United States—1787
2. Uniform Code of Military Justice
3. DoD Directive 5525.7 Subject: Implementation of the Memorandum of Understanding Between the 
   Department of Justice and the Department of Defense Relating to the Investigation and Prosecution 
   of Certain Crimes
3.1. Memorandum of Understanding Between the Departments of Justice and Transportation (Coast 
   Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two 
   Departments Have Concurrent Jurisdiction.
4. Charge Sheet (DD Form 458)
5. Investigating Officers Report (DD Form 457)
6. Forms for Orders Convening Courts-Martial
7. Subpoena (DD Form 453)
8. Guide for General and Special Courts-Martial
10. Forms of Findings
11. Forms of Sentences
12. Maximum Punishment Chart
13. Guide for Preparation of Record of Trial by General Court-Martial and by Special Court-Martial 
   When a Verbatim Record Is Not Required
14. Guide for Preparation of Record of Trial by General Court-Martial and by Special Court-Martial 
   When a Verbatim Record Is Required
15. Record of Trial by Summary Court-Martial (DD Form 2329)
16. Forms for Action
17. Forms for Court-Martial Orders
18. Report of Proceedings to Vacate Suspension of a General Court-Martial Sentence or of a Special Court-Martial Sentence Including a Bad-Conduct Discharge Under Article 72, UCMJ, and R.C.M. 1109 (DD Form 455)
19. Waiver/Withdrawal of Appellate Rights in General and Special Courts-Martial Subject to Review by a Court of Military Review (DD Form 2330)
20. Waiver/Withdrawal of Appellate Rights in General Courts-Martial Subject to Examination in the Office of the Judge Advocate General (DD Form 2331)
21. Analysis
22. Analysis of the Military Rules of Evidence
23. Historical Executive Orders
PART I
PREAMBLE

1. Sources of military jurisdiction.

The sources of military jurisdiction include the Constitution and international law. International law includes the law of war.

2. Exercise of military jurisdiction.

(a) Kinds. Military jurisdiction is exercised by:

(1) A government in the exercise of that branch of the municipal law which regulates its military establishment. (Military law).

(2) A government temporarily governing the civil population within its territory or a portion of its territory through its military forces as necessity may require. (Martial law).

(3) A belligerent occupying enemy territory. (Military government).

(4) A government with respect to offenses against the law of war.

(b) Agencies. The agencies through which military jurisdiction is exercised include:

(1) Courts-martial for the trial of offenses against military law and, in the case of general courts-martial, of persons who by the law of war are subject to trial by military tribunals. See Parts II, III, and IV of this Manual for rules governing courts-martial.

(2) Military commissions and provost courts for the trial of cases within their respective jurisdictions. Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.

(3) Courts of inquiry for the investigation of any matter referred to such court by competent authority. See Article 135. The Secretary concerned may prescribe regulations governing courts of inquiry.

(4) Nonjudicial punishment proceedings of a commander under Article 15. See Part V of this Manual.


Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.


The Manual for Courts-Martial shall consist of this Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures (Part I-V). This Manual shall be applied consistent with the purpose of military law.

Discussion

The Department of Defense, in conjunction with the Department of Transportation, has published supplementary materials to accompany the Manual for Courts-Martial. These materials consist of a Discussion (accompanying the Preamble, the Rules for Courts-Martial, and the Punitive Articles), an Analysis, and various appendices. These supplementary materials do not constitute the official views of the Department of Defense, the Department of Transportation, the Department of Justice, the military departments, the United States Court of Military Appeals, or any other authority of the Government of the United States, and they do not constitute rules. Cf., for example, 5 U.S.C. § 551 (1982).

The supplementary materials do not create rights or responsibilities that are binding on any person, party, or other entity (including any authority of the Government of the United States whether or not included in the definition of "agency" in 5 U.S.C. § 551(1)). Failure to comply with matter set forth in the supplementary materials does not, of itself, constitute error, although these materials may refer to requirements in the rules set forth in the Executive Order or established by other legal authorities (for example, binding judicial precedents applicable to courts-martial) which are based on sources of authority independent of the supplementary materials.
PART II
RULES FOR COURTS-MARTIAL

CHAPTER I. GENERAL PROVISIONS

Rule 101. Scope, title
(a) In general. These rules govern the procedures and punishments in all courts-martial and, whenever expressly provided, preliminary, supplementary, and appellate procedures and activities.
(b) Title. These rules may be known and cited as the Rules for Courts-Martial (R.C.M.).

Rule 102. Purpose and construction
(a) Purpose. These rules are intended to provide for the just determination of every proceeding relating to trial by court-martial.
(b) Construction. These rules shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

Rule 103. Definitions and rules of construction
The following definitions and rules of construction apply throughout this Manual, unless otherwise expressly provided.
(1) “Article” refers to articles of the Uniform Code of Military Justice unless the context indicates otherwise.
(2) “Capital case” means a general court-martial to which a capital offense has been referred without an instruction that the case be treated as noncapital, and, in the case of a rehearing or new or other trial, for which offense death remains an authorized punishment under R.C.M. 810(d).
(3) “Capital offense” means an offense for which death is an authorized punishment under the code and Part IV of this Manual or under the law of war.
(4) “Code” refers to the Uniform Code of Military Justice, unless the context indicates otherwise.

Discussion
The Uniform Code of Military Justice is set forth at Appendix 2.
other compound, mixture, or device which is an explosive within the meaning of 18 U.S.C. § 232(5) or 844(j).

(12) "Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive.

(13) "Joint" in connection with military organization connotes activities, operations, organizations, and the like in which elements of more than one military service of the same nation participate.

(14) "Members." The members of a court-martial are the voting members detailed by the convening authority.

(15) "Military judge" means the presiding officer of a general or special court-martial detailed in accordance with Article 26. Except as otherwise expressly provided, in the context of a summary court-martial "military judge" includes the summary court-martial officer or in the context of a special court-martial without a military judge, the president. Unless otherwise indicated in the context, "the military judge" means the military judge detailed to the court-martial to which charges in a case have been referred for trial.

(16) "Party." Party, in the context of parties to a court-martial, means:

(A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial in question; and

(B) Any trial or assistant trial counsel representing the United States, and agents of the trial counsel when acting on behalf of the trial counsel with respect to the court-martial in question.

(17) "Staff judge advocate" means a judge advocate so designated in Army, Air Force, or Marine Corps, and means the principal legal advisor of a command in the Navy and Coast Guard who is a judge advocate.

(18) "Sua sponte" means that the person involved acts on that person's initiative, without the need for a request, motion, or application.

(19) "War, time of." For purpose of R.C.M. 1004(c)(6) and of implementing the applicable paragraphs of Parts IV and V of this Manual only, "time of war" means a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a "time of war" exists for purposes of R.C.M. 1004(c)(6) and Parts IV and V of this Manual.


**Discussion**


1 U.S.C. § 1. Words denoting number, gender, and so forth. In determining the meaning of any Act of Congress, unless the context indicates otherwise—

words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words "insane" and "insane person" and "lunatic" shall include every idiot, lunatic, insane person, and person non compos mentis; the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

"officer" includes any person authorized by law to perform the duties of the office;

"signature" or "subscription" includes a mark when the person making the same intended it as such;

"oath" includes affirmation, and "sworn" includes affirmed;

"writing" includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

2. "County" as including "parish," and so forth. The word "county" includes a parish, or any other equivalent subdivision of a State or Territory of the United States.

3. "Vessel" as including all means of water transportation. The word "vessel" includes every description of watercraft or other artificial contrivance used or capable of being used, as a means of transportation on water.

4. "Vehicle" as including all means of land transportation.

The word "vehicle" includes every description of carriage or other artificial contrivance used or capable of being used, as a means of transportation on land.

5. "Company" or "association" as including successors and assigns.

The word "company" or "association", when used in reference to a corporation, shall be deemed to embrace the words "successors and assigns of such company or association", in like manner as if these last-named words, or words of similar import, were expressed.

10 U.S.C. § 101. Definitions
In addition to the definitions in sections 1-5 of title 1, the following definitions apply in this title:

(1) "United States", in a geographic sense, means the States and the District of Columbia.

(2) Except as provided in section 101(1) of title 32 for laws relating to the militia, the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States, "Territory" means any Territory organized after this title is enacted, so long as it remains a Territory.

(3) "Possessions" includes the Virgin Islands, the Canal Zone, Guam, American Samoa, and the Guano Islands, so long as they remain possessions, but does not include any Territory or Commonwealth.

(4) "Armed forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(5) "Department", when used with respect to a military department, means the executive part of the department and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of the department. When used with respect to the Department of Defense, it means the executive part of the department, including the executive parts of the military departments, and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of Defense, including those of the military departments.

(6) "Executive part of the department" means the executive part of the Department of the Army, Department of the Navy, or Department of the Air Force, as the case may be, at the seat of government.

(7) "Military departments" means the Department of the Army, the Department of the Navy, and the Department of the Air Force.

(8) "Secretary concerned" means—
(A) the Secretary of the Army, with respect to matters concerning the Army;
(B) the Secretary of the Navy, with respect to matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy;
(C) the Secretary of the Air Force, with respect to matters concerning the Air Force; and
(D) the Secretary of Transportation, with respect to matters concerning the Coast Guard when it is not operating as a service in the Navy.

(9) "National Guard" means the Army National Guard and the Air National Guard.

(10) "Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, and the Canal Zone, and the District of Columbia, active and inactive, that—
(A) is a land force;
(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article 1, of the Constitution;
(C) is organized, armed, and equipped wholly or partly at Federal expense; and
(D) is federally recognized.

(11) "Army National Guard of the United States" means the reserve component of the Army all of whose members are members of the Army National Guard.

(12) "Air National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that—
(A) is an air force;
(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article 1, of the Constitution;
(C) is organized, armed, and equipped wholly or partly at Federal expense; and
(D) is federally recognized.

(13) "Air National Guard of the United States" means the reserve component of the Air Force all of whose members are members of the Air National Guard.

(14) "Officer" means commissioned or warrant officer.

(15) "Commissioned officer" includes a commissioned warrant officer.

(16) "Warrant officer" means a person who holds a commission or warrant in a warrant officer grade.

(17) "Enlisted member" means a person in an enlisted grade.

(18) "Grade" means a step or degree, in a graduated scale of office or military rank that is established and designated as a grade by law or regulation.

(19) "Rank" means the order of precedence among members of the armed forces.

[Note: Definitions established in clauses (18) and (19) post-date the enactment of the code and, as a result, differ from usage of the same terms in the code and current and prior Manual provisions. See Articles 1(5) and 25(d)(1); R.C.M. 1003(c)(2); paragraphs 13c(1), 83c(2), and 84c, Part IV, MCM, 1984. MCM 1951 referred to officer personnel by 'rank' and enlisted personnel by "grade." See paragraphs 4c, 16b, 126d, 126i, and 168, MCM, 1951. "Rank" as defined in 10 U.S.C. § 101, clause (19) above, refers to the MCM, 1951 provision regarding "lineal precedence, numbers, and seniority." Paragraph 126i, MCM, 1951; see also paragraph 26f, MCM, 1969 (Rev). Except where lineal position or seniority is clearly intended, rank, as commonly and traditionally used, and grade refer to the current definition of "grade." ]

(20) "Rating" means the name (such as "boatswain's mate") prescribed for members of an armed force in an occupational field. "Rate" means the name (such as chief petty officer or seaman apprentice).

[Note: The definitions in clauses (3), (15), (18)-(21), (23)-(30), and (31)-(33) reflect the adoption of terminology which, though undefined in the source statutes restated in this title, represents the closest practicable approximation of the ways in which the terms defined have been most commonly used. A choice has been made where established uses conflict.]

(21) "Authorized strength" means the largest number of members authorized to be in an armed force, a component, a branch, a grade, or any other category of the armed forces.

(22) "Active duty" means full-time duty in the active military service of the United States. It includes full-time training
duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned.

(23) "Active duty for a period of more than 30 days" means active duty under a call or order that does not specify a period of 30 days or less.

(24) "Active service" means service on active duty.

(25) "Active status" means the status of a reserve commissioned officer, other than a commissioned warrant officer, who is not in the inactive Army National Guard or inactive Air National Guard, on an inactive status list, or in the Retired Reserve.

(26) "Supplies" includes material, equipment, and stores of all kinds.

(27) "Pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

(28) "Shall" is used in an imperative sense.

(29) "May" is used in a permissive sense. The words "no person may . . . " mean that no person is required, authorized, or permitted to do the act prescribed.

(30) "Includes" means "includes but is not limited to."

(31) "Inactive-duty training" means—

(A) duty prescribed for Reserves by the Secretary concerned under section 206 of title 37 or any other provision of law; and

(B) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

It includes those duties when performed by Reserves in their status as members of the National Guard.

(32) "Spouse" means husband or wife, as the case may be.

(33) "Regular", with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office in a regular component of an armed force.

(34) "Reserve", with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office held as a Reserve of an armed force.

(35) "Original", with respect to the appointment of a member of the armed forces in a regular or reserve component, refers to his most recent appointment in the component that is neither a promotion nor a demotion.

(36) Repealed.

(37) "Active-duty list" means a single list for the Army, Navy, Air Force or Marine Corps (required to be maintained under section 620 of this title) which contains the names of all officers of that armed force, other than officers described in section 641 of this title, who are serving on active duty.

(38) "Medical officer" means an officer of the Medical Corps of the Army, an officer of the Medical Corps of the Navy, or an officer in the Air Force designated as a medical officer.

(39) "Dental officer" means an officer of the Dental Corps of the Army, an officer of the Dental Corps of the Navy, or an officer of the Air Force designated as a dental officer.

(40) "General officer" means an officer of the Army, Air Force, or Marine Corps serving in or having the grade of general, lieutenant general, major general, or brigadier general.

(41) "Flag officer" means an officer of the Navy or Coast Guard serving in or having the grade of admiral, vice admiral, rear admiral, or commodore.


In this chapter:

(1) "Judge Advocate General" means, severally, the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, the General Counsel of the Department of Transportation.

(2) The Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy, shall be considered as one armed force.

(3) "Commanding officer" includes only commissioned officers.

(4) "Officer in charge" means a member of the Navy, the Marine Corps, or the Coast Guard designated as such by appropriate authority.

(5) "Superior commissioned officer" means a commissioned officer superior in rank or command.

(6) "Cadet" means a cadet of the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy.

(7) "Midshipman" means a midshipman of the United States Naval Academy and any other midshipman on active duty in the naval service.

(8) "Military" refers to any or all of the armed forces.

(9) "Accuser" means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

(10) "Military judge" means an official of a general or special court-martial detailed in accordance with section 826 of this title (article 26). [See also R.C.M. 103(15).]

(11) "Law specialist" means a commissioned officer of the Coast Guard designated for special duty (law).

(12) "Legal officer" means any commissioned officer of the Navy, Marine Corps, or Coast Guard designated to perform legal duties for a command.

(13) "Judge Advocate" means—

(A) an officer of the Judge Advocate General's Corps of the Army or Navy;

(B) an officer of the Air Force or the Marine Corps who is designated as a judge advocate; or

(C) an officer of the Coast Guard who is designated as a law specialist.
Rule 104. Unlawful command influence

(a) General prohibitions.

(1) Convening authorities and commanders. No convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.

(2) All persons subject to the code. No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts.

(3) Exceptions.

(A) Instructions. Subsections (a)(1) and (2) of the rule do not prohibit general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing personnel of a command in the substantive and procedural aspects of courts-martial.

(B) Court-martial statements. Subsections (a)(1) and (2) of this rule do not prohibit statements and instructions given in open session by the military judge or counsel.

(C) Professional supervision. Subsections (a)(1) and (2) of this rule do not prohibit action by the Judge Advocate General concerned under R.C.M. 109.

(D) Offense. Subsection (a)(1) and (2) of this rule do not prohibit appropriate action against a person for an offense committed while detailed as a military judge, counsel, or member of a court-martial, or while serving as individual counsel.

(b) Prohibitions concerning evaluations.

(1) Evaluation of member or defense counsel. In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to the code may:

   (A) Consider or evaluate the performance of duty of any such person as a member of a court-martial; or

   (B) Give a less favorable rating or evaluation of any defense counsel because of the zeal with which such counsel represented any accused.

(2) Evaluation of military judge.

   (A) General courts-martial. Unless the general court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of the convening authority's staff may prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge detailed to a general court-martial, which relates to the performance of duty as a military judge.

   (B) Special courts-martial. The convening authority may not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to a special court-martial which relates to the performance of duty as a military judge. When the military judge is normally rated or the military judge's report is reviewed by the convening authority, the manner in which such military judge will be rated or evaluated upon the performance of duty as a military judge may be as prescribed in regulations of the Secretary concerned which shall ensure the absence of any command influence in the rating or evaluation of the military judge's judicial performance.

Discussion

See paragraph 22 of Part IV concerning prosecuting violations of Article 37 under Article 98.

Rule 105. Direct communications: convening authorities and staff judge advocates; among staff judge advocates

(a) Convening authorities and staff judge advocates. Convening authorities shall at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice.

(b) Among staff judge advocates and with the Judge Advocate General. The staff judge advocate of any command is entitled to communicate directly with the staff judge advocate of a superior or subordinate command, or with the Judge Advocate General.
R.C.M. 105(b)

Discussion

See R.C.M. 103(17) for a definition of staff judge advocate.

Rule 106. Delivery of military offenders to civilian authorities

Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civilian authority may be delivered, upon request, to the civilian authority for trial. A member may be placed in restraint by military authorities for this purpose only upon receipt of a duly issued warrant for the apprehension of the member or upon receipt of information establishing probable cause that the member committed an offense, and upon reasonable belief that such restraint is necessary. Such restraint may continue only for such time as is reasonably necessary to effect the delivery.

Discussion

See R.C.M. 1113(d)(2)(A)(ii) for the effect of such delivery on the execution of a court-martial sentence.

Rule 107. Dismissed officer's right to request trial by court-martial

If a commissioned officer of any armed force is dismissed by order of the President under 10 U.S.C. § 1161(a)(3), that officer may apply for trial by general court-martial within a reasonable time.

Discussion

See Article 4 for the procedures to be followed. See also Article 75(c).

Rule 108. Rules of court

The Judge Advocate General concerned and persons designated by the Judge Advocate General may make rules of court not inconsistent with these rules for the conduct of court-martial proceedings. Such rules shall be disseminated in accordance with procedures prescribed by the Judge Advocate General concerned or a person to whom this authority has been delegated. Noncompliance with such procedures shall not affect the validity of any rule of court with respect to a party who has received actual and timely notice of the rule or who has not been prejudiced under Article 59 by the absence of such notice. Copies of all rules of court issued under this rule shall be forwarded to the Judge Advocate General concerned.

Rule 109. Professional supervision of military judges and counsel

(a) In general. Each Judge Advocate General is responsible for the professional supervision and discipline of military trial and appellate military judges, judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual. To discharge this responsibility each Judge Advocate General may prescribe rules of professional conduct not inconsistent with this rule or this Manual. Rules of professional conduct promulgated pursuant to this rule may include sanctions for violations of such rules. Sanctions may include but are not limited to indefinite suspension from practice in courts-martial and in the Courts of Military Review. Such suspensions may only be imposed by the Judge Advocate General of the armed service of such courts. Prior to imposing any discipline under this rule, the subject of the proposed action must be provided notice and an opportunity to be heard. The Judge Advocate General concerned may upon good cause shown modify or revoke suspension. Procedures to investigate complaints against military trial judges and appellate military judges are contained in subsection (c) of this rule.

(b) Action after suspension or disbarment. When a Judge Advocate General suspends a person from practice or the Court of Military Appeals disbars a person, any Judge Advocate General may suspend that person from practice upon written notice and opportunity to be heard.

(c) Investigation of judges.

(1) In general. These rules and procedures promulgated pursuant to Article 6a are established to investigate and dispose of charges, allegations, or information pertaining to the fitness of a military trial judge or appellate military judge to perform the duties of the judge's office.

(2) Policy. Allegations of judicial misconduct or unfitness shall be investigated pursuant to the procedures of this rule and appropriate action shall be
taken. Judicial misconduct includes any act or omission that may serve to demonstrate unfitness for further duty as a judge, including, but not limited to violations of applicable ethical standards.

Discussion

The term "unfitness" should be construed broadly, including, for example, matters relating to the incompetence, impartiality, and misconduct of the judge. Erroneous decisions of a judge are not subject to investigation under this rule. Challenges to these decisions are more appropriately left to the appellate process.

(3) Complaints. Complaints concerning a military trial judge or appellate military judge will be forwarded to the Judge Advocate General of the service concerned or to a person designated by the Judge Advocate General concerned to receive such complaints.

Discussion

Complaints need not be made in any specific form, but if possible complaints should be made under oath. Complaints may be made by judges, lawyers, a party, court personnel, members of the general public or members of the military community. Reports in the news media relating to the conduct of a judge may also form the basis of a complaint.

An individual designated to receive complaints under this subsection should have judicial experience. The chief trial judge of a service may be designated to receive complaints against military trial judges.

(4) Initial action upon receipt of a complaint. Upon receipt, a complaint will be screened by the Judge Advocate General concerned or by the individual designated in subsection (c)(3) of this rule to receive complaints. An initial inquiry is necessary if the complaint, taken as true, would constitute judicial misconduct or unfitness for further service as a judge. Prior to the commencement of an initial inquiry, the Judge Advocate General concerned shall be notified that a complaint has been filed and that an initial inquiry will be conducted. The Judge Advocate General concerned may temporarily suspend the subject of a complaint from performing judicial duties pending the outcome of any inquiry or investigation conducted pursuant to this rule. Such inquiries or investigations shall be conducted with reasonable promptness.

Discussion

Complaints under this subsection will be treated with confidentiality. Confidentiality protects the subject judge and the judiciary when a complaint is not substantiated. Confidentiality also encourages the reporting of allegations of judicial misconduct or unfitness and permits complaints to be screened with the full cooperation of others.

Complaints containing allegations of criminality should be referred to the appropriate criminal investigative agency in accordance with Appendix 3 of this Manual.

(5) Initial inquiry.

(A) In general. An initial inquiry is necessary to determine if the complaint is substantiated. A complaint is substantiated upon finding that it is more likely than not that the subject judge has engaged in judicial misconduct or is otherwise unfit for further service as a judge.

(B) Responsibility to conduct initial inquiry. The Judge Advocate General concerned, or the person designated to receive complaints under subsection (c)(3) of this rule will conduct or order an initial inquiry. The individual designated to conduct the inquiry should, if practicable, be senior to the subject of the complaint. If the subject of the complaint is a military trial judge, the individual designated to conduct the initial inquiry should, if practicable, be a military trial judge or an individual with experience as a military trial judge. If the subject of the complaint is an appellate military judge, the individual designated to conduct the inquiry should, if practicable, have experience as an appellate military judge.

Discussion

To avoid the type of conflict prohibited in Article 66(g), the Judge Advocate General's designee should not ordinarily be a member of the same Court of Military Review as the subject of the complaint. If practicable, a former appellate military judge should be designated.

(C) Due process. During the initial inquiry, the subject of the complaint will, at a minimum, be given notice and an opportunity to be heard.

(D) Action following the initial inquiry. If the complaint is not substantiated pursuant to subsection (c)(5)(A) of this rule, the complaint shall be dismissed as unfounded. If the complaint is substantiated, minor professional disciplinary action may be taken or the complaint may be forwarded, with findings and recommendations, to the Judge Advocate
General concerned. Minor professional disciplinary action is defined as counselling or the issuance of an oral or written admonition or reprimand. The Judge Advocate General concerned will be notified prior to taking minor professional disciplinary action or dismissing a complaint as unfounded.

(6) **Action by the Judge Advocate General.**

(A) **In general.** The Judge Advocates General are responsible for the professional supervision and discipline of military trial and appellate military judges under their jurisdiction. Upon receipt of findings and recommendations required by subsection (c)(5) of this rule the Judge Advocate General concerned will take appropriate action.

(B) **Appropriate actions.** The Judge Advocate General concerned may dismiss the complaint, order an additional inquiry, appoint an ethics commission to consider the complaint, refer the matter to another appropriate investigative agency or take appropriate professional disciplinary action pursuant to the rules of professional conduct prescribed by the Judge Advocate General under subsection (a) of this rule. Any decision of the Judge Advocate General, under this rule, is final and is not subject to appeal.

**Discussion**

The discretionary reassignment of military trial judges or appellate military judges to meet the needs of the service is not professional disciplinary action.

(C) **Standard of proof.** Prior to taking professional disciplinary action, other than minor disciplinary action as defined in subsection (c)(5) of this rule, the Judge Advocate General concerned shall find, in writing, that the subject of the complaint engaged in judicial misconduct or is otherwise unfit for continued service as a military judge, and that such misconduct or unfitness is established by clear and convincing evidence.

(D) **Due process.** Prior to taking final action on the complaint, the Judge Advocate General concerned will ensure that the subject of the complaint is, at a minimum, given notice and an opportunity to be heard.

(7) **The Ethics Commission.**

(A) **Membership.** If appointed pursuant to subsection (c)(6)(B) of this rule, an ethics commission shall consist of at least three members.

If the subject of the complaint is a military trial judge, the commission should include one or more military trial judges or individuals with experience as a military trial judge. If the subject of the complaint is an appellate military judge, the commission should include one or more individuals with experience as an appellate military judge. Members of the commission should, if practicable, be senior to the subject of the complaint.

(B) **Duties.** The commission will perform those duties assigned by the Judge Advocate General concerned. Normally, the commission will provide an opinion as to whether the subject's acts or omissions constitute judicial misconduct or unfitness. If the commission determines that the affected judge engaged in judicial misconduct or is unfit for continued judicial service, the commission may be required to recommend an appropriate disposition to the Judge Advocate General concerned.

**Discussion**

The Judge Advocate General concerned may appoint an ad hoc or a standing commission.

(8) **Rules of procedure.** The Secretary of Defense or the Secretary of the service concerned may establish additional procedures consistent with this rule and Article 6a.
CHAPTER II. JURISDICTION

Rule 201. Jurisdiction in general

(a) Nature of courts-martial jurisdiction.

(1) The jurisdiction of courts-martial is entirely penal or disciplinary.

Discussion

"Jurisdiction" means the power to hear a case and to render a legally competent decision. A court-martial has no power to adjudge civil remedies. For example, a court-martial may not adjudge the payment of damages, collect private debts, order the return of property, or order a criminal forfeiture of seized property. A summary court-martial appointed under 10 U.S.C. §§ 4712 or 9712 to dispose of the effects of a deceased person is not affected by these Rules or this Manual.

(2) The code applies in all places.

Discussion

Except insofar as required by the Constitution, the code, or the Manual, jurisdiction of courts-martial does not depend on where the offense was committed.

The code applies in all places (Article 5), but its application may be limited by the service-connection doctrine. The location of an offense is often of major importance in the application of this doctrine. See R.C.M. 203 and discussion. Article 2(a)(11) and (12) establishes court-martial jurisdiction only in certain places. See R.C.M. 202.

(3) The jurisdiction of a court-martial with respect to offenses under the code is not affected by the place where the court-martial sits. The jurisdiction of a court-martial with respect to military government or the law of war is not affected by the place where the court-martial sits except as otherwise expressly required by this Manual or applicable rule of international law.

Discussion

In addition to the power to try persons for offenses under the code, general courts-martial have power to try certain persons for violations of the law of war and for crimes or offenses against the law of the territory occupied as an incident of war or belligerency whenever the local civil authority is superseded in whole or part by the military authority of the occupying power. See R.C.M. 201(f)(1)(B). In cases where a person is tried by general court-martial for offenses against the law of an occupied territory, the court-martial normally sits in the country where the offense is committed, and must do so under certain circumstances. See Articles 4, 64, and 66, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, arts. 4, 64, and 66, 6 U.S.T. 3516, 3559-60 T.I.A.S. No. 3365.

(b) Requisites of court-martial jurisdiction. A court-martial always has jurisdiction to determine whether it has jurisdiction. Otherwise for a court-martial to have jurisdiction:

(1) The court-martial must be convened by an official empowered to convene it;

Discussion

See R.C.M. 504; 1302.

(2) The court-martial must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here “personnel” includes only the military judge, the members, and the summary court-martial;

Discussion

See R.C.M. 501-504; 1301.

(3) Each charge before the court-martial must be referred to it by competent authority;

Discussion

See R.C.M. 601.

(4) The accused must be a person subject to court-martial jurisdiction; and

Discussion

See R.C.M. 202.

(5) The offense must be subject to court-martial jurisdiction.

Discussion

See R.C.M. 203.

The judgment of a court-martial without jurisdiction is void and is entitled to no legal effect. See R.C.M. 907(b)(2)(C)(iv). But see R.C.M. 810(d) concerning the effect of certain decisions by courts-martial without jurisdiction.
R.C.M. 201(c)

(c) Contempt. A court-martial may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both.

Discussion

See R.C.M. 809 for procedures and standards for contempt proceedings.

(d) Exclusive and nonexclusive jurisdiction.

(1) Courts-martial have exclusive jurisdiction of purely military offenses.

(2) An act or omission which violates both the code and local criminal law, foreign or domestic, may be tried by a court-martial, or by a proper civilian tribunal, foreign or domestic, or, subject to R.C.M. 907(b)(2)(C) and regulations of the Secretary concerned, by both.

(3) Where an act or omission is subject to trial by court-martial and by one or more civil tribunals, foreign or domestic, the determination which nation, state, or agency will exercise jurisdiction is a matter for the nations, states, and agencies concerned, and is not a right of the suspect or accused.

Discussion

In the case of an act or omission which violates the code and a criminal law of a State, the United States, or both, the determination which agency shall exercise jurisdiction should normally be made through consultation or prior agreement between appropriate military officials (ordinarily the staff judge advocate) and appropriate civilian authorities (United States Attorney, or equivalent). See also Memorandum of Understanding Between Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction at Appendix 3.

Under the Constitution, a person may not be tried for the same misconduct by both a court-martial and another federal court. See R.C.M. 907(b)(2)(C). Although it is constitutionally permissible to try a person by court-martial and by a State court for the same act, as a matter of policy a person who is pending trial or has been tried by a State court should not ordinarily be tried by court-martial for the same act. Overseas, international agreements might preclude trial by one state of a person acquitted or finally convicted of a given act by the other state.

Under international law, a friendly foreign nation has jurisdiction to punish offenses committed within its borders by members of a visiting force, unless expressly or impliedly consents to relinquish its jurisdiction to the visiting sovereign. The procedures and standards for determining which nation will exercise jurisdiction are normally established by treaty. See, for example, NATO Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846. As a matter of policy, efforts should be made to maximize the exercise of court-martial jurisdiction over persons subject to the code to the extent possible under applicable agreements.

See R.C.M. 106 concerning delivery of offenders to civilian authorities.

See also R.C.M. 201(g) concerning the jurisdiction of other military tribunals.

(e) Reciprocal jurisdiction.

(1) Each armed force has court-martial jurisdiction over all persons subject to the code.

(2)(A) A commander of a unified or specified combatant command may convene courts-martial over members of any of the armed forces.

(B) So much of the authority vested in the President under Article 22(a)(9) to empower any commanding officer of a joint command or joint task force to convene courts-martial is delegated to the Secretary of defense, and such a commanding officer may convene general courts-martial for the trial of members of any of the armed forces.

(C) A commander who is empowered to convene a court-martial under subsections (e)(2)(A) or (e)(2)(B) of this rule may expressly authorize a commanding officer of a subordinate joint command or subordinate joint task force who is authorized to convene special and summary courts-martial to convene such courts-martial for the trial of members of other armed forces under regulations which the superior command may prescribe.

(3) A member of one armed force may be tried by a court-martial convened by a member of another armed force when:

(A) The court-martial is convened by a commander authorized to convene courts-martial under subsection (e)(2) of this rule; or

(B) The accused cannot be delivered to the armed force of which the accused is a member without manifest injury to the armed forces.

An accused should not ordinarily be tried by a court-martial convened by a member of a different armed force except when the circumstances described in (A) or (B) exist. However, failure to comply with this policy does not affect an otherwise valid referral.

(4) Nothing in this rule prohibits detailing to a court-martial a military judge who is a member of an
armed force different from that of the accused or the convening authority, or both.

(5) In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required by the code, shall be carried out by the department that includes the armed force of which the accused is a member.

(6) When there is a disagreement between the Secretaries of two military departments or between the Secretary of a military department and the commander of a unified or specified combatant command or other joint command or joint task force as to which organization should exercise jurisdiction over a particular case or class of cases, the Secretary of Defense or an official acting under the authority of the Secretary of Defense shall designate which organization will exercise jurisdiction.

(7) Except as provided in subsections (5) and (6) or as otherwise directed by the President or Secretary of Defense, whenever action under this Manual is required or authorized to be taken by a person superior to—

(A) a commander of a unified or specified combatant command or;

(B) a commander of any other joint command or joint task force that is not part of a unified or specified combatant command,

the matter shall be referred to the Secretary of the armed force of which the accused is a member. The Secretary may convene a court-martial, take other appropriate action, or, subject to R.C.M. 504(c), refer the matter to any person authorized to convene a court-martial of the accused.

**Discussion**

"Manifest injury" does not mean minor inconvenience or expense. Examples of manifest injury include direct and substantial effect on morale, discipline, or military operations, substantial expense or delay, or loss of essential witnesses.

As to the composition of a court-martial for the trial of an accused who is a member of another armed force, see R.C.M. 503(a)(3) Discussion. Cases involving two or more accused who are members of different armed forces should not be referred to a court-martial for a common trial.

(f) **Types of courts-martial.**

(1) **General courts-martial.**

(A) **Cases under the code.**

(i) Except as otherwise expressly provided, general courts-martial may try any person subject to the code for any offense made punishable under the code. General courts-martial also may try any person for a violation of Article 83, 104, or 106.

(ii) Upon a finding of guilty of an offense made punishable by the code, general courts-martial may, within limits prescribed by this Manual, adjudge any punishment authorized under R.C.M. 1003.

(iii) Notwithstanding any other rule, the death penalty may not be adjudged if:

(a) Not specifically authorized for the offense by the code and Part IV of this Manual; or

(b) The case has been referred as noncapital.

(B) **Cases under the law of war.**

(i) General courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime or offense against:

(a) The law of war; or

(b) The law of the territory occupied as an incident of war or belligerency whenever the local civil authority is superseded in whole or part by the military authority of the occupying power. The law of the occupied territory includes the local criminal law as adopted or modified by competent authority, and the proclamations, ordinances, regulations, or orders promulgated by competent authority of the occupying power.

**Discussion**

Subsection (f)(1)(B)(i)(b) is an exercise of the power of military government.

(ii) When a general court-martial exercises jurisdiction under the law of war, it may adjudge any punishment permitted by law of war.

**Discussion**

Certain limitations on the discretion of military tribunals to adjudge punishment under the law of war are prescribed in international conventions. See, for example, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, T.I.A.S. No. 3365.

(C) **Limitations in judge alone cases.** A general court-martial composed only of a military judge does not have jurisdiction to try any person for any
offense for which the death penalty may be adjudged unless the case has been referred to trial as noncapital.

(2) Special courts-martial.

(A) In general. Except as otherwise expressly provided, special courts-martial may try any person subject to the code for any noncapital offense made punishable by the code and, as provided in this rule, for capital offenses.

(B) Punishments.

(i) Upon a finding of guilty, special courts-martial may adjudge, under limitations prescribed by this Manual, any punishment authorized under R.C.M. 1003 except death, dishonorable discharge, dismissal, confinement for more than 6 months, hard labor without confinement for more than 3 months, forfeiture of pay exceeding two-thirds pay per month, or any forfeiture of pay for more than 6 months.

(ii) A bad-conduct discharge may not be adjudged by a special court-martial unless:

(a) Counsel qualified under Article 27(b) is detailed to represent the accused; and

(b) A military judge is detailed to the trial, except in a case in which a military judge could not be detailed because of physical conditions or military exigencies, as the terms are here used, may exist under rare circumstances, such as on an isolated ship on the high seas or in a unit in an inaccessible area, provided compelling reasons exist why trial must be held at that time and at that place. Mere inconvenience does not constitute a physical condition or military exigency and does not excuse a failure to detail a military judge. If a military judge cannot be detailed because of physical conditions or military exigencies, a bad-conduct discharge may be adjudged provided the other conditions have been met. In that event, however, the convening authority shall, prior to trial, make a written statement explaining why a military judge could not be obtained. This statement shall be appended to the record of trial and shall set forth in detail the reasons why a military judge could not be detailed, and why the trial had to be held at that time and place.

The requirement for counsel is satisfied when counsel qualified under Article 27(b), and not otherwise disqualified, has been detailed and made available, even though the accused may not choose to cooperate with, or use the services of, such detailed counsel.

The physical condition or military exigency exception to the requirement for a military judge does not apply to the requirement for detailing counsel qualified under Article 27(b).

See also R.C.M. 1103(c) concerning the requirements for a record of trial in special courts-martial.

(C) Capital offenses

(i) A capital offense for which there is prescribed a mandatory punishment beyond the punitive power of a special court-martial shall not be referred to such a court-martial.

(ii) An officer exercising general court-martial jurisdiction over the command which includes the accused may permit any capital offense other than one described in subsection (f)(2)(C)(i) of this rule to be referred to a special court-martial for trial.

(iii) The Secretary concerned may authorize, by regulation, officers exercising special court-martial jurisdiction to refer capital offenses, other than those described in subsection (f)(2)(C)(i) of this rule, to trial by special court-martial without first obtaining the consent of the officer exercising general court-martial jurisdiction over the command.

Discussion

See R.C.M. 103(3) for a definition of capital offenses.

(3) Summary courts-martial. See R.C.M. 1301(c) and (d)(1).

(g) Concurrent jurisdiction of other military tribunals. The provisions of the code and this Manual conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

Discussion

See Articles 104 and 106 for some instances of concurrent jurisdiction.
Rule 202. Persons subject to the jurisdiction of courts-martial

(a) In general. Courts-martial may try any person when authorized to do so under the code.

Discussion

(1) Authority under the code. Article 2 lists classes of persons who are subject to the code. These include active duty personnel (Article 2(a)(1)); cadets, aviation cadets, and midshipmen (Article 2(a)(2)); certain retired personnel (Article 2(a)(4) and (5)); members of Reserve components not on active duty under some circumstances (Article 2(a)(3) and (6)); persons in the custody of the armed forces serving a sentence imposed by court-martial (Article 2(a)(7)); and, under some circumstances, specified categories of civilians (Article 2(a)(8), (9), (10), (11), and (12); see subsection (3) and (4) of this discussion). In addition, certain persons whose status as members of the armed forces or as persons otherwise subject to the code apparently has ended may, nevertheless, be amenable to trial by court-martial. See Article 3, 4, and 73. A person need not be subject to the code to be subject to trial by court-martial under Articles 83, 104, or 106. See also Article 48 and R.C.M. 809 concerning who may be subject to the contempt powers of a court-martial.

(2) Active duty personnel. Court-martial jurisdiction is most commonly exercised over active duty personnel. In general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the armed forces, acceptance of a commission, or entry onto active duty pursuant to orders. Court-martial jurisdiction over active duty personnel ordinarily ends on delivery of a discharge certificate or its equivalent to the person concerned issued pursuant to competent orders. Orders transferring a person to the inactive reserve are the equivalent of a discharge certificate for purposes of jurisdiction.

These are several important qualifications and exceptions to these general guidelines.

(A) Inception of court-martial jurisdiction over active duty personnel.

(i) Enlistment. “The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under [Article 2(a)] and a change of status from civilian to member of the armed forces shall be effective upon taking the oath of enlistment.” Article 2(b). A person who is, at the time of enlistment, insane, intoxicated, or under the age of 17 does not have the capacity to enlist by law. No court-martial jurisdiction over such a person may exist as long as the incapacity continues. If the incapacity ceases to exist, a “constructive enlistment” may result under Article 2(c). See discussion of “constructive enlistment” below. Similarly, if the enlistment was involuntary, court-martial jurisdiction will exist only when the coercion is removed and a “constructive enlistment” under Article 2(c) is established.

Persons age 17 (but not yet 18) may not enlist without parental consent. A parent or guardian may, within 90 days of its inception, terminate the enlistment of a 17-year-old who enlisted without parental consent, if the person has not yet reached the age of 18. 10 U.S.C. § 1170. See also DOD Directive 1332.14 and service regulations for specific rules on separation of persons 17 years of age on the basis of a parental request. Absent effective action by a parent or guardian to terminate such an enlistment, court-martial jurisdiction exists over the person. An application by a parent for release does not deprive a court-martial of jurisdiction to try a person for offenses committed before action is completed on such an application.

Even if a person lacked capacity to understand the effect of enlistment or did not enlist voluntarily, a “constructive enlistment” may be established under Article 2(c), which provides:

Notwithstanding any other provision of law, a person serving with an armed force who—

(1) submitted voluntary to military authority;
(2) met the mental competency and minimum age qualifications of sections 304 and 305 of this title at the time of voluntary submission to military authority [that is, not insane, intoxicated, or under the age of 17];
(3) received military pay or allowances; and
(4) performed military duties;

is subject to [the code] until such person’s active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

Even if a person never underwent an enlistment or induction proceeding of any kind, court-martial jurisdiction could be established under this provision.

(ii) Induction. Court-martial jurisdiction does not extend to a draftee until: the draftee has completed an induction ceremony which was in substantial compliance with the requirements prescribed by statute and regulations; the draftee by conduct after an apparent induction, has waived objection to substantive defects in it; or a “constructive enlistment” under Article 2(c) exists.

The fact that a person was improperly inducted (for example, because of incorrect classification or erroneous denial of exemption) does not of itself negate court-martial jurisdiction. When a person has made timely and persistent efforts to correct such an error, court-martial jurisdiction may be defeated if improper induction is found, depending on all the circumstances of the case.

(iii) Call to active duty. A member of a reserve component may be called or ordered to active duty for a variety of reasons, including training, service in time of war or national emergency, discipline, or as a result of failure to participate satisfactorily in unit activities.

When a person is ordered to active duty for failure to satisfactorily participate in unit activities, the order must substantially comply with procedures prescribed by regulations, to the extent due process requires, for court-martial jurisdiction to exist. Generally, the person must be given notice of the activation and the reasons therefor, and an opportunity to object to the activation. A person waives the right to contest involuntary activation by failure to exercise this right within a reasonable time after notice of the right to do so.

(B) Termination of jurisdiction over active duty personnel. As indicated above, the delivery of a valid discharge certificate or its equivalent ordinarily serves to terminate court-martial jurisdiction.

(i) Effect of completion of term of service. Completion of an enlistment or term of service does not by itself terminate court-martial jurisdiction. An original term of enlist-
ment may be adjusted for a variety of reasons, such as making up time lost for unauthorized absence. Even after such adjustments are considered, court-martial jurisdiction normally continues past the time of scheduled separation until a discharge certificate or its equivalent is delivered or until the Government fails to act within a reasonable time after the person objects to continued re-

As indicated in subsection (c) of this rule, servicemembers may be retained past their scheduled time of separation, over pro-
test, by action with a view to trial while they are still subject to the code. Thus, if action with a view to trial is initiated before dis-
charge or the effective terminal date of self-executing orders, a person may be retained beyond the date that the period of service would otherwise have expired or the terminal date of such orders.

(i) Effect of discharge and reenlistment. Under Article 3(a), a person who reenlists following a discharge may not be tried for offenses committed during the earlier term of service unless the offense was punishable by confinement for 5 years or more and could not be tried in the courts of the United States or of a State, a Territory, or the District of Columbia. However, see (ii) below.

(ii) Exceptions. There are several exceptions to the general principle that court-martial jurisdiction terminates on discharge or its equivalent.

(a) A person who was subject to the code at the time an offense was committed may be tried by court-martial for that offense despite a later discharge or other termination of that status if:

1. The offense is one for which a court-martial may adjudge confinement for 5 or more years;
2. The person cannot be tried in the courts of the United States or of a State, Territory, or the District of Columbia; and
3. The person is, at the time of the court-martial, subject to the code, by reentry into the armed forces or otherwise. See Article 3(a).

(b) A person who was subject to the code at the time the offense was committed is subject to trial by court-martial despite a later discharge if—
1. The discharge was issued before the end of the accused's term of enlistment for the purpose of reenlisting;
2. The person remains, at the time of the court-martial, subject to the code; and
3. The reenlistment occurred after 26 July 1982.

(c) Persons in the custody of the armed forces serving a sentence imposed by a court-martial remain subject to the code and court-martial jurisdiction. A prisoner who has received a discharge and who remains in the custody of an armed force may be tried for an offense committed while a mem-
er of the armed forces and before the execution of the discharge as well as for offenses committed after it.

(d) A person discharged from the armed forces who is later charged with having fraudulently obtained that discharge is, subject to the statute of limitations, subject to trial by court-martial on that charge, and is after apprehension subject to the code while in the custody of the armed forces for trial. Upon conviction of that charge such a person is subject to trial by court-martial for any offenses under the code committed before the fraudulent discharge.

(e) No person who has deserted from the armed forces is relieved from court-martial jurisdiction by a separation from any later period of service.

(f) When a person's discharge or other separation does not interrupt the status as a person belonging to the general category of persons subject to the code, court-martial jurisdiction over that person does not end. For example, when an officer holding a commission in a Reserve component of an armed force is discharged from that commission while on active duty because of acceptance of a commission in a Regular component of that armed force, without an interval between the periods of ser-
vie under the two commissions, that officer's military status does not end. There is merely a change in personnel status from temporary to permanent officer, and court-martial jurisdiction over an offense committed before the discharge is not affected.

(3) Public Health Service and National Oceanic and Atmospheric Administration. Members of the Public Health Service and the National Oceanic and Atmospheric Administration become subject to the code when assigned to an serving with the armed forces.

(4) Limitations on jurisdiction over civilians. Court-martial jurisdiction over civilians under the code is limited by judicial decisions. The exercise of jurisdiction under Article 2(a)(11) in peacetime has been held unconstitutional by the Supreme Court of the United States. Article 2(a)(10) has also been limited. Before initiating court-martial proceedings against a civilian, relevant statutes and decisions should be carefully examined.

(5) Members of a Reserve Component. Members of a reserve component in federal service on active duty, as well as those in federal service on inactive-duty training, are subject to the code. Moreover, members of a reserve component are amendable to the jurisdiction of courts-martial notwithstanding the termination of a period of such duty. See R.C.M. 204.

(b) Offenses under the law of war. Nothing in this rule limits the power of general courts-martial to try persons under the law of war. See R.C.M. 201(f)(1)(B).

(c) Attachment of jurisdiction over the person.

1. In general. Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Once court-martial jurisdiction over a person attaches, such jurisdiction shall continue for all purposes of trial, sentence, and punishment, notwithstanding the expiration of that person's term of service or other period in which that person was subject to the code or trial by court-martial. When jurisdiction attaches over a serv-
icemember on active duty, the servicemember may be held on active duty over objection pending dispo-
sion of any offense for which held and shall remain subject to the code during the entire period.
Discussion

Court-martial jurisdiction exists to try a person as long as that person occupies a status as a person subject to the code. See also Article 104 and 106. Thus, a servicemember is subject to court-martial jurisdiction until lawfully discharged or, when the servicemember's term of service has expired, the government fails to act within a reasonable time on objection by the servicemember to continued retention.

Court-martial jurisdiction attaches over a person upon action with a view to trial. Once court-martial jurisdiction attaches, it continues throughout the trial and appellate process, and for purposes of punishment.

If jurisdiction has attached before the effective terminal date of self-executing orders, the person may be held for trial by court-martial beyond the effective terminal date.

(2) Procedure. Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges.

Rule 203. Jurisdiction over the offense

To the extent permitted by the Constitution, courts-martial may try any offense under the code and, in the case of general courts-martial, the law of war.

Discussion

(a) In general. Courts-martial have power to try any offense under the code except when prohibited from doing so by the Constitution. (Jurisdiction over certain offenses and individuals may be affected by Article 3; see R.C.M. 202.) The major constitutional limitation on the subject-matter jurisdiction of courts-martial was established by the Supreme Court of the United States in O'Callahan v. Parker, 395 U.S. 258 (1969), which held that an offense under the code may not be tried by court-martial unless it is "service-connected." Later decisions by the Supreme Court, the Court of Military Appeals, and other courts have established standards for applying the service-connection rule, as well as certain exceptions to it. Because each case depends on its own facts, and because these rules are subject to continuing interpretation, careful attention must be paid to service-connection in every case. The remainder of this discussion provides guidance concerning service-connection based on judicial decisions.

(b) Pleading and proof. The prosecution should plead the facts establishing jurisdiction (see R.C.M. 307(c)(3) Discussion (F)). If the issue is raised, the prosecution must prove the disputed facts necessary to establish jurisdiction over the offense. See R.C.M. 307(b)(1)(A). Jurisdiction must exist over each offense. The fact that some offenses with which the accused is charged are service-connected does not necessarily establish jurisdiction over others, even if they are of a similar or related nature. However, where related on-base and off-base offenses are involved, there is a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay. The existence of this interest helps provide a basis for finding service-connection for the off-base offenses.

(c) Determining service-connection.

(1) In general. In Relford v. Commandant, 401 U.S. 355 (1971), the Supreme Court identified 12 factors which may be considered in deciding service-connection. The factors are:

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any caption of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. The offenses being among those traditionally prosecuted in civilian courts.

These factors are not exhaustive. The Supreme Court also described nine additional considerations in Relford:

1. The essential and obvious interest of the military in the security of persons and of property on the military enclave;
2. The responsibility of the military commander for maintenance of order in the command and the commander's authority to maintain that order;
3. The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon the morale, discipline, reputation and integrity of the base itself, upon its personnel, and upon the military operations and the military mission;
4. Article I, section 8, clause 14 of the Constitution of the United States, vesting in Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a servicemember-offender and turn that person over to the civil authorities;
5. The distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community;
6. The presence of factors such as geographical and military relationships which have important significance in favor of service-connection;
7. Historically, a crime against the person of one associated with the post was subject even to the General Article; (8) The absence of any connection between the post's strictly military areas and its nonmilitary areas, or between a servicemember's duty and off-duty activities and hours on the post. In addition, the effect of the offense on the reputation and morale of the Armed Service is an appropriate consideration in determining service-connection.
Rule 204. Jurisdiction over certain reserve component personnel

(a) Service regulations. The Secretary concerned shall prescribe regulations setting forth rules and procedures for the exercise of court-martial jurisdiction and nonjudicial punishment authority over reserve component personnel under Article 2(a)(3) and 2(d), subject to the limitations of this Manual and the UCMJ.

Discussion

Such regulations should describe procedures for ordering a reservist to active duty for disciplinary action, for the preferential investigation, forwarding, and referral of charges, designation of convening authorities and commanders authorized to conduct nonjudicial punishment proceedings, and for other appropriate purposes.

See definitions in R.C.M. 103 (Discussion). See paragraph 5e and f, Part V, concerning limitations on nonjudicial punishments imposed on reservists while on inactive-duty training.

Members of the Army National Guard and the Air National Guard are subject to Federal court-martial jurisdiction only when the offense concerned is committed while the member is in Federal service.

(b)(1) General and special court-martial proceedings. A member of a reserve component must be on active duty prior to arraignment at a general or special court-martial. A member ordered to active duty pursuant to Article 2(d) may be retained on active duty to serve any adjudged confinement or other restriction on liberty if the order to active duty was ap-
proved in accordance with Article 2(d)(5), but such member may not be retained on active duty pursuant to Article 2(d) after service of the confinement or other restriction on liberty. All punishments remaining unserved at the time the member is released from active duty may be carried over to subsequent periods of inactive-duty training or active duty.

Discussion
An accused ordered to active duty pursuant to Article 2(d) may be retained on active duty after service of the punishment if permitted by other authority. For example, an accused who commits another offense while on active duty ordered pursuant to Article 2(d) may be retained on active duty pursuant to R.C.M. 202(c)(1).

(2) Summary courts-martial. A member of a reserve component may be tried by summary court-martial either while on active duty or inactive-duty training. A summary court-martial conducted during inactive-duty training may be in session only during normal periods of such training. The accused may not be held beyond such periods of training for trial or service or any punishment. All punishments remaining unserved at the end of a period of active duty or the end of any normal period of inactive duty training may be carried over to subsequent periods of inactive-duty training or active duty.

Discussion
A "normal period" of inactive-duty training does not include periods which are scheduled solely for the purpose of conducting court-martial proceedings.

(c) Applicability. This subsection is not applicable when a member is held on active duty pursuant to R.C.M. 202(c).

(d) Changes in type of service. A member of a reserve component at the time disciplinary action is initiated, who is alleged to have committed an offense while on active duty or inactive-duty training, is subject to court-martial jurisdiction without regard to any change between active and reserve service or within different categories of reserve service subsequent to commission of the offense. This subsection does not apply to a person whose military status was completely terminated after commission of an offense.

Discussion
A member of a regular or reserve component remains subject to court-martial jurisdiction after leaving active duty for offenses committed prior to such termination of active duty if the member retains military status in a reserve component without having been discharged from all obligations of military service.

See R.C.M. 202(a), Discussion, paragraph (2)(B)(ii) and (iii) regarding the jurisdictional effect of a discharge from military service. A "complete termination" of military status refers to a discharge relieving the servicemember of any further military service. It does not include a discharge conditioned upon acceptance of further military service.
CHAPTER III. INITIATION OF CHARGES; APPREHENSION; PRETRIAL 
RESTRAINT; RELATED MATTERS

Rule 301. Report of offense
(a) Who may report. Any person may report an offense subject to trial by court-martial.
(b) To whom reports conveyed for disposition. Ordinarily, any military authority who receives a report of an offense shall forward as soon as practicable the report and any accompanying information to the immediate commander of the suspect. Competent authority superior to that commander may direct otherwise.

Discussion

Any military authority may receive a report of an offense. Typically such reports are made to law enforcement or investigative personnel, or to appropriate persons in the chain of command. A report may be made by any means, and no particular format is required. When a person who is not a law enforcement official receives a report of an offense, that person should forward the report to the immediate commander of the suspect unless that person believes it would be more appropriate to notify law enforcement or investigative authorities.

If the suspect is unidentified, the military authority who receives the report should refer it to a law enforcement or investigative agency.

Upon receipt of a report, the immediate commander of a suspect should refer to R.C.M. 306 (Initial disposition). See also R.C.M. 302 (Apprehension); R.C.M. 303 (Preliminary inquiry); R.C.M. 304, 305 (Pretrial restraint, confinement).

Rule 302. Apprehension
(a) Definition and scope.
(1) Definition. Apprehension is the taking of a person into custody.

Discussion

Apprehension is the equivalent of "arrest" in civilian terminology. (In military terminology, "arrest" is a form of restraint. See Article 9; R.C.M. 304.) See subsection (c) of this rule concerning the bases for apprehension. An apprehension is not required in every case; the fact that an accused was never apprehended does not affect the jurisdiction of a court-martial to try the accused. However, see R.C.M. 202(c) concerning attachment of jurisdiction.

An apprehension is different from detention of a person for investigative purposes, although each involves the exercise of government control over the freedom of movement of a person. An apprehension must be based on probable cause, and the custody initiated in an apprehension may continue until proper authority is notified and acts under R.C.M. 304 or 305. An investigative de-
Whenever enlisted persons, including police and guards, and civilian police and guards apprehend any commissioned or warrant officer, such persons should make an immediate report to the commissioned officer to whom the apprehending person is responsible.

The phrase “persons designated by proper authority to perform military criminal investigative, guard or police duties” includes special agents of the Defense Criminal Investigative Service.

(2) Commissioned, warrant, petty, and noncommissioned officers. All commissioned, warrant, petty, and noncommissioned officers on active duty or inactive duty training;

Noncommissioned and petty officers not otherwise performing law enforcement duties should not apprehend a commissioned officer unless directed to do so by a commissioned officer or in order to prevent disgrace to the service or the escape of one who has committed a serious offense.

(3) Civilians authorized to apprehend deserters. Under Article 8, any civilian officer having authority to apprehend offenders under laws of the United States or of a State, Territory, Commonwealth, or possession, or the District of Columbia, when the apprehension is of a deserter from the armed forces.

(a) Grounds for apprehension. A person subject to the code or trial thereunder may be apprehended for an offense triable by court-martial upon probable cause to apprehend. Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it. Persons authorized to apprehend under subsection (b)(2) of this rule may also apprehend persons subject to the code who take part in quarrels, frays, or disorders, wherever they occur.

Discussion

“Reasonable grounds” means that there must be the kind of reliable information that a reasonable, prudent person would rely on which makes it more likely than not that something is true. A mere suspicion is not enough but proof which would support a conviction is not necessary. A person who determines probable cause may rely on the reports of others.

(d) How an apprehension may be made.

(1) In general. An apprehension is made by clearly notifying the person to be apprehended that person is in custody. This notice should be given orally or in writing, but it may be implied by the circumstances.

(2) Warrants. Neither warrants nor any other authorization shall be required for an apprehension under these rules except as required in subsection (e)(2) of this rule.

(3) Use of force. Any person authorized under these rules to make an apprehension may use such force and means as reasonably necessary under the circumstances to effect the apprehension.

(e) Where an apprehension may be made.

(1) In general. An apprehension may be made at any place, except as provided in subsection (e)(2) of this rule.

(2) Private dwellings. A private dwelling includes dwellings, on or off a military installation, such as single family houses, duplexes, and apartments. The quarters may be owned, leased, or rented by the residents, or assigned, and may be occupied on a temporary or permanent basis. “Private dwelling” does not include the following, whether or not subdivided into individual units: living areas in military barracks, vessels, aircraft, vehicles, tents, bunkers, field encampments, and similar places. No person may enter a private dwelling for the purpose of making an apprehension under these rules unless:

Discussion

In addition to any other action required by law or regulation or proper military officials, any person making an apprehension under these rules should: maintain custody of the person apprehended; and inform as promptly as possible the immediate commander of the person apprehended, or any official higher in the chain of command of the person apprehended if it is impractical to inform the immediate commander.

R.C.M. 302(e)(2)
R.C.M. 302(e)(2)(A)

(A) Pursuant to consent under Mil. R. Evid. 314(e) of 316(d)(2);
(B) Under exigent circumstances described in Mil. R. Evid. 315(g) or 316(d)(4)(B);
(C) In the case of a private dwelling which is military property or under military control, or non-military property in a foreign country.

(i) if the person to be apprehended is a resident of the private dwelling, there exists at the time of the entry, reason to believe that the person to be apprehended is present in the dwelling, and the apprehension has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause to apprehend the person exists; or
(ii) if the person to be apprehended is not a resident of the private dwelling, the entry has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause exists to apprehend the person and to believe that the person to be apprehended is or will be present at the time of the entry;
(D) In the case of a private dwelling not included in subsection (e)(2)(C) of this rule,
(i) if the person to be apprehended is a resident of the private dwelling, there exists at the time of the entry, reason to believe that the person to be apprehended is present and the apprehension is authorized by an arrest warrant issued by competent civilian authority; or
(ii) if the person to be apprehended is not a resident of the private dwelling, the apprehension is authorized by an arrest warrant and the entry is authorized by a search warrant, each issued by competent civilian authority.

A person who is not a resident of the private dwelling entered may not challenge the legality of an apprehension of that person on the basis of failure to secure a warrant or authorization to enter that dwelling, or on the basis of the sufficiency of such a warrant or authorization. Nothing in this subsection ((e)(2)) affects the legality of an apprehension which is incident to otherwise lawful presence in a private dwelling.

Discussion

For example, if law enforcement officials enter a private dwelling pursuant to a valid search warrant or search authorization, they may apprehend persons therein if grounds for an apprehension exist. This subsection is not intended to be an independent grant of authority to execute civilian arrest or search warrants. The authority must derive from an appropriate Federal or state procedure. See e.g. Fed. R. Crim. P. 41 and 28 C.F.R. 60.1.

Rule 303. Preliminary inquiry into reported offenses

Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.

Discussion

The preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should consider whether to seek the assistance of law enforcement personnel in conducting any inquiry or further investigation. The inquiry should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation.

The Military Rules of Evidence should be consulted when conducting interrogations (see Mil. R. Evid. 301-306), searches (see Mil. R. Evid. 311-317), and eyewitness identifications (see Mil. R. Evid. 321).

If the offense is one for which the Department of Justice has investigative responsibilities, appropriate coordination should be made under the Memorandum of Understanding, see Appendix 3, and any implementing regulations.

If it appears that any witness may not be available for later proceedings in the case, this should be brought to the attention of appropriate authorities. See also R.C.M. 702 (depositions).

A person who is an accuser (see Article l(9)) is disqualified from convening a general or special court-martial in that case. R.C.M. 504(c)(1). Therefore, when the immediate commander is a general or special court-martial convening authority, the preliminary inquiry should be conducted by another officer of the command. That officer may be informed that charges may be preferred if the officer determines that preferral is warranted.

Rule 304. Pretrial restraint

(a) Types of pretrial restraint. Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.
(1) **Conditions on liberty.** Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.

(2) **Restriction in lieu of arrest.** Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.

(3) **Arrest.** Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

(4) **Confinement.** Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. See R.C.M. 305.

**Discussion**

Conditions on liberty include orders to report periodically to a specified official, orders not to go to a certain place (such as the scene of the alleged offense), and orders not to associate with specified persons (such as the alleged victim or potential witnesses). Conditions on liberty must not hinder pretrial preparation, however. Thus, when such conditions are imposed, they must be sufficiently flexible to permit pretrial preparation.

Restriction in lieu of arrest is a less severe restraint on liberty than is arrest. Arrest includes suspension from performing full military duties and the limits of arrest are normally narrower than those of restriction in lieu of arrest. The actual nature of the restraint imposed, and not the characterization of it by the officer imposing it, will determine whether it is technically an arrest or restriction in lieu of arrest.

Breach of arrest or restriction in lieu of arrest or violation of conditions on liberty are offenses under the code. See paragraphs 16, 19, and 102, Part IV. When such an offense occurs, it may warrant appropriate action such as nonjudicial punishment or court-martial. See R.C.M. 306. In addition, such a breach or violation may provide a basis for the imposition of a more severe form of restraint.

R.C.M. 707(a) requires that the accused be brought to trial within 120 days of preferral of charges or imposition of restraint under R.C.M. 304(a)(2)-(4).

(b) **Who may order pretrial restraint.**

(1) **Of civilians and officers.** Only a commanding officer to whose authority the civilian or officer is subject may order pretrial restraint of that civilian or officer.

**Discussion**

Civilians may be restrained under these rules only when they are subject to trial by court-martial. See R.C.M. 202.

(2) **Of enlisted persons.** Any commissioned officer may order pretrial restraint of any enlisted person.

(3) **Delegation of authority.** The authority to order pretrial restraint of civilians and commissioned and warrant officers may not be delegated. A commanding officer may delegate to warrant, petty, and noncommissioned officers authority to order pretrial restraint of enlisted persons of the commanding officer’s command or subject to the authority of that commanding officer.

(4) **Authority to withhold.** A superior competent authority may withhold the authority to order pretrial restraint.

(c) **When a person may be restrained.** No person may be ordered into restraint before trial except for probable cause. Probable cause to order pretrial restraint exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person to be restrained committed it; and

(3) The restraint ordered is required by the circumstances.

**Discussion**

The decision whether to impose pretrial restraint, and, if so, what type or types, should be made on a case-by-case basis. The factors listed in the Discussion of R.C.M. 305(h)(2)(B) should be considered. The restraint should not be more rigorous than the circumstances require to ensure the presence of the person restrained or to prevent foreseeable serious criminal misconduct.

Restraint is not required in every case. The absence of pretrial restraint does not affect the jurisdiction of a court-martial. However, see R.C.M. 202(c) concerning attachment of jurisdiction. See R.C.M. 305 concerning the standards and procedures governing pretrial confinement.
R.C.M. 304(d)

(d) Procedures for ordering pretrial restraint. Pretrial restraint other than confinement is imposed by notifying the person orally or in writing of the restraint, including its terms or limits. The order to an enlisted person shall be delivered personally by the authority who issues it or through other persons subject to the code. The order to an officer or a civilian shall be delivered personally by the authority who issues it or by another commissioned officer. Pretrial confinement is imposed pursuant to orders by a competent authority by the delivery of a person to a place of confinement.

(e) Notice of basis for restraint. When a person is placed under restraint, the person shall be informed of the nature of the offense which is the basis for such restraint.

Discussion

See R.C.M. 305(e) concerning additional information which must be given to a person who is confined. If the person ordering the restrain is not the commander of the person restrained, that officer should be notified.

(f) Punishment prohibited. Pretrial restraint is not punishment and shall not be used as such. No person who is restrained pending trial may be subjected to punishment or penalty for the offense which is the basis for that restraint. Prisoners being held for trial shall not be required to undergo punitive duty hours or training, perform punitive labor, or wear special uniforms prescribed only for post-trial prisoners. This rule does not prohibit minor punishment during pretrial confinement for infractions of the rules of the place of confinement. Prisoners shall be afforded facilities and treatment under regulations of the Secretary concerned.

Discussion

Offenses under the code by a person under restraint may be disposed of in the same manner as any other offenses.

(g) Release. Except as otherwise provided in R.C.M. 305, a person may be released from pretrial restraint by a person authorized to impose it. Pretrial restraint shall terminate when a sentence is adjudged, the accused is acquitted of all charges, or all charges are dismissed.

Discussion

Pretrial restraint may be imposed (or reimposed) if charges are to be reinstated or of a rehearing or “other” trial is to be ordered.

(h) Administrative restraint. Nothing in this rule prohibits limitations on a servicemember imposed for operational or other military purposes independent of military justice, including administrative hold or medical reasons.

Discussion

See also R.C.M. 306.

Rule 305. Pretrial confinement

(a) In general. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

Discussion

No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States. Article 12. However, if members of the armed forces of the United States are separated from prisoners of the other categories mentioned, they may be confined in the same confinement facilities.

(b) Who may be confined. Any person who is subject to trial by court-martial may be confined if the requirements of this rule are met.

Discussion

See R.C.M. 201 and 202 and the discussions therein concerning persons who are subject to trial by courts-martial.

(c) Who may order confinement. See R.C.M. 304(b).

Discussion

“No provost marshal, commander of a guard, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.” Article 11(a).
When a person may be confined. No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

1. An offense triable by court-martial has been committed;
2. The person confined committed it; and
3. Confinement is required by the circumstances.

Discussion

The person who directs confinement should consider the matters discussed under subsection (h)(2)(B) of this rule before ordering confinement. However, the person who initially orders confinement is not required to make a detailed analysis of the necessity for confinement. It is often not possible to review a person's background and character or even the details of an offense before physically detaining the person. For example, until additional information can be secured, it may be necessary to confine a person apprehended in the course of a violent crime.

"When charged only with an offense normally tried by summary court-martial, [an accused] shall not ordinarily be paced in confinement." Article 10.

Confinement should be distinguished from custody. Custody is restraint which is imposed by apprehension and which may, but is not necessarily, physical. Custody may be imposed by anyone authorized to apprehend (see R.C.M. 302(b)), and may continue until a proper authority under R.C.M. 304(B) is notified and takes action. Thus, a person who has been apprehended could be physically restrained, but this would not be pretrial confinement in the sense of this rule until a person authorized to do so under R.C.M. 304(b) directed confinement.

Advice to the accused upon confinement. Each person confined shall be promptly informed of:

1. The nature of the offenses for which held;
2. The right to remain silent and that any statement made by the person may be used against the person;
3. The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and
4. The procedures by which pretrial confinement will be reviewed.

Military counsel. If requested by the prisoner and such request is made known to military authorities, military counsel shall be provided to the prisoner before the initial review under subsection (i) of this rule or within 72 hours of such a request being first communicated to military authorities, whichever occurs first. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a prisoner does not have a right under this rule to have military counsel of the prisoner's own selection.

Who may direct release from confinement. Any commander of a prisoner, an officer appointed under regulations of the Secretary concerned to conduct the review under subsection (i) of this rule, or, once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred may direct release from pretrial confinement. For purposes of this subsection, "any commander" includes the immediate or higher commander of the prisoner and the commander of the installation on which the confinement facility is located.

Notification and action by commander.

1. Report. Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer to whose charge the prisoner was committed shall, within 24 hours after that commitment, cause to be made a report to the commander which shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement.

Discussion

This report may be made by any means. Ordinarily, the immediate commander of the prisoner should be notified. In unusual cases any commander to whose authority the prisoner is subject, such as the commander of the confinement facility, may be notified. In the latter case, the commander so notified must ensure compliance with subsection (h)(2) of this rule.

2. Action by commander.

★(A) Decision. Not later than 72 hours after the commander's ordering of a prisoner into pretrial confinement, or after receipt of a report that a member of the commander's unit or organization has been confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue.

(B) Requirements for confinement. The commander shall direct the prisoner's release from pretrial confinement unless the commander believes
upon probable cause, that is, upon reasonable grounds, that:

(i) An offense triable by a court-martial has been committed;
(ii) The prisoner committed it; and
(iii) Confinement is necessary because it is foreseeable that:
   (a) The prisoner will not appear at trial, pretrial hearing, or investigation, or
   (b) The prisoner will engage in serious criminal misconduct; and
   (iv) Less severe forms of restraint are inadequate.

Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States. As used in this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

Discussion

A person should not be confined as a mere matter of convenience or expediency.

Some of the factors which should be considered under this subsection are:

1. The nature and circumstances of the offenses charged or suspected, including extenuating circumstances;
2. The weight of the evidence against the accused;
3. The accused's ties to the locale, including family, off-duty employment, financial resources, and length of residence;
4. The accused's character and mental condition;
5. The accused's service record, including any record of previous misconduct;
6. The accused's record of appearance at or flight from other pretrial investigations, trials, and similar proceedings; and
7. The likelihood that the accused can and will commit further serious criminal misconduct if allowed to remain at liberty.

Although the Military Rules of Evidence are not applicable, the commander should judge the reliability of the information available. Before relying on the reports of others, the commander must have a reasonable belief that the information is believable and has a factual basis. The information may be received orally or in writing. Information need not be received under oath, but an oath may add to its reliability. A commander may examine the prisoner's personnel records, police records, and may consider the recommendations of others.

Less serious forms of restraint must always be considered before pretrial confinement may be approved. Thus the commander should consider whether the prisoner could be safely returned to the prisoner's unit, at liberty or under restriction, arrest, or conditions on liberty. See R.C.M. 304.

(C) Memorandum. If continued pretrial confinement is approved, the commander shall prepare a written memorandum which states the reasons for the conclusion that the requirements for confinement in subsection (h)(2)(B) of this rule have been met. This memorandum may include hearsay and may incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the reviewing officer under subsection (i) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared. However, additional information may be added to the memorandum at any time.

(i) Procedures for review of pretrial confinement.

1. In general. A review of the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement shall be made within 7 days of the imposition of confinement under military control. If the prisoner was apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion. In calculating the number of days of confinement for purposes of this rule, the initial date of confinement shall count as one day and the date of the review shall also count as one day.

2. By whom made. The review under this subsection shall be made by a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned.


(A) Matters considered. The review under this subsection shall include a review of the memorandum submitted by the prisoner's commander under subsection (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the accused. The prisoner, and the prisoner's counsel, if any, shall be allowed to appear before the reviewing officer and make a statement, if practica-
ble. A representative of command may appear before the reviewing officer to make a statement.

(B) Rules of evidence. Except for Mil. R. Evid., Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to the matters considered.

(C) Standard of proof. The requirements for confinement under subsection (h)(2)(B) of this rule must be proved by a preponderance of the evidence.

(4) Extension of time limit. The reviewing officer may, for good cause, extend the time limit for completion of the initial review to 10 days after the imposition of pretrial confinement.

(5) Action by reviewing officer. Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release.

(6) Memorandum. The reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. A copy of the memorandum and of all documents considered by the reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(7) Reconsideration of approval of continued confinement. The reviewing officer shall, after notice to the parties, reconsider the decision to confine the prisoner upon request based upon any significant information not previously considered.

(j) Review by military judge. Once the charges for which the accused has been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.

(1) Release. The military judge shall order release from pretrial confinement only if:

(A) The reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subsection (h)(2)(B) of this rule;

(B) Information not presented to the reviewing officer establishes that the prisoner should be released under subsection (h)(2)(B) of this rule; or

(C) The provisions of subsection (i)(2) or (3) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subsection (h)(2)(B) of this rule.

(2) Credit. The military judge shall order administrative credit under subsection (k) of this rule for any pretrial confinement served as a result of an abuse of discretion or of failure to comply with the provisions of subsection (f), (h), or (i) of this rule.

(k) Remedy. The remedy for noncompliance with subsection (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit, using the conversion formula under R.C.M. 1003(b)(6) and (7), shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, if adjudged. For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

(i) Confinement after release. No person whose release from pretrial confinement has been directed by a person authorized in subsection (g) of this rule may be confined again before completion of trial except upon the discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.

Discussion

See R.C.M. 304(b) concerning who may order confinement.

(m) Exceptions.

(1) Operational necessity. The Secretary of Defense may suspend application of subsections (e)(2) and (3), (f), (h)(2)(A) and (C), and (i) of this rule to specific units or in specified areas when operational requirements of such units or in such areas would make application of such provisions impracticable.

(2) At sea. Subsections (e)(2) and (3), (f), (h)(2)(C), and (i) of this rule shall not apply in the case of a person on board a vessel at sea. In such situ-
ations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer the memorandum required by subsection (h)(2)(C) of this rule shall be transmitted to the reviewing officer under subsection (i) of this rule and shall include an explanation of any delay in the transfer.

Discussion

Under this subsection the standards for confinement remain the same (although the circumstances giving rise to the exception could bear on the application of those standards). Also, pretrial confinement remains subject to judicial review. The prisoner's commander still must determine whether confinement will continue under subsection (h)(2)(B) of this rule. The suspension of subsection (h)(2)(A) of this rule removes the 72-hour requirement since in a combat environment, the commander may not be available to comply with it. The commander must make the pretrial confinement decision as soon as reasonably possible, however. (This provision is not suspended under subsection (2) since the commander of a vessel is always available.)

Rule 306. Initial disposition

(a) Who may dispose of offenses. Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

Discussion

Each commander in the chain of command has independent, yet overlapping discretion to dispose of offenses within the limits of that officer's authority. Normally, in keeping with the policy in subsection (b) of this rule, the initial disposition decision is made by the official at the lowest echelon with the power to make it. A decision by a commander ordinarily does not bar a different disposition by a superior authority. See R.C.M. 401(c); 601(f). Once charges are referred to a court-martial by a convening authority competent to do so, they may be withdrawn from that court-martial only in accordance with R.C.M. 604.

See Appendix 3 with respect to offenses for which coordination with the Department of Justice is required.

(b) Policy. Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection (c) of this rule.

Discussion

The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.

In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:

(A) the character and military service of the accused;
(B) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
(C) appropriateness of the authorized punishment to the particular accused or offense;
(D) possible improper motives of the accuser;
(E) reluctance of the victim or others to testify;
(F) cooperation of the accused in the apprehension or conviction of others;
(G) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;
(H) availability and admissibility of evidence;
(I) existence of jurisdiction over the accused and the offense; and
(J) likely issues.

(c) How offenses may be disposed of. Within the limits of the commander's authority, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense.

Discussion

Prompt disposition of charges is essential. See R.C.M. 707 (speedy trial requirements).

Before determining an appropriate disposition, a commander should ensure that a preliminary inquiry under R.C.M. 303 has been conducted. If charges have not already been preferred, the commander may, if appropriate, prefer them and dis-
pose of them under this rule. But see R.C.M. 601 (c) regarding disqualification of an accuser.

If charges have been preferred, the commander should ensure that the accused has been notified in accordance with R.C.M. 308, and that charges are in proper form. See R.C.M. 307. Each commander who forwards or disposes of charges may make minor changes therein. See R.C.M. 603(a) and (b). If major changes are necessary, the affected charge should be preferred anew. See R.C.M. 603(d).

When charges are brought against two or more accused with a view to a joint or common trial, see R.C.M. 307(c)(5); 601(e)(3). If it appears that the accused may lack mental capacity to stand trial or may not have been mentally responsible at the times of the offenses, see R.C.M. 706; 909; 916(k).

(1) No action. A commander may decide to take no action on an offense. If charges have been preferred, they may be dismissed.

Discussion

A decision to take no action or dismissal of charges at this stage does not bar later disposition of the offenses under subsection (c)(2) through (5) of this rule. See R.C.M. 401(a) concerning who may dismiss charges, and R.C.M. 401(c)(1) concerning dismissal of charges. When a decision is made to take no action, the accused should be informed.

(2) Administrative action. A commander may take or initiate administrative action, in addition to or instead of other action taken under this rule, subject to regulations of the Secretary concerned. Administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, reprove, extra military instruction, or the administrative withholding of privileges, or any combination of the above.

Discussion

Other administrative measures, which are subject to regulations of the Secretary concerned, include matters related to efficiency reports, academic reports, and other ratings; rehabilitation and reassignment; career field reclassification; administrative reduction for inefficiency; bar to reenlistment; personnel reliability program reclassification; security classification changes; pecuniary liability for negligence or misconduct; and administrative separation.

(3) Nonjudicial punishment. A commander may consider the matter pursuant to Article 15, nonjudicial punishment. See Part V.

(4) Disposition of charges. Charges may be disposed of in accordance with R.C.M. 401.

Discussion

If charges have not been preferred, they may be preferred. See R.C.M. 307 concerning preferral of charges. However, see R.C.M. 601(e) concerning disqualification of an accuser.

Charges may be disposed of by dismissing them, forwarding them to another commander for disposition, or referring them to a summary, special, or general court-martial. Before charges may be referred to a general court-martial, compliance with R.C.M. 405 and 406 is necessary. Therefore, if appropriate, an investigation under R.C.M. 405 may be directed. Additional guidance on these matters is found in R.C.M. 401-407.

(5) Forwarding for disposition. A commander may forward a matter concerning an offense, or charges, to a superior or subordinate authority for disposition.

Discussion

The immediate commander may lack authority to take action which that commander believes is an appropriate disposition. In such cases, the matter should be forwarded to a superior officer with a recommendation as to disposition. See also R.C.M. 401(c)(2) concerning forwarding charges. If allegations are forwarded to a higher authority for disposition, because of lack of authority or otherwise, the disposition decision becomes a matter within the discretion of the higher authority.

A matter may be forwarded for other reasons, such as for investigation of allegations and preferral of charges, if warranted (see R.C.M. 303; 307), or so that a subordinate can dispose of the matter.

(d) National security matters. If a commander not authorized to convene general courts-martial finds that an offense warrants trial by court-martial, but believes that trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the general court-martial convening authority for action under R.C.M. 407(b).

Rule 307. Preferral of charges

(a) Who may prefer charges. Any person subject to the code may prefer charges.

Discussion

No person may be ordered to prefer charges to which that person is unable to make truthfully the required oath. See Article 30(a) and subsection (b) of this rule. A person who has been the
R.C.M. 307(a)

accuser or nominal accuser (see Article 1(9)) may not also serve as the convening authority of a general or special court-martial to which the charges are later referred. See Articles 22(b) and 23(b); R.C.M. 601; however, see R.C.M. 1302(b) (summary court-martial convening authority is not disqualified by being the accuser). A person authorized to dispose of offenses (see R.C.M. 306(a); 401–404 and 407) should not be ordered to prefer charges when this would disqualify that person from exercising that person's authority or would improperly restrict that person's discretion to act on the case. See R.C.M. 104 and 504(c).

Charges may be preferred against a person subject to trial by court-martial at any time but should be preferred without unnecessary delay. See the statute of limitations prescribed by Article 43. Prefferral of charges should not be unnecessarily delayed. When a good reason exists—as when a person is permitted to continue a course of conduct so that a ringleader or other conspirators may also be discovered or when a suspected counterfeiter goes uncharged until guilty knowledge becomes apparent—a reasonable delay is permissible. However, see R.C.M. 707 concerning speedy trial requirements.

(b) How charges are preferred; oath. A person who prefers charges must:

(1) Sign the charges and specifications under oath before a commissioned officer of the armed forces authorized to administer oaths; and

(2) State that the signer has personal knowledge of or has investigated the matters set forth in the charges and specifications and that they are true in fact to the best of that person's knowledge and belief.

Discussion

See Article 136 for authority to administer oaths. The following form may be used to administer the oath:

"You (swear) (affirm) that you are a person subject to the Uniform Code of Military Justice, that you have personal knowledge of or have investigated the matters set forth in the foregoing charge(s) and specification(s), and that the same are true in fact to the best of your knowledge and belief. (So help you God.)"

The accuser's belief may be based upon reports of others in whole or in part.

(c) How to allege offenses.

(1) In general. The format of charge and specification is used to allege violations of the code.

Discussion

See Appendix 4 for a sample of a Charge Sheet (DD Form 458).

(2) Charge. A charge states the article of the code, law of war, or local penal law of an occupied territory which the accused is alleged to have violated.

Discussion

The particular subdivision of an article of the code (for example, Article 118(1)) should not be included in the charge. When there are numerous infractions of the same article, there will be only one charge, but several specifications thereunder. There may also be several charges, but each must allege a violation of a different article of the code. For violations of the law of war, see (D) below.

(A) Numbering charges. If there is only one charge, it is not numbered. When there is more than one charge, each charge is numbered by a Roman numeral.

(B) Additional charges. Charges preferred after others have been preferred are labeled "additional charges" and are also numbered with Roman numerals, beginning with "I" if there is more than one additional charge. These ordinarily relate to offenses not known at the time or committed after the original charges were preferred. Additional charges do not require a separate trial if incorporated in the trial of the original charges before arraignment. See R.C.M. 601(e)(2).

(C) Preemption. An offense specifically defined by Articles 81 through 132 may not be alleged as a violation of Article 134. See paragraph 60c(5)(a) of Part IV. But see subsection (d) of this rule.

(D) Charges under the law of war. In the case of a person subject to trial by general court-martial for violations of the law of war (see Article 18), the charge should be: "Violation of the Law of War"; or "Violation of ________", referring to the local penal law of the occupied territory. See R.C.M. 201(f)(1)(B). But see subsection (d) of this rule. Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war.

(3) Specification. A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. No particular format is required.

Discussion

How to draft specifications.

(A) Sample specifications. Before drafting a specification, the drafter should read the pertinent provisions of Part IV, where the elements of proof of various offenses and forms for specifications appear.
(B) Numbering specifications. If there is only one specification under a charge it is not numbered. When there is more than one specification under any charge, the specifications are numbered in Arabic numerals. The term “additional” is not used in connection with the specifications under an additional charge.

(C) Name and description of the accused.

(i) Name. The specification should state the accused’s full name: first name, middle name or initial, last name. If the accused is known by more than one name, the name acknowledged by the accused should be used. If there is no such acknowledgment, the name believed to be the true name should be listed first, followed by all known aliases. For example: Seaman John P. Smith, U.S. Navy, alias Lt. Robert R. Brown, U.S. Navy.

(ii) Military association. The specification should state the accused’s rank or grade. If the rank or grade of the accused has changed since the date of an alleged offense, and the change is pertinent to the offense charged, the accused should be identified by the present rank or grade followed by rank or grade on the date of the alleged offense. For example: In that Seaman __________________, then Seaman Apprentice __________________, etc.

(iii) Social security number or service number. The social security number or service number of an accused should not be stated in the specification.

(iv) Basis of personal jurisdiction.

(a) Military members on active duty. Ordinarily, no allegation of the accused’s armed force or unit or organization is necessary for military members on active duty.

(b) Persons subject to the code under Article 2(a), subsections (3) through (12), or subject to trial by court-martial under Articles 3 or 4. The specification should describe the accused’s armed force, unit or organization, position, or status which will indicate the basis of jurisdiction. For example: John Jones, (a person employed by and serving with the U.S. Army in the field in time of war) (a person convicted of having obtained a fraudulent discharge), etc.

(D) Date and time of offense

(i) In general. The date of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand what particular act or omission to defend against.

(ii) Use of “on or about.” In alleging the date of the offense it is proper to allege it as “on or about” a specified day.

(iii) Hour. The exact hour of the offense is ordinarily not alleged except in certain absence offenses. When the exact time is alleged, the 24-hour clock should be used. The use of “at or about” is proper.

(iv) Extended periods. When the acts specified extend(s) over a considerable period of time it is proper to allege it (or them) as having occurred, for example, “from about 15 June 1983 to about 4 November 1983,” or “did on divers occasions between 15 June 1983 and 4 November 1983.”

(E) Place of offense. The place of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand the particular act or omission to defend against. In alleging the place of the offense, it is proper to allege it as “at or near” a certain place if the exact place is uncertain.

(F) Subject-matter jurisdiction allegations. Sufficient facts to establish subject-matter jurisdiction should be alleged. See R.C.M. 203 for a discussion of subject-matter jurisdiction and the concept of service-connection.

(i) On-base. If the offense occurred on a military installation, that factor alone is usually sufficient to confer jurisdiction over the offense.

(ii) Off-base area under military jurisdiction. If the offense occurred in an off-base area under military control, such as a housing area, the specification should state that such area was under the military jurisdiction of the United States.

(iii) Off-base area not under military jurisdiction. If the offense occurred in an off-base area not under military control, other jurisdictional factors should be alleged. Every significant fact and circumstance supporting subject-matter jurisdiction should be alleged. Offenses under the following articles usually require no additional jurisdictional information: 82–91, 93, 94, 96, 98–105, 108, 110, 112, 112a, 113, 115, and some offenses under 92, 133, and 134. This list is not exclusive, and is only a guide to the kinds of offenses usually requiring no additional language to demonstrate subject-matter jurisdiction.

(iv) Overseas. If the offense occurred outside the United States, its territories, and possessions, that factor alone is usually sufficient to confer jurisdiction over the offense.

(G) Description of offense.

(i) Elements. The elements of the offense must be alleged, either expressly or by necessary implication. If a specific intent, knowledge, or state of mind is an element of the offense, it must be alleged.

(ii) Words indicating criminality. If the alleged act is not itself an offense but is made an offense either by applicable statute (including Articles 133 and 134), or regulation or custom having the effect of law, then words indicating criminality such as “wrongfully,” “unlawfully,” or “without authority” (depending upon the nature of the offense) should be used to describe the accused’s acts.

(iii) Specificity. The specification should be sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy. Only those facts that make the accused’s conduct criminal ordinarily should be alleged. Specific evidence supporting the allegations ordinarily should not be included in the specifications.

(iv) Duplicitousness. One specification should not allege more than one offense, either conjunctively (the accused “lost and destroyed”) or alternatively (the accused “lost or destroyed”). However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively.

(H) Other considerations in drafting specifications.

(i) Principals. All principals are charged as if each was the perpetrator. See paragraph 1 of Part IV for a discussion of principals.

(ii) Victim. In the case of an offense against the person or property of a person, the first name, middle initial and last name of such person should be alleged, if known. If the name of
the victim is unknown, a general physical description may be used. If this cannot be done, the victim may be described as “a person whose name is unknown.” Military rank or grade should be alleged, and must be alleged if an element of the offense, as in an allegation of disobedience of the command of a superior officer. If the person has no military position, it may otherwise be necessary to allege the status as in an allegation of using provoking words toward a person subject to the code. See paragraph 42 of Part IV.

(iii) Property. In describing property generic terms should be used, such as “a watch” or “a knife,” and descriptive details such as make, model, color, and serial number should ordinarily be omitted. In some instances, however, details may be essential to the offense, so they must be alleged. For example: the length of a knife blade may be important when alleging a violation of general regulation prohibiting carrying a knife with a blade that exceeds a certain length.

(iv) Value. When the value of property or other amount determines the maximum punishment which may be adjudged for an offense, the value or amount should be alleged, for in such a case increased punishments that are contingent upon value may not be adjudged unless there is an allegation, as well as proof, of a value which will support the punishment. If several articles of different kinds are the subject of the offense, the value of each article should be stated followed by a statement of the aggregate value. Exact value should be stated, if known. For ease of proof an allegation may be “of a value not less than ___________.” If only an approximate value is known, it may be alleged as “of a value of about ___________.” If the value of an item is unknown but obviously minimal, the term “of some value” may be used. These principles apply to allegations of amounts.

(v) Documents. When documents other than regulations or orders must be alleged (for example, bad checks in violation of Article 123a), the document may be set forth verbatim (including photocopies and similar reproductions) or may be described, in which case the description must be sufficient to inform the accused of the offense charged.

(vi) Orders.

(a) General orders. A specification alleging a violation of a general order or regulation (Article 92(1)) must clearly identify the specific order or regulation allegedly violated. The general order or regulation should be cited by its identifying title or number, section or paragraph, and date. It is not necessary to recite the text of the general order or regulation verbatim.

(b) Other orders. If the order allegedly violated is an “other lawful order” (Article 92(2)), it should be set forth verbatim or described in the specification. When the order is oral, see (vii) below.

(c) Negating exceptions. If the order contains exceptions, it is not necessary that the specification contain a specific allegation negating the exceptions. However, words of criminality may be required if the alleged act is not necessarily criminal. See subsection (G)(ii) of this discussion.

(vii) Oral statements. When alleging oral statements the phrase “or words to that effect” should be added.

(viii) Joint offense. In the case of a joint offense each accused may be charged separately as if each accused acted alone or all may be charged together in a single specification. For example:

(a) If Doe and Roe are joint perpetrators of an offense and it is intended to charge and try both at the same trial, they should be charged in a single specification as follows:

“In that Doe and Roe, acting jointly and pursuant to a common intent, did . . . .”

(b) If it is intended that Roe will be tried alone or that Roe will be tried with Doe at a common trial, Roe may be charged in the same manner as if Roe alone had committed the offense. However, to show in the specification that Doe was a joint actor with Roe, even though Doe is not to be tried with Roe, Roe may be charged as follows:

“In that Roe did, in conjunction with Doe, . . . .”

(ix) Matters in aggravation. Aggravating circumstances which increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. Other matters in aggravation ordinarily should not be alleged in the specification.

(x) Abbreviations. Commonly used and understood abbreviations may be used, particularly abbreviations for ranks, grades, units and organizations, components, and geographic or political entities, such as the names of states or countries.

(4) Multiple offenses. Charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense.

Discussion

What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person. See R.C.M. 906(b)(12) and 1003(c)(1)(C). For example, a person should not be charged with both failure to report for a routine scheduled duty, such as reveille, and with absence without leave if the failure to report occurred during the period for which the accused is charged with absence without leave. There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses. In no case should both an offense and a lesser included offense thereof be separately charged.

See also R.C.M. 601(e)(2) concerning referral of several offenses.

(5) Multiple offenders. A specification may name more than one person as an accused if each person so named is believed by the accuser to be a principal in the offense which is the subject of the specification.

Discussion

See also R.C.M. 601(e)(3) concerning joinder of accused.

A joint offense is one committed by two or more persons acting together with a common intent. Principals may be charged
jointly with the commission of the same offense, but an accessory after the fact cannot be charged jointly with the principal whom the accused is alleged to have received, comforted, or assisted. Offenders are properly joined only if there is a common unlawful design or purpose; the mere fact that several persons happen to have committed the same kinds of offenses at the time, although material as tending to show concert of purpose, does not necessarily establish this. The fact that several persons happen to have absented themselves without leave at about the same time will not, in the absence of evidence indicating a joint design, purpose, or plan justify joining them in one specification, for they may merely have been availing themselves of the same opportunity. In joint offenses the participants may be separately or jointly charged. However, if the participants are members of different armed forces, they must be charged separately because their trials must be separately reviewed. The preparation of joint charges is discussed in subsection (c)(3) Discussion (H) (viii) (a) of this rule. The advantage of a joint charge is that all accused will be tried at one trial, thereby saving time, labor, expense. This must be weighed against the possible unfairness to the accused which may result if their defenses are inconsistent or antagonistic. An accused cannot be called as a witness except upon that accused's own request. If the testimony of an accomplice is necessary, the accomplice should not be tried jointly with those against whom the accomplice is expected to testify. See also Mil.R.Evid. 306.

R.C.M. 308(c) Error in or omission of the designation of the article of the code or other statute, law of war, or regulation violated shall not be ground for dismissal of a charge or reversal of a conviction if the error or omission did not prejudicially mislead the accused.

Rule 308. Notification to accused of charges
(a) Immediate commander. The immediate commander of the accused shall cause the accused to be informed of the charges preferred against the accused, and the name of the person who preferred the charges and of any person who ordered the charges to be preferred, if known, as soon as practicable.

Discussion
When notice is given, a certificate to that effect on the Charge Sheet should be completed. See Appendix 4.

(b) Commanders at higher echelons. When the accused has not been informed of the charges, commanders at higher echelons to whom the preferred charges are forwarded shall cause the accused to be informed of the matters required under subsection (a) of this rule as soon as practicable.

(c) Remedy. The sole remedy for violation of this rule is a continuance or recess of sufficient length to permit the accused to adequately prepare a defense, and no relief shall be granted upon a failure to comply with this rule unless the accused demonstrates that the accused has been hindered in the preparation of a defense.

(d) Harmless error in citation. Error in or omission of the designation of the article of the code or other statute, law of war, or regulation violated shall not be ground for dismissal of a charge or reversal of a
CHAPTER IV. FORWARDING AND DISPOSITION OF CHARGES

Rule 401. Forwarding and disposition of charges in general
(a) Who may dispose of charges. Only persons authorized to convene courts-martial or to administer nonjudicial punishment under Article 15 may dispose of charges. A superior competent authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally.

Discussion
See R.C.M. 504 as to who may convene courts-martial and paragraph 2 of Part V as to who may administer nonjudicial punishment. If the power to convene courts-martial and to administer nonjudicial punishment has been withheld, a commander may not dispose of charges under this rule.

Ordinarily charges should be forwarded to the accused’s immediate commander for initial consideration as to disposition. Each commander has independent discretion to determine how charges will be disposed of, except to the extent that the commander’s authority has been withheld by superior competent authority. See also R.C.M. 104.

Each commander who forwards or disposes of charges may make minor changes therein. See R.C.M. 603(a) and (b). If major changes are necessary, the affected charge should be preferred anew. See R.C.M. 603(d). If a commander is an accuser (see Article 1(9); 307(a)) that commander is ineligible to refer such charges to a general or special court-martial. See R.C.M. 601(c).

However, see R.C.M. 1302(b) (accuser may refer charges to a summary courts-martial).

(b) Prompt determination. When a commander with authority to dispose of charges receives charges, that commander shall promptly determine what disposition will be made in the interest of justice and discipline.

Discussion
In determining what level of disposition is appropriate, see R.C.M. 306(b) and (c). When charges are brought against two or more accused with a view to a joint or common trial, see R.C.M. 307(c)(5); 601(e)(3). If it appears that the accused may lack mental capacity to stand trial or may not have been mentally responsible at the times of the offenses, see R.C.M. 706; 909; 916(k).

As to the rules concerning speedy trial, see R.C.M. 707. See also Articles 10; 30; 33; 98.

Before determining an appropriate disposition, a commander who receives charges should ensure that: (1) a preliminary inquiry under R.C.M. 303 has been conducted; (2) the accused has been notified in accordance with R.C.M. 308; and (3) the charges are in proper form.

(c) How charges may be disposed of. Unless the authority to do so has been limited or withheld by superior competent authority, a commander may dispose of charges by dismissing any or all of them, forwarding any or all of them to another commander for disposition, or referring any or all of them to a court-martial which the commander is empowered to convene. Charges should be disposed of in accordance with the policy in R.C.M. 306(b).

Discussion
A commander may dispose of charges individually or collectively. If charges are referred to a court-martial, ordinarily all known charges should be referred to a single court-martial.

See Appendix 3 when the charges may involve matters in which the Department of Justice has an interest.

(1) Dismissal. When a commander dismisses charges further disposition under R.C.M. 306(c) of the offenses is not barred.

Discussion
Charges are ordinarily dismissed by lining out and initialing the deleted specifications or otherwise recording that a specification is dismissed. When all charges and specifications are dismissed, the accuser and the accused ordinarily should be informed.

A charge should be dismissed when it fails to state an offense, when it is unsupported by available evidence, or when there are other sound reasons why trial by court-martial is not appropriate. Before dismissing charges because trial would be detrimental to the prosecution of the war or harmful to national security, see R.C.M. 401(d); 407(b).

If the accused has already refused nonjudicial punishment, charges should not be dismissed with a view to offering nonjudicial punishment unless the accused has indicated willingness to accept nonjudicial punishment if again offered. The decision whether to dismiss charges in such circumstances is within the sole discretion of the commander concerned.

Charges may be amended in accordance with R.C.M. 603.

It is appropriate to dismiss a charge and prefer another charge anew when, for example, the original charge failed to state an offense, or was so defective that a major amendment was required (see R.C.M. 603(d)), or did not adequately reflect the nature or seriousness of the offense.

See R.C.M. 907(b)(2)(C) concerning the effect of dismissing charges after the court-martial has begun.

(2) Forwarding charges.
(A) Forwarding to a superior commander. When charges are forwarded to a superior com-
mander for disposition, the forwarding commander shall make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted.

**Discussion**

A commander's recommendation is within that commander's sole discretion. No authority may direct a commander to make a specific recommendation as to disposition.

When charges are forwarded to a superior commander with a view to trial by general or special court-martial, they should be forwarded by a letter of transmittal or indorsement. To the extent practicable without unduly delaying forwarding the charges, the letter should include or carry as inclosures: a summary of the available evidence relating to each offense; evidence of previous convictions and nonjudicial punishments of the accused; an indication that the accused has been offered and refused nonjudicial punishment, if applicable; and any other matters required by superior authority or deemed appropriate by the forwarding commander. Other matters which may be appropriate include information concerning the accused's background and character of military service, and a description of any unusual circumstances in the case. The summary of evidence should include available witness statements, documentary evidence, and exhibits. When practicable, copies of signed statements of the witnesses should be forwarded, as should copies of any investigative or laboratory reports. Forwarding charges should not be delayed, however, solely to obtain such statements or reports when it otherwise appears that sufficient evidence to warrant trial is or will be available in time for trial. If because of the bulk of documents or exhibits, it is impracticable to forward them with the letter of transmittal, they should be properly preserved and should be referred to in the letter of transmittal.

When it appears that any witness may not be available for later proceedings in the case or that a deposition may be appropriate, that matter should be brought to the attention of the convening authority promptly and should be noted in the letter of transmittal.

When charges are forwarded with a view to disposition other than trial by general or special court-martial, they should be accompanied by sufficient information to enable the authority receiving them to dispose of them without further investigation.

(B) Other cases. When charges are forwarded to a commander who is not a superior of the forwarding commander, no recommendation as to disposition may be made.

**Discussion**

Except when directed to forward charges, a subordinate commander may not be required to take any specific action to dispose of charges. See R.C.M. 104. See also paragraph 1d(2) of Part V. When appropriate, charges may be sent or returned to a subordinate commander for compliance with procedural requirements. See, for example, R.C.M. 303 (preliminary inquiry); R.C.M. 308 (notification to accused of charges).

(3) Referral of charges. See R.C.M. 403, 404, 407, 601.

(d) National security matters. If a commander who is not a general court-martial convening authority finds that the charges warrant trial by court-martial but believes that trial would probably be detrimental to the prosecution of a war or harmful to national security, the charges shall be forwarded to the officer exercising general court-martial convening authority.

**Discussion**

See R.C.M. 407(b).

---

**Rule 402. Action by commander not authorized to convene courts-martial**

When in receipt of charges, a commander authorized to administer nonjudicial punishment but not authorized to convene courts-martial may:

(1) Dismiss any charges; or

**Discussion**

See R.C.M. 401(c)(1) concerning dismissal of charges, the effect of dismissal, and options for further action.

(2) Forward them to a superior commander for disposition.

**Discussion**

See R.C.M. 401(c)(2) for additional guidance concerning forwarding charges. See generally R.C.M. 303 (preliminary inquiry); 308 (notification to accused of charges) concerning other duties of the immediate commander when in receipt of charges.

When the immediate commander is authorized to convene courts-martial, see R.C.M. 403, 404, or 407, as appropriate.

---

**Rule 403. Action by commander exercising summary court-martial jurisdiction**

(a) Recording receipt. Immediately upon receipt of sworn charges, an officer exercising summary court-martial jurisdiction over the command shall cause
R.C.M. 403(a)

the hour and date of receipt to be entered on the
charge sheet.

Discussion

See Article 24 and R.C.M. 1302(a) concerning who may
exercise summary court-martial jurisdiction.

The entry indicating receipt is important because it stops the
running of the statute of limitations. See Article 43; R.C.M.
907(b)(2)(B). Charges may be preferred and forwarded to an of-

ficer exercising summary court-martial jurisdiction over the com-
mand to stop the running of the statute of limitations even though
the accused is absent without authority.

(b) Disposition. When in receipt of charges a com-
mander exercising summary court-martial jurisdiction may:

(1) Dismiss any charges;

Discussion

See R.C.M. 401(c)(1) concerning dismissal of charges, the ef-

fect of dismissing charges, and options for further action.

(2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

Discussion

See R.C.M. 401(c)(2)(B) concerning forwarding charges to a sub-
ordinate. When appropriate, charges may be forwarded to a sub-
ordinate even if the subordinate previously considered them.

(3) Forward any charges to a superior com-
mander for disposition;

Discussion

See R.C.M. 401(c)(2)(A) for guidance concerning forward-
ing charges to a superior.

(4) Subject to R.C.M. 601(d), refer charges to a
summary court-martial for trial; or

Discussion

See R.C.M. 1302(c) concerning referral of charges to a sum-
mary court-martial.

(5) Unless otherwise prescribed by the Secretary con-
cerned, direct a pretrial investigation under

R.C.M. 405, and, if appropriate, forward the report
of investigation with the charges to a superior com-
mander for disposition.

Discussion

An investigation should be directed when it appears that the
charges are of such a serious nature that trial by general court-
martial may be warranted. See R.C.M. 405. If an investigation of
the subject matter already has been conducted, see R.C.M.
405(b).

Rule 404. Action by commander exercising
special court-martial jurisdiction

When in receipt of charges, a commander exercising
special court-martial jurisdiction may:

(a) Dismiss any charges;

Discussion

See R.C.M. 401(c)(1) concerning dismissal of charges, the ef-

fect of dismissing charges, and options for further action.

(b) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

Discussion

See R.C.M. 401(c)(2)(B) concerning forwarding charges to a sub-
ordinate. When appropriate, charges may be forwarded to a sub-
ordinate even if that subordinate previously considered them.

(c) Forward any charges to a superior commander for disposition;

Discussion

See R.C.M. 401(c)(2)(A) for guidance concerning forward-
ing charges to a superior.

(d) Subject to R.C.M. 601(d), refer charges to a
summary court-martial or to a special court-martial for trial; or

Discussion

See Article 23 and R.C.M. 504(b)(2) concerning who may
convene special courts-martial.
Rule 405. Pretrial investigation
(a) In general. Except as provided in subsection (k) of this rule, no charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule. Failure to comply with this rule shall have no effect if the charges are not referred to a general court-martial.

Discussion
The primary purpose of the investigation required by Article 32 and this rule is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case. The investigation also serves as a means of discovery. The function of the investigation is to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, not to perfect a case against the accused. The investigation should be limited to the issues raised by the charges and necessary to proper disposition of the case. The investigation is not limited to examination of the witnesses and evidence mentioned in the accompanying allied papers. See subsection (e) of this rule. Recommendations of the investigating officer are advisory.

If at any time after an investigation under this rule the charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matters alleged.

Failure to comply substantially with the requirements of Article 32, which failure prejudices the accused, may result in delay in disposition of the case or disapproval of the proceedings. See R.C.M. 905(b)(1) and 906(b)(3) concerning motions for appropriate relief relating to the pretrial investigation.

The accused may waive the pretrial investigation. See subsection (k) of this rule. In such case, no investigation need be held.

(b) Earlier investigation. If an investigation of the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the investigation and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further investigation is required unless demanded by the accused to recall witnesses for further cross-examination and to offer new evidence.

Discussion
An earlier investigation includes courts of inquiry and similar investigations which meet the requirements of this subsection.

(c) Who may direct investigation. Unless prohibited by regulations of the Secretary concerned, an investigation may be directed under this rule by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with these rules.

(d) Personnel.
(1) Investigating officer. The commander directing an investigation under this rule shall detail a commissioned officer not the accuser, as investigating officer, who shall conduct the investigation and make a report of conclusions and recommendations. The investigating officer is disqualified to act later in the same case in any other capacity.

Discussion
The investigating officer should be an officer in the grade of major or lieutenant commander or higher or one with legal training. The investigating officer may seek legal advice concerning the investigating officer’s responsibilities from an impartial source, but may not obtain such advice from counsel for any party.

(2) Defense counsel.
(A) Detailed counsel. Except as provided in subsection (d)(2)(B) of this rule, military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(B) Individual military counsel. The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with R.C.M. 506(b). When the accused is rep-
resented by individual military counsel, counsel detailed to represent the accused shall ordinarily be excused, unless the authority who detailed the defense counsel, as a matter of discretion, approves a request by the accused for retention of detailed counsel. The investigating officer shall forward any request by the accused for individual military counsel to the commander who directed the investigation. That commander shall follow the procedures in R.C.M. 506(b).

(C) Civilian counsel. The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the investigation. However, the investigation shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under subsections (d)(2)(A) and (B) of this rule.

**Discussion**

See R.C.M. 502(d)(6) concerning the duties of defense counsel.

(3) Others. The commander who directed the investigation may also, as a matter of discretion, detail or request an appropriate authority to detail:

(A) Counsel to represent the United States;
(B) A reporter; and
(C) An interpreter.

(e) Scope of investigation. The investigating officer shall inquire into the truth and form of the charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges.

**Discussion**

The investigation may properly include such inquiry into issues raised directly by the charges as is necessary to make an appropriate recommendation. For example, inquiry into the legality of a search or the admissibility of a confession may be appropriate. However, the investigating officer is not required to rule on the admissibility of evidence and need not consider such matters except as the investigating officer deems necessary to an informed recommendation. When the investigating officer is aware that evidence may not be admissible, this should be noted in the report. See also subsection (f) of this rule.

(f) Rights of the accused. At any pretrial investigation under this rule the accused shall have the right to:

(1) Be informed of the charges under investigation;
(2) Be informed of the identity of the accuser;
(3) Except in circumstances described in R.C.M. 840(b)(2), be present throughout the taking of evidence;
(4) Be represented by counsel;
(5) Be informed of the witnesses and other evidence then known to the investigating officer;
(6) Be informed of the purpose of the investigation;
(7) Be informed of the right against self-incrimination under Article 31;
(8) Cross-examine witnesses who are produced under subsection (g) of this rule;
(9) Have witnesses produced as provided for in subsection (g) of this rule;
(10) Have evidence, including documents or physical evidence, within the control of military authorities produced as provided under subsection (g) of this rule;
(11) Present anything in defense, extenuation, or mitigation for consideration by the investigating officer; and
(12) Make a statement in any form.

(g) Production of witnesses and evidence; alternatives.

(1) In general.

(A) Witnesses. Except as provided in subsection (g)(4)(A) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is “reasonably available” when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness’ appearance. A witness who is unavailable under Mil. R. Evid. 804(a)(1)-(6), is not “reasonably available.”

(B) Evidence. Subject to Mil.R.Evid., Section V, evidence, including documents or physical evidence, which is under the control of the Government and which is relevant to the investigation and
not cumulative shall be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence.

Discussion

In preparing for the investigation, the investigating officer should consider what evidence will be necessary to prepare a thorough and impartial investigation. The investigating officer should consider, as to potential witnesses, whether their personal appearance will be necessary. Generally, personal appearance is preferred, but the investigating officer should consider whether, in light of the probable importance of a witness' testimony, an alternate to testimony under subsection (g)(4)(A) of this rule would be sufficient.

After making a preliminary determination of what witnesses will be produced and other evidence considered, the investigating officer should notify the defense and inquire whether it requests the production of other witnesses or evidence. In addition to witnesses for the defense, the defense may request production of witnesses whose testimony would favor the prosecution.

Once it is determined what witnesses the investigating officer intends to call it must be determined whether each witness is reasonably available. That determination is a balancing test. The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. For example, the temporary absence of a witness on leave for 10 days would normally justify using an alternative to that witness' personal appearance if the sole reason for the witness' testimony was to impeach the credibility of another witness by reputation evidence, or to establish a mitigating character trait of the accused. On the other hand, if the same witness was the only eyewitness to the offense, personal appearance would be required if the defense requested it and the witness is otherwise reasonably available. The time and place of the investigation may be changed if reasonably necessary to permit the appearance of a witness. Similar considerations apply to the production of evidence.

If the production of witnesses or evidence would entail substantial costs or delay, the investigating officer should inform the commander who directed the investigation.

(2) Determination of reasonable availability.

(A) Military witnesses. The investigating officer shall make an initial determination whether a military witness is reasonably available. If the investigating officer decides that the witness is not reasonably available, the investigating officer shall inform the parties. Otherwise, the immediate commander of the witness shall be requested to make the witness available. A determination by the immediate commander that the witness is not reasonably available is not subject to appeal by the accused but may be reviewed by the military judge under R.C.M. 906(b)(3).

Discussion

The investigating officer may discuss factors affecting reasonable availability with the immediate commander of the requested witness and with others. If the immediate commander determined that the witness is not reasonably available, the reasons for that determination should be provided to the investigating officer.

(B) Civilian witnesses. The investigating officer shall decide whether a civilian witness is reasonably available to appear as a witness.

Discussion

The investigating officer should initially determine whether a civilian witness is reasonably available without regard to whether the witness is willing to appear. If the investigating officer determines that a civilian witness is apparently reasonably available, the witness should be invited to attend and when appropriate, informed that necessary expenses will be paid.

If the witness refuses to testify, the witness is not reasonably available because civilian witnesses may not be compelled to attend a pretrial investigation. Under subsection (g)(3) of this rule, civilian witnesses may be paid for travel and associated expenses to testify at a pretrial investigation.

(C) Evidence. The investigating officer shall make an initial determination whether evidence is reasonably available. If the investigating officer decides that it is not reasonably available, the investigating officer shall inform the parties. Otherwise, the custodian of the evidence shall be requested to provide the evidence. A determination by the custodian that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3).

Discussion

The investigating officer may discuss factors affecting reasonable availability with the custodian and with others. If the custodian determines that the evidence is not reasonably available, the reasons for that determination should be provided to the investigating officer.

(D) Action when witness or evidence is not reasonably available. If the defense objects to a determi-
nation that a witness or evidence is not reasonably available, the investigating officer shall include a statement of the reasons for the determination in the report of investigation.

(3) **Witness expenses.** Transportation expenses and a per diem allowance may be paid to civilians requested to testify in connection with an investigation under this rule according to regulations prescribed by the Secretary of a Department.

**Discussion**

See Department of Defense Joint Travel Regulations, Vol 2, paragraphs C3054, C6000.

(4) **Alternatives to testimony.**

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the witness:

(i) Sworn statements;
(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed;
(iii) Prior testimony under oath;
(iv) Depositions;
(v) Stipulations of fact or expected testimony;
(vi) Unsworn statements; and
(vii) Offers of proof of expected testimony of that witness.

(B) The investigating officer may consider, over objection of the defense, when the witness is not reasonably available:

(i) Sworn statements;
(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is a claimed;
(iii) Prior testimony under oath; and
(iv) In time of war, unsworn statements.

(5) **Alternatives to evidence.**

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the evidence:

(i) Testimony describing the evidence;
(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence;
(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described;
(iv) A stipulation of fact, document's contents, or expected testimony;
(v) An unsworn statement describing the evidence; or
(vi) An offer of proof concerning pertinent characteristics of the evidence.

(B) The investigating officer may consider, over objection of the defense, when the evidence is not reasonably available:

(i) Testimony describing the evidence;
(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence; or
(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described.

**Procedure.**

(1) **Presentation of evidence.**

(A) **Testimony.** All testimony shall be taken under oath, except that the accused may make an unsworn statement. The defense shall be given wide latitude in cross-examining witnesses.

**Discussion**

The following oath may be given to witnesses:

"Do you (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (, so help you God)?"

The investigating officer is required to include in the report of the investigation a summary of the substance of all testimony. See subsection (j)(2)(B) of this rule. After the hearing, the investigating officer should, whenever possible, reduce the substance of the testimony of each witness to writing and, unless it would unduly delay completion of the investigation, have each witness sign and swear to the truth of the respective summaries. The following oath may be given to a witness in such cases:

"You (swear) (affirm) that this statement is the truth, the whole truth, and nothing but the truth (,so help you God)?" If the accused testifies, the investigating officer may invite but not require the accused to swear to the truth of a summary of that testimony. If substantially verbatim notes of a testimony or Recordings of testimony were taken during the investigation, they should be preserved until the end of trial.

If it appears that material witnesses for either side will not be available at the time anticipated for trial, the investigating officer should notify the commander who directed the investigation so that depositions may be taken if necessary.
If during the investigation any witness subject to the code is suspected of an offense under the code, the investigating officer should comply with the warning requirements of Mil.R.Evid. 305(c), (d), and, if necessary, (e).

(B) **Other evidence.** The investigating officer shall inform the parties what other evidence will be considered. The parties shall be permitted to examine all other evidence considered by the investigating officer.

(C) **Defense evidence.** The defense shall have full opportunity to present any matters in defense, extenuation, or mitigation.

(2) **Objections.** Any objection alleging failure to comply with this rule, except subsection (j), shall be made to the investigating officer promptly upon discovery of the alleged error. The investigating officer shall not be required to rule on any objection. An objection shall be noted in the report of investigation if a party so requests. The investigating officer may require a party to file any objection in writing.

**Discussion**

See also subsection (k) of this rule.

Although the investigating officer is not required to rule on objections, the investigating officer may take corrective action in response to an objection as to matters relating to the conduct of the proceedings when the investigating officer believes such action is appropriate.

If an objection raises a substantial question about a matter within the authority of the commander who directed the investigation (for example, whether the investigating officer was properly appointed) the investigating officer should promptly inform the commander who directed the investigation.

(3) **Access by spectators.** Access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer.

**Discussion**

Closure may encourage complete testimony by an embarrassed or timid witness. Ordinarily the proceedings of a pretrial investigation should be open to spectators.

(4) **Presence of accused.** The further progress of the taking of evidence shall not be prevented and the accused shall be considered to have waived the right to be present, whenever the accused:

(A) After being notified of the time and place of the proceeding is voluntarily absent (whether or not informed by the investigating officer of the obligation to be present); or

(B) After being warned by the investigating officer that disruptive conduct will cause removal from the proceeding, persists in conduct which is such as to justify exclusion from the proceeding.

(i) **Military Rules of Evidence.** The Military Rules of Evidence—other than Mil.R.Evid. 301, 302, 303, 305, 412 and Section V—shall not apply in pretrial investigations under this rule.

**Discussion**

The investigating officer should exercise reasonable control over the scope of the inquiry. See subsection (e) of this rule. An investigating officer may consider any evidence, even if that evidence would not be admissible at trial. However, see subsection (g)(4) of this rule as to limitations on the ways in which testimony may be presented.

Certain rules relating to the form of testimony which may be considered by the investigating officer appear in subsection (g) of this rule.

(j) **Report of investigation.**

(1) **In general.** The investigating officer shall make a timely written report of the investigation to the commander who directed the investigation.

**Discussion**

If practicable, the charges and the report of investigation should be forwarded to the general court-martial convening authority within 8 days after an accused is ordered into arrest or confinement. Article 33.

(2) **Contents.** The report of investigation shall include:

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or if not present the reason why;

(B) The substance of the testimony taken on both sides, including any stipulated testimony;

(C) Any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence;

(D) A statement of any reasonable grounds for belief that the accused was not mentally responsible
for the offense or was not competent to participate in the defense during the investigation;

**Discussion**

See R.C.M. 909 (mental capacity); 916(k) (mental responsibility).

---

(E) A statement whether the essential witnesses will be available at the time anticipated for trial and the reasons why any essential witness may not then be available;

(F) An explanation of any delays in the investigation;

(G) The investigating officer's conclusion whether the charges and specifications are in proper form;

(H) The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

(I) The recommendations of the investigating officer, including disposition.

**Discussion**

For example, the investigating officer may recommend that the charges and specifications be amended or that additional charges be preferred. See R.C.M. 306 and 401 concerning other possible dispositions.

See Appendix 5 for a sample of the Investigating Officer's Report (DD Form 457).

---

(3) **Distribution of the report.** The investigating officer shall cause the report to be delivered to the commander who directed the investigation. That commander shall promptly cause a copy of the report to be delivered to each accused.

(4) **Objections.** Any objection to the report shall be made to the commander who directed the investigation within 5 days of its receipt by the accused. This subsection does not prohibit a convening authority from referring the charges or taking other action within the 5-day period.

(k) **Waiver.** The accused may waive an investigation under this rule. In addition, failure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

**Discussion**

See also R.C.M. 905(b)(1); 906(b)(3).

If the report fails to include reference to objections which were made under subsection (b)(2) of this rule, failure to object to the report will constitute waiver of such objections in the absence of good cause for relief from the waiver.

The commander who receives an objection may direct that the investigation be reopened or take other action, as appropriate.

Even if the accused made a timely objection to failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review.

---

**Rule 406. Pretrial advice**

(a) **In general.** Before any charge may be referred for trial by a general court-martial, it shall be referred to the staff judge advocate of the convening authority for consideration and advice.

**Discussion**

A pretrial advice need not be prepared in cases referred to special or summary courts-martial. A convening authority may, however, seek the advice of a lawyer before referring charges to such a court-martial. When charges have been withdrawn from a general court-martial (see R.C.M. 604) or when a mistrial has been declared in a general court-martial (see R.C.M. 915), supplementary advice is necessary before the charges may be referred to another general court-martial.

The staff judge advocate may make changes in the charges and specifications in accordance with R.C.M. 603.

(b) **Contents.** The advice of the staff judge advocate shall include a written and signed statement which sets forth that person's:

1. Conclusion with respect to whether each specification alleges an offense under the code;
2. Conclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is such a report);
3. Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and
4. Recommendation of the action to be taken by the convening authority.

**Discussion**

The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice.
Another person may prepare the advice, but the staff judge advocate is, unless disqualified, responsible for it and must sign it personally. Grounds for disqualification in a case include previous action in that case as investigating officer, military judge, trial counsel, defense counsel, or member.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter and indorsements, and report of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations, by commanders or others who have forwarded the charges, for disposition of the case. However, there is no legal requirement to include such information and failure to do so is not error.

Whatever matters are included in the advice, whether or not they are required, should be accurate. Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective, necessitating appropriate relief. See R.C.M. 905(b)(1); 906(b)(3).

The standard of proof to be applied in R.C.M. 406(b)(2) is probable cause. See R.C.M. 601(d)(1). Defects in the pretrial advice are not jurisdictional and are raised by pretrial motion. See R.C.M. 905(b)(1) and its Discussion.

(c) Distribution. A copy of the advice of the staff judge advocate shall be provided to the defense if charges are referred to trial by general court-martial.

Rule 407. Action by commander exercising general court-martial jurisdiction

(a) Disposition. When in receipt of charges, a commander exercising general court-martial jurisdiction may:

(1) Dismiss any charges;

Discussion

See R.C.M. 401(c)(1) concerning dismissal of charges and the effect of dismissing charges.

(2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

Discussion

See R.C.M. 401(c)(2)(B) concerning forwarding charges to a subordinate.

A subordinate commander may not be required to take any specific action or to dispose of charges. See R.C.M. 104. See also paragraph 1d(2) of Part V. When appropriate, charges may be sent or returned to a subordinate commander for compliance with procedural requirements. See, for example, R.C.M. 303 (preliminary inquiry); R.C.M. 308 (notification to accused of charges).

(3) Forward any charges to a superior commander for disposition;

Discussion

See R.C.M. 401(c)(2)(A) for guidance concerning forwarding charges to a superior.

(4) Refer charges to a summary court-martial or a special court-martial for trial;

Discussion

See R.C.M. 601; 1302(c).

(5) Unless otherwise prescribed by the Secretary concerned, direct a pretrial investigation under R.C.M. 405, after which additional action under this rule may be taken;

Discussion

An investigation should be directed when it appears the charges are of such a serious nature that trial by general court-martial may be warranted. See R.C.M. 405. If an investigation of the subject matter already has been conducted. See R.C.M. 405(b).

(6) Subject to R.C.M. 601(d), refer charges to a general court-martial.

Discussion

See Article 22 and R.C.M. 504(b)(1) concerning who may exercise general court-martial jurisdiction.

See R.C.M. 601 concerning referral of charges. See R.C.M. 306 and 401 concerning other dispositions.

(b) National security matters. When in receipt of charges the trial of which the commander exercising general court-martial jurisdiction finds would probably be inimical to the prosecution of a war or harmful to national security, that commander, unless otherwise prescribed by regulations of the Secretary concerned, shall determine whether trial is warranted and, if so, whether the security considerations involved are paramount to trial. As the commander finds appropriate, the commander may
R.C.M. 407(b)

dismiss the charges, authorize trial of them, or forward them to a superior authority.

Discussion

In time of war, charges may be forwarded to the Secretary concerned for disposition under Article 43(e). Under Article 43(e), the Secretary may take action suspending the statute of limitations in time of war.
CHAPTER V. COURT-MARTIAL COMPOSITION AND PERSONNEL; CONVENING COURTS-MARTIAL

Rule 501. Composition and personnel of courts-martial
(a) Composition of courts-martial.
(1) General courts-martial. General courts-martial shall consist of:
(A) A military judge and not less than five members; or
(B) Except in capital cases, of the military judge alone if requested and approved under R.C.M. 903.
(2) Special courts-martial. Special courts-martial shall consist of:
(A) Not less than three members;
(B) A military judge and not less than three members; or
(C) A military judge alone if a military judge is detailed and if requested and approved under R.C.M. 903.

Discussion
See R.C.M. 1301(a) concerning composition of summary courts-martial.

(b) Counsel in general and special courts-martial. Military trial and defense counsel shall be detailed to general and special courts-martial. Assistant trial and associate or assistant defense counsel may be detailed.

(c) Other personnel. Other personnel, such as reporters, interpreters, bailiffs, clerks, escorts, and orderlies, may be detailed or employed as appropriate but need not be detailed by the convening authority personally.

Discussion
The convening authority may direct that a reporter not be used in special courts-martial. Regulations of the Secretary concerned may also require or restrict the use of reporters in special courts-martial.

Rule 502. Qualifications and duties of personnel of courts-martial
(a) Members.
(1) Qualifications. The members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. Each member shall be on active duty with the armed forces and shall be:
(A) A commissioned officer;
(B) A warrant officer, except when the accused is a commissioned officer; or
(C) An enlisted person if the accused is an enlisted person and has made a timely request under R.C.M. 503(a)(2).

Discussion
Retired members of any Regular component and members of Reserve components of the armed forces are eligible to serve as members if they are on active duty.

Members of the National Oceanic and Atmospheric Administration and of the Public Health Service are eligible to serve as members when assigned to and serving with an armed force. The Public Health Service includes both commissioned and warrant officers. The National Oceanic and Atmospheric Administration includes only commissioned officers.

(2) Duties. The members of a court-martial shall determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge. Each member has an equal voice and vote with other members in deliberating upon and deciding all matters submitted to them, except as otherwise specifically provided in these rules. No member may use rank or position to influence another member. No member of a court-martial may have access to or use in any open or closed session this Manual, reports of decided cases, or any other reference material, except the president of a special court-martial without a military judge may use such materials in open session.

Discussion
Members should avoid any conduct or communication with the military judge, witnesses, or other trial personnel during the trial which might present an appearance of partiality. Except as provided in these rules, members should not discuss any part of a case with anyone until the matter is submitted to them for determination. Members should not on their own visit or conduct a view of the scene of the crime and should not investigate or gather evidence of the offense. Members should not form an opinion on
any matter in connection with a case until that matter has been submitted to them for determination.

(b) President.
   (1) Qualifications. The president of a court-martial shall be the detailed member senior in rank then serving.
   (2) Duties. The president shall have the same duties as the other members and shall also:
      (A) Preside over closed sessions of the members of the court-martial during their deliberations;
      (B) Speak for the members of the court-martial when announcing the decision of the members or requesting instructions from the military judge; and
      (C) In a special court-martial without a military judge, perform the duties assigned by this Manual to the military judge except as otherwise expressly provided.

(c) Qualifications of military judge. A military judge shall be a commissioned officer on active duty in the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which the military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judges in special courts-martial. As used in this subsection “military judge” does not include the president of a special court-martial without a military judge.

Discussion

See R.C.M. 801 for description of some of the general duties of the military judge.

Military judges assigned as general court-martial judges may perform duties in addition to the primary duty of judge of a general court-martial only when such duties are assigned or approved by the Judge Advocate General, or a designee, of the service of which the military judge is a member. Similar restrictions on other duties which a military judge in special courts-martial may perform may be prescribed in regulations of the Secretary concerned.

(d) Counsel.
   (1) Certified counsel required. Only persons certified under Article 27(b) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as defense counsel or associate defense counsel in general or special courts-martial or as trial counsel in general courts-martial.

Discussion

To be certified by the Judge Advocate General concerned under Article 27(b), a person must be a member of the bar of a Federal court or the highest court of a State. The Judge Advocate General concerned may establish additional requirements for certification.

When the accused has individual military or civilian defense counsel, the detailed counsel is “associate counsel” unless excused from the case. See R.C.M. 506(b)(3).

(2) Other military counsel. Any commissioned officer may be detailed as trial counsel in special courts-martial, or as assistant trial counsel or assistant defense counsel in general or special courts-martial. The Secretary concerned may establish additional qualifications for such counsel.

(3) Qualifications of individual military and civilian defense counsel. Individual military or civilian defense counsel who represents an accused in a court-martial shall be:
   (A) A member of the bar of a Federal court or of the bar of the highest court of a State; or
   (B) If not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity with the general principles of criminal law which apply in a court-martial.

Discussion

In making such a determination—particularly in the case of civilian defense counsel who are members only of a foreign bar—the military judge also should inquire into:
   (i) the availability of the counsel at times at which sessions of the court-martial have been scheduled;
   (ii) whether the accused wants the counsel to appear with military defense counsel;
   (iii) the familiarity of the counsel with spoken English;
(iv) practical alternatives for discipline of the counsel in the event of misconduct;
(v) whether foreign witnesses are expected to testify with whom the counsel may more readily communicate than military counsel; and
(vi) whether ethnic or other similarity between the accused and the counsel may facilitate communication and confidence between the accused and civilian defense counsel.

(4) Disqualifications. No person shall act as trial counsel or assistant trial counsel or, except when expressly requested by the accused, as defense counsel or associate or assistant defense counsel in any case in which that person is or has been:
(A) The accuser;
(B) An investigating officer;
(C) A military judge; or
(D) A member.
No person who has acted as counsel for a party may serve as counsel for an opposing party in the same case.

Discussion

In the absence of evidence to the contrary, it is presumed that a person who, between referral and trial of a case, has been detailed as counsel for any party to the court-martial to which the case has been referred, has acted in that capacity.

(5) Duties of trial and assistant trial counsel. The trial counsel shall prosecute cases on behalf of the United States and shall cause the record of trial of such cases to be prepared. Under the supervision of trial counsel an assistant trial counsel may perform any act or duty which trial counsel may perform under law, regulation, or custom of the service.

Discussion

(A) General duties before trial. Immediately upon receipt of referred charges, trial counsel should cause a copy of the charges to be served upon accused. See R.C.M. 602.

Trial counsel should: examine the charge sheet and allied papers for completeness and correctness; correct (and initial) minor errors or obvious mistakes in the charges but may not without authority make any substantial changes (see R.C.M. 603); and assure that the information about the accused on the charge sheet and any evidence of previous convictions are accurate.

(B) Relationship with convening authority. Trial counsel should: report to the convening authority any substantial irregularity in the convening orders, charges, or allied papers; report an actual or anticipated reduction of the number of members below quorum to the convening authority; bring to the attention of the convening authority any case in which trial counsel finds trial inadvisable for lack of evidence or other reasons.

(C) Relations with the accused and defense counsel. Trial counsel must communicate with a represented accused only through the accused's defense counsel. However, see R.C.M. 602. Trial counsel may not attempt to induce an accused to plead guilty or surrender other important rights.

(D) Preparation for trial. Trial counsel should: ensure that a suitable room, a reporter (if authorized), and necessary equipment and supplies are provided for the court-martial; obtain copies of the charges and specifications and convening orders for each member and all personnel of the court-martial; give timely notice to the members, other parties, other personnel of the court-martial, and witnesses for the prosecution and (if known) defense of the date, time, place, and uniform of the meetings of the court-martial; ensure that any person having custody of the accused is also informed; comply with applicable discovery rules (see R.C.M. 701); prepare to make a prompt, full, and orderly presentation of the evidence at trial; consider the elements of proof of each offense charged, the burden of proof of guilt and the burdens of proof on motions which may be anticipated, and the Military Rules of Evidence; secure for use at trial such legal texts as may be available and necessary to sustain the prosecution's contentions; arrange for the presence of witnesses and evidence in accordance with R.C.M. 703; prepare to make an opening statement of the prosecution's case (see R.C.M. 913); prepare to conduct the examination and cross-examination of witnesses; and prepare to make final argument on the findings and, if necessary, on sentencing (see R.C.M. 919; 100(g)).

(E) Trial. Trial counsel should bring to the attention of the military judge any substantial irregularity in the proceedings. Trial counsel should not allude to or disclose to the members any evidence not yet admitted or reasonably expected to be admitted in evidence or intimate, transmit, or purport to transmit to the military judge or members the views of the convening authority or others as to the guilt or innocence of the accused, an appropriate sentence, or any other matter within the discretion of the court-martial.

(F) Post-trial duties. Trial counsel must promptly provide written notice of the findings and sentence adjudged to the convening authority or a designee, the accused's immediate commander, and (if applicable) the officer in charge of the confinement facility (see R.C.M. 1101(a)), and supervise the preparation, authentication, and distribution of copies of the record as required by these rules and regulations of the Secretary concerned (see R.C.M. 1103; 1104).

R.C.M. 502(d)(5)
R.C.M. 502(d)(5)

(G) Assistant trial counsel. An assistant trial counsel may act in that capacity only under the supervision of the detailed trial counsel. Responsibility for trial of a case may not devolve to an assistant not qualified to serve as trial counsel. Unless the contrary appears, all acts of an assistant trial counsel are presumed to have been done by the direction of the trial counsel. An assistant trial counsel may not act in the absence of trial counsel at trial in a general court-martial unless the assistant has the qualifications required of a trial counsel. See R.C.M. 805(c).

(6) Duties of defense and associate or assistant defense counsel. Defense counsel shall represent the accused in matters under the code and these rules arising from the offenses of which the accused is then suspected or charged. Under the supervision of the defense counsel an associate or assistant defense counsel may perform any act or duty which a defense counsel may perform under law, regulation, or custom of the service.

Discussion

(A) Initial advice by military defense counsel. Defense counsel should promptly explain to the accused the general duties of the defense counsel and inform the accused of the rights to request individual military counsel of the accused's own selection, and of the effect of such a request, and to retain civilian counsel. If the accused wants to request individual military counsel, the defense counsel should immediately inform the convening authority through trial counsel and, if the request is approved, serve as associate counsel if the accused requests and the convening authority permits. Unless the accused directs otherwise, military counsel will begin preparation of the defense immediately after being detailed without waiting for approval of a request for individual military counsel or retention of civilian counsel. See R.C.M. 506.

(B) General duties of defense counsel. Defense counsel must: guard the interests of the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused; disclose to the accused any interest defense counsel may have in connection with the case, any disqualification, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused's secrets or confidences except as the accused may authorize (see also Mil. R. Evid. 502). A defense counsel designated to represent two or more co-accused in a joint or common trial or in allied cases must be particularly alert to conflicting interests of those accused. Defense counsel should bring such matters to the attention of the military judge so that the accused’s understanding and choice may be made a matter of record. See R.C.M. 901(d)(4)(D).

Defense counsel must explain to the accused: the elections available as to composition of the court-martial and assist the accused to make any request necessary to effect the election (see R.C.M. 903); the right to plead guilty or not guilty and the meaning and effect of a plea of guilty; the rights to introduce evidence, to testify or remain silent, and to assert any available defense; and the rights to present evidence during sentencing and the rights of the accused to testify under oath, make an unsworn statement, and have counsel make a statement on behalf of the accused. These explanations must be made regardless of the intentions of the accused as to testifying and pleading.

Defense counsel should try to obtain complete knowledge of the facts of the case before advising the accused, and should give the accused a candid opinion of the merits of the case.

(C) Preparation for trial. Defense counsel may have the assistance of trial counsel in obtaining the presence of witnesses and evidence for the defense. See R.C.M. 703.

Defense counsel should consider the elements of proof of the offenses alleged and the pertinent rules of evidence to ensure that evidence that the defense plans to introduce is admissible and to be prepared to object to inadmissible evidence offered by the prosecution.

Defense counsel should: prepare to make an opening statement of the defense case (see R.C.M. 913(b)); prepare to examine and cross-examine witnesses, and to make final argument on the findings and, if necessary, on sentencing (see R.C.M. 919; 1001(g)).

(D) Trial. Defense counsel should represent and protect the interests of the accused at trial.

When a trial proceeds in the absence of the accused, defense counsel must continue to represent the accused.

(E) Post-trial duties.

(i) Deferment of confinement. If the accused is sentenced to confinement, the defense counsel must explain to the accused the right to request the convening authority to defer service of the sentence to confinement and assist the accused in making such a request if the accused chooses to make one. See R.C.M. 1101(c).

(ii) Examination of the record; appellate brief. The defense counsel should in any case examine the record for accuracy and note any errors in it. This notice may be forwarded for attachment to the record. See R.C.M. 1103(b)(3)(C). See also R.C.M. 1103(i)(1)(B).

(iii) Submission of matters. If the accused is convicted, the defense counsel may submit to the convening authority matters for the latter's consideration in deciding whether to approve the sentence or to disapprove any findings. See R.C.M. 1105. Defense counsel should discuss with the accused the right to submit matters to the convening authority and the powers of the convening authority in taking action on the case. Defense counsel may also submit a brief of any matters counsel believes should be considered on further review.

(iv) Appellate rights. Defense counsel must explain to the accused the rights to appellate review that apply in the case,
and advise the accused concerning the exercise of those rights. If the case is subject to review by the Court of Military Review, defense counsel should explain the powers of that court and advise the accused of the right to be represented by counsel before it. See R.C.M. 1202 and 1203. Defense counsel should also explain the possibility of further review by the Court of Military Appeals and the Supreme Court. See R.C.M. 1204 and 1205. If the case may be examined in the office of the Judge Advocate General under Article 69(a), defense counsel should explain the nature of such review to the accused. See R.C.M. 1201(b)(1). Defense counsel must explain the consequences of waiver of appellate review, when applicable, and, if the accused elects to waive appellate review, defense counsel will assist in preparing the waiver. See R.C.M. 1110. If the accused waives appellate review, or if it is not available, defense counsel should explain that the case will be reviewed by a judge advocate and should submit any appropriate matters for consideration by the judge advocate. See R.C.M. 1112. The accused should be advised of the right to apply to the Judge Advocate General for relief under Article 69(b) when such review is available. See R.C.M. 1201(b)(3).

(v) Examination of post-trial recommendation. When the post-trial recommendation is served on defense counsel, defense counsel should examine it and reply promptly in writing, noting any errors or omissions. Failure to note defects in the recommendation waives them. See R.C.M. 1106(f).

(F) Associate or assistant defense counsel. Associate or assistant counsel may act in that capacity only under the supervision and by the general direction of the defense counsel. A detailed defense counsel becomes associate defense counsel when the accused has individual military or civilian counsel and detailed counsel is not excused. Although associate counsel acts under the general supervision of the defense counsel, associate defense counsel may act without such supervision when circumstances require. See, for example, R.C.M. 805(c). An assistant defense counsel may do this only if such counsel has the qualifications to act as defense counsel. Responsibility for trial of a case may not devolve upon an assistant who is not qualified to serve as defense counsel. An assistant defense counsel may not act in the absence of the defense counsel at trial unless the assistant has the qualifications required of a defense counsel. See also R.C.M. 805. Unless the contrary appears, all acts of an assistant or associate defense counsel are presumed to have been done under the supervision of the defense counsel.

(e) Interpreters, reporters, escorts, bailiffs, clerks, and guards.

(1) Qualifications. The qualifications of interpreters and reporters may be prescribed by the Secretary concerned. Any person who is not disqualified under subsection (e)(2) of this rule may serve as escort, bailiff, clerk, or orderly, subject to removal by the military judge.

(2) Disqualifications. In addition to any disqualifications which may be prescribed by the Secretary concerned, no person shall act as interpreter, reporter, escort, bailiff, clerk, or orderly in any case in which that person is or has been in the same case:

(A) The accuser;
(B) A witness;
(C) An investigating officer;
(D) Counsel for any party; or
(E) A member of the court-martial or of any earlier court-martial of which the trial is a rehearing or new or other trial.

(3) Duties. In addition to such other duties as the Secretary concerned may prescribe, the following persons may perform the following duties:

(A) Interpreters. Interpreters shall interpret for the court-martial or for an accused who does not speak or understand English.

Discussion

The accused also may retain an unofficial interpreter without expense to the United States.

(B) Reporters. Reporters shall record the proceedings and testimony and shall transcribe them so as to comply with the requirements for the record of trial as prescribed in these rules.

(C) Others. Other personnel detailed for the assistance of the court-martial shall have such duties as may be imposed by the military judge.

(4) Payment of reporters, interpreters. The Secretary concerned may prescribe regulations for the payment of allowances, expenses, per diem, and compensation of reporters and interpreters.

Discussion

See R.C.M. 807 regarding oaths for reporters, interpreters, and escorts.

(f) Action upon discovery of disqualification or lack of qualifications. Any person who discovers that a person detailed to a court-martial is disqualified or lacks the qualifications specified by this rule shall cause a report of the matter to be made before the court-martial is first in session to the convening authority or, if discovered later, to the military judge.

II-47
R.C.M. 503

Rule 503. Detailing members, military judge, and counsel

(a) Members.

(1) In general. The convening authority shall detail qualified persons as members for courts-martial.

Discussion

The following persons are subject to challenge under R.C.M. 912(f) and should not be detailed as members: any person who is, in the same case, an accuser, witness, investigating officer, or counsel for any party; any person who, in the case of a new trial, other trial, or rehearing, was a member of any court-martial which previously heard the case; any person who is junior to the accused, unless this is unavoidable; an enlisted member from the same unit as the accused; any person who is in arrest or confinement.

(2) Enlisted members. An enlisted accused may, before assembly, request orally on the record or in writing that enlisted persons serve as members of the general or special court-martial to which that accused's case has been or will be referred. If such a request is made, an enlisted accused may not be tried by a court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total number of members unless eligible enlisted members cannot be obtained because of physical conditions or military exigencies. If the appropriate number of enlisted members cannot be obtained, the court-martial may be assembled, and the trial may proceed without them, but the convening authority shall make a detailed written explanation why enlisted members could not be obtained which must be appended to the record of trial.

Discussion

When such a request is made, the convening authority should:

(1) Detail an appropriate number of enlisted members to the court-martial and, if appropriate, relieve an appropriate number of commissioned or warrant officers previously detailed;

(2) Withdraw the charges from the court-martial to which they were originally referred and refer them to a court-martial which includes the proper proportion of enlisted members; or

(3) Advise the court-martial before which the charges are then pending to proceed in the absence of enlisted members if eligible enlisted members cannot be detailed because of physical conditions or military exigencies.

See also R.C.M. 1103(b)(2)(D)(iii).

(b) Military judge.

(1) By whom detailed. The military judge shall be detailed, in accordance with regulations of the Secretary concerned, by a person assigned as a military judge and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The authority to detail military judges may be delegated to persons assigned as military judges. If authority to detail military judges has been delegated to a military judge, that military judge may detail himself or herself as military judge for a court-martial.

(2) Record of detail. The order detailing a military judge shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement shall indicate by whom the military judge was detailed. The Secretary concerned may require that the order be reduced to writing.

(c) Counsel.

(1) By whom detailed. Trial and defense counsel, assistant trial and defense counsel, and associate defense counsel shall be detailed in accordance with regulations of the Secretary concerned. If authority
to detail counsel has been delegated to a person, that
person may detail himself or herself as counsel for a
court-martial.

(2) Record of detail. The order detailing a counsel
shall be reduced to writing and included in the re-
cord of trial or announced orally on the record at the
court-martial. The writing or announcement shall
indicate by whom the counsel was detailed. The Sec-
retary concerned may require that the order be re-
duced to writing.

(3) Counsel from a different armed force. A per-
son from one armed force may be detailed to serve as
counsel in a court-martial in a different armed force
when permitted by the Judge Advocate General of
the armed force of which the counsel is a member.
The Judge Advocate General may delegate author-
ity to make persons available for this purpose.

Rule 504. Convening courts-martial
(a) In general. A court-martial is created by a con-
vening order of the convening authority.
(b) Who may convene courts-martial.
(1) General courts-martial. Unless otherwise lim-
ited by superior competent authority, general
courts-martial may be convened by persons occupy-
ing positions designated in Article 22(a) and by any
commander designated by the Secretary concerned
or empowered by the President.

Discussion

The authority to convene courts-martial is independent of
rank and is retained as long as the convening authority remains a
commander in one of the designated positions. The rule by which
command devolves are found in regulations of the Secretary con-
cerned.

(2) Special courts-martial. Unless otherwise lim-
ited by superior competent authority, special courts-martial may be convened by persons occupying positions designated in Article 23(a) and by commanders designated by the Secretary concerned.

Discussion

See the discussion under subsection (b)(1) of this rule.

(4) Delegation prohibited. The power to convene
courts-martial may not be delegated.
(c) Disqualification.
(1) Accuser. An accuser may not convene a gen-
eral or special court-martial for the trial of the person
accused.

Discussion

See also Article 1(9); 307(a); 601(c). However, see R.C.M.
1302(b) (accuser may convene a summary court-martial).

(2) Other. A convening authority junior in rank
to an accuser may not convene a general or special
court-martial for the trial of the accused unless that
convening authority is superior in command to the
accuser. A convening authority junior in command
to an accuser may not convene a general or special
court-martial for the trial of the accused.

R.C.M. 504(c)(2)
(3) **Action when disqualified.** When a commander who would otherwise convene a general or special court-martial is disqualified in a case, the charges shall be forwarded to a superior competent authority for disposition. That authority may personally dispose of the charges or forward the charges to another convening authority who is superior in rank to the accuser, or, if in the same chain of command, who is superior in command to the accuser.

**Discussion**

See also R.C.M. 401(c).

(d) **Convening orders.**

(1) **General and special courts-martial.** A convening order for a general or special court-martial shall designate the type of court-martial and detail the members and may designate where the court-martial will meet. If the convening authority has been designated by the Secretary concerned, the convening order shall so state.

**Discussion**

See Appendix 6 for a suggested format for a convening order.

(2) **Summary courts-martial.** A convening order for a summary court-martial shall designate that it is a summary court-martial and detail the summary court-martial, and may designate where the court-martial will meet. If the convening authority has been designated by the Secretary concerned, the convening order shall so state.

**Discussion**

See also R.C.M. 1302(c).

(3) **Additional matters.** Additional matters to be included in convening orders may be prescribed by the Secretary concerned.

(e) **Place.** The convening authority shall ensure that an appropriate location and facilities for courts-martial are provided.

**Rule 505. Changes of members, military judge, and counsel**

(a) **In general.** Subject to this rule, the members, military judge, and counsel may be changed by an authority competent to detail such persons. Members also may be excused as provided in subsections (c)(1)(B)(ii) and (c)(2)(A) of this rule.

**Discussion**

Changes of the members of the court-martial should be kept to a minimum. If extensive changes are necessary and no session of the court-martial has begun, it may be appropriate to withdraw the charges from one court-martial and refer them to another. See R.C.M. 604.

(b) **Procedure.** When new persons are added as members or counsel or when substitutions are made as to any members or counsel or the military judge, such persons shall be detailed in accordance with R.C.M. 503. An order changing the members of the court-martial, except one which excuses members without replacement, shall be reduced to writing before authentication of the record of trial.

**Discussion**

When members or counsel have been excused and the excusal is not reduced to writing, the excusal should be announced on the record. A member who has been temporarily excused need not be formally reappointed to the court-martial.

(c) **Changes of members.**

(1) **Before assembly.**

   (A) **By convening authority.** Before the court-martial is assembled, the convening authority may change the members of the court-martial without showing cause.

   (B) **By convening authority’s delegate.**

      (i) **Delegation.** The convening authority may delegate, under regulations of the Secretary concerned, authority to excuse individual members to the staff judge advocate or legal officer or other principal assistant to the convening authority.

      (ii) **Limitations.** Before the court-martial is assembled, the convening authority’s delegate may excuse members without cause shown; however, no more than one-third of the total number of members detailed by the convening authority may be excused by the convening authority’s delegate in any one court-martial. After assembly the convening authority’s delegate may not excuse members.

(2) **After assembly.**

   (A) **Excusal.** After assembly no member may be excused, except:
(i) By the convening authority for good cause shown on the record;
(ii) By the military judge for good cause shown on the record; or
(iii) As a result of challenge under R.C.M. 912.

(B) New members. New members may be detailed after assembly only when, as a result of excusals under subsection (c)(2)(A) of this rule, the number of members of the court-martial is reduced below a quorum, or the number of enlisted members, when the accused has made a timely written request for enlisted members, is reduced below one-third the total membership.

(d) Changes of detailed counsel.

(1) Trial counsel. An authority competent to detail trial counsel may change the trial counsel and any assistant trial counsel at any time without showing cause.

(2) Defense counsel.

(A) Before formation of attorney-client relationship. Before an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail defense counsel may excuse or change such counsel without showing cause.

(B) After formation of attorney-client relationship. After an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail such counsel may excuse or change such counsel only:

(i) Under R.C.M. 506(b)(3);
(ii) Upon request of the accused or application for withdrawal by such counsel under R.C.M. 506(c); or
(iii) For other good cause shown on the record.

(e) Change of military judge.

(1) Before assembly. Before the court-martial is assembled, the military judge may be changed by an authority competent to detail the military judge, without cause shown on the record.

(2) After assembly. After the court-martial is assembled, the military judge may be changed by an authority competent to detail the military judge only when, as a result of disqualification under R.C.M. 902 or for good cause shown, the previously detailed military judge is unable to proceed.

(f) Good cause. For purposes of this rule, "good cause" includes physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge unable to proceed with the court-martial within a reasonable time. "Good cause" does not include temporary inconveniences which are incident to normal conditions of military life.

Rule 506. Accused's rights to counsel

(a) In general. The accused has the right to be represented before a general or special court-martial by civilian counsel if provided at no expense to the Government, and either by the military counsel detailed under Article 27 or military counsel of the accused's own selection, if reasonably available. The accused is not entitled to be represented by more than one military counsel.

Discussion

See R.C.M. 502(d)(3) as to qualifications of civilian counsel or individual military counsel.

(b) Individual military counsel.

(1) Reasonably available. Subject to this subsection, the Secretary concerned shall define "reasonably available." While so assigned, the following persons are not reasonably available to serve as individual military counsel because of the nature of their duties or positions:

(A) A general of flag officer;
(B) A trial or appellate military judge;
(C) A trial counsel;
(D) An appellate defense or government counsel;
(E) A principal legal advisor to a command, organization, or agency and, when such command, organization, or agency has general court-martial jurisdiction, the principal assistant of such an advisor;
(F) An instructor or student at a service school or academy:
(G) A student at a college or university;
(H) A member of the staff of the Judge Advocate General of the Army, Navy, or Air Force, the Chief Counsel of the Coast Guard, or the Director,
Judge Advocate Division, Headquarters, Marine Corps.

The Secretary concerned may determine other persons to be not reasonably available because of the nature or responsibilities of their assignments, geographic considerations, exigent circumstances, or military necessity. A person who is a member of an armed force different from that of which the accused is a member shall be reasonably available to serve as individual military counsel for such accused to the same extent as that person is available to serve as individual military counsel for an accused in the same armed force as the person requested. The Secretary concerned may prescribe circumstances under which exceptions may be made to the prohibitions in this subsection when merited by the existence of an attorney-client relationship regarding matters relating to a charge in question. However, if the attorney-client relationship arose solely because the counsel represented the accused on review under Article 70, this exception shall not apply.

(2) Procedure. Subject to this subsection, the Secretary concerned shall prescribe procedures for determining whether a requested person is “reasonably available” to act as individual military counsel. Requests for an individual military counsel shall be made by the accused or the detailed defense counsel through the trial counsel to the convening authority. If the requested person is among those not reasonably available under subsection (b)(1) of this rule or under regulations of the Secretary concerned, the convening authority shall deny the request and notify the accused, unless the accused asserts that there is an existing attorney-client relationship regarding a charge in question or that the person requested will not, at the time of the trial or investigation for which requested be among those so listed as not reasonably available, the convening authority shall forward the request to the commander or head of the organization, activity, or agency to which the requested person is assigned. That authority shall make an administrative determination whether the requested person is reasonably available in accordance with the procedure prescribed by the Secretary concerned. This determination is a matter within the sole discretion of that authority. An adverse determination may be reviewed upon request of the accused through that authority to the next higher commander or level of supervision, but no administrative review may be made which requires action at the departmental or higher level.

(3) Excusal of detailed counsel. If the accused is represented by individual military counsel, detailed defense counsel shall normally be excused. The authority who detailed the defense counsel, as a matter of discretion, may approve a request from the accused that detailed defense counsel shall act as associate counsel. The action of the authority who detailed the counsel is subject to review only for abuse of discretion.

Discussion

A request under subsection (b)(3) should be considered in light of the general statutory policy that the accused is not entitled to be represented by more than one military counsel. Among the factors that may be considered in the exercise of discretion are the seriousness of the case, retention of civilian defense counsel, complexity of legal or factual issues, and the detail of additional trial counsel.

See R.C.M. 905(b)(6) and 960(b)(2) as to motions concerning denial of a request for individual military counsel or retention of detailed counsel as associate counsel.

(c) Excusal or withdrawal. Except as otherwise provided in R.C.M. 505(d)(2) and subsection (b)(3) of this rule, defense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown.

(d) Waiver. The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.

(e) Nonlawyer present. Subject to the discretion of the military judge, the accused may have present and seated at the counsel table for purpose of consultation persons not qualified to serve as counsel under R.C.M. 502.
Discussion

See also Mil.R.Evid. 615 if the person is a potential witness in the case.
CHAPTER VI. REFERRAL, SERVICE, AMENDMENT, AND WITHDRAWAL OF CHARGES

Rule 601. Referral
(a) In general. Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial.

Discussion
Referral of charges requires three elements: a convening authority who is authorized to convene the court-martial and is not disqualified (see R.C.M. 601(b) and (c)); preferred charges which have been received by the convening authority for disposition (see R.C.M. 307 as to preferral of charges and Chapter IV as to disposition); and a court-martial convened by that convening authority or a predecessor (see R.C.M. 504).

If trial would be warranted but would be detrimental to the prosecution of a war or inimical to national security, see R.C.M. 401(d) and 407(b).

(b) Who may refer. Any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor, unless the power to do so has been withheld by superior competent authority.

Discussion
See R.C.M. 306(a), 403, 404, 407, and 504.

The convening authority may be of any command, including a command different from that of the accused, but as a practical matter the accused must be subject to the orders of the convening authority or otherwise under the convening authority's control to assure the appearance of the accused at trial. The convening authority's power over the accused may be based upon agreements between the commanders concerned.

(c) Disqualification. An accuser may not refer charges to a general or special court-martial.

Discussion
Convening authorities are not disqualified from referring charges by prior participation in the same case except when they have acted as accuser. For a definition of "accuser," see Article 1(9). A convening authority who is disqualified may forward the charges and allied papers for disposition by competent authority superior in rank or command. See R.C.M. 401(c) concerning actions which the superior may take.

See R.C.M. 1302 for rules relating to convening summary courts-martial.

(d) When charges may be referred.

(1) Basis for referral. If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general court-martial except in compliance with subsection (d)(2) of this rule. The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

Discussion
For a discussion of selection among alternative dispositions, see R.C.M. 306. The convening authority is not obliged to refer all charges which the evidence might support. The convening authority should consider the options and considerations under R.C.M. 306 in exercising the discretion to refer.

(2) General courts-martial. The convening authority may not refer a specification under a charge to a general court-martial unless—

(A) There has been substantial compliance with the pretrial investigation requirements of R.C.M. 405; and

(B) The convening authority has received the advice of the staff judge advocate required under R.C.M. 406. These requirements may be waived by the accused.

Discussion
See R.C.M. 201(f)(2)(C) concerning limitations on referral of capital offenses to special courts-martial. See R.C.M. 103(3) for the definition of a capital offense.

See R.C.M. 1301(c) concerning limitations on the referral of certain cases to summary courts-martial.

(e) How charges shall be referred.

(1) Order, instructions. Referral shall be by the personal order of the convening authority. The con-
vening authority may include proper instructions in the order.

**Discussion**

Referral is ordinarily evidenced by an indorsement on the charge sheet. Although the indorsement should be completed on all copies of the charge sheet, only the original must be signed. The signature may be that of a person acting by the order or direction of the convening authority. In such a case the signature element must reflect the signer's authority.

If, for any reason, charges are referred to a court-martial different from that to which they were originally referred, the new referral is ordinarily made by a new indorsement attached to the original charge sheet. The previous indorsement should be lined out and initialed by the person signing the new referral. The original indorsement should not be obliterated. See also R.C.M. 604.

If the only officer present in a command refers the charges to a summary court-martial and serves as the summary court-martial under R.C.M. 1302, the indorsement should be completed with the additional comments, "only officer present in the command."

The convening authority may instruct that the charges against the accused be tried with certain other charges against the accused. See subsection (2) below.

The convening authority may instruct that charges against one accused be referred for joint or common trial with another accused. See subsection (3) below.

Capital offenses may be referred as noncapital if the death penalty is not mandatory. When a convening authority has discretion to refer a capital case as noncapital, the convening authority should be guided by the criteria for adjudging capital punishment found at R.C.M. 1004.

The convening authority may acknowledge by an instruction that no bad-conduct discharge may be adjudged when the prerequisites for a bad-conduct discharge under Article 19 will not be met. See R.C.M. 201(f)(2)(B)(ii). For example, this instruction may be given when a court reporter is not detailed.

Any special instructions must be stated in the referral indorsement.

When the charges have been referred to a court-martial, the indorsed charge sheet and allied papers should be promptly transmitted to the trial counsel.

(2) **Joinder of offenses.** In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.

**Discussion**

Ordinarily all known charges should be referred to a single court-martial.

(3) **Joinder of accused.** Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such accused may be charged in one or more specifications together or separately, and every accused need not be charged in each specification. Related allegations against two or more accused which may be proved by substantially the same evidence may be referred to a common trial.

**Discussion**

A joint offense is one committed by two or more persons acting together with a common intent. Joint offenses may be referred for joint trial, along with all related offenses against each of the accused. A common trial may be used when the evidence of several offenses committed by several accused separately is essentially the same, even though the offenses were not jointly committed. See R.C.M. 307(c)(5) Discussion. Convening authorities should consider that joint and common trials may be complicated by procedural and evidentiary rules.

(f) **Superior convening authorities.** Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to the authority for further consideration, including, if appropriate, referral.

**Rule 602. Service of charges**

The trial counsel detailed to the court-martial to which charges have been referred for trial shall cause to be served upon each accused a copy of the charge sheet. In time of peace, no person may, over objection, be brought to trial—including an Article 39(a) session—before a general court-martial within a period of five days after service of charges, or before a special court-martial within a period of three days after service of charges. In computing these periods, the date of service of charges and the date of trial are excluded; holidays and Sundays are included.
Discussion

Trial counsel should comply with this rule immediately upon receipt of the charges. Whenever after service the charges are amended or changed the trial counsel must give notice of the changes to the defense counsel. Whenever such amendments or changes add a new party, a new offense, or substantially new allegations, the charge sheet so amended or changed must be served anew. See also R.C.M. 603.

Service may be made only upon the accused; substitute service upon defense counsel is insufficient. The trial counsel should promptly inform the defense counsel when charges have been served.

If the accused has questions when served with charges, the accused should be told to discuss the matter with defense counsel.

Rule 603. Changes to charges and specifications

(a) Minor changes defined. Minor changes in charges and specifications are any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged.

Discussion

Minor changes include those necessary to correct inartfully drafted or redundant specifications; to correct a misnaming of the accused; to allege the proper article; or to correct other slight errors. Minor changes also include those which reduce the seriousness of an offense, as when the value of an allegedly stolen item in a larceny specification is reduced, or when a desertion specification is amended to allege only unauthorized absence.

(b) Minor changes before arraignment. Any person forwarding, acting upon, or prosecuting charges on behalf of the United States except an investigating officer appointed under R.C.M. 405 may make minor changes to charges or specifications before arraignment.

Discussion

Charges forwarded or referred for trial should be free from defects of form and substance. Minor errors may be corrected and the charge may be redrafted without being sworn anew by the accuser. Other changes should be signed and sworn to be an accuser. All changes in the charges should be initialed by the person who makes them. A trial counsel acting under this provision ordinarily should consult with the convening authority before making any changes which, even though minor, change the nature or seriousness of the offense.

(c) Minor changes after arraignment. After arraignment the military judge may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced.

(d) Major changes. Changes or amendments to charges or specifications other than minor changes may not be made over the objection of the accused unless the charge or specification affected is preferred anew.

Discussion

If there has been a major change or amendment over the accused's objection to a charge already referred, a new referral is necessary. Similarly, in the case of a general court-martial, a new investigation under R.C.M. 405 will be necessary if the charge as amended or changed was not covered in the prior investigation. If the substance of the charge or specification as amended or changed has not been referred or, in the case of a general court-martial, investigated, a new referral and, if appropriate, investigation are necessary. When charges are re-referred, they must be served anew under R.C.M. 602.

Rule 604. Withdrawal of charges

(a) Withdrawal. The convening authority or a superior competent authority may for any reason cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced.

Discussion

Charges which are withdrawn from a court-martial should be dismissed (see R.C.M. 401(c)(1)) unless it is intended to refer them anew promptly or to forward them to another authority for disposition.

Charges should not be withdrawn from a court-martial arbitrarily or unfairly to an accused. See also subsection (b) of this rule.

Some or all charges and specifications may be withdrawn. In a joint or common trial the withdrawal may be limited to charges against one or some of the accused.

Charges which have been properly referred to a court-martial may be withdrawn only by the direction of the convening authority or a superior competent authority in the exercise of that officer's independent judgment. When directed to do so by the convening authority or a superior competent authority, trial counsel may withdraw charges or specifications by lining out the affected charges or specifications, renumbering remaining charges or specifications as necessary, and initialing the changes. Charges and specifications withdrawn before commencement of trial will not be brought to the attention of the members. When charges or specifications are withdrawn after they have come to the attention
of the members, the military judge must instruct them that the withdrawn charges or specifications may not be considered for any reason.

(b) **Referral of withdrawn charges.** Charges which have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason. Charges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen military necessity.

**Discussion**

*See also R.C.M. 915 (Mistrial).*

When charges which have been withdrawn from a court-martial are referred to another court-martial, the reasons for the withdrawal and later referral should be included in the record of the later court-martial, if the later referral is more onerous to the accused. Therefore, if further prosecution is contemplated at the time of the withdrawal, the reasons for the withdrawal should be included in or attached to the record of the earlier proceeding.

Improper reasons for withdrawal include an intent to interfere with the free exercise by the accused of constitutional or codal rights, or with the impartiality of a court-martial. A withdrawal is improper if it was not directed personally and independently by the convening authority or by a superior competent authority.

Whether the reason for a withdrawal is proper, for purposes of the propriety of a later referral, depends in part on the stage in the proceedings at which the withdrawal takes place. Before arraignment, there are many reasons for a withdrawal which will not preclude another referral. These include receipt of additional charges, absence of the accused, reconsideration by the convening authority or by a superior competent authority of the seriousness of the offenses, questions concerning the mental capacity of the accused, and routine duty rotation of the personnel constituting the court-martial. Charges withdrawn after arraignment may be referred to another court-martial under some circumstances. For example, it is permissible to refer charges which were withdrawn pursuant to a pretrial agreement if the accused fails to fulfill the terms of the agreement. See R.C.M. 705. Charges withdrawn after some evidence on the general issue of guilty is introduced may be re-referred only under the narrow circumstances described in the rule.
CHAPTER VII. PRETRIAL MATTERS

Rule 701. Discovery

(a) Disclosure by the trial counsel. Except as otherwise provided in subsections (f) and (g)(2) of this rule, the trial counsel shall provide the following information or matters to the defense—

(1) Papers accompanying charges; convening orders; statements. As soon as practicable after service of charges under R.C.M. 602, the trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:

(A) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;

(B) The convening order and any amending orders; and

(C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

(2) Documents, tangible objects, reports. After service of charges, upon request of the defense, the Government shall permit the defense to inspect:

(A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and

(B) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

Discussion

Such notice should be in writing except when impracticable.

(4) Prior convictions of accused offered on the merits. Before arraignment the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to inspect such records when they are in the trial counsel’s possession.

(5) Information to be offered at sentencing. Upon request of the defense the trial counsel shall:

(A) Permit the defense to inspect such written material as will be presented by the prosecution at the presentencing proceedings; and

(B) Notify the defense of the names and addresses of the witnesses the trial counsel intends to call at the presentencing proceedings under R.C.M. 1001(b).

(6) Evidence favorable to the defense. The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged; or

(C) Reduce the punishment.

Discussion

In addition to the matters required to be disclosed under subsection (a) of this rule, the Government is required to notify the defense of or provide to the defense certain information under other rules. Mil.R.Evid. 506 covers the disclosure of unclassified information which is under the control of the Government. Mil.R.Evid. 505 covers disclosure of classified information.

Other R.C.M. and Mil.R.Evid. concern disclosure of other specific matters. See R.C.M. 308 (identification of accuser), 405
(report of Article 32 investigation), 706(c)(3)(B) (mental examination of accused), 914 (production of certain statements), and 1004(b)(1) (aggravating circumstances in capital cases); Mil.R.Evid. 301(c)(2) (notice of immunity or leniency to witnesses), 302 (mental examination of accused), 304(d)(1) (statements by accused), 311(d)(1) (evidence seized from accused), 321(c)(1) (evidence based on lineups), 507 (identity of informants), 612 (memoranda used to refresh recollection), and 613(a) (prior inconsistent statements).

Requirements for notice of intent to use certain evidence are found in: Mil.R.Evid. 201A(b) (judicial notice of foreign law), 301(c)(2) (immunized witnesses), 304(d)(2) (notice of intent to use undisclosed confessions), 304(f) (testimony of accused for limited purpose on confession), 311(d)(2)(B) (notice of intent to use undisclosed evidence seized), 311(f) (testimony of accused for limited purpose on seizures), 321(c)(2)(B) (notice of intent to use undisclosed line-up evidence), 321(e) (testimony of accused for limited purpose of line-ups), 412(c)(1) and (2) (intent of defense to use evidence of sexual misconduct by a victim); 505(h) (intent to impeach with conviction over 10 years old).

(b) Disclosure by the defense. Except as otherwise provided in subsections (f) and (g)(2) of this rule, the defense shall provide the following information to the trial counsel—

(1) Names of witnesses and statements.

(A) Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of the trial counsel, the defense shall also

(i) Provide the trial counsel with the names and addresses of any witnesses whom the defense intends to call at the presentencing proceedings under R.C.M. 1001(c); and

(ii) Permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

Discussion

Such notice shall be in writing except when impracticable. See R.C.M. 916(k) concerning the defense of lack of mental responsibility. See R.C.M. 706 concerning inquiries into the mental responsibility of the accused. See Mil.R.Evid. 302 concerning statements by the accused during such inquiries. If the defense needs more detail as to the time, date, or place of the offense to comply with this rule, it should request a bill of particulars. See R.C.M. 906(b)(6).

(3) Documents and tangible objects. If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

(4) Reports of examination and tests. If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of trial counsel, shall (except as provided in R.C.M. 706 and Mil.R.Evid. 302) permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, which are within the possession, custody, or control of the defense which the defense intends to introduce as evidence in the defense case-in-chief at trial or which were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony.
(5) Inadmissibility of withdrawn defense. If an intention to rely upon a defense under subsection (b)(2) of this rule is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not, in any court-martial, admissible against the accused who gave notice of the intention.

Discussion

In addition to the matters covered in subsection (b) of this rule, defense counsel is required to give notice or disclose evidence under certain Military Rules of Evidence: Mil.R.Evid. 201A(b) (judicial notice of foreign law), 304(f) (testimony by the accused for a limited purpose in relation to a confession), 311(b) (same, search), 321(e) (same, lineup), 412(c)(1) and (2) (intent to offer evidence of sexual misconduct by a victim), 505(h) (intent to disclose classified information), 506(h) (intent to disclose privileged government information), 609(b) (intent to impeach a witness with a conviction older than 10 years), 612(2) (writing used to refresh recollection), and 613(a) (prior inconsistent statements).

(c) Failure to call witness. The fact that a witness' name is on a list of expected or intended witnesses provided to an opposing party, whether required by this rule or not, shall not be ground for comment upon a failure to call the witness.

(d) Continuing duty to disclose. If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material.

(e) Access to witnesses and evidence. Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.

(f) Information not subject to disclosure. Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memo-randa, or similar working papers prepared by counsel and counsel's assistants and representatives.

(g) Regulation of discovery.

(1) Time, place, and manner. The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.

(2) Protective and modifying orders. Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge. If the military judge grants relief after such an ex parte showing, the entire text of the party's statement shall be sealed and attached to the record of trial as an appellate exhibit. Such material may be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(3) Failure to comply. If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

(A) Order the party to permit discovery;
(B) Grant a continuance;
(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and
(D) Enter such other order as is just under the circumstances. This rule shall not limit the right of the accused to testify in the accused's behalf.

Discussion

Factors to be considered in determining whether to grant an exception to exclusion under subsection (3)(C) include: the extent of disadvantage that resulted from a failure to disclose; the reason for the failure to disclose; the extent to which later events mitigated the disadvantage caused by the failure to disclose; and any other relevant factors.

The sanction of excluding the testimony of a defense witness should be used only upon finding that the defense counsel's failure to comply with this rule was willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony. Moreover, the sanction of excluding the testimony of a defense witness should only be used if alternative sanctions could not have minimized the prejudice to the Govern-
ment. Before imposing this sanction, the military judge must weigh the defendant's right to compulsory process against the countervailing public interests, including (1) the integrity of the adversary process; (2) the interest in the fair and efficient administration of military justice; and (3) the potential prejudice to the truth-determining function of the trial process.

Procedures governing refusal to disclose classified information are in Mil.R.Evid. 504. Procedures governing refusal to disclose other government information are in Mil.R.Evid. 506. Procedures governing refusal to disclose an informant's identity are in Mil.R.Evid. 507.

(h) Inspect. As used in this rule “inspect” includes the right to photograph and copy.

Rule 702. Depositions
(a) In general. A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.

Discussion

A deposition is the out-of-court testimony of a witness under oath in response to questions by the parties, which is reduced to writing or recorded on videotape or audiotape or similar material. A deposition taken on oral examination is an oral deposition, and a deposition taken on written interrogatories is a written deposition. Written interrogatories are questions, prepared by the prosecution, defense, or both, which are reduced to writing before submission to a witness whose testimony is to be taken by deposition. The answers, reduced to writing and properly sworn to, constitute the deposition testimony of the witness.

Not that under subsection (i) of this rule a deposition may be taken by agreement of the parties without necessity of an order.

A deposition may be taken to preserve the testimony of a witness who is likely to be unavailable at the investigation under Article 32 (see R.C.M. 405(g)) or at the time of trial (see R.C.M. 703(b)). Part of all of a deposition, so far as otherwise admissible under the Military Rules of Evidence, may be used on the merits or on an interlocutory question as substantive evidence if the witness is unavailable under Mil.R.Evid. 804(a) except that a deposition may be admitted in a capital case only upon offer by the defense. See Mil.R.Evid. 804(b)(1). In any case, a deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. See Mil.R.Evid. 613. If only a part of a deposition is offered in evidence by a party, an adverse party may required the proponent to offer all which is relevant to the part offered, and any party may offer other parts. See Mil.R.Evid. 106.

A deposition which is transcribed is ordinarily read to the court-martial by the party offering it. See also subsection (g)(3) of this rule. The transcript of a deposition may not be inspected by the members. Objections may be made to testimony in a written deposition in the same way that they would be if the testimony were offered through the personal appearance of a witness.

Part or all of a deposition so far as otherwise admissible under the Military Rules of Evidence may be used in presentencing proceedings as substantive evidence as provided in R.C.M. 1001.

DD Form 456 (Interrogatories and Deposition) may be used in conjunction with this rule.

(b) Who may order. A convening authority who has the charges for disposition or, after referral, the convening authority or the military judge may order that a deposition be taken on request of a party.

(c) Request to take deposition.

(1) Submission of request. At any time after charges have been preferred, any party may request in writing that a deposition be taken.

Discussion

A copy of the request and any accompanying papers ordinarily should be served on the other parties when the request is submitted.

(2) Contents of request. A request for a deposition shall include:

(A) The name and address of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;

(B) A statement of the matters on which the person is to be examined;

(C) A statement of the reasons for taking the deposition; and

(D) Whether an oral or written deposition is requested.

(3) Action on request.

(A) In general. A request for a deposition may be denied only for good cause.

Discussion

Good cause for denial includes: failure to state a proper ground for taking a deposition; failure to show the probable relevance of the witness' testimony, or that the witness' testimony would be unnecessary. The fact that the witness is or will be available for trial is good cause for denial in the absence of unusual circumstances, such as improper denial of a witness request at an Article 32 hearing, unavailability of an essential witness at an Article 32 hearing, or when the Government has improperly impeded defense access to a witness.
R.C.M. 702(c)(3)(B)

(B) Written deposition. A request for a written deposition may not be approved without the consent of the opposing party except when the deposition is ordered solely in lieu of producing a witness for sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be adequately served by a written deposition.

Discussion

A request for an oral deposition may be approved without the consent of the opposing party.

(C) Notification of decision. The authority who acts on the request shall promptly inform the requesting party of the action on the request and, if the request is denied, the reasons for denial.

(D) Waiver. Failure to review before the military judge a request for a deposition denied by a convening authority waives further consideration of the request.

(d) Action when request is approved.

(1) Detail of deposition officer. When a request for a deposition is approved, the convening authority shall detail an officer to serve as deposition officer or request an appropriate civil officer to serve as deposition officer.

Discussion

See Article 49(c).

When a deposition will be at a point distant from the command, an appropriate authority may be requested to make available an officer to serve as deposition officer.

(2) Assignment of counsel. If charges have not yet been referred to a court-martial when a request to take a deposition is approved, the convening authority who directed the taking of the deposition shall ensure that counsel qualified as required under R.C.M. 502(d) are assigned to represent each party.

Discussion

The counsel who represents the accused at a deposition ordinarily will form an attorney-client relationship with the accused which will continue through a later court-martial. See R.C.M. 506.

If the accused has formed an attorney-client relationship with military counsel concerning the charges in question, ordinarily that counsel should be appointed to represent the accused.

(3) Instructions. The convening authority may give instructions not inconsistent with this rule to the deposition officer.

Discussion

Such instruction may include the time and place for taking the deposition.

(e) Notice. The party at whose request a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition and the name and address of each person to be examined. On motion of a party upon whom the notice is served the deposition officer may for cause shown extend or shorten the time or change the place for taking the deposition, consistent with any instructions from the convening authority.

(f) Duties of the deposition officer. In accordance with this rule, and subject to any instructions under subsection (d)(3) of this rule, the deposition officer shall:

(1) Arrange a time and place for taking the deposition and, in the case of an oral deposition, notify the party who requested the deposition accordingly;

(2) Arrange for the presence of any witness whose deposition is to be taken in accordance with the procedures for production of witnesses and evidence under R.C.M. 703(e);

(3) Maintain order during the deposition and protect the parties and witnesses from annoyance, embarrassment, or oppression;

(4) Administer the oath to each witness, the reporter, and interpreter, if any;

(5) In the case of a written deposition, ask the questions submitted by counsel to the witness;

(6) Cause the proceedings to be recorded so that a verbatim record is made or may be prepared;

(7) Record, but not rule upon, objections or motions and the testimony to which they relate;

(8) Authenticate the record of the deposition and forward it to the authority who ordered the deposition; and

(9) Report to the convening authority any substantial irregularity in the proceeding.
Discussion

When any unusual problem, such as improper conduct by counsel or a witness, prevents an orderly and fair proceeding, the deposition officer should adjourn the proceedings and inform the convening authority.

The authority who ordered the deposition should forward copies to the parties.

(g) Procedure.

(1) Oral depositions.

(A) Rights of accused. At an oral deposition, the accused shall have the rights to:

(i) Be present except when: (a) the accused, absent good cause shown, fails to appear after notice of time and place of the deposition; (b) the accused is disruptive within the meaning of R.C.M. 804(b)(2); or (c) the deposition is ordered in lieu of production of a witness on sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be served adequately by an oral deposition without the presence of the accused; and

(ii) Be represented by counsel as provided in R.C.M. 506.

(B) Examination of witnesses. Each witness giving an oral deposition shall be examined under oath. The scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The Government shall make available to each accused for examination and use at the taking of the deposition any statement of the witness which is in the possession of the United States and to which the accused would be entitled at the trial.

Discussion

As to objections, see subsections (f)(7) and (h) of this rule. As to production of prior statements of witnesses, see R.C.M. 914; Mil.R.Evid. 612, 613.

A sample oath for a deposition follows.

"You (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?"

(2) Written depositions.

(A) Rights of accused. The accused shall have the right to be represented by counsel as provided in R.C.M. 506 for the purpose of taking a written deposition, except when the deposition is taken for use at a summary court-martial.

(R.C.M. 702(h)(1)

(B) Presence of parties. No party has a right to be present at a written deposition.

(C) Submission of interrogatories to opponent. The party requesting a written deposition shall submit to opposing counsel a list of written questions to be asked of the witness. Opposing counsel may examine the questions and shall be allowed a reasonable time to prepare cross-interrogatories and objections, if any.

Discussion

The interrogatories and cross-interrogatories should be sent to the deposition officer by the party who requested the deposition. See subsection (h)(3) of this rule concerning objections.

(D) Examination of witnesses. The deposition officer shall swear the witness, read each question presented by the parties to the witness, and record each response. The testimony of the witness shall be recorded on videotape, audiotape, or similar material or shall be transcribed. When the testimony is transcribed, the deposition shall, except when impracticable, be submitted to the witness for examination. The deposition officer may enter additional matters then stated by the witness under oath. The deposition shall be signed by the witness if the witness is available. If the deposition is not signed by the witness, the deposition officer shall record the reason. The certificate of authentication shall then be executed.

(3) How recorded. In the discretion of the authority who ordered the deposition, a deposition may be recorded by a reporter or by other means including videotape, audiotape, or sound film. In the discretion of the military judge, depositions recorded by videotape, audiotape, or sound film may be played for the court-martial or may be transcribed and read to the court-martial.

Discussion

A deposition read in evidence or one that is played during a court-martial, is recorded and transcribed by the reporter in the same was as any other testimony. The deposition need not be included in the record of trial.

(h) Objections.

(1) In general. A failure to object prior to the deposition to the taking of the deposition on grounds
which may be corrected if the objection is made prior to the deposition waives such objection.

(2) Oral depositions. Objections to questions, testimony, or evidence at an oral deposition and the grounds for such objection shall be stated at the time of taking such deposition. If an objection relates to a matter which could have been corrected if the objection had been made during the deposition, the objection is waived if not made at the deposition.

Discussion

A party may show that an objection was made during the deposition but not recorded, but, in the absence of such evidence, the transcript of the deposition governs.

(3) Written depositions. Objections to any question in written interrogatories shall be served on the party who proposed the question before the interrogatories are sent to the deposition officer or the objection is waived. Objections to answers in a written deposition may be made at trial.

(i) Deposition by agreement not precluded.

(1) Taking deposition. Nothing in this rule shall preclude the taking of a deposition without cost to the United States, orally or upon written questions, by agreement of the parties.

(2) Use of deposition. Subject to Article 49, nothing in this rule shall preclude the use of a deposition at the court-martial by agreement of the parties unless the military judge forbids its use for good cause.

Rule 703. Production of witnesses and evidence

(a) In general. The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.

Discussion

See also R.C.M. 801(c) concerning the opportunity of the court-martial to obtain witnesses and evidence.

(b) Right to witnesses.

(1) On the merits or on interlocutory questions. Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.

(2) On sentencing. Each party is entitled to the production of a witness whose testimony on sentencing is required under R.C.M. 1001(e).

(3) Unavailable witness. Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil.R.Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.

(c) Determining which witness will be produced.

(1) Witnesses for the prosecution. The trial counsel shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution.

(2) Witnesses for the defense.

(A) Request. The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests.

(B) Contents of request.

(i) Witnesses on merits or interlocutory questions. A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

(ii) Witnesses on sentencing. A list of witnesses wanted for presentencing proceedings shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence, a synopsis of the testimony that it is expected the witness will give, and the reasons why the witness'
personal appearance will be necessary under the standards set forth in R.C.M. 1001(e).

(C) Time of request. A list of witnesses under this subsection shall be submitted in time reasonably to allow production of each witness on the date when the witness’ presence will be necessary. The military judge may set a specific date by which such lists must be submitted. Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown.

(D) Determination. The trial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness’ production is not required under this rule. If the trial counsel contends that the witness’ production is not required by this rule, the matter may be submitted to the military judge. If the military judge grants a motion for a witness, the trial counsel shall produce the witness or the proceedings shall be abated.

Discussion

When significant or unusual costs would be involved in producing witnesses, the trial counsel should inform the convening authority, as the convening authority may elect to dispose of the matter by means other than a court-martial. See R.C.M. 906(b)(7). See also R.C.M. 905(j).

(d) Employment of expert witnesses. When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

Discussion

See Mil.R.Evid. 702, 706.

(e) Procedures for production of witnesses.

(1) Military witnesses. The attendance of a military witness may be obtained by notifying the commander of the witness of the time, place, and date the witness’ presence is required and requesting the commander to issue any necessary orders to the witness.

Discussion

When military witnesses are located near the court-martial, their presence can usually be obtained through informal coordination with them and their commander. If the witness is not near the court-martial and attendance would involve travel at government expense, or if informal coordination is inadequate, the appropriate superior should be requested to issue the necessary order.

If practicable, a request for the attendance of a military witness should be made so that the witness will have at least 48 hours notice before starting to travel to attend the court-martial.

The attendance of persons not on active duty should be obtained in the manner prescribed in subsection (e)(2) of this rule.

(2) Civilian witnesses—subpoena.

(A) In general. The presence of witnesses not on active duty may be obtained by subpoena.

Discussion

A subpoena is not necessary if the witness appears voluntarily at no expense to the United States.

Civilian employees of the Department of Defense may be directed by appropriate authorities to appear as witnesses in courts-martial as an incident of their employment. Appropriate travel orders may be issued for this purpose.

A subpoena may not be used to compel a civilian to travel outside the United States and its territories.

A witness must be subject to United States jurisdiction to be subject to a subpoena. Foreign nationals in a foreign country are not subject to subpoena. Their presence may be obtained through cooperation of the host nation.

(B) Contents. A subpoena shall state the command by which the proceeding is directed, and the title, if any, of the proceeding. A subpoena shall
command each person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command the person to whom it is directed to produce books, papers, documents or other objects designated therein at the proceeding or at an earlier time for inspection by the parties.

Discussion

A subpoena may not be used to compel a witness to appear at an examination or interview before trial, but a subpoena may be used to obtain witnesses for a deposition or a court of inquiry.

A subpoena normally is prepared, signed, and issued in duplicate on the official forms. See Appendix 7 for an example of a Subpoena with certificate of service (DD Form 453) and a Travel Order (DD Form 453-1).

(C) Who may issue. A subpoena may be issued by the summary court-martial or trial counsel of a special or general court-martial to secure witnesses or evidence for that court-martial. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively.

(D) Service. A subpoena may be served by the person authorized by this rule to issue it, a United States marshal, or any other person who is not less than 18 years of age. Service shall be made by delivering a copy of the subpoena to the person named and by tendering to the person named travel orders and fees as may be prescribed by the Secretary concerned.

Discussion


If practicable, a subpoena should be issued in time to permit service at least 24 hours before the time the witness will have to travel to comply with the subpoena.

Informal service. Unless formal service is advisable, the person who issued the subpoena may mail it to the witness in duplicate, enclosing a postage-paid envelope bearing a return address, with the request that the witness sign the acceptance of service on the copy and return it in the envelope provided. The return envelope should be addressed to the person who issued the subpoena. The person who issued the subpoena should include with it a statement to the effect that the rights of the witness to fees and mileage will not be impaired by voluntary compliance with the request and that a voucher for fees and mileage will be delivered to the witness promptly on being discharged from attendance.

Formal service. Formal service is advisable whenever it is anticipated that the witness will not comply voluntarily with the subpoena. Appropriate fees and mileage must be paid or tendered. See Article 47. If formal service is advisable, the person who issued the subpoena must assure timely and economical service. That person may do so by serving the subpoena personally when the witness is in the vicinity. When the witness is not in the vicinity, the subpoena may be sent in duplicate to the commander of a military installation near the witness. Such commanders should give prompt and effective assistance, issuing travel orders for their personnel to serve the subpoena when necessary.

Service should ordinarily be made by a person subject to the code. The duplicate copy of the subpoena must have entered upon it proof of service as indicated on the form and must be promptly returned to the person who issued the subpoena. If service cannot be made, the person who issued the subpoena must be informed promptly. A stamped, addressed envelope should be provided for these purposes.

(E) Place of service.

(i) In general. A subpoena requiring the attendance of a witness at a deposition, court-martial, or court of inquiry may be served at any place within the United States, its Territories, Commonwealths, or possessions.

(ii) Foreign territory. In foreign territory, the attendance of civilian witnesses may be obtained in accordance with existing agreements or, in the absence of agreements, with principles of international law.

(iii) Occupied territory. In occupied enemy territory, the appropriate commander may compel the attendance of civilian witnesses located within the occupied territory.

(F) Relief. If a person subpoenaed requests relief on grounds that compliance is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena be modified or withdrawn if appropriate.

(G) Neglect or refusal to appear.

(i) Issuance of warrant of attachment. The military judge or, if there is no military judge, the convening authority may, in accordance with this rule, issue a warrant of attachment to compel the attendance of a witness or production of documents.

Discussion

A warrant of attachment (DD Form 454) may be used when necessary to compel a witness to appear or produce evidence under this rule. A warrant of attachment is a legal order addressed to an official directing that official to have the person named in the order brought before a court.

Subpoenas issued under R.C.M. 703 are Federal process and a person not subject to the code may be prosecuted in a Federal ci-
vilian court under Article 47 for failure to comply with a sub-
poena issued in compliance with this rule and formally served.

The different purposes of the warrant of attachment and
criminal complaint under Article 47 should be borne in mind.
The warrant of attachment, available without the intervention of
civilian judicial proceedings, has as its purpose the obtaining of
the witness' presence, testimony, or documents. The criminal
complaint, prosecuted through the civilian Federal courts, has as
its purpose punishment for failing to comply with process issued
by military authority. It serves to vindicate the military interest in
obtaining compliance with its lawful process.

(ii) Requirements. A warrant of attachment
may be issued only upon probable cause to believe
that the witness was duly served with a subpoena,
that the subpoena was issued in accordance with
these rules, that appropriate fees and mileage were
tendered to the witness, that the witness is material,
that the witness refused or willfully neglected to ap-
pear at the time and place specified on the subpoena,
and that no valid excuse reasonably appears for the
witness' failure to appear.

(iii) Form. A warrant of attachment shall be
written. All documents in support of the warrant of
attachment shall be attached to the warrant, to-
gether with the charge sheet and convening orders.

(iv) Execution. A warrant of attachment
may be executed by a United States marshal or such
other person who is not less than 18 years of age as
the authority issuing the warrant may direct. Only
such nondeadly force as may be necessary to bring
the witness before the court-martial or other pro-
ceeding may be used to execute the warrant. A wit-
ness attached under this rule shall be brought before
the court-martial or proceeding without delay and
shall testify as soon as practicable and be released.

Discussion

In executing a warrant of attachment, no more force than
necessary to bring the witness to the court-martial, deposition, or
court of inquiry may be used.

(v) Definition. For purposes of subsection
(e)(2)(G) of this rule “military judge” does not in-
clude a summary court-martial or the president of a
special court-martial without a military judge.

(f) Right to evidence.

(1) In general. Each party is entitled to the pro-
duction of evidence which is relevant and necessary.

(2) Unavailable evidence. Notwithstanding sub-
section (f)(1) of this rule, a party is not entitled to the pro-
duction of evidence which is destroyed, lost, or
otherwise not subject to compulsory process. How-
ever, if such evidence is of such central importance to
an issue that it is essential to a fair trial, and if
there is no adequate substitute for such evidence, the
military judge shall grant a continuance or other re-

lied in order to attempt to produce the evidence or
shall abate the proceedings, unless the unavailability
of the evidence is the fault of or could have been pre-
vented by the requesting party.

(3) Determining what evidence will be produced.
The procedures in subsection (c) of this rule shall ap-
ply to a determination of what evidence will be pro-
duced, except that any defense request for the produc-
tion of evidence shall list the items of evidence to be
produced and shall include a description of each item sufficient to show its relevance and necessity, a
statement where it can be obtained, and, if known,
the name, address, and telephone number of the cus-
todian of the evidence.

(4) Procedures for production of evidence.

(A) Evidence under the control of the Govern-
ment. Evidence under the control of the Govern-
ment may be obtained by notifying the custodian of
the evidence of the time, place, and date the evidence
is required and requesting the custodian to send or
deliver the evidence.

(B) Evidence not under the control of the Gov-
ernment. Evidence not under the control of the Gov-
ernment may be obtained by subpoena issued in ac-


See Mil.R.Evid. 401 concerning relevance.

Relevant evidence is necessary when it is not cumulative and
when it would contribute to a party’s presentation of the case in
some positive way on a matter in issue. A matter is not in issue
when it is stipulated as a fact.

As to the discovery and introduction of classified or other
government information, see Mil.R.Evid. 505 and 506.

Discussion

See Mil.R.Evid. 401 concerning relevance.

Relevant evidence is necessary when it is not cumulative and
when it would contribute to a party’s presentation of the case in
some positive way on a matter in issue. A matter is not in issue
when it is stipulated as a fact.

As to the discovery and introduction of classified or other
government information, see Mil.R.Evid. 505 and 506.
Rule 704. Immunity

(a) Types of immunity. Two types of immunity may be granted under this rule.

(1) Transactional immunity. A person may be granted transactional immunity from trial by court-martial for one or more offenses under the code.

(2) Testimonial immunity. A person may be granted immunity from the use of testimony, statements, and any information derived therefrom, or information directly or indirectly derived from such testimony or statements by that person in a later court-martial.

Discussion

"Testimonial" immunity is also called "use" immunity.

Immunity ordinarily should be granted only when testimony or other information from the person is necessary to the public interest, including the interest of the Court-Martial, and when the person has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination.

Testimonial immunity is preferred because it does not bar prosecution of the person for the offenses about which testimony or information is given under the grant of immunity.

(b) Scope. Nothing in this rule bars:

(1) A later court-martial for perjury, false swearing, making a false official statement, or failure to comply with an order to testify; or

(2) Use in a court-martial under subsection (b)(1) of this rule of testimony or statements derived from such testimony or statements.

(c) Authority to grant immunity. Only a general court-martial convening authority may grant immunity, and may do so only in accordance with this rule.

Discussion

Only general court-martial convening authorities are authorized to grant immunity. However, in some circumstances, when a person testifies or makes statements pursuant to a promise of immunity, or a similar promise, by a person with apparent authority to make it, such testimony or statements and evidence derived from them may be inadmissible in a later trial. Under some circumstances a promise of immunity by someone other than a general court-martial convening authority may bar prosecution altogether. Persons not authorized to grant immunity should exercise care when dealing with accused or suspects to avoid inadvertently causing statements to be inadmissible or prosecution to be barred.

A convening authority who grants immunity to a prosecution witness in a court-martial may be disqualified from taking post-trial action in the case under some circumstances.

(1) Persons subject to the code. A general court-martial convening authority may grant immunity to any person subject to the code. However, a general court-martial convening authority may grant immunity to a person subject to the code extending to a prosecution in a United States district-court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

Discussion

When testimony or a statement for which a person subject to the code may be granted immunity may relate to an offense for which that person could be prosecuted in a United States district court, immunity should not be granted without prior coordination with the Department of Justice. Ordinarily coordination with the local United States Attorney is appropriate. Unless the Department of Justice indicates it has no interest in the case, authorization for the grant of immunity should be sought from the Attorney General. A request for such authorization should be forwarded through the office of the Judge Advocate General concerned. Service regulations may provide additional guidance. Even if the Department of Justice expresses no interest in the case, authorization by the Attorney General for the grant of immunity may be necessary to compel the person to testify or make a statement if such testimony or statement would make the person liable for a Federal civilian offense.

(2) Persons not subject to the code. A general court-martial convening authority may grant immunity to persons not subject to the code only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.
Discussion

See the discussion under subsection (c)(1) of this rule concerning forwarding a request for authorization to grant immunity to the Attorney General.

(3) Other limitations. The authority to grant immunity under this rule may not be delegated. The authority to grant immunity may be limited by superior authority.

Discussion

Department of Defense Directive 1355.1 (21 July 1981) provides: "A proposed grant of immunity in a case involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of rules or statutes concerning classified information or the foreign relations of the United States, shall be forwarded to the General Counsel of the Department of Defense for the purpose of consultation with the Department of Justice. The General Counsel shall obtain the view of other appropriate elements of the Department of defense in furtherance of such consultation."

(d) Procedure. A grant of immunity shall be written and signed by the convening authority who issues it. The grant shall include a statement of the authority under which it is made and shall identify the matters to which it extends.

Discussion

A person who has received a valid grant of immunity from a proper authority may be ordered to testify. In addition, a servicemember who has received a valid grant of immunity may be ordered to answer questions by investigators or counsel pursuant to that grant. See Mil.R.Evid. 301(c). A person who refuses to testify despite a valid grant of immunity may be prosecuted for such refusal. Persons subject to the code may be charged under Article 134. See paragraph 108, Part IV. A grant of immunity removes the right to refuse to testify or make a statement on self-incrimination grounds. It does not, however, remove other privileges against disclosure of information. See Mil.R.Evid., Section V.

An immunity order or grant must not specify the contents of the testimony it is expected the witness will give.

When immunity is granted to a prosecution witness, the accused must be notified in accordance with Mil.R.Evid. 301(c)(2).

(e) Decision to grant immunity. Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the appropriate general court-martial convening authority. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated, upon findings that:

(1) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; and

(2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses.

Rule 705. Pretrial agreements

(a) In general. Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule.

Discussion

The authority of convening authorities to refer cases to trial and approve pretrial agreements extends only to trials by court-martial. To ensure that such actions do not preclude appropriate action by Federal civilian authorities in cases likely to be prosecuted in the United States district courts, convening authorities shall ensure that appropriate consultation under the "Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction" has taken place prior to trial by court-martial or approval of a pretrial agreement in cases where such consultation is required. See Appendix 3.

(b) Nature of agreement. A pretrial agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

(A) Refer the charges to a certain type of court-martial;
R.C.M. 705(b)(2)(B)

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the court-martial;

**Discussion**

A convening authority may withdraw certain offenses from a court-martial and dismiss them if the accused fulfills the accused’s promises in the agreement. Except when jeopardy has attached (see R.C.M. 907(b)(2)(C)), such withdrawal and dismissal does not bar later reinstitution of the charges by the same or a different convening authority. Such reinstitution may invalidate the pretrial agreement, however, if the agreement is intended to grant immunity to an accused, see R.C.M. 704.

(D) Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) Take specified action on the sentence adjudged by the court-martial.

**Discussion**

For example, the convening authority may agree to approve no sentence in excess of a specified maximum, to suspend all or part of a sentence, to defer confinement, or to mitigate certain forms of punishment into less severe forms.

(c) **Terms and conditions.**

(1) **Prohibited terms or conditions.**

(A) _Not voluntary._ A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) _Deprivation of certain rights._ A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

**Discussion**

A pretrial agreement provision which prohibits the accused from making certain pretrial motions (see R.C.M. 905–907) may be improper.

(2) **Permissible terms or conditions.** Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit either party from proposing the following additional conditions:

(A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

**Discussion**

See R.C.M. 704(a)(2) concerning testimonial immunity. Only a general court-martial convening authority may grant immunity.

(C) A promise to provide restitution;

(D) A promise to conform the accused’s conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and

(E) A promise to waive procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

(d) **Procedure.**

(1) **Negotiation.** Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.

(2) **Formal submission.** After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.
Discussion

The first part of the agreement ordinarily contains an offer to plead guilty and a description of the offenses to which the offer extends. It must also contain a complete and accurate statement of any other agreed terms or conditions. For example, if the convening authority agrees to withdraw certain specifications, or if the accused agrees to waive the right to an Article 32 investigation, this should be stated. The written agreement should contain a statement by the accused that the accused enters it freely and voluntarily and may contain a statement that the accused has been advised of certain rights in connection with the agreement.

(3) Acceptance. The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

Discussion

The convening authority should consult with the staff judge advocate or trial counsel before acting on an offer to enter into a pretrial agreement.

(4) Withdrawal.

(A) By accused. The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confession stipulation entered pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively.

(B) By convening authority. The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

(c) Nondisclosure of existence of agreement. Except in a special court-martial without a military judge, no member of a court-martial shall be informed of the existence of a pretrial agreement. In addition, except as provided in Mil.R.Evid. 410, the fact that an accused offered to enter into a pretrial agreement, and any statements made by an accused in connection therewith, whether during negotiations or during a providence inquiry, shall not be otherwise disclosed to the members.

Discussion

See also R.C.M. 910(f) (plea agreement inquiry).

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused

(a) Initial action. If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

Discussion

See R.C.M. 909 concerning the capacity of the accused to stand trial and R.C.M. 916(k) concerning mental responsibility of the accused.

(b) Ordering an inquiry.

(1) Before referral. Before referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the convening authority before whom the charges are pending for disposition.

(2) After referral. After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge. The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the court-martial (including any Article 39(a) session) when the military judge is not reasonably available. The military judge may order a mental examination of the accused regardless
of any earlier determination by the convening authority.

(c) Inquiry.

(1) By whom conducted. When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall report as to the mental capacity or mental responsibility or both of the accused.

(2) Matters in inquiry. When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions:

   (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term “severe mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

   (B) What is the clinical psychiatric diagnosis?

   (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

   (D) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense?

Other appropriate questions may also be included.

(3) Directions to board. In addition to the requirements specified in subsection (c)(2) of this rule, the order to the board shall specify:

   (A) That upon completion of the board’s investigation, a statement consisting only of the board’s ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused’s commanding officer, the investigating officer, if any, appointed pursuant to Article 32 and to all counsel in the case, the convening authority, and, after referral, to the military judge;

   (B) That the full report of the board may be released by the board or other medical personnel only to other medical personnel for medical purposes, unless otherwise authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report shall be furnished to the defense and, upon request, to the commanding officer of the accused; and

   (C) That neither the contents of the full report nor any matter considered by the board during its investigation shall be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge.

Discussion

Based on the report, further action in the case may be suspended, the charges may be dismissed by the convening authority, administrative action may be taken to discharge the accused from the service or, subject to Mil.R.Evid. 302, the charges may be tried by court-martial.

(4) Additional examinations. Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require.

(5) Disclosure to trial counsel. No person, other than the defense counsel, accused, or, after referral of charges, the military judge may disclose to the trial counsel any statement made by the accused to the board or any evidence derived from such statement.

Discussion

See Mil.R.Evid. 302.

Rule 707. Speedy trial

(a) In general. The accused shall be brought to trial within 120 days after the earlier of:

(1) Preferral of charges;

Discussion

Delay from the time of an offense to preferral of charges or the imposition of pretrial restraint is not considered for speedy trial purposes. See also Article 43 (statute of limitations). In some circumstances such delay may prejudice the accused and may result in dismissal of the charges or other relief. Offenses ordinarily
should be disposed of promptly to serve the interests of good order and discipline. Priority shall be given to persons in arrest or confinement.

(2) The imposition of restraint under R.C.M. 304(a)(2)-(4); or
(3) Entry on active duty under R.C.M. 204.

(b) Accountability.

(1) In general. The date of preferral of charges, the date on which pretrial restraint under R.C.M. 304 (a)(2)-(4) is imposed, or the date of entry on active duty under R.C.M. 204 shall not count for purpose of computing time under subsection (a) of this rule. The date on which the accused is brought to trial shall count. The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904.

(2) Multiple Charges. When charges are preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge.

(3) Events which affect time periods.

(A) Dismissal or mistrial. If charges are dismissed, or if a mistrial is granted, a new 120-day time period under this rule shall begin on the date of dismissal or mistrial for cases in which there is no repreferral and cases in which the accused is in pretrial restraint. In all other cases, a new 120-day time period under the rule shall begin on the earlier of
(i) the date of repreferral;
(ii) the date of imposition of restraint under R.C.M. 304(a)(2)-(4).

(B) Release from restraint. If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the date of dismissal or mistrial for cases in which there is no repreferral and cases in which the accused is in pretrial restraint. In all other cases, a new 120-day time period under the rule shall begin on the earlier of
(i) the date of preferral of charges;
(ii) the date on which restraint under R.C.M. 304(a) (2)-(4) is reimposed; or
(iii) the date of entry on active duty under R.C.M. 204.

(C) Government appeals. If notice of appeal under R.C.M. 908 is filed, a new 120-day time period under this rule shall begin, for all charges neither proceeded on nor severed under R.C.M. 908(b)(4), on the date of notice to the parties under R.C.M. 908(b)(8) or 908(e)(3), unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. After the decision of the Court of Military Review under R.C.M. 908, if there is a further appeal to the Court of Military Appeals or, subsequently, to the Supreme Court, a new 120-day time period under this rule shall begin on the date the parties are notified of the final decision of the Court of Military Appeals, or, if appropriate, the Supreme Court.

(D) Rehearings. If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing.

(e) Excludable delay. All periods of time covered by stays issued by appellate courts and all other pretrial delays approved by a military judge or the convening authority shall be excluded when determining whether the period in subsection (a) of this rule has run.

(1) Procedure. Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

Discussion

The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge. This decision should be based on the facts and circumstances then and there existing. Reasons to grant a delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.

Pretrial delays should not be granted ex parte, and when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.

Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer.

(2) Motions. Upon accused's timely motion to a military judge under R.C.M. 905 for speedy trial re-
R.C.M. 707(c)(2)

lied, counsel should provide the court a chronology detailing the processing of the case. This chronology should be made a part of the appellate record.

(d) Remedy. A failure to comply with the right to a speedy trial will result in dismissal of the affected charges. This dismissal will be with or without prejudice to the government's right to reinstitute court martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

(e) Waiver. Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense.

Discussion

Speedy trial issues may also be waived by a failure to raise the issue at trial. See R.C.M. 905(e) and 907(b)(2).
CHAPTER VIII. TRIAL PROCEDURE GENERALLY

Rule 801. Military judge’s responsibilities; other matters

(a) Responsibilities of military judge. The military judge is the presiding officer in a court-martial.

Discussion

The military judge is responsible for ensuring that court-martial proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources. Unless otherwise specifed, the president of a special court-martial without a military judge has the same authority and responsibility as a military judge. See R.C.M. 502(b)(2).

The military judge shall:

1) Determine the time and uniform for each session of a court-martial;

Discussion

The military judge should consult with counsel concerning the scheduling of sessions and the uniform to be worn. The military judge recesses or adjourns the court-martial as appropriate. Subject to R.C.M. 504(d)(1), the military judge may also determine the place of trial. See also R.C.M. 906(b)(11).

2) Ensure that the dignity and decorum of the proceedings are maintained;

Discussion

See also R.C.M. 804 and 806. Courts-martial should be conducted in an atmosphere which is conducive to calm and detached deliberation and determination of the issues presented and which reflects the seriousness of the proceedings.

3) Subject to the code and this Manual, exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual;

Discussion

See R.C.M. 102. The military judge may, within the framework established by the code and this Manual, prescribe the manner and order in which the proceedings may take place. Thus, the military judge may determine: when, and in what order, motions will be litigated (see R.C.M. 905); the manner in which voir dire will be conducted and challenges made (see R.C.M. 902(d) and 912); the order in which witnesses may testify (see R.C.M. 913; Mil.R.Evid. 611); the order in which the parties may argue on a motion or objection; and the time limits for argument (see R.C.M. 905; 919; 1001(g)).

The military judge should prevent unnecessary waste of time and promote the ascertainment of truth, but must avoid undue interference with the parties’ presentations or the appearance of partiality. The parties are entitled to a reasonable opportunity to properly present and support their contentions on any relevant matter.

4) Subject to subsection (e) of this rule, rule on all interlocutory questions and all questions of law raised during the court-martial; and

5) Instruct the members on questions of law and procedure which may arise.

Discussion

The military judge instructs the members concerning findings (see R.C.M. 920) and sentence (see R.C.M. 1005), and when otherwise appropriate. For example, preliminary instructions to the members concerning their duties and the duties of other trial participants and other matters are normally appropriate. See R.C.M. 913. Other instructions (for example, instructions on the limited purpose for which evidence has been introduced, see Mil.R.Evid. 105) may be given whenever the need arises.

(b) Rules of court; contempt. The military judge may:

1) Subject to R.C.M. 108, promulgate and enforce rules of court.

2) Subject to R.C.M. 809, exercise contempt power.

(c) Obtaining evidence. The court-martial may act to obtain evidence in addition to that presented at the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.

Discussion

The members may request and the military judge may require that a witness be recalled, or that a new witness be summoned, or other evidence produced. The members or military judge may direct trial counsel to make an inquiry along certain lines to discover and produce additional evidence. See also Mil.R.Evid. 614. In taking such action, the court-martial must not depart from an impartial role.

(d) Uncharged offenses. If during the trial there is evidence that the accused may be guilty of an untried offense not alleged in any specification before the court-martial, the court-martial shall proceed with the trial of the offense charged.
Discussion

A report of the matter may be made to the convening authority after trial. If charges are preferred for an offense indicated by the evidence referred to in this subsection, no member of the court-martial who participated in the first trial should sit in any later trial. Such a member would ordinarily be subject to a challenge for cause. See R.C.M. 912. See also Mil.R.Evid. 105 concerning instructing the members on evidence of uncharged misconduct.

(e) Interlocutory questions and questions of law. For purposes of this subsection “military judge” does not include the president of a special court-martial without a military judge.

(1) Rulings by the military judge.

(A) Finality of rulings. Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final.

(B) Changing a ruling. The military judge may change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(C) Article 39(a) sessions. When required by this Manual or otherwise deemed appropriate by the military judge, interlocutory questions or questions of law shall be presented and decided at sessions held without members under R.C.M. 803.

Discussion

Sessions without members are appropriate for interlocutory questions, questions of law, and instructions. See also Mil.R.Evid. 103; 304; 311; 321. Such sessions should be used to the extent possible consistent with the orderly, expeditious progress of the proceedings.

(2) Ruling by the president of a special court-martial without a military judge.

(A) Questions of law. Any ruling by the president of a special court-martial without a military judge on any question of law other than a motion for a finding of not guilty is final.

(B) Questions of fact. Any ruling by the president of a special court-martial without a military judge on any interlocutory question of fact, including a factual issue of mental capacity of the accused, or on a motion for a finding of not guilty, is final unless objected to by a member.

(C) Changing a ruling. The president of a special court-martial without a military judge may change a ruling made by that or another president in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(D) Presence of members. Except as provided in R.C.M. 505 and 912, all members will be present at all sessions of a special court-martial without a military judge, including sessions at which questions of law or interlocutory questions are litigated. However, the president of a special court-martial without a military judge may examine an offered item of real or documentary evidence before ruling on its admissibility without exposing it to other members.

(3) Procedures for rulings by the president of a special court-martial without a military judge which are subject to objection by a member.

(A) Determination. The president of a special court-martial without a military judge shall determine whether a ruling is subject to objection.

(B) Instructions. When a ruling by the president of a special court-martial without a military judge is subject to objection, the president shall so advise the members and shall give such instructions on the issue as may be necessary to enable the members to understand the issue and the legal standards by which they will determine it if objection is made.

(C) Voting. When a member objects to a ruling by the president of a special court-martial without a military judge which is subject to objection, the court-martial shall be closed, and the members shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote on a motion for a finding of not guilty is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

(D) Consultation. The president of a special court-martial without a military judge may close the court-martial and consult with other members before ruling on a matter, when such ruling is subject to the objection of any member.

(4) Standard of proof. Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absence of a rule in this Manual assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion.
Discussion

A ruling on an interlocutory question should be preceded by any necessary inquiry into the pertinent facts and law. For example, the party making the objection, motion, or request may be required to furnish evidence or legal authority in support of the contention. An interlocutory issue may have a different standard of proof. See, for example, Mil.R.Evid. 314(e)(5), which requires consent for a search to be proved by clear and convincing evidence.

Most of the common motions are discussed in specific rules in this Manual, and the burden of persuasion is assigned therein. The prosecution usually bears the burden of persuasion (see Mil.R.Evid. 304(e); 311(e); see also R.C.M. 905 through 907) once an issue has been raised. What "raises" an issue may vary with the issue. Some issues may be raised by a timely motion or objection. See, for example, Mil.R.Evid. 304(e). Others may not be raised until the defense has made an offer of proof or presented evidence in support of its position. See, for example, Mil.R.Evid. 311(g)(2). The rules in this Manual and relevant decisions should be consulted when a question arises as to whether an issue is raised, as well as which side has the burden of persuasion. The military judge or president of a special court-martial may require a party to clarify a motion or objection or to make an offer of proof, regardless of the burden of persuasion, when it appears that the motion or objection is vague, inapposite, irrelevant, or spurious.

(5) Scope. Subsection (e) of this rule applies to the disposition of questions of law and interlocutory questions arising during trial except the question whether a challenge should be sustained.

Discussion

Questions of law and interlocutory questions include all issues which arise during trial other than the findings (that is, guilty or not guilty), sentence, and administrative matters such as declaring recesses and adjournments. A question may be both interlocutory and a question of law. Challenges are specifically covered in R.C.M. 902 and 912.

Questions of the applicability of a rule of law to an undisputed set of facts are normally questions of law. Similarly, the legality of an act is normally a question of law. For example, the legality of an order when disobedience of an order is charged, the legality of restraint when there is a prosecution for breach of arrest, or the sufficiency of warnings before interrogation are normally questions of law. It is possible, however, for such questions to be decided solely upon some factual issue, in which case they would be questions of fact. For example, the question of what warnings, if any, were given by an interrogator to a suspect would be a factual question.

A question is interlocutory unless the ruling on it would finally decide whether the accused is guilty. Questions which may determine the ultimate issue of guilt are not interlocutory. An issue may arise as both an interlocutory question and a question which may determine the ultimate issue of guilt. An issued is not purely interlocutory if an accused raises a defense or objection and the disputed facts involved determine the ultimate question of guilt. For example, if, during a trial for desertion the accused moves to dismiss for lack or jurisdiction and presents some evidence that the accused is not a member of an armed force, the accused's status as a military person may determine the ultimate question of guilt because status is an element of the offense. If the motion is denied, the disputed facts must be resolved by each member in deliberation upon the findings. (The accused's status as a servicemember would have to be proved by a preponderance of the evidence to uphold jurisdiction, see R.C.M. 907, but beyond a reasonable doubt to permit a finding of guilty.) If, on the other hand, the accused was charged with larceny and presented the same evidence as to military status, the evidence would bear only upon amenability to trial and the issue would be disposed of solely as an interlocutory question.

Interlocutory questions may be questions of fact or questions of law. This distinction is important because the president of a special court-martial without a military judge rules finally on interlocutory questions of law, but not on interlocutory questions of fact. On interlocutory questions of fact the president of a special court-martial without a military judge rules subject to the objection of any other member. On mixed questions of fact and law, rulings by the president are subject to objection by any member to the extent that the issue of fact can be isolated and considered separately.

(f) Rulings on record. All sessions involving rulings or instructions made or given by the military judge or the president of a special court-martial without a military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge. For purposes of this subsection [R.C.M. 801(f)] "military judge" does not include the president of a special court-martial without a military judge.

Discussion

See R.C.M. 808 and 1103 concerning preparation of the record of trial.

(g) Effect of failure to raise defenses or objections. Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, but the military judge for good cause shown may grant relief from the waiver.
Rule 802. Conferences

(a) In general. After referral, the military judge may, upon request of any party or sua sponte, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial.

Discussion

Conferences between the military judge and counsel may be held when necessary before or during trial. The purpose of such conference is to inform the military judge of anticipated issues and to expeditiously resolve matters on which the parties can agree, not to litigate or decide contested issues. See subsection (c) below. No party may be compelled to resolve any matter at a conference.

A conference may be appropriate in order to resolve scheduling difficulties, so that witnesses and members are not unnecessarily inconvenienced. Matters which will ultimately be in the military judge’s discretion, such as conduct of voir dire, seating arrangements in the courtroom, or procedures when there are multiple accused may be resolved at a conference. Conferences may be used to advise the military judge of issues or problems, such as unusual motions or objections, which are likely to arise during trial.

Occasionally it may be appropriate to resolve certain issues, in addition to routine or administrative matters, if this can be done with the consent of the parties. For example, a request for a witness which, if litigated and approved at trial, would delay the proceedings and cause expense or inconvenience, might be resolved at a conference. Note, however, that this could only be done by an agreement of the parties and not by a binding ruling of the military judge. Such a resolution must be included in the record. See subsection (b) below.

A military judge may not participate in negotiations relating to pleas. See R.C.M. 705 and Mil.R.Evid. 410.

No place or method is prescribed for conducting a conference. A conference may be conducted by radio or telephone.

(b) Matters on record. Conferences need not be made part of the record, but matters agreed upon at a conference shall be included in the record orally or in writing. Failure of a party to object at trial to failure to comply with this subsection shall waive this requirement.

(c) Rights of parties. No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial.

(d) Accused's presence. The presence of the accused is neither required nor prohibited at a conference.

Rule 803. Court-martial sessions without members under Article 39(a)

A military judge who has been detailed to the court-martial may, under Article 39(a), after service of charges, call the court-martial into session without the presence of members. Such sessions may be held before and after assembly of the court-martial, and when authorized in these rules, after adjournment and before action by the convening authority. All such sessions are a part of the trial and shall be conducted in the presence of the accused, defense counsel, and trial counsel, in accordance with R.C.M. 804 and 805, and shall be made a part of the record. For purposes of this rule “military judge” does not include the president of a special court-martial without a military judge.

Discussion

The purpose of Article 39(a) is “to give statutory sanction to pretrial and other hearings without the presence of the members concerning those matters which are amendable to disposition on either a tentative or final basis by the military judge.” The military judge and members may, and ordinarily should, call the court-martial into session without members to ascertain the accused’s understanding of the right to counsel, the right to request trial by military judge alone, and when applicable, enlisted members, and the accused’s choices with respect to these matters; dispose of interlocutory matters; hear objections and motions; rule upon other matters that may legally be ruled upon by the military judge, such as admitting evidence; and perform other procedural functions which do not require the presence of members. See, for example, R.C.M. 901–910. The military judge may, if permitted by regulations of the Secretary concerned, hold the arraignment, receive pleas, and enter findings of guilty upon an accepted plea of guilty.
Evidence may be admitted and process, including a subpoena, may be issued to compel attendance of witnesses and production of evidence at such sessions. See R.C.M. 703.

Article 39(a) authorizes sessions only after charges have been referred to trial and served on the accused, but the accused has an absolute right to object, in time of peace, to any session until the period prescribed by Article 35 has run.

See R.C.M. 804 concerning waiver by the accused of the right to be present. See also R.C.M. 802 concerning conferences.

Rule 804. Presence of the accused at trial proceedings

(a) Presence required. The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, sentencing proceedings, and post-trial sessions, if any, except as otherwise provided by this rule.

(b) Continued presence not required. The further progress of the trial to an including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present:

(1) Is voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain during the trial); or

(2) After being warned by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

Discussion

Express waiver. The accused may expressly waive the right to be present at trial proceedings. There is no right to be absent, however, and the accused may be required to be present over objection. Thus, an accused cannot frustrate efforts to identify the accused at trial by waiving the right to be present. The right to be present is so fundamental, and the Government's interest in the attendance of the accused so substantial, that the accused should be permitted to waive the right to be present only for good cause, and only after the military judge explains to the accused the right, and the consequences of foregoing it, and secures the accused's personal consent to proceeding without the accused.

Voluntary absence. In any case the accused may forfeit the right to be present by being voluntarily absent after arraignment. "Voluntary absence" means voluntary absence from trial. For an absence from court-martial proceedings to be voluntary, the accused must have known of the scheduled proceedings and intentionally missed them. For example, although an accused ser-
R.C.M. 804(b)(2)

to the courtroom at appropriate intervals, and offered the opportunity to remain upon good behavior.

(D) Ensure that the reasons for removal appear in the record.

(c) Appearance and security of accused.

(1) Appearance. The accused shall be properly attired in the uniform or dress prescribed by the military judge. An accused servicemember shall wear the insignia of grade and may wear any decorations, emblems, or ribbons to which entitled. The accused and defense counsel are responsible for ensuring that the accused is properly attired; however, upon request, the accused’s commander shall render such assistance as may be reasonably necessary to ensure that the accused is properly attired.

Discussion

This subsection recognizes the right, as well as the obligation, of an accused servicemember to present a good military appearance at trial. An accused servicemember who refuses to present a proper military appearance before a court-martial may be compelled to do so.

(2) Custody. Responsibility for maintaining custody or control of an accused before and during trial may be assigned, subject to R.C.M. 304 and 305, and subsection (c)(3) of this rule, under such regulations as the Secretary concerned may prescribe.

(3) Restraint. Physical restraint shall not be imposed on the accused during open sessions of the court-martial unless prescribed by the military judge.

Rule 805. Presence of military judge, members, and counsel

(a) Military judge. No court-martial proceeding, except the deliberations of the members, may take place in the absence of the military judge, if detailed.

(b) Members. Unless trial is by military judge alone pursuant to a request by the accused, no court-martial proceeding may take place in the absence of any detailed member except: Article 39(a) sessions under R.C.M. 803; examination of members under R.C.M. 912(d); when the member has been excused under R.C.M. 505 or 912(f); or as otherwise provided in R.C.M. 1102. No general court-martial proceeding requiring the presence of members may be conducted unless at least 5 members are present and, except as provided in R.C.M. 912(h), no special court-martial proceeding requiring the presence of members may be conducted unless at least 3 members are present. Except as provided in R.C.M. 503(b), when an enlisted accused has requested enlisted members, no proceeding requiring the presence of members may be conducted unless at least one-third of the members actually sitting on the court-martial are enlisted persons.

(c) Counsel. As long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a court-martial session. An assistant counsel who lacks the qualifications necessary to serve as counsel for a party may not act at a session in the absence of such qualified counsel.

Discussion

See R.C.M. 504(d) concerning qualifications of counsel.

Ordinarily, no court-martial proceeding should take place if any defense or assistant defense counsel is absent unless the accused expressly consents to the absence. The military judge may, however proceed in the absence of one or more defense counsel, without the consent of the accused, if the military judge finds that, under the circumstances, a continuance, a continuance is not warranted and that the accused’s right to be adequately represented would not be impaired.

See R.C.M. 502(d)(6) and 505(d)(2) concerning withdrawal or substitution of counsel. See R.C.M. 506(d) concerning the right of the accused to proceed without counsel.

(d) Effect of replacement of member or military judge.

(1) Members. When after presentation of evidence on the merits has begun, a new member if detailed under R.C.M. 505(c)(2)(B), trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to the new member, or, if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented.

Discussion

When a new member is detailed, the military judge should give such instructions as may be appropriate. See also R.C.M. 912 concerning voir dire and challenges.

When the court-martial has been reduced below a quorum, a mistrial may be appropriate. See R.C.M. 915.
Rule 806. Public trial

(a) In general. Except as otherwise provided in this rule, courts-martial shall be open to the public. For purposes of this rule, "public" includes members of both the military and civilian communities.

Discussion

Because of the requirement for public trials, courts-martial must be conducted in facilities which can accommodate a reasonable number of spectators. Military exigencies may occasionally make attendance at courts-martial difficult or impracticable, as, for example, when a court-martial is conducted on a ship at sea or in a unit in a combat zone. This does not violate this rule. However, such exigencies should not be manipulated to prevent attendance at a court-martial. The requirements of this rule may be met even though only servicemembers are able to attend a court-martial. Although not required, servicemembers should be encouraged to attend courts-martial.

When public access to a court-martial is limited for some reason, including lack of space, special care must be taken to avoid arbitrary exclusion of specific groups or persons. This may include allocating a reasonable number of seats to members of the press and to relatives of the accused, and establishing procedures for entering and exiting from the courtroom. See also subsection (b) below. There is no requirement that there actually be spectators at a court-martial.

The fact that a trial is conducted with members does not make it a public trial.

(b) Control of spectators. In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, exclude specific persons from the courtroom, and close a session; however, a session may be closed over the objection of the accused only when expressly authorized by another provision of this Manual.

Discussion

The military judge is responsible for protecting both the accused's right to and the public's interest in a public trial. The military judge must also ensure that the dignity and decorum of the proceedings are maintained and that the other rights and interests of the parties and society are protected. Public access to a session may be limited, and certain persons excluded from the courtroom, and, under unusual circumstances, a session may be closed.

A court-martial session is "closed" when no member of the public is permitted to attend. A court-martial is not "closed" merely because the exclusion of certain individuals results in there being no spectators present, so long as the exclusion is not so broad as to effectively bar everyone who might attend the sessions and is for a proper purpose. Note, however, that exclusion of specific individuals, if unreasonable under the circumstances, may violate the accused's right to a public trial, even though other spectators remain.

Whenever a session is closed, or some of the public is excluded, closure or exclusion must be limited in time and scope to the minimum necessary to achieve the purpose for which it is authorized. Prevention of overcrowding or noise may justify limiting access to the courtroom. Disruptive or distracting appearance or conduct may justify excluding certain spectators. Certain spectators may be excluded when necessary to protect witnesses from harm or intimidation. Access may be reduced when no other means is available to relieve inability to testify due to embarrassment or extreme nervousness.

Under some circumstances, it may be necessary to conduct an evidentiary hearing to justify exclusion of some spectators (for example, where harm to or intimidation of a witness is the reason for the exclusion).

A session may be closed without the consent of the accused only under Mil.R.Evid. 412(c), 505(i) and (j), or 506(i).

Witnesses will ordinarily be excluded from the courtroom so that they cannot hear the testimony of other witnesses. See Mil.R.Evid. 615. In addition, witnesses may be instructed not to discuss their testimony or prospective testimony with anyone except counsel, counsel’s agent, or the accused in the case.

The accused may waive the right to a public trial. The fact that the prosecution and defense jointly seek to have some sessions closed does not, however, automatically justify closure, for the public has an interest in attending courts-martial. Opening courts-martial to public scrutiny reduces the chance of arbitrary or capricious decisions and enhances public confidence in the court-martial process. Absent an overriding interest articulated in findings, a court-martial must be open to the public.

The most likely reason for a defense request to close court-martial proceedings is to minimize the potentially adverse effect of publicity on the trial. Thus, for example, a pretrial Article 39(a) hearing at which the admissibility of a confession will be litigated may, under some circumstances, be closed in order to prevent disclosure to the public (and hence to potential members) of the very evidence that may be excluded. When such publicity may be a problem a session should be closed only as a last resort.

There are other methods of protecting the proceedings from harmful effects of publicity, including a thorough voir dire (see R.C.M. 912), and, if necessary, a continuance to allow the harmful effects of publicity to dissipate. See R.C.M. 906(b)(1). Other methods which may occasionally be appropriate and which are usually preferable to closing a session include: directing members not to read, listen to, or watch any accounts concerning the case; directing counsel, witnesses, and other personnel connected with
the case not to discuss the case with certain persons (see R.C.M. 801); and selecting members from recent arrivals in the command, or from outside the immediate area (see R.C.M. 503(a)(3)). In more extreme cases, the place of trial may be changed (see R.C.M. 906(b)(11)) or members may be sequestered.

Occasionally the defense and prosecution may agree to request a closed session to enable a witness to testify without fear of intimidation or acute embarrassment, or to testify about a matter which, while not classified, is of a sensitive or private nature. Closure may be appropriate in such cases, but the military judge must carefully examine the reasons for the request and weigh them against the public’s interest in attending courts-martial. Excluding only part of the public may be more appropriate in some cases.

(c) Photography and broadcasting prohibited. Video and audio recording and the taking of photographs—except for the purpose of preparing the record of trial—in the courtroom during the proceedings and radio or television broadcasting of proceedings from the courtroom shall not be permitted. However, the military judge may, as a matter of discretion permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed under R.C.M. 804 or by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

Rule 807. Oaths

(a) Definition. “Oath” includes “affirmation.”

Discussion

An affirmation is the same as an oath, except in an affirmation the words “so help you God” are omitted.

(b) Oaths in courts-martial.

(1) Who must be sworn.

(A) Court-martial personnel. The military judge, members of a general or special court-martial, trial counsel, assistant trial counsel, defense counsel, associate defense counsel, assistant defense counsel, reporter, interpreter, and escort shall take an oath to perform their duties faithfully. For purposes of this rule, “defense counsel,” “associate defense counsel,” and “assistant defense counsel,” include detailed and individual military and civilian counsel.

Discussion

Article 42(a) provides that regulations of the Secretary concerned shall prescribe: the form of the oath; the time and place of the taking thereof; the manner of recording it; and whether the oath shall be taken for all cases in which the duties are to be performed or in each case separately. In the case of certified legal personnel (Article 26(b); Article 27(b)) these regulations may provide for the administration of an oath on a one-time basis. See also R.C.M. 813 and 901 concerning the point in the proceedings at which it is ordinarily determined whether the required oaths have been taken or are then administered.

(B) Witnesses. Each witness before a court-martial shall be examined on oath.

Discussion

See R.C.M. 307 concerning the requirement for an oath in preferral of charges. See R.C.M. 405 and 702 concerning the requirements for an oath in Article 32 investigations and depositions.

An accused making an unsworn statement is not a “witness.” See R.C.M. 1001(c)(2)(C).

(2) Procedure for administering oaths. Any procedure which appeals to the conscience of the person to whom the oath is administered and which binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

(A) Oath for military judge. When the military judge is not previously sworn, the trial counsel will administer the following oath to the military judge:

“Do you (swear) (affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trial by court-martial, all the duties incumbent upon you as military judge of this court-martial ( , so help you God)?”

(B) Oath for members. The following oath, as appropriate, will be administered to the members by the trial counsel:

“Do you (swear) (affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trial by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opin-
ion of any particular member of the court (upon a challenge or upon the findings or sentence unless required to do so in due course of law (so help you God)?)

(C) Oaths for counsel. When counsel for either side, including any associate or assistant, is not previously sworn the following oath, as appropriate, will be administered by the military judge:

"Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) counsel in the case now in hearing (so help you God)?"

(D) Oath for reporter. The trial counsel will administer the following oath to every reporter of a court-martial who has not been previously sworn:

"Do you (swear) (affirm) that you will faithfully perform the duties of reporter to this court-martial (so help you God)?"

(E) Oath for interpreter. The trial counsel or the summary court-martial shall administer the following oath to every interpreter in the trial of any case before a court-martial:

"Do you (swear) (affirm) that in the case now in hearing you will interpret truly the testimony you are called upon to interpret (so help you God)?"

(F) Oath for witnesses. The trial counsel or the summary court-martial will administer the following oath to each witness before the witness first testifies in a case:

"Do you (swear) (affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth (so help you God)?"

(G) Oath for escort. The escort on views or inspections by the court-martial will, before serving, take the following oath, which will be administered by the trial counsel:

"Do you (swear) (affirm) that you will escort the court-martial and will well and truly point out to them (the place in which the offense charged in this case is alleged to have been committed), and that you will not speak to the members concerning (the alleged offense), except to describe (the place aforesaid), (so help you God)?"

See Article 136 concerning persons authorized to administer oaths.

Rule 808. Record of trial

The trial counsel of a general or special court-martial shall take such action as may be necessary to ensure that a record which will meet the requirements of R.C.M. 1103 can be prepared.

Discussion

Except in a special court-martial not authorized to adjudge a bad-conduct discharge (that is, when no qualified reporter is detailed or, absent exigency, military judge is detailed), the trial counsel should ensure that a qualified court reporter is detailed to the court-martial. Trial counsel should also ensure that all exhibits and other documents relating to the case are properly maintained for later inclusion in the record. See also R.C.M. 1103(j) as to the use of videotapes, audiotapes, and similar recordings for the record of trial. Because of the potential requirement for a verbatim transcript, all proceedings, including sidebar conferences, arguments, and rulings and instructions by the military judge, should be recorded.

Where there is recorder failure or loss of court reporter's notes, the record should be reconstructed as completely as possible. See also R.C.M. 1103(f). If the interruption is discovered during trial, the military judge should summarize or reconstruct the portion of the proceedings which has not been recorded and then proceed anew and repeat the proceedings from the point where the interruption began.

See R.C.M. 1305 concerning the record of trial in summary courts-martial.

See DD Forms 490 (Record of Trial), 491 (Summarized Record of Trial), and 491–1 (Summarized Record of Trial—Article 39(a) Session).

Rule 809. Contempt proceedings

(a) In general. Courts-martial may exercise contempt power under Article 48.

Discussion

Article 48 provides: "A court-martial provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both."

Article 48 makes punishable "direct" contempt, that is, contempt which is committed in the presence of the court-martial or its immediate proximity. "Presence" includes those places outside the courtroom itself, such as waiting areas, deliberation room, and other places set aside for the use of the court-martial while it is in session. A "direct" contempt may be actually seen or heard by the court-martial, in which case it may be punished summarily. See subsection (b)(1) below. A "direct" contempt may also be a contempt not actually observed by the court-martial, for example, when an unseen person makes loud noises, whether inside or outside the courtroom, which impede the orderly progress of the proceedings. In such a case the procedures for punishing for contempt are more extensive. See subsection (b)(2) below.

The words "any person," as used in Article 48, include all persons, whether or not subject to military law, except the military judge, members, and foreign nationals outside the territorial limits of the United States who are not subject to the code.

Each contempt may be separately punished.

A person subject to the code who commits contempt may be tried by court-martial or otherwise disciplined for such misconduct in addition to or instead of punishment for contempt. The military judge may order the offender removed whether or not contempt proceedings are held. In some cases it may be appropriate to warn a person whose conduct is improper that persistence
R.C.M. 809(a)

therein may result in removal or punishment for contempt. See R.C.M. 804, 806.

The military judge may issue orders when appropriate to ensure the orderly progress of the trial. Violation of such orders is not punishable under Article 48, but may be prosecuted as a violation of Article 90 or 92. See also Article 98.

Refusal to appear or to testify is not punishable under Article 48. Persons not subject to military law having been duly subpoenaed, may be prosecuted in Federal civilian court under Article 47 for neglect or refusal to appear or refusal to qualify as a witness or to testify or to produce evidence. Persons subject to the code may be punished under Article 134 for such offenses. See paragraph 108, Part IV.

A summary court-martial may punish for contempt.

(b) Method of disposition.

(1) Summary disposition. When conduct constituting contempt is directly witnessed by the court-martial, the conduct may be punished summarily. In such cases, the regular proceedings shall be suspended while the contempt is disposed of.

(2) Disposition upon notice and hearing. When the conduct apparently constituting contempt is not directly witnessed by the court-martial, the alleged offender shall be brought before the court-martial and informed orally or in writing of the alleged contempt. The alleged offender shall be given a reasonable opportunity to present evidence, including calling witnesses. The alleged offender shall have the right to be represented by counsel and shall be so advised. The contempt must be proved beyond a reasonable doubt before it may be punished.

(c) Procedure; who may punish for contempt.

(1) Members not present. When the conduct allegedly constituting contempt occurs during a session when the members are not present, the military judge shall determine whether to punish for contempt, and, if so, what the punishment shall be. The military judge may punish summarily under subsection (b)(1) only if the military judge recites the facts for the record and states that they were directly witnessed by the military judge in the actual presence of the court-martial.

(2) Members present. When the conduct allegedly constituting contempt occurs during a session when the members are present, contempt proceedings may be initiated by the military judge or upon motion of any member, unless the military judge rules that as a matter of law, contempt has not been committed. If contempt proceedings are initiated the following procedures apply.

(A) Instructions. The military judge shall instruct the members so that they can properly decide the questions presented.

(B) Findings. The members shall decide in a closed session, upon vote by secret written ballot whether to hold an alleged offender in contempt. At least two-thirds of the members must concur in a finding of contempt to convict unless that member directly witnessed the conduct in question in the presence of the court-martial and finds it to be contemptuous.

(C) Sentence. If the members find the offender in contempt, they shall, without reopening the court-martial determine the punishment in accordance with the procedures in R.C.M. 1006.

(D) Announcement. After reaching findings, and, if necessary, a sentence, the court-martial shall be reopened and the results announced by the president.

(d) Record; review. A record of the contempt proceedings shall be part of the record of the court-martial during which it occurred. If the person was held in contempt, then a separate record of the contempt proceedings shall be prepared and forwarded to the convening authority for review. The convening authority may approve or disapprove all or part of the sentence. The action of the convening authority is not subject to further review or appeal.

(e) Sentence. A sentence of confinement pursuant to a finding of contempt shall begin to run when it is adjudged unless deferred, suspended, or disapproved by the convening authority. The place of confinement for a civilian or military person who is held in contempt and is to be punished by confinement shall be designated by the convening authority. A fine does not become effective until ordered executed by the convening authority. The military judge may delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in the proceedings.

Discussion

The immediate commander of the person held in contempt, or, in the case of a civilian, the convening authority should be notified immediately so that the necessary action on the sentence may be taken. See R.C.M. 1101.

(f) Informing person held in contempt. The person held in contempt shall be informed by the convening
authority in writing of the holding and sentence, if any, of the court-martial and of the action of the convening authority upon the sentence.

**Discussion**

Copies of this communication should be furnished to such other persons including the immediate commander of the offender as may be concerned with the execution of the punishment. A copy shall be included with the record of both the trial and the contempt proceeding.

**Rule 810. Procedures for rehearings, new trials, and other trials**

(a) In general.

(1) *Rehearings in full and new or other trials.* In rehearings which require findings on all charges and specifications referred to a court-martial and in new or other trials, the procedure shall be the same as in an original trial except as otherwise provided in this rule.

(2) *Rehearings on sentence only.* In a rehearing on sentence only, the procedure shall be the same as in an original trial, except that the portion of the procedure which ordinarily occurs after challenges and through and including the findings is omitted, and except as otherwise provided in this rule.

(A) *Contents of the record.* The contents of the record of the original trial consisting of evidence properly admitted on the merits relating to each offense of which the accused stands convicted but not sentenced may be established by any party whether or not testimony so read is otherwise admissible under Mil.R.Evid. 804(b)(1) and whether or not it was given through an interpreter.

(b) *Composition.*

(1) *Members.* No member of the court-martial which previously heard the case may sit as a member of the court-martial at any rehearing, new trial, or other trial of the same case.

(2) *Military judge.* The military judge at a rehearing may be the same military judge who presided over a previous trial of the same case. The existence or absence of a request for trial by military judge alone at a previous hearing shall have no effect on the composition of a court-martial on rehearing.

(3) *Accused’s election.* The accused at a rehearing or new or other trial shall have the same right to request enlisted members or trial by military judge alone as the accused would have at an original trial.

**Discussion**

See R.C.M. 902; 903.

(c) *Examination of record of former proceedings.* No member may, upon a rehearing or upon a new or other trial, examine the record of any former proceedings in the same case except:

(1) When permitted to do so by the military judge after such matters have been received in evidence; or

(2) That the president of a special court-martial without a military judge may examine that part of the record of former proceedings which relates to errors committed at the former proceedings when necessary to decide the admissibility of offered evidence or other questions of law, and such a part of the record may be read to the members when necessary for them to consider a matter subject to objection by any member.
Rule 810(c)(2)

Discussion

See R.C.M. 801(e)(2).

When a rehearing is ordered, the trial counsel should be provided a record of the former proceedings, accompanying documents, and any decision or review relating to the case, as well as a statement of the reason for the rehearing.

(d) Sentence limitations.

(1) In general. Except as otherwise provided in subsection (d)(2) of this rule, offenses on which a rehearing, new trial, or other trial has been ordered shall not be the basis for punishment in excess of or more severe than the legal sentence adjudged at the previous trial or hearing, as ultimately reduced by the convening or higher authority, unless the sentence prescribed for the offense is mandatory. When a rehearing on sentencing is combined with trial on new charges, the maximum punishment shall be the maximum punishment for the offenses being reheard as limited above plus the total maximum punishment under R.C.M. 1003 for any new charges of which the accused has been found guilty. In the case of an “other trial” no sentence limitations apply if the original trial was invalid because a summary or special court-martial improperly tried an offense involving a mandatory punishment or one otherwise considered capital.

Discussion

In adjudging a sentence not in excess of one more severe than one imposed previously, a court-martial is not limited to adjudging the same or a lesser amount of the same type of punishment formerly adjudged. An appropriate sentence on a retried or reheard offense should be adjudged without regard to any credit to which the accused may be entitled.

See R.C.M. 201(f)(2)(C); 1301(c).

See R.C.M. 103(2) and (3) as to when a rehearing may be a capital case.

The members should not be advised of the basis for the sentence limitation under this rule.

(2) Pretrial agreement. If, after the earlier court-martial, the sentence was approved in accordance with a pretrial agreement and at the rehearing the accused fails to comply with the pretrial agreement, by failing to enter a plea of guilty or otherwise, the sentence as to the affected charges and specifications may include any otherwise lawful punishment not in excess of or more severe than that lawfully adjudged at the earlier court-martial.

(e) Definition. “Other trial” means another trial of a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense.

Rule 811. Stipulations

(a) In general. The parties may make an oral or written stipulation to any fact, the contents of a document, or the expected testimony of a witness.

(b) Authority to reject. The military judge may, in the interest of justice, decline to accept a stipulation.

Discussion

Although the decision to stipulate should ordinarily be left to the parties, the military judge should not accept a stipulation if there is any doubt of the accused’s or any other party’s understanding of the nature and effect of the stipulation. The military judge should also refuse to accept a stipulation which is unclear or ambiguous. A stipulation of fact which amounts to a complete defense to any offense charged should not be accepted nor, if a plea of not guilty is outstanding, should one which practically amounts to a confession, except as described in the discussion under subsection (c) of this rule. If a stipulation is rejected, the parties may be entitled to a continuance.

(c) Requirements. Before accepting a stipulation in evidence, the military judge must be satisfied that the parties consent to its admission.

Discussion

Ordinarily, before accepting any stipulation the military judge should inquire to ensure that the accused understands the right not to stipulate, understands the stipulation, and consents to it.

If the stipulation practically amounts to a confession to an offense to which a not guilty plea is outstanding, it may not be accepted unless the military judge ascertains: (A) from the accused that the accused understands the right not to stipulate and that the stipulation will not be accepted without the accused's consent; that the accused understands the contents and effect of the stipulation; that a factual basis exists for the stipulation; and that the accused, after consulting with counsel, consents to the stipulation; and (B) from the accused and counsel for each party whether there are any agreements between the parties in connection with the stipulation, and, if so, what the terms of such agreements are.

A stipulation practically amounts to a confession when it is the equivalent of a guilty plea, that is, when it establishes, directly or by reasonable inference, every element of a charged offense and when the defense does not present evidence to contest any potential remaining issue of the merits. Thus, a stipulation which tends to establish, by reasonable inference, every element of a charged offense does not practically amount to a confession if the defense contests an issue going to guilt which is not foreclosed by the stip-
ulation. For example, a stipulation of fact that contraband drugs were discovered in a vehicle owned by the accused would normally practically amount to a confession if no other evidence were presented on the issue, but would not if the defense presented evidence to show that the accused was unaware of the presence of the drugs. Whenever a stipulation establishes the elements of a charged offense, the military judge should conduct an inquiry as described above.

If, during an inquiry into a confessional stipulation the military judge discovers that there is a pretrial agreement, the military judge must conduct an inquiry into the pretrial agreement. See R.C.M. 910(f). See also R.C.M. 705.

(d) Withdrawal. A party may withdraw from an agreement to stipulate or from a stipulation at any time before a stipulation is accepted; the stipulation may not then be accepted. After a stipulation has been accepted a party may withdraw from it only if permitted to do so in the discretion of the military judge.

Discussion

If a party withdraws from an agreement to stipulate or from a stipulation, before or after it has been accepted, the opposing party may be entitled to a continuance to obtain proof of the matters which were to have been stipulated.

If a party is permitted to withdraw from a stipulation previously accepted, the stipulation must be disregarded by the court-martial, and an instruction to that effect should be given.

(e) Effect of stipulation. Unless properly withdrawn or ordered stricken from the record, a stipulation of fact that has been accepted is binding on the court-martial and may not be contradicted by the parties thereto. The contents of a stipulation of expected testimony or of a document’s contents may be attacked, contradicted, or explained in the same way as if the witness had actually so testified or the document had been actually admitted. The fact that the parties so stipulated does not admit the truth of the indicated testimony or document’s contents, nor does it add anything to the evidentiary nature of the testimony or document. The Military Rules of Evidence apply to the contents of stipulations.

(f) Procedure. When offered, a written stipulation shall be presented to the military judge and shall be included in the record whether accepted or not. Once accepted, a written stipulation of expected testimony shall be read to the members, if any, but shall not be presented to them; a written stipulation of fact or of a document’s contents may be read to the members, if any, presented to them, or both. Once accepted, an oral stipulation shall be announced to the members, if any.

Rule 812. Joint and common trials

In joint trials and in common trials, each accused shall be accorded the rights and privileges as if tried separately.

Discussion

See R.C.M. 307(c)(5) concerning preparing charges and specifications for joint trials. See R.C.M. 601(e)(3) concerning referral of charges for joint or common trials, and the distinction between the two. See R.C.M. 906(b)(9) concerning motions to sever and other appropriate motions in joint or common trials.

In a joint or common trial, each accused may be represented by separate counsel, make challenges for cause, make peremptory challenges (see R.C.M. 912), cross-examine witnesses, elect whether to testify, introduce evidence, request that the membership of the court include enlisted persons, if an enlisted accused, and, if a military judge has been detailed, request trial by military judge alone.

Where different elections are made (and, when necessary, approved) as to court-martial composition a severance is necessary. Thus, if one co-accused elects to be tried by a court-martial composed of officers, and a second requests that enlisted members be detailed to the court, and a third submits a request for trial by military judge alone, which request is approved, three separate trials must be conducted.

In a joint or common trial, evidence which is admissible against only one or some of the joint or several accused may be considered only against the accused concerned. For example, when a stipulation is accepted which was made by only one or some of the accused, the stipulation does not apply to those accused who did not join it. See also Mil.R.Evid. 306. In such instances the members must be instructed that the stipulation or evidence may be considered only with respect to the accused with respect to whom it is accepted.

Rule 813. Announcing personnel of the court-martial and accused

(a) Opening sessions. When the court-martial is called to order for the first time in a case, the military judge shall ensure that the following is announced:

(1) The order, including any amendment, by which the court-martial is convened;

(2) The name, rank, and unit or address of the accused;

(3) The name and rank of the military judge, if one has been detailed;
R.C.M. 813(a)(4)

(4) The names and ranks of the members, if any, who are present;
(5) The names and ranks of members who are absent, if presence of members is required;
(6) The names and ranks (if any) of counsel who are present;
(7) The names and ranks (if any) of counsel who are absent; and
(8) The name and rank (if any) of any detailed court reporter.

(b) Later proceedings. When the court-martial is called to order after a recess or adjournment or after it has been closed for any reason, the military judge shall ensure that the record reflects whether all parties and members who were present at the time of the adjournment or recess, or at the time the court-martial closed, are present.

(c) Additions, replacement, and absences of personnel. Whenever there is a replacement of the military judge, any member, or counsel, either through the appearance of new personnel or personnel previously absent or through the absence of personnel previously present, the military judge shall ensure the record reflects the change and the reason for it.
Rule 901. Opening session

(a) Call to order. A court-martial is in session when the military judge so declares.

Discussion

The military judge should examine the charge sheet, convening order, and any amending orders before calling the initial session to order.

Article 35 provides that in time of peace, no proceedings, including Article 39(a) sessions, may be conducted over the accused's objection until five days have elapsed from the service of charges on the accused in the case of a general court-martial. The period is three days for a special court-martial. In computing these periods, the date of service and the date of the proceedings are excluded. Holidays and Sundays are not excluded. Failure to object waives the right to the waiting period, but if it appears that the waiting period has not elapsed, the military judge should bring this to the attention of the defense and secure an affirmative waiver on the record.

(b) Announcement of parties. After the court-martial is called to order, the presence or absence of the parties, military judge, and members shall be announced.

Discussion

If the orders detailing the military judge and counsel have not been reduced to writing, an oral announcement of such detailing is required. See R.C.M. 503(b) and (c).

(c) Swearing reporter and interpreter. After the personnel have been accounted for as required in subsection (b) of this rule, the trial counsel shall announce whether the reporter and interpreter, if any is present, have been properly sworn. If not sworn, the reporter and interpreter, if any, shall be sworn.

Discussion

See R.C.M. 807 concerning the oath to be administered to a court reporter or interpreter. If a reporter or interpreter is replaced at any time during trial, this should be noted for the record, and the procedures in this subsection should be repeated.

(d) Counsel.

(1) Trial counsel. The trial counsel shall announce the legal qualifications and status as to oaths of the members of the prosecution and whether any member of the prosecution has acted in any manner which might tend to disqualify that counsel.

(2) Defense counsel. The detailed defense counsel shall announce the legal qualifications and status as to oaths of the detailed members of the defense and whether any member of the defense has acted in any manner which might tend to disqualify that counsel. Any defense counsel not detailed shall state that counsel's legal qualifications, and whether that counsel has acted in any manner which might tend to disqualify the counsel.

(3) Disqualification. If it appears that any counsel may be disqualified, the military judge may be disqualified, the military judge shall decide the matter and take appropriate action.

Discussion

Counsel may be disqualified because of lack of necessary qualifications, or because of duties or actions which are inconsistent with the role of counsel. See R.C.M. 502(d) concerning qualifications of counsel.

If it appears that any counsel may be disqualified, the military judge should conduct an inquiry or hearing. If any detailed counsel is disqualified, the appropriate authority should be informed. If any defense counsel is disqualified, the accused should be so informed.

If the disqualification of trial or defense counsel is one which the accused may waive, the accused should be so informed by the military judge, and given the opportunity to decide whether to waive the disqualification. In the case of defense counsel, if the disqualification is not waivable or if the accused elects not to waive the disqualification, the accused should be informed of the choices available and given the opportunity to exercise such options.

If any counsel is disqualified, the military judge should ensure that the accused is not prejudiced by any actions of the disqualified counsel or any break in representation of the accused.

Disqualification of counsel is not a jurisdictional defect; such error must be tested for prejudice.

If the membership of the prosecution or defense changes at any time during the proceedings, the procedures in this subsection should be repeated as to the new counsel. In addition, the military judge should ascertain on the record whether the accused objects to a change of defense counsel. See R.C.M. 505(d)(2) and 506(c).

(4) Inquiry. The military judge shall, in open session:

(A) Inform the accused of the rights to be represented by military counsel detailed to the defense; or by individual military counsel requested by the accused, if such military counsel is reasonably available; and by civilian counsel, either alone or in asso-
R.C.M. 901(d)(4)(A)

association with military counsel, if such civilian counsel is provided at no expense to the United States;

(B) Inform the accused that, if afforded individual military counsel, the accused may request retention of detailed counsel as associate counsel, which request may be granted or denied in the sole discretion of the authority who detailed the counsel;

(C) Ascertain from the accused whether the accused understands these rights;

(D) Promptly inquire, whenever two or more accused in a joint or common trial are represented by the same detailed or individual military or civilian counsel, or by civilian counsel who are associated in the practice of law, with respect to such joint representation and shall personally advise each accused of the right to effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the military judge shall take appropriate measures to protect each accused’s right to counsel; and

Discussion

Whenever it appears that any defense counsel may face a conflict of interest, the military judge should inquire into the matter, advise the accused of the right to effective assistance of counsel, and ascertain the accused’s choice of counsel. When defense counsel is aware of a potential conflict of interest, counsel should discuss the matter with the accused. If the accused elects to waive such conflict, counsel should inform the military judge of the matter at an Article 39(a) session so that an appropriate record can be made.

(E) Ascertain from the accused by whom the accused chooses to be represented.

(5) Unsworn counsel. The military judge shall administer the oath to any counsel not sworn.

Discussion

See R.C.M. 807.

Rule 902. Disqualification of military judge

(a) In general. Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge’s impartiality might reasonably be questioned.

(b) Specific grounds. A military judge shall also disqualify himself or herself in the following circumstances:

1. Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

2. Where the military judge has acted as counsel, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.

3. Where the military judge has been or will be a witness in the same case, is the accuser, has forwarded charges in the case with a personal recommendation as to disposition, or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.

4. Where the military judge is not eligible to act because the military judge is not qualified under R.C.M. 502(c) or not detailed under R.C.M. 503(b).

5. Where the military judge, the military judge’s spouse, or a person within the third degree of relationship to either of them or a spouse of such person:

   (A) Is a party to the proceeding;

   (B) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding; or

   (C) Is to the military judge’s knowledge likely to be a material witness in the proceeding.

Discussion

A military judge should inform himself or herself about his or her financial interests, and make a reasonable effort to inform himself or herself about the financial interests of his or her spouse and minor children living in his or her household.

(c) Definitions. For the purposes of this rule the following words or phrases shall have the meaning indicated—

1. “Proceeding” includes pretrial, trial, posttrial, appellate review, or other stages of litigation.
(2) The "degree of relationship" is calculated according to the civil law system.

Discussion

Relatives within the third degree of relationship are children, grandchildren, great grandchildren, parents, grandparents, great grandparents, brothers, sisters, uncles, aunts, nephews, and nieces.

(3) "Military judge" does not include the president of a special court-martial without a military judge.

(d) Procedure.

(1) The military judge shall, upon motion of any party or sua sponte, decide whether the military judge is disqualified.

Discussion

There is no peremptory challenge against a military judge. A military judge should carefully consider whether any of the grounds for disqualification in this rule exist in each case. The military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily.

Possible grounds for disqualification should be raised at the earliest reasonable opportunity. They may be raised at any time, and an earlier adverse ruling does not bar later consideration of the same issue, as, for example, when additional evidence is discovered.

(2) Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter.

(3) Except as provided under subsection (e) of this rule, if the military judge rules that the military judge is disqualified, the military judge shall recuse himself or herself.

(e) Waiver. No military judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b) of this rule. Where the ground for disqualification arises only under subsection (a) of this rule, waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Rule 903. Accused's elections on composition of court-martial

(a) Time of elections.

(1) Request for enlisted members. Before the end of the initial Article 39(a) session or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable, whether an enlisted accused elects to be tried by a court-martial including enlisted members. The military judge may, as a matter of discretion, permit the accused to defer requesting enlisted members until any time before assembly, which time may be determined by the military judge.

(2) Request for trial by military judge alone. Before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable, whether in a noncapital case, the accused requests trial by the military judge alone. The accused may defer requesting trial by military judge alone until any time before assembly.

Discussion

Only an enlisted accused may request that enlisted members be detailed to a court-martial. Trial by military judge alone is not permitted in capital cases (see R.C.M. 201(f)(1)(C)) or in special courts-martial in which no military judge has been detailed.

(b) Form of election.

(1) Request for enlisted members. A request for the membership of the court-martial to include enlisted persons shall be in writing and signed by the accused or shall be made orally on the record.

(2) Request for trial by military judge alone. A request for trial by military judge alone shall be in writing and signed by the accused or shall be made orally on the record.

(c) Action on election.

(1) Request for enlisted members. Upon notice of a timely request for enlisted members by an enlisted accused, the convening authority shall detail enlisted members to the court-martial in accordance with R.C.M. 503 or prepare a detailed written statement explaining why physical conditions or military exigencies prevented this. The trial of the general issue shall not proceed until this is done.

(2) Request for military judge alone. Upon receipt of a timely request for trial by military judge alone the military judge shall:

(A) Ascertained whether the accused has consulted with defense counsel and has been informed of the identity of the military judge and of the right to trial by members; and
R.C.M. 903(c)(2)(A)

Discussion

Ordinarily the military judge should inquire personally of the accused to ensure that the accused's waiver of the right to trial by members is knowing and understanding. Failure to do so is not error, however, where such knowledge and understanding otherwise appear on the record.

DD Form 1722 (Request for Trial Before Military Judge Alone (Art. 16, UCMJ)) should normally be used for the purpose of requesting trial by military judge alone under this rule, if a written request is used.

(B) Approve or disapprove the request, in the military judge's discretion.

Discussion

A timely request for trial by military judge alone should be granted unless there is substantial reason why, in the interest of justice, the military judge should not sit as factfinder. The military judge may hear arguments from counsel before acting on the request. The basis for denial of a request must be made a matter of record.

(3) Other. In the absence of a request for enlisted members or a request for trial by military judge alone, trial shall be by a court-martial composed of officers.

Discussion

Ordinarily if no request for enlisted members or trial by military judge alone is submitted, the military judge should inquire whether such a request will be made (see subsection (a)(1) of this rule) unless these elections are not available to the accused.

(d) Right to withdraw request.

(1) Enlisted members. A request for enlisted members may be withdrawn by the accused as a matter of right any time before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly.

(2) Military judge. A request for trial by military judge alone may be withdrawn by the accused as a matter of right any time before it is approved, or even after approval, if there is a change of the military judge.

Discussion

Withdrawal of a request for enlisted members or trial by military judge alone should be shown in the record.

(e) Untimely requests. Failure to request, or failure to withdraw a request for enlisted members or trial by military judge alone in a timely manner shall waive the right to submit or to withdraw such a request. However, the military judge may until the beginning of the introduction of evidence on the merits, as a matter of discretion, approve an untimely request or withdrawal of a request.

Discussion

In exercising discretion whether to approve an untimely request or withdrawal of a request, the military judge should balance the reason for the request (for example, whether it is a mere change of tactics or results from a substantial change of circumstances) against any expense, delay, or inconvenience which would result from granting the request.

(f) Scope. For purposes of this rule, "military judge" does not include the president of a special court-martial without a military judge.

Rule 904. Arraignment

Arraignment shall be conducted in a court-martial session and shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading.

Discussion

Arraignment is complete when the accused is called upon to plead; the entry of pleas is not part of the arraignment.

When authorized by regulations of the Secretary concerned, the arraignment should be conducted at an Article 39(a) session when a military judge has been detailed. The accused may not be arraigned at a conference under R.C.M. 802.

Once the accused has been arraigned, no additional charges against that accused may be referred to that court-martial for trial with the previously referred charges. See R.C.M. 601(e)(2).

The defense should be asked whether it has any motions to make before pleas are entered. Some motions ordinarily must be made before a plea is entered. See R.C.M. 905(b).

Rule 905. Motions generally

(a) Definitions and form. A motion is an application to the military judge for particular relief. Motions may be oral or, at the discretion of the military judge, written. A motion shall state the grounds upon which it is made and shall set forth the ruling.
or relief sought. The substance of a motion, not its form or designation, shall control.

**Discussion**

Motions may be motions to suppress [(see R.C.M. 905(b)(3))]; motions for appropriate relief (see R.C.M. 906); motions to dismiss (see R.C.M. 907); or motions for findings of not guilty (see R.C.M. 917).

(b) *Pretrial motions.* Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial. The following must be raised before a plea is entered:

(1) Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, investigation, or referral of charges;

**Discussion**

Such nonjurisdictional defects include unsworn charges, inadequate Article 32 investigation, and inadequate pretrial advice. See R.C.M. 307; 401–407; 601–604.

(2) Defenses or objections based on defects in the charges and specifications (other than any failure to show jurisdiction or to charge an offense, which objections shall be resolved by the military judge at any time during the pendency of the proceedings);

**Discussion**

See R.C.M. 307; 906(b)(3).

(3) Motions to suppress evidence;

**Discussion**

Mil.R.Evid. 304(d), 311(d), and 321(c) deal with the admissibility of confessions and admissions, evidence obtained from unlawful searches and seizures, and eyewitness identification, respectively. Questions concerning the admissibility of evidence on other grounds may be raised by objection at trial or by motions in limine. See R.C.M. 906(b)(13); Mil.R.Evid. 103(c); 104(a) and (c).

(4) Motions for discovery under R.C.M. 701 or for production of witnesses or evidence;

**Discussion**

See also R.C.M. 703; 1001(e).

(5) Motions for severance of charges or accused;

**Discussion**

See R.C.M. 812; 906(b)(9) and (10).

(6) Objections based on denial of request for individual military counsel or for retention of detailed defense counsel when individual military counsel has been granted.

**Discussion**

See R.C.M. 506(b); 906(b)(2).

(c) *Burden of proof.*

(1) *Standard.* Unless otherwise provided in this Manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.

**Discussion**

See Mil.R.Evid. 104(a) concerning the applicability of the Military Rules of Evidence to certain preliminary questions.

(2) *Assignment.*

(A) Except as otherwise provided in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party.

**Discussion**

See, for example, subsection (c)(2)(B) of this rule, R.C.M. 908 and Mil.R.Evid. 304(e), 311(e), and 321(d) for provisions specifically assigning the burden of proof.

(B) In the case of a motion to dismiss for lack of jurisdiction, denial of the right to speedy trial under R.C.M. 707, or the running of the statute of limitations, the burden of persuasion shall be upon the prosecution.

(d) *Ruling on motions.* A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited by this
Manual, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings, but no such determination shall be deferred if a party's right to review or appeal is adversely affected. Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record.

Discussion

When trial cannot proceed further as the result of dismissal or other rulings on motions, the court-martial should adjourn and a record of the proceedings should be prepared for the convening authority. See R.C.M. 908(b)(4) regarding automatic stay of certain rulings and orders subject to appeal under that rule. Notwithstanding the dismissal of some specifications, trial may proceed in the normal manner as long as one or more charges and specifications remain. The promulgating orders should reflect the action taken by the court-martial on each charge and specification, including any which were dismissed by the military judge on a motion. See R.C.M. 1114.

(e) Effect of failure to raise defenses or objections. Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

Discussion

See also R.C.M. 910(j) concerning matters waived by a plea of guilty.

(f) Reconsideration. On request of any party or sua sponte, the military judge may reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.

(g) Effect of final determinations. Any matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other court-martial of the same accused, except that, when the offenses charged at one court-martial did not arise out of the same transaction as those charged at the court-martial at which the determination was made, a determination of law and the application of law to the facts may be disputed by the United States. This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a Federal governmental unit were parties.

Discussion

See also R.C.M. 907(b)(2)(C). Whether a matter has been finally determined in another judicial proceeding with jurisdiction to decide it, and whether such determination binds the United States in another proceeding are interlocutory questions. See R.C.M. 801(e). It does not matter whether the earlier proceeding ended in an acquittal, conviction, or otherwise, as long as the determination is final. Except for a ruling which is, or amounts to, a finding of not guilty, a ruling ordinarily is not final until action on the court-martial is completed. See Article 76; R.C.M. 1209. The accused is not bound in a court-martial by rulings in another court-martial. But see Article 3(b); R.C.M. 202.

The determination must have been made by a court-martial, reviewing authority, or appellate court, or by another judicial body, such as a United States court. A pretrial determination by a convening authority is not a final determination under this rule, although some decisions by a convening authority may bind the Government under other rules. See, for example, R.C.M. 601, 604, 704, 705.

The United States is bound by a final determination by a court of competent jurisdiction even if the earlier determination is erroneous, except when the offenses charged at the second proceeding arose out of a different transaction from those charged at the first and the ruling at the first proceeding was based on an incorrect determination of law.

A final determination in one case may be the basis for a motion to dismiss or a motion for appropriate relief in another case, depending on the circumstances. The nature of the earlier determination and the grounds for it will determine its effect in other proceedings.

Examples:

(1) The military judge dismissed a charge for lack of personal jurisdiction, on grounds that the accused was only 16 years old at the time of enlistment and when the offenses occurred. At a second court-martial of the same accused for a different offense, the determination in the first case would require dismissal of the new charge unless the prosecution could show that since that determination the accused had effected a valid enlistment or constructive enlistment. See R.C.M. 202. Note, however, that if the initial ruling had been based on an error of law (for example, if the military judge had ruled the enlistment invalid because the accused was 18 at the time of enlistment) this would not require dismissal in the second court-martial for a different offense.

(2) The accused was tried in United States district court for assault on a Federal officer. The accused defended solely on the basis of alibi and was acquitted. The accused is then charged in a court-martial with assault on a different person at the same
shall be deemed a witness called by the Government.

Section 914(d) of this rule. For purposes of this subsection, a law enforcement officer shall apply at a hearing on a motion to suppress evidence under subsection (b)(3) of this rule. For purposes of this subsection, a law enforcement officer shall be deemed a witness called by the Government, and upon a claim of privilege the military judge shall excise portions of the statement containing privileged material.

Rule 906. Motions for appropriate relief

(a) In general. A motion for appropriate relief is a request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing for trial or presenting its case.

(b) Grounds for appropriate relief. The following may be requested by motion for appropriate relief.

This list is not exclusive.

(1) Continuances. A continuance may be granted only by the military judge.

Discussion

The military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just. Article 40. Whether a request for a continuance should be granted is a matter within the discretion of the military judge. Reasons for a continuance may include: insufficient opportunity to prepare for trial; unavailability of an essential witness; the interest of Government in the order of trial of related cases; illness of an accused, counsel, military judge, or member. See also R.C.M. 602; 803.

(2) Record of denial of individual military counsel or of denial of request to retain detailed counsel when a request for individual military counsel was granted. If a request for military counsel was denied, which denial was upheld on appeal (if available) or if a request to retain detailed counsel was denied when the accused is represented by individual military counsel, and if the accused so requests, the military judge shall ensure that a record of the matter is included in the record of trial, and may make findings. The trial counsel may request a continuance to inform the convening authority of those findings. The military judge may not dismiss the charges or otherwise effectively prevent further proceedings based on this issue. However, the military judge may grant reasonable continuances until the requested military counsel can be made available if the unavailability results from temporary conditions or if the decision of unavailability is in the process of review in administrative channels.

(3) Correction of defects in the Article 32 investigation or pretrial advice.
R.C.M. 906(b)(3)

Discussion

See R.C.M. 405; 406. If the motion is granted, the military judge should ordinarily grant a continuance so the defect may be corrected.

(4) Amendment of charges or specifications. A charge or specification may not be amended over the accused's objection unless the amendment is minor within the meaning of R.C.M. 603(a).

Discussion

See also R.C.M. 307.

An amendment may be appropriate when a specification is unclear, redundant, inartfully drafted, misnames an accused, or is laid under the wrong article. A specification may be amended by striking surplusage, or substituting or adding new language. Surplusage may include irrelevant or redundant details or aggravating circumstances which are not necessary to enhance the maximum authorized punishment or to explain the essential facts of the offense. When a specification is amended after the accused has entered a plea to it, the accused should be asked to plead anew to the amended specification. A bill of particulars (see subsection (b)(6) of this rule) may also be used when a specification is indefinite or ambiguous.

If a specification, although stating an offense, is so defective that the accused appears to have been misled, the accused should be given a continuance upon request, or, in an appropriate case (see R.C.M. 907(b)(3)), the specification may be dismissed.

(5) Severance of a duplicitous specification into two or more specifications.

Discussion

Each specification may state only one offense. R.C.M. 307(c)(4). A duplicitous specification is one which alleges two or more separate offenses. Lesser included offenses (see Part IV, paragraph 2) are not separate, nor is a continuing offense involving several separate acts. The sole remedy for a duplicitous specification is severance of the specification into two or more specifications, each of which alleges a separate offense contained in the duplicitous specification. However, if the duplicitousness is combined with or results in other defects, such as misleading the accused, other remedies may be appropriate. See subsection (b)(3) of this rule. See also R.C.M. 907(B)(3).

(6) Bill of particulars. A bill of particulars may be amended at any time, subject to such conditions as justice permits.

Discussion

The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes. A bill of particulars should not be used to conduct discovery of the Government's theory of a case, to force detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial.

A bill of particulars need not be sworn because it is not part of the specification. A bill of particulars cannot be used to repair a specification which is otherwise not legally sufficient.

(7) Discovery and production of evidence and witnesses.

Discussion

See R.C.M. 701 concerning discovery. See R.C.M. 703, 914 and 1001(e) concerning production of evidence and witnesses.

(8) Relief from pretrial confinement in violation of R.C.M. 305.

Discussion

See R.C.M. 305(j).

(9) Severance of multiple accused, if it appears that an accused or the Government is prejudiced by a joint or common trial. In a common trial, a severance shall be granted whenever any accused, other than the moving accused, faces charges unrelated to those charged against the moving accused.

Discussion

A motion for severance is a request that one or more accused against whom charges have been referred to a joint or common trial be tried separately. Such a request should be liberally considered in a common trial, and should be granted if good cause is shown. For example, a severance is ordinarily appropriate when: the moving party wishes to use the testimony of one or more of the coaccused or the spouse of a coaccused; a defense of a coaccused is antagonistic to the moving party; or evidence as to any other accused will improperly prejudice the moving accused.

If a severance is granted by the military judge, the military judge will decide which accused will be tried first. See R.C.M. 801(a)(1). In the case of joint charges, the military judge will direct an appropriate amendment of the charges and specifications.
(10) Severance of offenses, but only to prevent manifest injustice.

Discussion

Ordinarily, all known charges should be tried at a single court-martial. Joinder of minor and major offenses, or of unrelated offenses is not alone a sufficient ground to sever offenses. For example, when an essential witness as to one offense is unavailable, it might be appropriate to sever that offense to prevent violation of the accused's right to a speedy trial.

(11) Change of place of trial. The place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are not prejudiced thereby.

Discussion

A change of the place of trial may be necessary when there exists in the place where the court-martial is pending so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial there, or to obtain compulsory process over an essential witness.

When it is necessary to change the place of trial, the choice of places to which the court-martial will be transferred will be left to the convening authority, as long as the choice is not inconsistent with the ruling of the military judge.

(12) Determination of multiplicity of offenses for sentencing purposes.

Discussion

See R.C.M. 1003 concerning determination of the maximum punishment. See also R.C.M. 907(b)(3)(B) concerning dismissal of charges on grounds of multiplicity.

A ruling on this motion ordinarily should be deferred until after findings are entered.

(13) Preliminary ruling on admissibility of evidence.

Discussion

See Mil.R.Evid. 104(c)

A request for a preliminary ruling on admissibility is a request that certain matters which are ordinarily decided during trial of the general issue be resolved before they arise, outside the presence of members. The purpose of such a motion is to avoid the prejudice which may result from bringing inadmissible matters to the attention of court members.

Whether to rule on an evidentiary question before it arises during trial on the general issue is a matter within the discretion of the military judge. But see R.C.M. 905(b)(3) and (d); and Mil.R.Evid. 304(e)(2); 311(e)(2); 321(d)(2).

(14) Motions relating to mental capacity or responsibility of the accused.

Discussion

See R.C.M. 706, 909, and 916(k) regarding procedures and standards concerning the mental capacity or responsibility of the accused.

Rule 907. Motions to dismiss

(a) In general. A motion to dismiss is a request to terminate further proceedings as to one or more charges and specifications on grounds capable of resolution without trial of the general issue of guilt.

Discussion

Dismissal of a specification terminates the proceeding with respect to that specification unless the decision to dismiss is reconsidered and reversed by the military judge. See R.C.M. 905(f).

Dismissal of a specification on grounds stated in subsection (b)(1) or (b)(3)(A) below does not ordinarily bar a later court-martial for the same offense if the grounds for dismissal no longer exist. See also R.C.M. 905(g) and subsection (b)(2) below.

See R.C.M. 916 concerning defenses.

(b) Grounds for dismissal. Grounds for dismissal include the following—

(1) Nonwaivable grounds. A charge or specification shall be dismissed at any stage of the proceedings if:

(A) The court-martial lacks jurisdiction to try the accused for the offense; or

Discussion

See R.C.M. 201-203.

(B) The specification fails to state an offense.

Discussion

See R.C.M. 307(c)
(2) Waivable grounds. A charge or specification shall be dismissed upon motion made by the accused before the final adjournment of the court-martial in that case if:

(A) Dismissal is required under R.C.M. 707;

(B) The statute of limitations (Article 43) has run, provided that, if it appears that the accused is unaware of the right to assert the statute of limitations in bar of trial, the military judge shall inform the accused of this right;

Discussion

Except for certain offenses for which there is no limitation as to time, see Article 43(a), a person charged with an offense under the code may not be tried by court-martial over objection if sworn charges have not been received by the officer exercising summary court-martial jurisdiction over the command within five years. See Article 43(b). This period may be tolled (Article 43(c) and (d)), extended (Article 43(e) and (g)), or suspended (Article 43(f)) under certain circumstances. The prosecution bears the burden of proving that the statute of limitations has been tolled, extended, or suspended if it appears that it has run.

Some offenses are continuing offenses and any period of the offense occurring within the statute of limitations is not barred. Absence without leave, desertion, and fraudulent enlistment are not continuing offenses and are committed, respectively, on the day the person goes absent, deserts, or first receives pay or allowances under the enlistment.

When computing the statute of limitations, periods in which the accused was fleeing from justice or periods when the accused was absent without leave or in desertion are excluded. The military judge must determine by a preponderance, as an interlocutory matter, whether the accused was absent without authority or fleeing from justice. It would not be necessary that the accused be charged with the absence offense. In cases where the accused is charged with both an absence offense and a non-absence offense, but is found not guilty of the absence offense, the military judge would reconsider, by a preponderance, his or her prior determination whether that period of time is excludable.

If sworn charges have been received by an officer exercising summary court-martial jurisdiction over the command within the period of the statute, minor amendments (see R.C.M. 603(a)) may be made in the specification after the statute of limitations has run. However, if new charges are drafted or a major amendment made (see R.C.M. 603(d)) after the statute of limitations has run, prosecution is barred. The date of receipt of sworn charges is excluded when computing the appropriate statutory period. The date of the offense is included in the computation of the elapsed time. Article 43(g) allows the government time to reinstate charges dismissed as defective or insufficient for any cause. The government would have up to six months to reinstate the charges if the original period of limitations has expired or will expire within six months of the dismissal.

In some cases, the issue whether the statute of limitations has run will depend on the findings on the general issue of guilt. For example, where the date of an offense is in dispute, a finding by the court-martial that the offense occurred at an earlier time may affect a determination as to the running of the statute of limitations.

When the statute of limitations has run as to a lesser included offense, but not as to the charged offense, see R.C.M. 920(c)(2) with regard to instructions on the lesser offense.

(C) The accused has previously been tried by court-martial or federal civilian court for the same offense, provided that:

(i) No court-martial proceeding is a trial in the sense of this rule unless presentation of evidence on the general issue of guilt has begun;

(ii) No court-martial proceeding which has been terminated under R.C.M. 604(b) or R.C.M. 915 shall bar later prosecution for the same offense or offenses, if so provided in those rules;

(iii) No court-martial proceeding in which an accused has been found guilty of any charge or specification is a trial in the sense of this rule until the finding of guilty has become final after review of the case has been fully completed; and

(iv) No court-martial proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of this rule.

(D) Prosecution is barred by:

(i) A pardon issued by the President;

Discussion

A pardon may grant individual or general amnesty.

(ii) Immunity from prosecution granted by a person authorized to do so;

Discussion

See R.C.M. 704.

(iii) Constructive condonation of desertion established by unconditional restoration to duty without trial of a deserter by a general court-martial convening authority who knew of the desertion; or

(iv) Prior punishment under Articles 13 or 15 for the same offense, if that offense was minor.

Discussion

See Articles 13 and 15(f). See paragraph 1e of Part V for a definition of "minor" offenses.
Permissible grounds. A specification may be dismissed upon timely motion by the accused if:

(A) The specification is so defective that it substantially misled the accused, and the military judge finds that, in the interest of justice, trial should proceed on remaining charges and specifications without undue delay; or

(B) The specification is multiplicious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and should be dismissed in the interest of justice.

Discussion

A specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other. A specification may also be multiplicious with another if they describe substantially the same misconduct in two different ways. For example, assault and disorderly conduct may be multiplicious if the disorderly conduct consists solely of the assault. See also R.C.M. 1003(c)(1)(C).

Ordinarily, a specification should not be dismissed for multiplicity before trial unless it clearly alleges the same offense, or one necessarily included therein, as is alleged in another specification. It may be appropriate to dismiss the less serious of any multiplicitious specifications after findings have been reached. Due consideration must be given, however, to possible post-trial or appellate action with regard to the remaining specification.

Rule 908. Appeal by the United States

(a) In general. In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceedings. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty, with respect to the charge or specification.

(b) Procedure.

(1) Delay. After an order or ruling which may be subject to an appeal by the United States, the court-martial may not proceed, except as to matters unaffected by the ruling or order, if the trial counsel requests a delay to determine whether to file notice of appeal under this rule. Trial counsel is entitled to no more than 72 hours under this subsection.

(2) Decision to appeal. The decision whether to file notice of appeal under this rule shall be made within 72 hours of the ruling or order to be appealed. If the Secretary concerned so prescribes, the trial counsel shall not file notice of appeal unless authorized to do so by a person designated by the Secretary concerned.

(3) Notice of appeal. If the United States elects to appeal, the trial counsel shall provide the military judge with written notice to this effect not later than 72 hours after the ruling or order. Such notice shall identify the ruling or order to be appealed and the charges and specifications affected. Trial counsel shall certify that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

(4) Effect on the court-martial. Upon written notice to the military judge under subsection (b)(3) of this rule, the ruling or order that is the subject of the appeal is automatically stayed and no session of the court-martial may proceed pending disposition by the Court of Military Review of the appeal, except that solely as to charges and specifications not affected by the ruling or order:

(A) Motions may be litigated, in the discretion of the military judge, at any point in the proceedings;

(B) When trial on the merits has not begun,

(i) a severance may be granted upon request of all the parties;

(ii) a severance may be granted upon request of the accused and when appropriate under R.C.M. 906(b)(10); or

(C) When trial on the merits has begun but has not been completed, a party may, on that party's request and in the discretion of the military judge, present further evidence on the merits.

(5) Record. Upon written notice to the military judge under subsection (b)(3) of this rule, trial counsel shall cause a record of the proceedings to be prepared. Such record shall be verbatim and complete to the extent necessary to resolve the issues appealed. R.C.M. 1103(g), (h), and (i) shall apply and the record shall be authenticated in accordance with R.C.M. 1104(a). The military judge or the Court of Military Review may direct that additional parts of the proceeding be included in the record; R.C.M. 1104(d) shall not apply to such additions.
(6) **Forwarding.** Upon written notice to the military judge under subsection (b)(3) of this rule, trial counsel shall promptly and by expeditious means forward the appeal to a representative of the Government designated by the Judge Advocate General. The matter forwarded shall include: a statement of the issues appealed; the record of the proceedings or, if preparation of the record has not been completed, a summary of the evidence; and such other matters as the Secretary concerned may prescribe. The person designated by the Judge Advocate General shall promptly decide whether to file the appeal with the Court of Military Review and notify the trial counsel of that decision.

(7) **Appeal filed.** If the United States elects to file an appeal, it shall be filed directly with the Court of Military Review, in accordance with the rules of that court.

(8) **Appeal not filed.** If the United States elects not to file an appeal, trial counsel promptly shall notify the military judge and the other parties.

(9) **Pretrial confinement of accused pending appeal.** If an accused is in pretrial confinement at the time the United States files notice of its intent to appeal under subsection (3) above, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the United States, should consider the same factors which would authorize the imposition of pretrial confinement under R.C.M. 305(h)(2)(B).

(c) **Appellate proceedings.**

(1) **Appellate counsel.** The parties shall be represented before appellate courts in proceedings under this rule as provided in R.C.M. 1202. Appellate Government counsel shall diligently prosecute an appeal under this rule.

(2) **Court of Military Review.** An appeal under Article 62 shall, whenever practicable, have priority over all other proceedings before the Court of Military Review. In determining an appeal under Article 62, the Court of Military Review may take action only with respect to matters of law.

(3) **Action following decision of Court of Military Review.** After the Court of Military Review has decided any appeal under Article 62, the accused may petition for review by the Court of Military Appeals, or the Judge Advocate General may certify a question to the Court of Military Appeals. The parties shall be notified of the decision of the Court of Military Review promptly. If the decision is adverse to the accused, the accused shall be notified of the decision and of the right to petition the Court of Military Appeals for review within 60 days orally on the record at the court-martial or in accordance with R.C.M. 1203(d). If the accused is notified orally on the record, trial counsel shall forward by expeditious means a certificate that the accused was so notified to the Judge Advocate General, who shall forward a copy to the clerk of the Court of Military Appeals when required by the Court. If the decision by the Court of Military Review permits it, the court-martial may proceed as to the affected charges and specifications pending further review by the Court of Military Appeals or the Supreme Court, unless either court orders the proceedings stayed. Unless the case is reviewed by the Court of Military Appeals, it shall be returned to the military judge or the convening authority for appropriate action in accordance with the decision of the Court of Military Review. If the case is reviewed by the Court of Military Appeals, R.C.M. 1204 and 1205 shall apply.

(d) **Military judge.** For purposes of this rule, “military judge” does not include the president of a special court-martial without a military judge.

**Rule 909. Capacity of the accused to stand trial by court-martial**

(a) **In general.** No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case.

(b) **Presumption of capacity.** A person is presumed to have the capacity to stand trial unless the contrary is established.

(c) **Determination at trial.**

(1) **Nature of issue.** The mental capacity of the accused is an interlocutory question of fact.
Discussion

The military judge rules finally on the mental capacity of the accused. The president of a special court-martial without a military judge rules on the matter subject to objection by any member. See R.C.M. 801(e).

(2) Standard. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense of the case.

Discussion

If the accused is not found to possess sufficient mental capacity to stand trial, the proceedings should be suspended. Depending on the nature and potential duration of the accused's incapacity, the case may be continued or charges withdrawn or dismissed. When appropriate, administrative action may be taken to discharge the accused from the service on grounds of mental disability. Additional mental examinations may be directed at any stage of the proceedings as circumstances may require.

Rule 910. Pleas

(a) Alternatives.

(1) In general. An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty. A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial.

Discussion

See paragraph 2, Part IV, concerning lesser included offenses. When the plea is to a named lesser included offense without the use of exceptions and substitutions, the defense counsel should provide a written revised specification accurately reflecting the plea and request that the revised specification be included in the record as an appellate exhibit. A plea of guilty to a lesser included offense does not bar the prosecution from proceeding on the offense as charged. See also subsection (e) of this rule.

A plea of guilty does not prevent the introduction of evidence, either in support of the factual basis for the plea, or, after findings are entered, in aggravation. See R.C.M. 1001(b)(4).

(c) Advice to accused. Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law;

Discussion

The elements of each offense to which the accused has pleaded guilty should be described to the accused. See also subsection (e) of this rule.

(2) In a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;

Discussion

In a general or special court-martial, if the accused in not represented by counsel, a plea of guilty should not be accepted.

(3) That the accused has the right to plead not guilty or to persist in that plea if already made, and
that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this Rule; and

(5) That if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement.

Discussion
The advice in subsection (5) is inapplicable in court-martial in which the accused is not represented by counsel.

(d) Ensuring that the plea is voluntary. The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) Determining accuracy of plea. The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

Discussion
A plea of guilty must be in accord with the truth. Before the plea is accepted, the accused must admit every element of the offense(s) to which the accused pleaded guilty. Ordinarily, the elements should be explained to the accused. If any potential defense is raised by the accused's account of the offense or by other matter presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense. If the statute of limitations would otherwise bar trial for the offense, the military judge should not accept a plea of guilty to it without an affirmative waiver by the accused. See R.C.M. 907(b)(2)(B).

The accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea. Nevertheless the accused must be convinced of, and able to describe all the facts necessary to establish guilt. For example, an accused may be unable to recall certain events in an offense, but may still be able to adequately describe the offense based on witness statements or similar sources which the accused believes to be true.

The accused should remain at the counsel table during questioning by the military judge.

(f) Plea agreement inquiry.

(1) In general. A plea agreement may not be accepted if it does not comply with R.C.M. 705.

(2) Notice. The parties shall inform the military judge if a plea agreement exists.

Discussion
The military judge should ask whether a plea agreement exists. See subsection (d) of this rule. Even if the military judge fails to so inquire or the accused answers incorrectly, counsel have an obligation to bring any agreements or understandings in connection with the plea to the attention of the military judge.

(3) Disclosure. If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge alone the military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.

(4) Inquiry. The military judge shall inquire to ensure:

(A) That the accused understands the agreement; and

(B) That the parties agree to the terms of the agreement.

Discussion
If the plea agreement contains any unclear or ambiguous terms, the military judge should obtain clarification from the parties. If there is doubt about the accused's understanding of any terms in the agreement, the military judge should explain those terms to the accused.

(g) Findings. Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at an Article 39(a) session unless:
(1) Such action is not permitted by regulations of the Secretary concerned;

(2) The plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged; or

(3) Trial is by a special court-martial without a military judge, in which case the president of the court-martial may enter findings based on the pleas without a formal vote except when subsection (g)(2) of this rule applies.

Discussion

If the accused has pleaded guilty to some offenses but not to others, the military judge should ordinarily defer informing the members of the offenses to which the accused has pleaded guilty until after findings on the remaining offenses have been entered. See R.C.M. 913(a), Discussion and R.C.M. 920(e), Discussion, paragraph 3.

(h) Later action.

(1) Withdrawal by the accused. If after acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge may as a matter of discretion permit the accused to do so.

(2) Statements by accused inconsistent with plea. If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

Discussion

When the accused withdraws a previously accepted plea for guilty or a plea of guilty is set aside, counsel should be given a reasonable time to prepare to proceed. In a trial by military judge alone, recusal of the military judge or disapproval of the request for trial by military judge alone will ordinarily be necessary when a plea is rejected or withdrawn after findings; in trial with members, a mistrial will ordinarily be necessary.

(3) Pretrial agreement inquiry. After sentence is announced the military judge shall inquire into any parts of a pretrial agreement which were not previously examined by the military judge. If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea.

Discussion

See subsection (f)(3) of this rule.

(i) Record of proceedings. A verbatim record of the guilty plea proceedings shall be made in cases in which a verbatim record is required under R.C.M. 1103. In other special courts-martial, a summary of the explanation and replies shall be included in the record of trial. As to summary courts-martial, see R.C.M. 1305.

(j) Waiver. Except as provided in subsection (a)(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made.

Rule 911. Assembly of the court-martial

The military judge shall announce the assembly of the court-martial.

Discussion

When trial is by a court-martial with members, the court-martial is ordinarily assembled immediately after the members are sworn. The members are ordinarily sworn at the first session at which they appear, as soon as all parties and personnel have been announced. The members are seated with the president, who is the senior member, in the center, and the other members alternately to the president's right and left according to rank. If the rank of a member is changed, or if the membership of the court-martial changes, the members should be reseated accordingly.

When trial is by military judge alone, the court-martial is ordinarily assembled immediately following approval of the request for trial by military judge alone.

Assembly of the court-martial is significant because it marks the point after which: substitution of the members and military judge may no longer take place without good cause (see Article 29; R.C.M. 505; 902; 912); the accused may no longer, as a matter of right, request trial by military judge alone or withdraw such a request previously approved (see Article 16; R.C.M. 903(a)(2)(d)); and the accused may no longer request, even with
the permission of the military judge, or withdraw from a request for, enlisted members (see Article 25(c)(1); R.C.M. 903(a)(1)(d)).

Rule 912. Challenge of selection of members; examination and challenges of members

(a) Pretrial matters.

(1) Questionnaires. Before trial the trial counsel may, and shall upon request of the defense counsel, submit to each member written questions requesting the following information:

(A) Date of birth;
(B) Sex;
(C) Race;
(D) Marital status and sex, age, and number of dependents;
(E) Home of record;
(F) Civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received;
(G) Current unit to which assigned;
(H) Past duty assignments;
(I) Awards and decorations received;
(J) Date of rank; and
(K) Whether the member has acted as accuser, counsel, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

Additional information may be requested with the approval of the military judge. Each member's responses to the questions shall be written and signed by the member.

Discussion

Using questionnaires before trial may expedite voir dire and may permit more informed exercise of challenges. If the questionnaire is marked or admitted as an exhibit at the court-martial it must be attached to or included in the record of trial. See R.C.M. 1103(b)(2)(D)(iv) and (b)(3)(B).

(2) Other materials. A copy of any written materials considered by the convening authority in selecting the members detailed to the court-martial shall be provided to any party upon request, except that such materials pertaining solely to persons who were not selected for detail as members need not be provided unless the military judge, for good cause, so directs.

(b) Challenge of selection of members.

(1) Motion. Before the examination of members under subsection (d) of this rule begins, or at the next session after a party discovered or could have discovered by the exercise of diligence, the grounds therefor, which ever is earlier, that party may move to stay the proceedings on the ground that members were selected improperly.

Discussion

See R.C.M. 502(a) and 503(a) concerning selection of members. Members are also improperly selected when, for example, a certain group or class is arbitrarily excluded from consideration as members.

(2) Procedure. Upon a motion under subsection (b)(1) of this rule containing an offer of proof of matters which, if true, would constitute improper selection of members, the moving party shall be entitled to present evidence, including any written materials considered by the convening authority in selecting the members. Any other party may also present evidence on the matter. If the military judge determines that the members have been selected improperly, the military judge shall stay any proceedings requiring the presence of members until members are properly selected.

(3) Waiver. Failure to make a timely motion under this subsection shall waive the improper selection unless it constitutes a violation of R.C.M. 501(a), 502(a)(1), or 503(a)(2).

(c) Stating grounds for challenge. The trial counsel shall state any ground for challenge for cause against any member of which the trial counsel is aware.

(d) Examination of members. The military judge may permit the parties to conduct the examination of members or may personally conduct the examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judged deems proper. A member may be questioned outside the presence of other members when the military judge so directs.
Examination of the members is called "voir dire." If the members have not already been placed under oath for the purpose of voir dire (see R.C.M. 807(b)(2) Discussion (B)), they should be sworn before they are questioned.

The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges; counsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case.

The nature and scope of the examination of members is within the discretion of the military judge. Members may be questioned individually or collectively. Ordinarily, the military judge should permit counsel to personally question the members. Trial counsel ordinarily conducts an inquiry before the defense. Whether trial counsel will question all the members before the defense begins or whether some other procedure will be followed depends on the circumstances. For example, when members are questioned individually outside the presence of other members, each party would ordinarily complete questioning that member before another member is questioned. The military judge and each party may conduct additional questioning, after initial questioning by a party, as necessary.

Ordinarily the members should be asked whether they are aware of any ground for challenge against them. This may expedite further questioning. The members should be cautioned, however, not to disclose information in the presence of other members which might disqualify them.

**Discussion**

Examples of matters which may be grounds for challenge under subsection (N) are that the member: has a direct personal interest in the result of the trial; is closely related to the accused, a counsel, or a witness in the case; has participated as a member or counsel in the trial of a closely related case; has a decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offenses charged.

**Evidence.** Any party may present evidence relating to whether grounds for challenge exist against a member.

**Challenges and removal for cause.**

(1) **Grounds.** A member shall be excused for cause whenever it appears that the member:

(A) Is not competent to serve as a member under Article 25(a), (b), or (c);
(B) Has not been properly detailed as a member of the court-martial;
(C) Is an accuser as to any offense charged;
(D) Will be a witness in the court-martial;
(E) Has acted as counsel for any party as to any offense charged;
(F) Has been an investigating officer as to any offense charged;
(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;
(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;
(I) Has forwarded charges in the case with a personal recommendation as to disposition;
(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;
(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;
(L) Is in arrest or confinement;
(M) Has informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;
(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

**Discussion**

**When made.**

(A) **Upon completion of examination.** Upon completion of any examination under subsection (d) of this rule and the presentation of evidence, if any, on the matter, each party shall state any challenges for cause it elects to make.

(B) **Other times.** A challenge for cause may be made at any other time during trial when it becomes apparent that a ground for challenge may exist. Such examination of the member and presentation of evidence as may be necessary may be made in order to resolve the matter.

(3) **Procedure.** Each party shall be permitted to make challenges outside the presence of the members. The party making a challenge shall state the grounds for it. Ordinarily the trial counsel shall enter any challenges for cause before the defense counsel. The military judge shall rule finally on each challenge. When a challenge for cause is granted, the member concerned shall be excused. The burden of establishing that grounds for a challenge exist is upon the party making the challenge. A member successfully challenged shall be excused.

(4) **Waiver.** The grounds for challenge in subsection (f)(1)(A) of this rule may not be waived except that membership of enlisted members in the same unit as the accused may be waived. Membership of
enlisted members in the same unit as the accused and any other ground for challenge is waived if the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner. Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie. When a challenge for cause has been denied, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.

**Discussion**

See also Mil.R.Evid. 606(b) when a member may be a witness.

(g) Peremptory challenges.

(1) Procedure. Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter any peremptory challenge before the defense.

**Discussion**

No reason is necessary for a peremptory challenge.

(2) Waiver. Failure to exercise a peremptory challenge when properly called upon to do so shall waive the right to make such a challenge. The military judge may, for good cause shown, grant relief from the waiver, but a peremptory challenge may not be made after the presentation of evidence before the members has begun. However, nothing in this subsection shall bar the exercise of a previously unexercised peremptory challenge against a member newly detailed under R.C.M. 505(c)(2)(B), even if presentation of evidence on the merits has begun.

**Discussion**

When the membership of the court-martial has been reduced below a quorum (see R.C.M. 501) or, when enlisted members have been requested, the fraction of enlisted members has been reduced below one-third, the proceedings should be adjourned and the convening authority notified so that new members may be detailed. See R.C.M. 505. See also R.C.M. 805(d) concerning other procedures when new members are detailed.

(h) Special courts-martial without a military judge.

In a special court-martial without a military judge, the procedures in this rule shall apply, except that challenges shall be made in the presence of the members and a ruling on any challenge for cause shall be decided by a majority vote of the members upon secret written ballot in closed session. The challenged member shall not be present at the closed session at which the challenge is decided. A tie vote on a challenge disqualifies the member challenged. Before closing, the president shall give such instructions as may be necessary to resolve the challenge. Each challenge shall be decided separately, and all unexcused members except the challenged member shall participate. When only three members are present and one is challenged, the remaining two may decide the challenge. When the president is challenged, the next senior member shall act as president for purposes of deciding the challenge.

(i) Definitions.

(1) Military judge. For purpose of this rule, “military judge” does not include the president of a special court-martial without a military judge.

(2) Witness. For purposes of this rule, “witness” includes one who testifies at a court-martial and anyone whose declaration is received in evidence for any purpose, including written declarations made by affidavit or otherwise.

**Discussion**

For example, a person who by certificate has attested or otherwise authenticated an official record or other writing introduced in evidence is a witness.

(3) Investigating officer. For purposes of this rule, “investigating officer” includes any person who has investigated charges under R.C.M. 405 and any per-
son who as counsel for a member of a court of inquiry, or otherwise personally has conducted an investigation of the general matter involving the offenses charged.

Rule 913. Presentation of the case on the merits

(a) Preliminary instructions. The military judge may give such preliminary instructions as may be appropriate. If mixed pleas have been entered, the military judge should ordinarily defer informing the members of the offenses to which the accused pleaded guilty until after the findings on the remaining contested offenses have been entered.

Discussion

Preliminary instructions may include a description of the duties of members, procedures to be followed in the court-martial, and other appropriate matters.

Exceptions to the rule requiring the military judge to defer informing the members of an accused’s prior pleas of guilty include cases in which the accused has specifically requested, on the record, that the military judge instruct the members of the prior pleas of guilty and cases in which a plea of guilty was to a lesser included offense within the contested offense charged in the specification. See R.C.M. 910(g), Discussion and R.C.M. 920(e), Discussion, paragraph 3.

(b) Opening statements. Each party may make one opening statement to the court-martial before presentation of evidence has begun. The defense may elect to make its statement after the prosecution has rested, before the presentation of evidence for the defense. The military judge may, as a matter of discretion, permit the parties to address the court-martial at other times.

Discussion

Counsel should confine their remarks to evidence they expect to be offered which they believe in good faith will be available and admissible and a brief statement of the issues in the case.

(c) Presentation of evidence. Each party shall have full opportunity to present evidence.

(1) Order of presentation. Ordinarily the following sequence shall be followed:

(A) Presentation of evidence for the prosecution;

(B) Presentation of evidence for the defense;

(C) Presentation of prosecution evidence in rebuttal;

(D) Presentation of defense evidence in rebuttal;

(E) Additional rebuttal evidence in the discretion of the military judge; and

(F) Presentation of evidence requested by the military judge or members.

Discussion

See R.C.M. 801(a) and Mil.R.Evid. 611 concerning control by the military judge over the order of proceedings.

(2) Taking testimony. The testimony of witnesses shall be taken orally in open session, unless otherwise provided in this Manual.

Discussion

Each witness must testify under oath. See R.C.M. 807(b)(1)(B); Mil.R.Evid. 603. After a witness is sworn, the witness should be identified for the record (full name, rank, and unit, if military, or full name and address, if civilian). The party calling the witness conducts direct examination of the witness, followed by cross-examination of the witness by the opposing party. Redirect and re-cross-examination are conducted as necessary, followed by any questioning by the military judge and members. See Mil.R.Evid. 611; 614.

All documentary and real evidence (except marks or wounds on a person’s body) should be marked for identification when first referred to in the proceedings and should be included in the record of trial whether admitted in evidence or not. See R.C.M. 1103(b)(2)(C), (c). “Real evidence” include physical objects, such as clothing, weapons, and marks or wounds on a person’s body. It is impracticable to attach an item of real evidence to the record, the item should be clearly and accurately described by testimony, photographs, or other means so that it may be considered on review. Similarly, when documentary evidence is used, if the document cannot be attached to the record (as in the case of an original official record or a large map), a legible copy or accurate extract should be included in the record. When a witness points to or otherwise refers to certain parts of a map, photograph, diagram, chart, or other exhibit, the place to which the witness pointed or referred should be clearly identified for the record, either by marking the exhibit or by an accurate description of the witness’ actions with regard to the exhibit.

(3) Views and inspections. The military judge may, as a matter of discretion, permit the court-martial to view or inspect premises or a place or an article or object. Such a view or inspection shall take place only in the presence of all parties, the members (if any), and the military judge. A person familiar
with the scene may be designated by the military judge to escort the court-martial. Such person shall perform the duties of escort under oath. The escort shall not testify, but may point out particular features prescribed by the military judge. Any statement made at the view or inspection by the escort, a party, the military judge, or any member shall be made part of the record.

Discussion

A view or inspection should be permitted only in extraordinary circumstances. The fact that a view or inspection has been made does not necessarily preclude the introduction in evidence of photographs, diagrams, maps, or sketches of the place or item viewed, if these are otherwise admissible.

(4) Evidence subject to exclusion. When offered evidence would be subject to exclusion upon objection, the military judge may, as a matter of discretion, bring the matter to the attention of the parties and may, in the interest of justice, exclude the evidence without an objection by a party.

Discussion

The military judge should not exclude evidence which is not objected to by a party except in extraordinary circumstances. Counsel should be permitted to try the case and present the evidence without unnecessary interference by the military judge. See also Mil.R.Evid. 103.

(5) Reopening case. The military judge may, as a matter of discretion, permit a party to reopen its case after it has rested.

Rule 914. Production of statements of witnesses

(a) Motion for production. After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is:

(1) In the case of a witness called by the trial counsel, in the possession of the United States; or

(2) In the case of a witness called by the defense, in the possession of the accused or defense counsel.

(b) Production of entire statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the military judge shall order that the statement be delivered to the moving party.

(c) Production of excised statement. If the party who called the witness claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of a statement that is withheld from an accused over objection shall be preserved by the trial counsel, and, in the event of a conviction, shall be made available to the reviewing authorities for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) Recess for examination of the statement. Upon delivery of the statement to the moving party, the military judge may recess the trial for the examination of the statement and preparation for its use in the trial.

(e) Remedy for failure to produce statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice.

(f) Definition. As used in this rule, a “statement” of a witness means:

(1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;
(2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a Federal grand jury.

Rule 915. Mistrial
(a) In general. The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. A mistrial may be declared as to some or all charges, and as to the entire proceedings or as to only the proceedings after findings.

Discussion
The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons. As examples, a mistrial may be appropriate when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members or when members engage in prejudicial misconduct. Also a mistrial is appropriate when the proceedings must be terminated because of a legal defect, such as a jurisdictional defect, which can be cured; for example, when the referral is jurisdictionally defective. See also R.C.M. 905(g) concerning the effect of rulings in one proceeding on later proceedings.

(b) Procedure. On motion for a mistrial or when it otherwise appears that grounds for a mistrial may exist, the military judge shall inquire into the views of the parties on the matter and then decide the matter as an interlocutory question.

Discussion
Except in a special court-martial without a military judge, the hearing on a mistrial should be conducted out of the presence of the members.

(c) Effect of declaration of mistrial.
(1) Withdrawal of charges. A declaration of a mistrial shall have the effect of withdrawing the affected charges and specifications from the court-martial.

Discussion
Upon declaration of a mistrial, the affected charges are returned to the convening authority who may refer them anew or otherwise dispose of them. See R.C.M. 401-407.

(2) Further proceedings. A declaration of a mistrial shall not prevent trial by another court-martial on the affected charges and specifications except when the mistrial was declared after jeopardy attached and before findings, and the declaration was:
(A) An abuse of discretion and without the consent of the defense; or
(B) The direct result of intentional prosecutorial misconduct designed to necessitate a mistrial.

Rule 916. Defenses
(a) In general. As used in this rule, “defenses” includes any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly or partially, criminal responsibility for those acts.

Discussion
Special defenses are also called “affirmative defenses.” “Alibi” and “good character” are not special defenses, as they operate to deny that the accused committed one or more of the acts constituting the offense. As to evidence of the accused’s good character, see Mil.R.Evid. 404(a)(1). See R.C.M. 701(b)(1) concerning notice of alibi.

(b) Burden of proof. Except for the defense of lack of mental responsibility, once a defense under this rule is placed in issue by some evidence, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist. The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

Discussion
A defense may be raised by evidence presented by the defense, the prosecution, or the court-martial. For example, in a prosecution for assault, testimony by prosecution witnesses that the victim brandished a weapon toward the accused may raise a defense of self-defense. See subsection (c) below. More than one defense may be raised as to a particular offense. The defenses need not necessarily be consistent.

See R.C.M. 920(e)(3) concerning instructions on defenses.
Justification. A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.

Discussion

The duty may be imposed by statute, regulation, or order. For example, the use of force by a law enforcement officer when reasonably necessary in the proper execution of a lawful apprehension is justified because the duty to apprehend is imposed by lawful authority. Also, killing an enemy combatant in battle is justified.

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 finally 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 subsection (c) of this rule. 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.

Self-defense.

1. Homicide or assault cases involving deadly force. It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused:
   (A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and
   (B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm.

Discussion

The words "involving deadly force" described the factual circumstances of the case, not specific assault offenses. If the accused is charged with simple assault, battery or any form of aggravated assault, or if simple assault, battery or any form of aggravated assault is in issue as a lesser included offense, the accused may rely on this subsection if the test specified in subsections (A) and (B) is satisfied.

The test for the first element of self-defense is objective. Thus, the accused's apprehension of death or grievous bodily harm must have been one which a reasonable, prudent person would have held under the circumstances. Because this test is objective, such matters as intoxication or emotional instability of the accused are irrelevant. On the other hand, such matters as the relative height, weight, and general build of the accused and the alleged victim, and the possibility of safe retreat are ordinarily among the circumstances which should be considered in determining the reasonableness of the apprehension of death or grievous bodily harm.

The test for the second element is entirely subjective. The accused is not objectively limited to the use of reasonable force. Accordingly, such matters as the accused's emotional control, education, and intelligence are relevant in determining the accused's actual belief as to the force necessary to repel the attack.

See also Mil.R.Evid. 404(a)(2) as to evidence concerning the character of the victim.

2. Certain aggravated assault cases. It is a defense to assault with a dangerous weapon or means likely to produce death or grievous bodily harm that the accused:
   (A) Apprehended, on reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and
   (B) In order to deter the assailant, offered but did not actually apply or attempt to apply such means or force as would be likely to cause death or grievous bodily harm.

Discussion

The principles in the discussion of subsection (e)(1) of this rule concerning reasonableness of the apprehension of bodily harm apply here.

If, as a result of the accused's offer of a means or force likely to produce grievous bodily harm, the victim was killed or injured unintentionally by the accused, this aspect of self-defense may operate in conjunction with the defense of accident (see subsection (f) of this rule) to excuse the accused's acts. The death or injury must have been an unintended and unexpected result of the accused's exercise of the right of self-defense.

3. Other assaults. It is a defense to any assault punishable under Article 90, 91, or 128 and not listed in subsections (e)(1) or (2) of this rule that the accused:
   (A) Apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and
   (B) Believed that the force that accused used was necessary for protection against bodily harm, provided that the force used by the accused was less
than force reasonably likely to produce death or grievous bodily harm.

Discussion

The principles in the discussion under subsection (e)(1) apply here.

If, in using only such force as the accused was entitled to use under this aspect of self-defense, death or serious injury to the victim results, this aspect of self-defense may operate in conjunction with the defense of accident (see subsection (f) of this rule) to excuse the accused's acts. The death or serious injury must have been an unintended and unexpected result of the accused's proper exercise of the right of self-defense.

(4) Loss of right to self-defense. The right to self-defense is lost and the defenses described in subsections (e)(1), (2), and (3) of this rule shall not apply if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.

Discussion

A person does not become an aggressor or provocator merely because that person approaches another to seek an interview, even if the approach is not made in a friendly manner. For example, one may approach another and demand an explanation of offensive words or redress of a complaint. If the approach is made in a nonviolent manner, the right to self-defense is not lost.

Failure to retreat, when retreat is possible, does not deprive the accused of the right to self-defense if the accused was lawfully present. The availability of avenues of retreat is one factor which may be considered in addressing the reasonableness of the accused's apprehension of bodily harm and the sincerity of the accused's belief that the force used was necessary for self-protection.

(5) Defense of another. The principles of self-defense under subsection (e)(1) through (4) of this rule apply to defense of another. It is a defense to homicide, attempted homicide, assault with intent to kill, or any assault under Article 90, 91, or 128 that the accused acted in defense of another, provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances.

Discussion

The accused acts at the accused's peril when defending another. Thus, if the accused goes to the aid of an apparent assault victim, the accused is guilty of any assault the accused commits on the apparent assailant if, unbeknownst to the accused, the apparent victim was in fact the aggressor and not entitled to use self-defense.

(f) Accident. A death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable.

Discussion

The defense of accident is not available when the act which caused the death, injury, or event was a negligent act.

(g) Entrapment. It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense.

Discussion

The "Government" includes agents of the Government and persons cooperating with them (for example, informants). The fact that persons acting for the Government merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct is the product of the creative activity of law enforcement officials.

When the defense of entrapment is raised, evidence of uncharged misconduct by the accused of a nature similar to that charged is admissible to show predisposition. See Mil.R.Evid. 404(b).

(h) Coercion or duress. It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.

Discussion

The immediacy of the harm necessary may vary with the circumstances. For example, a threat to kill a person's wife the next day may be immediate if the person has no opportunity to contact
law enforcement officials or otherwise protect the intended victim or avoid committing the offense before then.

(i) Inability. It is a defense to refusal or failure to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform the duty.

Discussion

The test of inability is objective in nature. The accused's opinion that a physical impairment prevented performance of the duty will not suffice unless the opinion is reasonable under all the circumstances.

If the physical or financial inability of the accused occurred through the accused's own fault or design, it is not a defense. For example, if the accused, having knowledge of an order to get a haircut, spends money on other nonessential items, the accused's inability to pay for the haircut would not be a defense.

(j) Ignorance or mistake of fact. Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

Discussion

Examples of ignorance or mistake which need only exist in fact include: ignorance of the fact that the person assaulted was an officer; belief that property allegedly stolen belonged to the accused; belief that a controlled substance was really sugar.

Examples of ignorance or mistake which must be reasonable as well as actual include: belief that the accused charged with unauthorized absence had permission to go; belief that the accused had a medical "profile" excusing shaving as otherwise required by regulation. Some offenses require special standards of conduct (see, for example, paragraph 68, Part IV, Dishonorable failure to maintain sufficient funds); the element of reasonableness must be applied in accordance with the standards imposed by such offenses.

Examples of offenses in which the accused's intent or knowledge is immaterial include: carnal knowledge (accused's knowledge of age of victim immaterial); improper use of countersign (mistake as to authority of person to whom disclosed not a defense). Such ignorance or mistake may be relevant in extenuation and mitigation, however.

See subsection (i)(1) of this rule concerning ignorance or mistake of law.

(k) Lack of mental responsibility.

(1) Lack of mental responsibility. It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

Discussion

See R.C.M. 706 concerning sanity inquiries. See also R.C.M. 909 concerning the capacity of the accused to stand trial.

(2) Partial mental responsibility. A mental condition not amounting to a lack of mental responsibility under subsection (k)(1) of this rule is not a defense, nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense.

(3) Procedure.

(A) Presumption. The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until the accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense.

Discussion

The accused is presumed to be mentally responsible, and this presumption continues throughout the proceedings unless the finder of fact determines that the accused has proven lack of mental responsibility by clear and convincing evidence. See subsection (b) of this rule.

(B) Inquiry. If a question is raised concerning the mental responsibility of the accused, the military judge shall rule finally whether to direct an inquiry under R.C.M. 706. In a special court-martial with-
out a military judge, the president shall rule finally except to the extent that the question is one of fact, in which case the president rules subject to objection by any member.

Discussion

See R.C.M. 801(e)(3) for the procedures for voting on rulings of the president of a special court-martial without a military judge.

If an inquiry is directed, priority should be given to it.

(C) Determination. The issue of mental responsibility shall not be considered as an interlocutory question.

(I) Not defenses generally.

(1) Ignorance or mistake of law. Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense.

Discussion

For example, ignorance that it is a crime to possess marijuana is not a defense to wrongful possession of marijuana.

Ignorance or mistake of law may be a defense in some limited circumstances. If the accused, because of a mistake as to a separate nonpenal law, lacks the criminal intent or state of mind necessary to establish guilt, this may be a defense. For example, if the accused, under mistaken belief that the accused is entitled to take an item under property law, takes an item, this mistake of law (as to the accused’s legal right) would, if genuine, be a defense to larceny. On the other hand, if the accused disobeyed an order, under the actual but mistaken belief that the order was unlawful, this would not be a defense because the accused’s mistake was as to the order itself, and not as to a separate nonpenal law. Also, mistake of law may be a defense when the mistake results from reliance on the decision or pronouncement of an authorized public official or agency. For example, if an accused, acting on the advice of an official responsible for administering benefits that the accused is entitled to those benefits, applies for and receives those benefits, the accused may have a defense even though the accused was not legally eligible for the benefits. On the other hand, reliance on the advice of counsel that a certain course of conduct is legal is not, of itself, a defense.

(2) Voluntary intoxication. Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

R.C.M. 917(e)

Discussion

Intoxication may reduce premeditated murder to unpredicated murder, but it will not reduce murder to manslaughter or any other lesser offense. See paragraph 43c(2)(c), Part IV.

Although voluntary intoxication is not a defense, evidence of voluntary intoxication may be admitted in extenuation.

Rule 917. Motion for a finding of not guilty

(a) In general. The military judge, on motion by the accused or sua sponte, shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offenses affected. If a motion for a finding of not guilty at the close of the prosecution’s case is denied, the defense may offer evidence on that offense without having reserved the right to do so.

(b) Form of motion. The motion shall specify wherein the evidence is insufficient.

(c) Procedure. Before ruling on a motion for a finding of not guilty, whether made by counsel or sua sponte, the military judge shall give each party an opportunity to be heard on the matter.

Discussion

The military judge ordinarily should permit the trial counsel to reopen the case as to the insufficiency specified in the motion.

See R.C.M. 801(e)(2) and (3) for additional procedures to be followed in a special court-martial without a military judge.

(d) Standard. A motion for a finding of not guilty shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.

(e) Motion as to greater offense. A motion for a finding of not guilty may be granted as to part of a specification and, if appropriate, the corresponding charge, as long as a lesser offense charged is alleged in the portion of the specification as to which the motion is not granted. In such cases, the military judge shall announce that a finding of not guilty has been granted as to specified language in the specification and, if appropriate, corresponding charge. In
cases before members, the military judge shall instruct the members accordingly, so that any findings later announced will not be inconsistent with the granting of the motion.

(f) Effect of ruling. A ruling granting a motion for a finding of not guilty is final when announced and may not be reconsidered. Such a ruling is a finding of not guilty of the affected specification, or affected portion thereof, and, when appropriate, of the corresponding charge. A ruling denying a motion for a finding of not guilty may be reconsidered at any time before findings on the general issue of guilt are announced.

(g) Effect of denial on review. If all the evidence admitted before findings, regardless of whom offered, is sufficient to sustain findings of guilty, the findings need not be set aside upon review solely because the motion for finding of not guilty should have been granted upon the state of the evidence when it was made.

Rule 918. Findings
(a) General findings. The general findings of a court-martial state whether the accused is guilty of each offense charged. If two or more accused are tried together, separate findings as to each shall be made.

(1) As to a specification. General findings as to a specification may be: guilty; not guilty of an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; not guilty only by reason of lack of mental responsibility; or, not guilty. Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.

(b) Special findings. In a trial by court-martial composed of military judge alone, the military judge shall make special findings upon request by any party. Special findings may be requested only as to matters of fact reasonably in issue as to an offense and need be made only as to offenses of which the accused was found guilty. Special findings may be requested at any time before general findings are announced. Only one set of special findings may be requested by a party in a case. If the request is for findings on specific matters, the military judge may require that the request be written. Special findings may be entered orally on the record at the court-martial or in writing during or after the court-mar-
trial, but in any event shall be made before authenti-
cation and included in the record of trial.

Discussion

Special findings ordinarily include findings as to the elements
of the offenses of which the accused has been found guilty, and
any affirmative defense relating thereto.

See also R.C.M. 905(d); Mil.R.Evid. 304(d)(4); 311(d)(4);
321(f) concerning other findings to be made by the military judge.

Members may not make special findings.

(c) Basis of findings. Findings may be based on di-
rect or circumstantial evidence. Only matters prop-
erly before the court-martial on the merits of the
case may be considered. A finding of guilty of any of-
fense may be reached only when the factfinder is sat-
sfied that guilt has been proved beyond a reasonable
doubt.

Discussion

Direct evidence is evidence which tends directly to prove or
disprove a fact in issue (for example, an element of the offense
charged). Circumstantial evidence is evidence which tends di-
rectly to prove not a fact in issue but some other fact or circum-
stance from which, either alone or together with other facts or cir-
cumstances, one may reasonably infer the existence or nonexis-
tence of a fact in issue. There is no general rule for deter-
mapping or comparing the weight to be given to direct or circum-
stantial evidence.

A reasonable doubt is a doubt based on reason and common
sense. A reasonable doubt is not mere conjecture; it is an honest,
conscious doubt suggested by the evidence, or lack of it, in the
case. An absolute or mathematical certainty is not required. The
rule as to reasonable doubt extends to every element of the of-
fense. It is not necessary that each particular fact advanced by the
prosecution which is not an element be proved beyond a reasona-
able doubt.

The factfinder should consider the inherent probability or
improbability of the evidence, using common sense and knowl-
dge of human nature, and should weigh the credibility of wit-
nesses. A fact finder may properly believe one witness and disbe-
ieve others whose testimony conflicts with that of the one. A fac-
tfinder may believe part of the testimony of a witness and disbe-
ieve other parts.

Findings of guilty may not be based solely on the testimony
of a witness other than the accused which is self-contradictory,
unless the contradiction is adequately explained by the witness.
Even if apparently credible and corroborated, the testimony of an
accomplice should be considered with great caution.

Rule 919. Argument by counsel on findings

(a) In general. After the closing of evidence, trial counsel shall be permitted to open the argument. The defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebut-

(b) Contents. Arguments may properly include rea-
sonable comment on the evidence in the case, in-
cluding inferences to be drawn therefrom, in support of a party's theory of the case.

Discussion

The military judge may exercise reasonable control over ar-
gument. See R.C.M. 801(a)(3).

Argument may include comment about the testimony, con-
duct, motives, interests, and biases of witnesses to the extent sup-
ported by the evidence. Counsel should not express a personnel
belief or opinion as to the truth or falsity of any testimony or evi-
dence or the guilt or innocence of the accused, nor should counsel
make arguments calculated to inflame passions or prejudices. In
argument counsel may treat the testimony of witnesses as conclu-
sively establishing the facts related by the witnesses. Counsel may
not cite legal authorities or the facts of other cases when arguing
to members on findings.

Trial counsel may not comment on the accused's exercise of
the right against self-incrimination or the right to counsel. See
Mil.R.Evid. 512. Trial counsel may not argue that the prosecu-
tion's evidence is unrebuted if the only rebuttal could come from
the accused. When the accused is on trial for several offenses and
testifies only as to some of the offenses, trial counsel may not com-
ment on the accused's failure to testify as to the others. When the
accused testifies on the merits regarding an offense charged, trial
counsel may comment on the accused's failure in that testimony
to deny or explain specific incriminating facts that the evidence
for the prosecution tends to establish regarding that offense.

Trial counsel may not comment on the failure of the defense
to call witnesses or of the accused to testify at the Article 32 inves-
tigation or upon the probable effect of the court-martial's findings
on relations between the military and civilian communities.

The rebuttal argument of trial counsel is generally limited to
matters argued by the defense. If trial counsel is permitted to in-
troduce new matter in closing argument, the defense should be al-
lowed to reply in rebuttal. However, this will not preclude trial
counsel from presenting a final argument.

(c) Waiver of objection to improper argument. Fail-
ure to object to improper argument before the mili-
itary judge begins to instruct the members on find-
ings shall constitute waiver of the objection.

Discussion

If an objection that an argument is improper is sustained, the
military judge should immediately instruct the members that the
argument was improper and that they must disregard it. In ex-
R.C.M. 919(c)

Rule 920. Instructions on findings
(a) In general. The military judge shall give the members appropriate instructions on findings.

Discussion

Instructions consist of a statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine findings. Instructions should be tailored to fit the circumstances of the case, and should fairly and adequately cover the issues presented.

(b) When given. Instructions on findings shall be given before or after arguments by counsel, or at both times, and before the members close to deliberate on findings, but the military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time.

Discussion

After members have reached a finding on a specification, instructions may not be given on an offense included therein which was not described in an earlier instruction unless the finding is illegal. This is true even if the finding has not been announced. When instructions are to be given is a matter within the sole discretion of the military trial judge.

(c) Requests for instructions. At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on findings before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments.

Discussion

Requests for and objections to instructions should be resolved at an Article 39(a) session. But see R.C.M. 801(e)(3); 803.

If an issue has been raised, ordinarily the military judge must instruct on the issue when requested to do so. The military judge is not required to give the specific instruction requested by counsel, however, as long as the issue is adequately covered in the instructions.

The military judge should not identify the source of any instruction when addressing the members.

All written requests for instructions should be marked as appellate exhibits, whether or not they are given.

(d) How given. Instructions on findings shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or, unless a party objects, portions of them, may also be given to the members for their use during deliberations.

Discussion

A copy of any written instructions delivered to the members should be marked as an appellate exhibit.

(e) Required instructions. Instructions on findings shall include:

(1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;
(2) A description of the elements of each lesser included offense in issue, unless trial of a lesser included offense is barred by the statute of limitations (Article 43) and the accused refuses to waive the bar;
(3) A description of any special defense under R.C.M. 916 in issue;
(4) A direction that only matters properly before the court-martial may be considered;
(5) A charge that—
   (A) The accused must be presumed to be innocent until the accused’s guilt is established by legal and competent evidence beyond reasonable doubt;
   (B) In the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;
   (C) If, when a lesser included offense is in issue, there is a reasonable doubt as to the degree of guilt of the accused, the finding must be in a lower degree as to which there is not reasonable doubt; and
   (D) The burden of proof to establish the guilt of the accused is upon the Government. [When the issue of lack of mental responsibility is raised, add:] However, the burden of proving the defense of lack
of mental responsibility by clear and convincing evidence is upon the accused.

(6) Directions on the procedures under R.C.M. 921 for deliberations and voting; and

(7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, sua sponte, should be given.

Discussion

A matter is "in issue" when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose. An instruction on a lesser included offense is proper when an element from the charged offense which distinguishes that offense from the lesser offense is in dispute.

See R.C.M. 918(c) and discussion as to reasonable doubt and other matters relating to the basis for findings which may be the subject of an instruction.

Other matters which may be the subject of instruction in appropriate cases included: inferences (see the explanations in Part IV concerning inferences relating to specific offenses); the limited purpose for which evidence was admitted (regardless of whether such evidence was offered by the prosecution of defense) (see Mil.R.Evid. 105); the effect of character evidence (see Mil.R.Evid. 404; 405); the effect of judicial notice (see Mil.R.Evid. 201, 201A); the weight to be given a pretrial statement (see Mil.R.Evid. 340(e)); the effect of stipulations (see R.C.M. 811); that, when a guilty plea to a lesser included offense has been accepted, the members should accept as proved the matters admitted by the plea, but must determine whether the remaining elements are established; that a plea of guilty to one offense may not be the basis for inferring the existence of a fact or element of another offense; the absence of the accused from trial should not be held against the accused; and that no adverse inferences may be drawn from an accused's failure to testify (see Mil.R.Evid. 301(g)).

The military judge may summarize and comment upon evidence in the case in instructions. In doing so, the military judge should present an accurate, fair, and dispassionate statement of what the evidence shows; not depart from an impartial role; not assume as true the existence or nonexistence of a fact in issue when the evidence is conflicting or disputed, or when there is no evidence to support the matter; and make clear that the members must exercise their independent judgment as to the facts.

(f) Waiver. Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify of what respect the instructions given were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 921. Deliberations and voting on findings

(a) In general. After the military judge instructs the members on findings, the members shall deliberate and vote in a closed session. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner in an attempt to control the independence of members in the exercise of their judgment.

(b) Deliberations. Deliberations properly include full and free discussion of the merits of the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request.

(c) Voting.

(1) Secret ballot. Voting on the findings for each charge and specification shall be by secret written ballot. All members present shall vote.

(2) Numbers of votes required to convict.

(A) Death penalty mandatory. A finding of guilty of an offense for which the death penalty is mandatory results only if all members present vote for a finding of guilty.

Discussion

Article 106 is the only offense under the code for which the death penalty is mandatory.

(B) Other offenses. As to any offense for which the death penalty is not mandatory, a finding of guilty results only if at least two-thirds of the members present vote for a finding of guilty.

Discussion

In computing the number of votes required to convict, any fraction of a vote is rounded up to the next whole number. For example, if there are five members, the concurrence of at least four would be required to convict. The military judge should instruct the members on the specific number of votes required to convict.

(3) Acquittal. If fewer than two-thirds of the members present vote for a finding of guilty—or, when the death penalty is mandatory, if fewer than
all the members present vote for a finding of guilty—a finding of not guilty has resulted as to the charge or specification on which the vote was taken.

(4) Not guilty only by reason of lack of mental responsibility. When the defense of lack of mental responsibility is in issue under R.C.M. 916(k)(1), the members shall first vote on whether the prosecution has proven the elements of the offense beyond a reasonable doubt. If at least two-thirds of the members present (all members for offenses where the death penalty is mandatory) vote for a finding of guilty, then the members shall vote on whether the accused has proven lack of mental responsibility. If a majority of the members present concur that the accused has proven lack of mental responsibility be clear and convincing evidence, a finding of not guilty only by reason of lack of mental responsibility results. If the vote on lack of mental responsibility does not result in a finding of not guilty only by reason of lack of mental responsibility, then the defense of lack of mental responsibility has been rejected and the finding of guilty stands.

Discussion

If lack of mental responsibility is in issue with regard to more than one specification, the members should determine the issue of lack of mental responsibility on each specification separately.

(5) Included offenses. Members shall not vote on a lesser included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of an offense charged has been reached the members shall vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members shall continue the vote on each included offense on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each such offense.

(6) Procedure for voting.

(A) Order. Each specification shall be voted on separately before the corresponding charge. The order of voting on several specifications under a charge or on several charges shall be determined by the president unless a majority of the members object.

(B) Counting votes. The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

Discussion

Once findings have been reached, they may be reconsidered only in accordance with R.C.M. 924.

(d) Action after findings are reached. After the members have reached findings on each charge and specification before them, the court-martial shall be opened and the president shall inform the military judge that findings have been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the findings and may assist the members in putting the findings in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the findings.

Rule 922. Announcement of findings

(a) In general. Findings shall be announced in the presence of all parties promptly after they have been determined.

Discussion

See Appendix 10. A finding of an offense about which no instructions were given is not proper.

(b) Findings by members. The president shall announce the findings by the members.

(1) If a finding is based on a plea of guilty, the president shall so state.

(2) In a capital case, if a finding of guilty is unanimous with respect to a capital offense, the president shall so state. This provision shall not apply during reconsideration under R.C.M. 924(a) of a finding of guilty previously announced in open court unless the prior finding was announced as unanimous.
Discussion

If the findings announced are ambiguous, the military judge should seek clarification. See also R.C.M. 924. A nonunanimous finding of guilty as to a capital offense may be reconsidered, but not for the purpose of rendering a unanimous verdict in order to authorize a capital sentencing proceeding. The president shall not make a statement regarding unanimity with respect to reconsideration of findings as to an offense in which the prior findings were not unanimous.

(c) Findings by military judge. The military judge shall announce the findings when trial is by military judge alone or when findings may be entered upon R.C.M. 910(g).

(d) Erroneous announcement. If an error was made in the announcement of the findings of the court-martial, the error may be corrected by a new announcement in accordance with this rule. The error must be discovered and the new announcement made before the final adjournment of the court-martial in the case.

Discussion

See R.C.M. 1102 concerning the action to be taken if the error in the announcement is discovered after final adjournment.

(e) Polling prohibited. Except as provided in Mil.R.Evid. 606, members may not be questioned about their deliberations and voting.

Rule 923. Impeachment of findings

Findings which are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Discussion

Deliberations of the members ordinarily are not subject to disclosure. See Mil.R.Evid. 606. Unsound reasoning by a member, misconception of the evidence, or misapplication of the law is not a proper basis for challenging the findings. However, when a showing of a ground for impeaching the verdict has been made, members may be questioned about such a ground. The military judge determines, as an interlocutory matter, whether such an inquiry will be conducted and whether a finding has been impeached.

Rule 924. Reconsideration of findings

(a) Time for reconsideration. Members may reconsider any finding reached by them before such finding is announced in open session. Members may reconsider any finding of guilty reached by them at any time before announcement of the sentence.

(b) Procedure. Any member may propose that a finding be reconsidered. If such a proposal is made in a timely manner the question whether to reconsider shall be determined in closed session by secret written ballot. Any finding of not guilty shall be reconsidered if a majority vote for reconsideration. Any finding of guilty shall be reconsidered if more than one-third of the members vote for reconsideration. When the death penalty is mandatory, a request by any member for reconsideration of a guilty finding requires reconsideration. Any finding of not guilty only by reason of lack of mental responsibility shall be reconsidered on the issue of the finding of guilty of the elements if more than one-third of the members vote for reconsideration, and on the issue of mental responsibility if a majority vote for reconsideration. If a vote to reconsider a finding succeeds, the procedures in R.C.M. 921 shall apply.

Discussion

After the initial secret ballot vote on a finding in closed session, no other vote may be taken on that finding unless a vote to reconsider succeeds.

(c) Military judge sitting alone. In trial by military judge alone, the military judge may reconsider any finding of guilty at any time before announcement of sentence.
CHAPTER X. SENTENCING

Rule 1001. Presentencing procedure

(a) In general.

(1) Procedure. After findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matter shall ordinarily be presented in the following sequence—

(A) Presentation by trial counsel of:

(i) service data relating to the accused taken from the charge sheet;

(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;

(iii) evidence of prior convictions, military or civilian;

(iv) evidence of aggravation; and

(v) evidence of rehabilitative potential.

(B) Presentation by the defense of evidence in extenuation or mitigation or both.

(C) Rebuttal.

(D) Argument by the trial counsel on sentence.

(E) Argument by the defense counsel on sentence.

(F) Rebuttal arguments in the discretion of the military judge.

(2) Adjudging sentence. A sentence shall be adjudged in all cases without unreasonable delay.

(3) Advice and inquiry. The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

(b) Matter to be presented by the prosecution.

(1) Service data from the charge sheet. Trial counsel shall inform the court-martial of the data on the charge sheet relating to the pay and service of the accused and the duration and nature of any pretrial restraint. In the discretion of the military judge, this may be done by reading the material from the charge sheet or by giving the court-martial a written statement of such matter. If the defense objects to the data as being materially inaccurate or incomplete, or containing specified objectionable matter, the military judge shall determine the issue. Objections not asserted are waived.

(2) Personal data and character of prior service of the accused. Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15.

"Personnel records of the accused" includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.

(3) Evidence of prior convictions of the accused.

(A) In general. The trial counsel may introduce evidence of military or civilian convictions of the accused. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

Discussion

A vacation of a suspended sentence (see R.C.M. 1109) is not a conviction and is not admissible as such, but may be admissible under subsection (b)(2) of this rule as reflective of the character of the prior service of the accused.

(B) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible except that a conviction by summary court-martial or special court-martial without a military judge may not be used for purposes of this rule until review has been completed pursuant to Article 64 or Article 66, if applicable. Evidence of the pendency of an appeal is admissible.

(C) Method of proof. Previous convictions may be proved by any evidence admissible under the Military Rules of Evidence.
(4) Evidence in aggravation. The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

Discussion

Evidence in aggravation may include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.

See also R.C.M. 1004 concerning aggravating circumstances in capital cases.

(5) Evidence of rehabilitative potential. The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence, in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instances of conduct.

(c) Matter to be presented by the defense.

(1) In general. The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.

(A) Matter in extenuation. Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

(B) Matter in mitigation. Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

(2) Statement by the accused.

(A) In general. The accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution, or for all three purposes whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. This subsection does not permit the filing of an affidavit of the accused.

(B) Testimony of the accused. The accused may give sworn oral testimony under this paragraph and shall be subject to cross-examination concerning it by the trial counsel or examination on it by the court-martial, or both.

(C) Unsworn statement. The accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

Discussion

An unsworn statement ordinarily should not include what is properly argument, but inclusion of such matter by the accused when personally making an oral statement normally should not be grounds for stopping the statement.

(3) Rules of evidence relaxed. The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.

(d) Rebuttal and surrebuttal. The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge. If the Military Rules of Evidence were relaxed under sub-
section (e)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

(e) Production of witnesses.

(1) In general. During the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. Whether a witness shall be produced to testify during presentence proceedings is a matter within the discretion of the military judge, subject to the limitations in subsection (e)(2) of this rule.

Discussion

See R.C.M. 703 concerning the procedures for production of witnesses.

(2) Limitations. A witness may be produced to testify during presentence proceedings through a subpoena or travel orders at Government expense only if—

(A) The testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;

(B) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(C) The other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;

(D) Other forms of evidence, such as oral depositions, written interrogatories, or former testimony would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and

(E) The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(f) Additional matters to be considered. In addition to matters introduced under this rule, the court-martial may consider—

(1) That a plea of guilty is a mitigating factor; and

(2) Any evidence properly introduced on the merits before findings, including:

(A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; and

(B) Evidence relating to any mental impairment or deficiency of the accused.

Discussion

The fact that the accused is of low intelligence or that, because of a mental or neurological condition the accused’s ability to adhere to the right is diminished, may be extenuating. On the other hand, in determining the severity of a sentence, the court-martial may consider evidence tending to show that an accused has little regard for the rights of others.

(g) Argument. After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than that court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection.

Rule 1002. Sentence determination

Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or
any lesser punishment, or may adjudge a sentence of no punishment.

Discussion

See R.C.M. 1003 concerning authorized punishments and limitations on punishments. See also R.C.M. 1004 in capital cases.

Rule 1003. Punishments

(a) In general. Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial.

Discussion

"Any person" includes officers, enlisted persons, person in custody of the armed forces serving a sentence imposed by a court-martial, and, insofar as the punishments are applicable, any other person subject to the code. See R.C.M. 202.

(b) Authorized punishments. Subject to the limitations in this Manual, a court-martial may adjudge only the following punishments:

(1) Reprimand. A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority;

Discussion

A reprimand adjudged by a court-martial is a punitive censure.

(2) Forfeiture of pay and allowances. Unless a total forfeiture is adjudged, a sentence to forfeiture shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last.

Allowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances. The maximum authorized amount of a partial forfeiture shall be determined by using the basic pay or, in the case of reserve component personnel on inactive-duty, compensation for periods of inactive-duty training, authorized by the cumulative years of service of the accused, and, if no confinement is adjudged, any sea or foreign duty pay. If the sentence also includes reduction in grade, expressly or by operation of law, the maximum forfeiture shall be based on the grade to which the accused is reduced.

Discussion

A forfeiture deprives the accused of the amount of pay (and allowances) specified as it accrues. Forfeitures accrue to the United States.

"Basic pay" does not include pay for special qualifications, such as diving pay, or incentive pay such as flying, parachuting, or duty on board a submarine.

(3) Fine. Any court-martial may adjudge a fine instead of forfeitures. General courts-martial may also adjudge a fine in addition to forfeitures. Special and summary courts-martial may not adjudge any fine in excess of the total amount of forfeitures which may be adjudged in that case. In order to enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial;

Discussion

A fine is in the nature of a judgement and, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted. Ordinarily, a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged against a civilian subject to military law.

See R.C.M. 1113(d)(3) concerning imposition of confinement when the accused fails to pay a fine.

(4) Loss of numbers, lineal position, or seniority. These punishments are authorized only in cases of Navy, Marine Corps, and Coast Guard officers;

Discussion

All losses of numbers will be numbers in the appropriate lineal list.

(5) Reduction in pay grade. Except as provided in R.C.M. 1301(d), a court-martial may sentence an
R.C.M. 1003(b)(5)

enlisted member to be reduced to the lowest or any intermediate pay grade;

Discussion

Reduction under Article 58a is not a part of the sentence but is an administrative result thereof.

(6) Restriction to specified limits. Restriction may be adjudged for no more than 2 months for each month of authorized confinement and in no case for more than 2 months. Confinement and restriction may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection;

Discussion

Restriction does not exempt the person on whom it is imposed from any military duty. Restriction and hard labor without confinement may be adjudged in the same case provided they do not exceed the maximum limits for each. See subsection (c)(1)(A)(ii) of this rule. See also R.C.M. 1113(d)(5). The sentence adjudged should specify the limits of the restriction.

(7) Hard labor without confinement. Hard labor without confinement may be adjudged for no more than 1-1/2 months for each month of authorized confinement and in no case for more than three months. Hard labor without confinement may be adjudged only in the cases of enlisted members. The court-martial shall not specify the hard labor to be performed. Confinement and hard labor without confinement may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection.

Discussion

Hard labor without confinement is performed in addition to other regular duties and does not excuse or relieve a person from performing regular duties. Ordinarily, the immediate commander of the accused will designate the amount and character of the labor to be performed. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which entitled.

See R.C.M. 1301(d) concerning limitations on hard labor without confinement in summary courts-martial.

(8) Confinement. The place of confinement shall not be designated by the court-martial. A court-martial shall not adjudge a sentence to solitary confinement or to confinement without hard labor;

Discussion

The authority executing a sentence to confinement may require hard labor whether or not the words "at hard labor" are included in the sentence. See Article 58(b). To promote uniformity, the words "at hard labor" should be omitted in a sentence to confinement.

(9) Confinement on bread and water or diminished rations. Confinement on bread and water or diminished rations may be adjudged only in cases of enlisted members attached to or embarked in a vessel and for no more than 3 days. The categories of enlisted personnel upon whom this type of punishment may be imposed may be further limited by regulations of the Secretary concerned. If adjudged in the same sentence with confinement, hard labor without confinement, or restriction, confinement on bread and water or diminished rations for 1 day shall be treated as the equivalent of confinement for 2 days;

Discussion

A sentence to confinement on bread and water or diminished rations may be served in a place where the prisoner can communicate only with authorized personnel. The ration to be furnished is that specified by the authority charged with the administration of the punishment, but may not consist solely of bread and water unless that punishment was specifically adjudged. A medical officer's approval must be obtained before the punishment may be executed. See R.C.M. 1113(d)(5); 1305(d).

(10) Punitive separation. A court-martial may not adjudge an administrative separation from the service. There are three types of punitive separation.

(A) Dismissal. Dismissal applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dismissal may be adjudged for any offense of which a commissioned officer, commissioned warrant officer, cadet, or midshipman has been found guilty;
(B) Dishonorable discharge. A dishonorable discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dishonorable discharge may be adjudged for any offense of which a warrant officer who is not commissioned has been found guilty. A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment; and

**Discussion**

*See also* subsection (d)(1) of this rule regarding when a dishonorable discharge is authorized as an additional punishment.

---

(C) Bad conduct discharge. A bad-conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial which has met the requirements of R.C.M. 201(F)(2)(B). A bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary;

**Discussion**

*See also* subsections (d)(2) and (3) of this rule regarding when a bad-conduct discharge is authorized as an additional punishment.

---

(11) Death. Death may be adjudged only in accordance with R.C.M. 1004; and

(12) Punishments under the law of war. In cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war.

(c) Limits on punishments.

(1) Based on offenses.

(A) Offenses listed in Part IV.

(i) Maximum punishment. The maximum limits for the authorized punishments of confinement, forfeitures and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual. These limitations are for each separate offense, not for each charge. When a dishonorable discharge is authorized, a bad-conduct discharge is also authorized.

(ii) Other punishments. Except as otherwise specifically provided in this Manual, the types of punishments listed in subsections (b)(1), (3), (4), (5), (6) and (7) of this rule may be adjudged in addition to or instead of confinement, forfeitures, a punitive discharge (if authorized), and death (if authorized).

(B) Offenses not listed Part IV.

(i) Included or related offenses. For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however if an offense not listed is included in a listed offense, and is closely related to another or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses.

(ii) Not included or related offenses. An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of the service. When the United States Code provides for confinement for a specified period or not more than a specified period the maximum punishment by court-martial shall include confinement for that period. If the period is 1 year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances; if 6 months or more, a bad-conduct discharge and forfeiture of all pay and allowances; if less than 6 months, forfeiture of two-thirds pay per month for the authorized period of confinement.

(C) Multiplicity. When the accused is found guilty of two or more offenses, the maximum authorized punishment may be imposed for each separate offense. Except as provided in paragraph 5 of Part IV, offenses are not separate if each does not require proof of an element not required to prove the other. If the offenses are not separate, the maximum punishment for those offenses shall be the maximum authorized punishment for the offense carrying the greatest maximum punishment.
The maximum punishment may be limited by: the jurisdictional limits of the court-martial (see R.C.M. 201(f) and 1301(d)); the nature of the proceedings (see R.C.M. 810(d) (sentence limitations in rehearings, new trials, and other trials)); and by instructions by a convening authority (see R.C.M. 601(e)(1)). See also
R.C.M. 1107(d)(3) concerning limits on the maximum punishment which may be approved depending on the nature of the record.

(d) Circumstances permitting increased punishments.

(1) Three or more convictions. If an accused is found guilty of an offense or offenses for none of which a dishonorable discharge is otherwise authorized, proof of three or more previous convictions adjudged by a court-martial during the year next preceding the commission of any offense of which the accused stands convicted shall authorize a dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 1 year, confinement for 1 year. In computing the 1-year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection, the court-martial convictions must be final.

(2) Two or more convictions. If an accused is found guilty of an offense or offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, proof of two or more previous convictions adjudged by a court-martial during the 3 years next preceding the commission of any offense of which the accused stands convicted shall authorize a dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 3 months, confinement for 3 months. In computing the 3 year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection the court-martial convictions must be final.

(3) Two or more offenses. If an accused is found guilty of two or more offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, the fact that the authorized confinement for these offenses totals 6 months or more shall, in addition, authorize a bad-conduct discharge and forfeiture of all pay and allowances.

Discussion

All of these increased punishments are subject to all other limitations on punishments set forth elsewhere in this rule. Convictions by summary court-martial may not be used to increase the maximum punishment under this rule. However they may be admitted and considered under R.C.M. 1001.

Rule 1004. Capital cases

(a) In general. Death may be adjudged only when:

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

(2) The accused was convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken; and

(3) The requirements of subsections (b) and (c) of this rule have been met.

(b) Procedure. In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—

(1) Notice. Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) Evidence of aggravating factors. Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.

Discussion

See also subsection (b)(5) of this rule.

(3) Evidence in extenuation and mitigation. The accused shall be given broad latitude to present evidence in extenuation and mitigation.

Discussion

See R.C.M. 1001(c).

(4) Necessary findings. Death may not be adjudged unless—

(A) The members find that at least one of the aggravating factors under subsection (c) existed;

(B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and
R.C.M. 1004(b)(4)(C)

(C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule.

(5) Basis for findings. The findings in subsection (b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(6) Instructions. In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

(7) Voting. In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) Announcement. If death is adjudged, the president shall, in addition to complying with R.C.M. 1007, announce which aggravating factors under subsection (c) of this rule were found by the members.

(c) Aggravating factors. Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118 or 120;

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118 or 120;

(4) That the offense was committed in such a way or under circumstances that the lives of persons other than the victim, if any, were unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 104, 106a, or 120;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(2) That in committing the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United

Discussion

See paragraph 23, Part IV, for a definition of "before or in the presence of the enemy."

II-128
States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil.R.Evid. 315(c)(2), 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim;

(J) The accused has been found guilty in the same case of another violation of Article 118;

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, sodomy, rape, robbery, or aggravated arson was major and who manifested a reckless indifference for human life.

Discussion

Reckless indifference means a heedless disregard of consequences under circumstances involving grave danger to the life of others, although no harm is intended. The accused must have had actual knowledge of the grave danger to others or knowledge of circumstances that would cause an ordinary reasonable man to realize the highly dangerous character of such conduct. In determining whether participation in the offense was "major" the accused's presence at the scene and the extent to which the accused aided, abetted, assisted, encouraged, or advised the other participant(s) should be considered.

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim;

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense;

(11) That, only in the case of a violation of Article 104 or 106a:

(A) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.

For purposes of this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

Discussion

Examples of substantial damage of the national security of the United States include: impeding the performance of a combat mission or operation; impeding the performance of an important mission in a hostile fire or imminent danger pay area (see 37 U.S.C. § 310(a)); and disclosing military plans, capabilities, or intelligence such as to jeopardize any combat mission or operation of the armed services of the United States or its allies or to materially aid an enemy of the United States.

(d) Spying. If the accused has been found guilty of spying under Article 106, subsections (a)(2), (b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.

(e) Other penalties. Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal, as appropriate. Confinement is a necessary incident of a sentence of death but not a part of it.
R.C.M. 1004(e)

Discussion

A sentence of death may not be ordered executed until approved by the President. See R.C.M. 1207. A sentence to death which has been finally ordered executed will be carried out in the manner prescribed by the Secretary concerned. See R.C.M. 1113(d)(1).

Rule 1005. Instructions on sentence

(a) In general. The military judge shall give the members appropriate instructions on sentence.

Discussion

Instructions should be tailored to the facts and circumstances of the individual case.

(b) When given. Instructions on sentence shall be given after arguments by counsel and before the members close to deliberate on sentence, but the military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time.

(c) Requests for instructions. After presentation of matters relating to sentence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on sentence before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments on sentence.

Discussion

Requests for and objections to instructions should be resolved at an Article 39(a) session. But see R.C.M. 801(e)(1)(C); 803. The military judge is not required to give the specific instruction requested by counsel if the matter is adequately covered in the instructions.

The military judge should not identify the source of any instruction when addressing the members.

All written requests for instructions should be marked as appellate exhibits, whether or not they are given.

(d) How given. Instructions on sentence shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or unless a party objects, portions of them, may also be given to the members for their use during deliberations.

Discussion

A copy of any written instructions delivered to the members should be marked as an appellate exhibit.

(e) Required instructions. Instructions on sentence shall include:

1. A statement of the maximum authorized punishment which may be adjudged and of the mandatory minimum punishment, if any;

Discussion

The maximum punishment is the lowest of: the total permitted by the applicable paragraph(s) in Part IV for each separate offense of which the accused was convicted (see also R.C.M. 1003 concerning additional limits on punishments and additional punishments which may be adjudged); the jurisdictional limit of the court-martial (see R.C.M. 201(f) and 1301(d)); or in a rehearing or new or other trial the punishment adjudged by a prior court-martial or approved on review, supplemented by the total permitted by any charges not tried previously (see R.C.M. 810(d)). The military judge may upon request or when otherwise appropriate instruct on lesser punishments. See R.C.M. 1003. The members should not be informed of the basis for the sentence limitation or of any sentence which might be imposed for the offense if not limited as set forth above. If an additional punishment if authorized under R.C.M. 1003(d), the members must be informed of the basis for the increased permissible punishment.

A carefully drafted sentence worksheet ordinarily should be used and should include reference to all authorized punishments in the case.

2. A statement of the procedures for deliberation and voting on the sentence set out in R.C.M. 1006;

Discussion

See also R.C.M. 1004 concerning additional instructions required in capital cases.

3. A statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and
Discussion

See also R.C.M. 1002.

(4) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3) and (5).

Discussion

For example, tailored instructions on sentencing should bring attention to the reputation or record of the accused in the service for good conduct, efficiency, fidelity, courage, bravery, or other traits of good character, and any pretrial restraint imposed on the accused.

(f) Waiver. Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 1006. Deliberations and voting on sentence

(a) In general. The members shall deliberate and vote after the military judge instructs the members on sentence. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner to control the independence of members in the exercise of their judgment.

(b) Deliberations. Deliberations may properly include full and free discussion of the sentence to be imposed in the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such requests.

(c) Proposal of sentences. Any member may propose a sentence. Each proposal shall be in writing and shall contain the complete sentence proposed. The junior member shall collect the proposed sentences and submit them to the president.

Discussion

A proposal should state completely each kind and, when appropriate, amount of authorized punishment proposed by that member. See R.C.M. 1003(b).

(d) Voting.

(1) Duty of members. Each member has the duty to vote for a proper sentence for the offenses of which the court-martial found the accused guilty, regardless of the member's vote or opinion as to the guilt of the accused.

(2) Secret ballot. Proposed sentences shall be voted on by secret written ballot.

(3) Procedure.

(A) Order. All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under subsection (d)(4) of this rule. The process of proposing sentences and voting on them may be repeated as necessary until a sentence is adopted.

(B) Counting votes. The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

Discussion

A sentence adopted by the required number of members may be reconsidered only in accordance with R.C.M. 1009.

(4) Number of votes required.

(A) Death. A sentence which includes death may be adjudged only if all members present vote for that sentence.

Discussion

See R.C.M. 1004.

(B) Confinement for life or more than 10 years. A sentence which includes confinement for life or more than 10 years may be adjudged only if at least three-fourths of the members present vote for that sentence.
R.C.M. 1006(d)(4)(C)

(C) Other. A sentence other than those described in subsection (d)(4)(A) or (B) of this rule may be adjudged only if at least two-thirds of the members present vote for that sentence.

Discussion

In computing the number of votes required to adopt a sentence, any fraction of a vote is rounded up to the next whole number. For example, if there are seven members, at least six would have to concur to impose a sentence requiring a three-fourths vote, while at least five would have to concur to impose a sentence requiring a two-thirds vote.

(5) Mandatory sentence. When a mandatory minimum is prescribed under Article 11 the members shall vote on a sentence in accordance with this rule.

(6) Effect of failure to agree. If the required number of members do not agree on a sentence after a reasonable effort to do so, a mistrial may be declared as to the sentence and the case shall be returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed.

(e) Action after a sentence is reached. After the members have agreed upon a sentence, the court-martial shall be opened and the president shall inform the military judge that a sentence has been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the sentence and may assist the members in putting the sentence in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the sentence.

Discussion

Ordinarily a sentence worksheet should be provided to the members as an aid to putting the sentence in proper form. See Appendix 11 for a format for forms of sentences. If a sentence worksheet has been provided, the military judge should examine it before the president announces the sentence. If the military judge intends to instruct the members after such examination, counsel should be permitted to examine the worksheet and to be heard on any instructions the military judge may give.

The president should not disclose any specific number of votes for or against any sentence.

If the sentence is ambiguous or apparently illegal, see R.C.M. 1009.

Rule 1007. Announcement of sentence

(a) In general. The sentence shall be announced by the president or, in a court-martial composed of a military judge alone, by the military judge, in the presence of all parties promptly after it has been determined.

Discussion

See Appendix 11.

An element of a sentence adjudged by members about which no instructions were given and which is not listed on a sentence worksheet is not proper.

(b) Erroneous announcement. If the announced sentence is not the one actually determined by the court-martial, the error may be corrected by a new announcement made before the record of trial is authenticated and forwarded to the convening authority. This action shall not constitute reconsideration of the sentence. If the court-martial has been adjourned before the error is discovered, the military judge may call the court-martial into session to correct the announcement.

Discussion

For procedures governing reconsideration of the sentence, see R.C.M. 1009. See also R.C.M. 1102 concerning the action to be taken if the error in the announcement is discovered after the record is authenticated and forwarded to the convening authority.

(c) Polling prohibited. Except as provided in Mil.R.Evid. 606, members may not otherwise be questioned about their deliberations and voting.

Rule 1008. Impeachment of sentence

A sentence which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Discussion

See R.C.M. 923 Discussion concerning impeachment of findings.
Rule 1009. Reconsideration of sentence

(a) Time for reconsideration. Subject to this rule, a sentence may be reconsidered by the members or the military judge who reached it at any time before the record of trial is authenticated.

(b) Limitations. After a sentence has been announced, it may not be increased upon reconsideration unless the sentence announced was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty.

(c) Initiation of reconsideration.

(1) By members. Any member may propose that a sentence reached by the members be reconsidered.

(2) By military judge.

(A) Adjudged by military judge. The military judge may initiate reconsideration of a sentence adjudged by that military judge.

(B) Reached by members. When a sentence reached by members is ambiguous or apparently illegal, the military judge shall bring the matter to the attention of the members if the matter is discovered before the court-martial is adjourned. If the matter is discovered after adjournment, the military judge may call a session for reconsideration and proceed in accordance with subsection (d) of this rule, or may bring the matter to the attention of the convening authority.

Discussion

If the ambiguity or illegality is discovered before the sentence is announced, see also R.C.M. 1006. If the ambiguity or apparent illegality is the result of an erroneous announcement, see R.C.M. 1007(b). See R.C.M. 804 and 805 concerning persons required to be present.

(2) Voting. The members shall vote by secret written ballot in closed session whether to reconsider a sentence already reached by them.

(3) Number of votes required.

(A) With a view to increasing. Subject to subsection (b) of this rule, members may reconsider a sentence with a view of increasing it only if at least a majority vote for reconsideration.

(B) With a view to decreasing. Members may reconsider a sentence with a view to decreasing it only if:

(i) In the case of a sentence which includes death, at least one member votes to reconsider;

(ii) In the case of a sentence which includes confinement for life or more than 10 years, more than one-fourth of the members vote to reconsider; or

(iii) In the case of any other sentence, more than one-third of the members vote to reconsider.

Discussion

After a sentence has been adopted by secret ballot vote in closed session, no other vote may be taken on the sentence unless a vote to reconsider succeeds.

For example, if six of nine (two-thirds) members adopt a sentence, a vote of at least five would be necessary to reconsider to increase it; four would have to vote to reconsider in order to decrease it. If seven of nine (three-fourths) members is required to adopt a sentence, a vote of at least five would be necessary to reconsider to increase it, while three would be necessary to reconsider to decrease it.

(4) Successful vote. If a vote to reconsider a sentence succeeds, the procedures in R.C.M. 1006 shall apply.

Rule 1010. Notice concerning post-trial and appellate rights

In each general and special court-martial, prior to adjournment, the military judge shall ensure that the defense counsel has informed the accused orally and in writing of:

(a) The right to submit matters to the convening authority to consider before taking action;

(b) The right to appellate review, as applicable, and the effect of waiver or withdrawal of such right;

(c) The right to apply for relief from the Judge Advocate General if the case is neither reviewed by a Court of Military Review nor reviewed by the Judge Advocate General under R.C.M. 1201(b)(1); and
R.C.M. 1010(d)

(d) The right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and the defense counsel and inserted in the record of trial as an appellate exhibit.

Discussion

The post-trial duties of the defense counsel concerning the appellate rights of the accused are set forth in paragraph (E)(iv) of the Discussion accompanying R.C.M. 502(d)(6). The defense counsel shall explain the appellate rights to the accused and prepare the written document of such advisement prior to or during trial.

Rule 1011. Adjournment

The military judge may adjourn the court-martial at the end of the trial of an accused or proceed to trial of other cases referred to that court-martial. Such an adjournment may be for a definite or indefinite period.

Discussion

A court-martial and its personnel have certain powers and responsibilities following the trial. See, for example, R.C.M. 502(d)(5) Discussion (F); 502(d)(6) Discussion (E); 808; 1007; 1009; Chapter XI.
CHAPTER XI. POST-TRIAL PROCEDURE

Rule 1101. Report of result of trial; post-trial restraint; deferment of confinement

(a) Report of the result of trial. After final adjournment of the court-martial in a case, the trial counsel shall promptly notify the accused's immediate commander, the convening authority or the convening authority's designee, and, if appropriate, the officer in charge of the confinement facility of the findings and sentence.

(b) Post-trial confinement.
   (1) In general. An accused may be placed in post-trial confinement if the sentence adjudged by the court-martial includes death or confinement.
   (2) Who may order confinement. Unless limited by superior authority, a commander of the accused may order the accused into post-trial confinement when post-trial confinement is authorized under subsection (b)(1) of this rule. A commander authorized to order post-trial confinement under this subsection may delegate this authority to the trial counsel.

Discussion

The commander may release the accused, order confinement, or order other appropriate restraint. Regardless whether the accused is ordered into confinement, a sentence to confinement begins to run on the date it is adjudged unless it is deferred under subsection (c) of this rule. See Article 57.

(3) Confinement on other grounds. Nothing in this rule shall prohibit confinement of a person after a court-martial on proper grounds other than the offenses for which the accused was tried at the court-martial.

Discussion

See R.C.M. 304, 305, and paragraph 5b(2), Part V, for other grounds for confinement.

(c) Deferment of confinement.
   (1) In general. Deferment of a sentence to confinement is a postponement of the service and of the running of the sentence.

Discussion

Deferment is not suspension of the sentence or a form of clemency.

(2) Who may defer. The convening authority or, if the accused is no longer in the convening authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may, upon written application of the accused, at any time after the adjournment of the court-martial, defer the accused's service of a sentence to confinement which has not been ordered executed.

(3) Action on deferment request. The authority acting on the deferment request may, in that authority's discretion, defer service of a sentence to confinement. The accused shall have the burden to show that the interests of the accused and the community in release outweigh the community's interests in confinement. Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witness, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; and the accused's character, mental condition, family situation, and service record. The decision of the authority acting on the deferment shall be subject to judicial review only for abuse of discretion. The action of the convening authority shall be written and a copy shall be provided to the accused.

Discussion

The deferment request and the action on the request must be attached to the record of trial. See R.C.M. 1103(b)(3)(D). If the request for deferment is denied, the basis for the denial should be in writing and attached to the record of trial.

(4) Orders. The action granting deferment shall be reported in the convening authority's action under R.C.M. 1107(f)(4)(E) and shall include the date of the action on the request when it occurs prior
to or concurrently with the action. Action granting deferment after the convening authority's action under R.C.M. 1107 shall be reported in orders under R.C.M. 1114 and included in the record of trial.

(5) Restraint when deferment is granted. When deferment of confinement is granted, no form of restraint or other limitation on the accused's liberty may be ordered as a substitute form of punishment. An accused may, however, be restricted to specified limits or conditions may be placed on the accused's liberty during the period of deferment for any other proper reason, including a ground for restraint under R.C.M. 304.

(6) End of deferment. Deferment of a sentence to confinement ends when:

(A) The convening authority takes action under R.C.M. 1107, unless the convening authority specifies in the action that service of confinement after the action is deferred;

(B) The confinement is suspended;

(C) The deferment expires by its own terms; or

(D) The deferment is otherwise rescinded in accordance with subsection (c)(7) of this rule. Deferment of confinement may not continue after the conviction is final under R.C.M. 1209.

Discussion

A sentence to confinement which has been ordered executed may not be deferred. When the sentence is ordered executed, the confinement may be suspended but may not be further deferred. Deferment and suspension of confinement cannot exist concurrently. When deferment of confinement ends, the sentence to confinement begins to run or resumes running, as appropriate. When the convening authority has specified in the action that confinement will be deferred after the action, the deferment may not be terminated, except under subsections (6)(B), (C), or (D), until the conviction is final under R.C.M. 1209.

(7) Rescission of deferment.

(A) Who may rescind. The authority who granted the deferment or, if the accused is no longer within that authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may rescind the deferment.

(B) Action. Deferment of confinement may be rescinded when additional information is presented to a proper authority which, when considered with all other information in the case, that authority finds, in that authority's discretion, is grounds for denial of deferment under subsection (c)(3) of this rule. The accused shall promptly be informed of the basis for the rescission and of the right to submit written matters in the accused's behalf and to request that the rescission be reconsidered. However, the accused may be required to serve the sentence to confinement pending this action.

(C) Execution. When deferment is rescinded after the convening authority's action under R.C.M. 1107, the confinement may be ordered executed. However, no such order may be issued within 7 days of notice of the rescission to the accused under subsection (c)(7)(B) of this rule, to afford the accused an opportunity to respond. The authority rescinding the deferment may extend this period for good cause shown. The accused shall be credited with any confinement actually served during this period.

(D) Orders. Rescission of a deferment before or concurrently with the initial action in the case shall be reported in the action under R.C.M. 1107(f)(4)(E), which action shall include the dates of the granting of the deferment and the rescission. Rescission of a deferment after the convening authority's action shall be reported in supplementary orders in accordance with R.C.M. 1114 and shall state whether the approved period of confinement is to be executed or whether all or part of it is to be suspended.

Discussion

See Appendix 16 for forms.

Rule 1102. Post-trial sessions

(a) In general. Post-trial sessions may be proceedings in revision or Article 39(a) sessions. Such sessions may be directed by the military judge or the convening authority in accordance with this rule.

(b) Purpose.

(1) Proceedings in revision. Proceedings in revision may be directed to correct an apparent error, omission, or improper or inconsistent action by the court-martial, which can be rectified by reopening the proceedings without material prejudice to the accused.
Discussion

Because the action at a proceeding in revision is corrective, a proceeding in revision may not be conducted for the purpose of presenting additional evidence.

Examples when a proceeding in revision is appropriate include: correction of an ambiguous or apparently illegal action by the court-martial; inquiry into the terms of a pretrial agreement; and inquiry to establish the accused's awareness of certain rights.

See also R.C.M. 1104(d) concerning correction of the record by certificate of correction.

(2) Article 39(a) sessions. An Article 39(a) session under this rule may be called for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence.

Discussion

For example, an Article 39(a) session may be called to examine allegations of misconduct by a member or by counsel.

(c) Matters not subject to post-trial sessions. Post-trial session may not be directed:

(1) For reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty;

(2) For reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of the code; or

(3) For increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.

(d) When directed. The military judge may direct a post-trial session any time before the record is authenticated. The convening authority may direct a post-trial session any time before the convening authority takes initial action on the case or at such later time as the convening authority is authorized to do so by a reviewing authority, except that no proceeding in revision may be held when any part of the sentence has been ordered executed.

(e) Procedure.

(1) Personnel. The requirements of R.C.M. 505 and 805 shall apply at post-trial sessions except that—

(A) For a proceeding in revision, if trial was before members and the matter subject to the proceeding in revision requires the presence of members:

(i) The absence of any members does not invalidate the proceedings if, in the case of a general court-martial, at least five members are present, or, in the case of a special court-martial, at least three members are present; and

(ii) A different military judge may be detailed, subject to R.C.M. 502(c) and 902, if the military judge who presided at the earlier proceedings is not reasonably available.

(B) For an Article 39(a) session, a different military judge may be detailed, subject to R.C.M. 502(c) and 902, for good cause.

(2) Action. The military judge shall take such action as may be appropriate, including appropriate instructions when members are present. The members may deliberate in closed session, if necessary, to determine what corrective action, if any, to take.

(3) Record. All post-trial sessions, except any deliberations by the members, shall be held in open session. The record of the post-trial sessions shall be prepared, authenticated, and served in accordance with R.C.M. 1103 and 1104 and shall be included in the record of the prior proceedings.

Rule 1103. Preparation of record of trial

(a) In general. Each general, special, and summary court-martial shall keep a separate record of the proceedings in each case brought before it.

(b) General courts-martial.

(1) Responsibility for preparation. The trial counsel shall:

(A) Under the direction of the military judge, cause the record of trial to be prepared; and

(B) Under regulations prescribed by the Secretary concerned, cause to be retained stenographic or other notes or mechanical or electronic recordings from which the record of trial was prepared.

(2) Contents.

(A) In general. The record of trial in each general court-martial shall be separate, complete, and independent of any other document.

(B) Verbatim transcript required. Except as otherwise provided in subsection (j) of this rule, the record of trial shall include a verbatim written tran-
script of all sessions except sessions closed for deliberations and voting when:

(i) Any part of the sentence adjudged exceeds six months confinement or other punishments which may be adjudged by a special court-martial; or

(ii) A bad-conduct discharge has been adjudged.

Discussion

A verbatim transcript includes: all proceedings including sidebar conferences, arguments of counsel, and rulings and instructions by the military judge; matter which the military judge orders stricken from the record or disregarded; and when a record is amended in revision proceedings (see R.C.M. 1102), the part of the original record changed and the changes made, without physical alteration of the original record. Conferences under R.C.M. 802 need not be recorded, but matters agreed upon at such conferences must be included in the record. If testimony is given through an interpreter, a verbatim transcript must so reflect.

(C) Verbatim transcript not required. If a verbatim transcript is not required under subsection (b)(2)(B) of this rule, a summarized report of the proceedings may be prepared instead of a verbatim transcript.

Discussion

See also R.C.M. 910(i) concerning guilty plea inquiries.

(D) Other matters. In addition to the matter required under subsection (b)(2)(B) or (b)(2)(C) of this rule, a complete record shall include:

(i) The original charge sheet or a duplicate;

(ii) A copy of the convening order and any amending order(s);

(iii) The request, if any, for trial by military judge alone, or that the membership of the court-martial include enlisted persons, and, when applicable, any statement by the convening authority required under R.C.M. 201(f)(2)(B)(ii) or 503(a)(2);

(iv) The original dated, signed action by the convening authority; and

(v) Exhibits, or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence and any appellate exhibits.

(3) Matters attached to the record. The following matters shall be attached to the record:

(A) If not used as exhibits—

(i) The report of investigation under Article 32, if any;

(ii) The staff judge advocate's pretrial advice under Article 34, if any;

(iii) If the trial was a rehearing or new or other trial of the case, the record of the former hearing(s); and

(iv) Written special findings, if any, by the military judge.

(B) Exhibits or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were marked for and referred to on the record but not received in evidence;

(C) Any matter filed by the accused under R.C.M. 1105, or any written waiver of the right to submit such matter;

(D) Any deferment request and the action on it;

(E) Explanation for any substitute authentication under R.C.M. 1104(a)(2)(B);

(F) Explanation for any failure to serve the record of trial on the accused under R.C.M. 1104(b);

(G) The post-trial recommendation of the staff judge advocate or legal officer and proof of service on defense counsel in accordance with R.C.M. 1106(f)(1);

(H) Any response by defense counsel to the post-trial review;

(I) Recommendations and other papers relative to clemency;

(J) Any statement why it is impracticable for the convening authority to act;

(K) Conditions of suspension, if any, and proof of service on probationer under R.C.M. 1108;

(L) The certificate of a medical officer concerning the physical condition of an accused sentenced to confinement on bread and water or diminished rations;

(M) Any waiver or withdrawal of appellate review under R.C.M. 1110; and

(N) Records of any proceedings in connection with vacation of suspension under R.C.M. 1109.

c Special courts-martial.

(1) Involving a bad-conduct discharge. The requirements of subsections (b)(1), (b)(2)(A), (b)(2)(B), (b)(2)(D), and (b)(3) of this rule shall ap-
ply in a special court-martial in which a bad-conduct discharge has been adjudged.

(2) *Not involving a bad-conduct discharge.* If the special court-martial resulted in findings of guilty but a bad-conduct discharge was not adjudged, the requirements of subsections (b)(1), (b)(2)(C), (b)(2)(D), and (b)(3)(A)-(F) and (I)-(N) of this rule shall apply.

d) *Summary courts-martial.* The summary court-martial record of trial shall be prepared as prescribed in R.C.M. 1305.

e) *Acquittal; courts-martial resulting in findings of not guilty only by reason of lack of mental responsibility; termination prior to findings.* Notwithstanding subsections (b), (c), and (d) of this rule, if proceedings resulted in an acquittal of all charges and specifications or in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or if the proceedings were terminated by withdrawal, mistrial, or dismissal before findings, the record may consist of the original charge sheet, a copy of the convening order and amending orders (if any), and sufficient information to establish jurisdiction over the accused and the offenses (if not shown on the charge sheet). The convening authority or higher authority may prescribe additional requirements.

**Discussion**

The notes or recordings of court-martial proceedings described in this subsection should be retained if reinstitution and re-referral of the affected charges is likely or when they may be necessary for the trial of another accused in a related case. See R.C.M. 905(g) and 914.

(f) *Loss of notes or recordings of the proceedings.* If, because of loss of recordings or notes, or other reasons, a verbatim transcript cannot be prepared when required by subsection (b)(2)(B) or (c)(1) of this rule, a record which meets the requirements of subsection (b)(2)(C) of this rule shall be prepared, and the convening authority may:

(1) Approve only so much of the sentence which could be adjudged by a special court-martial, except that no bad-conduct discharge may be approved; or

(2) Direct a rehearing as to any offense of which the accused was found guilty if the finding is supported by the summary of the evidence contained in the record, provided that the court-martial in a rehearing may not adjudged any sentence in excess of that adjudged by the earlier court-martial.

(g) *Copies of the record.*

(1) *General and special courts-martial.*

(A) *In general.* In general and special court-martial which require a verbatim transcript under subsections (b) or (c) of this rule and are subject to a review by a Court of Military Review under Article 66, the trial counsel shall cause to be prepared an original and four copies of the record of trial. In all other general and special courts-martial the trial counsel shall cause to be prepared an original and one copy of the record of trial.

**Discussion**

In a joint or common trial an additional copy of the record must be prepared for each accused. See R.C.M. 1104(b).

(B) *Additional copies.* The convening or higher authority may direct that additional copies of the record of trial of any general or special court-martial be prepared.

(2) *Summary courts-martial.* Copies of the summary court-martial record of trial shall be prepared as prescribed in R.C.M. 1305(b).

(h) *Security classification.* If the record of trial contains matter which must be classified under applicable security regulations, the trial counsel shall cause a proper security classification to be assigned to the record of trial and on each page thereof on which classified material appears.

**Discussion**

See R.C.M. 1104(b)(1)(D) concerning the disposition of records of trial requiring security protection.

(i) *Examination and correction before authentication.*

(1) *General and special courts-martial.*

(A) *Examination and correction by trial counsel.* In general and special courts-martial, the trial counsel shall examine the record of trial before authentication and cause those changes to be made which are necessary to report the proceedings accurately. The trial counsel shall not change the record after authentication.
R.C.M. 1103(i)(1)(A)

Discussion

The trial counsel may personally correct and initial the necessary changes or, if major changes are necessary, direct the reporter to rewrite the entire record or the portion of the record which is defective.

The trial counsel must ensure that the reporter makes a true, complete, and accurate record of the proceedings such that the record will meet the applicable requirements of this rule.

(B) Examination by defense counsel. Except when unreasonable delay will result, the trial counsel shall permit the defense counsel to examine the record before authentication.

If the defense counsel discovers errors or omissions in the record, the defense counsel may suggest to the trial counsel appropriate changes to make the record accurate, forward for attachment to the record under Article 38(c) any objections to the record, or bring any suggestions for correction of the record to the attention of the person who authenticates the record.

The defense counsel should be granted reasonable access to the reporter's notes and tapes to facilitate the examination of the record.

A suitable notation that the defense counsel has examined the record should be made on the authentication page. See Appendix 13 or 14 for sample forms.

(2) Summary courts-martial. The summary court-martial shall examine and correct the summary court-martial record of trial as prescribed in R.C.M. 1305(a).

(j) Videotape and similar records.

(1) Recording proceedings. If authorized by regulations of the Secretary concerned, general and special courts-martial may be recorded by videotape, audiotape, or similar material from which sound and visual images may be reproduced to accurately depict the entire court-martial. Such means of recording may be used in lieu of recording by a qualified court reporter, when one is required, subject to this rule.

(2) Preparation of written record. When the court-martial, or any part of it, is recorded by videotape, audiotape, or similar material under subsection (j)(1) of this rule, a written transcript or summary as required in subsection (b)(2)(A), (b)(2)(B), (b)(2)(C), or (c) of this rule, as appropriate, shall be prepared in accordance with this rule and R.C.M. 1104 before the record is forwarded under R.C.M. 1104(e), unless military exigencies prevent transcription.

(3) Military exigency. If military exigency prevents preparation of a written transcript or summary, as required, and when the court-martial has been recorded by videotape, audiotape, or similar material under subsection (j)(1) of this rule, the videotape, audiotape, or similar material, together with the matters in subsections (b)(2)(D) and (b)(3) of this rule shall be authenticated and forwarded in accordance with R.C.M. 1104, provided that in such case the convening authority shall cause to be attached to the record a statement of the reasons why a written record could not be prepared, and provided further that in such case the defense counsel shall be given reasonable opportunity to listen to or to view and listen to the recording whenever defense counsel is otherwise entitled to examine the record under these rules. Subsection (g) of this rule shall not apply in case of military exigency under this subsection.

(4) Further review.

(A) Cases reviewed by the Court of Military Review. Before review, if any, by a Court of Military Review of a case in which the record includes an authenticated recording prepared under subsection (j)(3) of this rule, a complete written transcript shall be prepared and certified as accurate in accordance with regulations of the Secretary concerned. The authenticated recording shall be retained for examination by appellate authorities.

(B) Cases not reviewed by the Court of Military Review. In cases in which the record includes an authenticated recording prepared under subsection (j)(3) of this rule, a written record shall be prepared under such circumstances as the Secretary concerned may prescribe.

(5) Accused's copy. When a record includes an authenticated recording under subsection (j)(3) of this rule, the Government shall, in order to comply with R.C.M. 1104(b):

(A) Provide the accused with a duplicate copy of the videotape, audiotape, or similar matter and copies of any written contents of and attachments to the record, and give the accused reasonable opportunity to use such viewing equipment as is necessary to listen to or view and listen to the recording; or
(B) With the written consent of the accused, defer service of the record until a written record is prepared under subsection (4) of this rule.

Rule 1104. Records of trial: Authentication; service; loss; correction; forwarding

(a) Authentication.

(1) In general. A record is authenticated by the signature of a person specified in this rule who thereby declares that the record accurately reports the proceedings. No person may be required to authenticate a record of trial if that person is not satisfied that it accurately reports the proceedings.

(2) General and special courts-martial.

(A) Authentication by the military judge. In special courts-martial in which a bad-conduct discharge has been adjudged and in general courts-martial, except as provided in subsection (a)(2)(B) of this rule, the military judge present at the end of the proceedings shall authenticate the record of trial, or that portion over which the military judge presided. If more than one military judge presided over the proceedings, each military judge shall authenticate the record of the proceedings over which that military judge presided, except as provided in subsection (a)(2)(B) of this rule. The record of trial of special courts-martial in which no bad-conduct discharge was adjudged shall be authenticated in accordance with regulations of the Secretary concerned.

(B) Substitute authentication. If the military judge cannot authenticate the record of trial because of the military judge's death, disability, or absence, the trial counsel present at the end of the proceedings shall authenticate the record of trial. If the trial counsel cannot authenticate the record of trial because of the trial counsel's death, disability, or absence, a member shall authenticate the record of trial. In a court-martial composed of a military judge alone, or as to sessions without members, the court reporter shall authenticate the record of trial when this duty would fall upon a member under this subsection. A person authorized to authenticate a record under this subsection may authenticate the record only as to those proceedings at which that person was present.

Discussion

See Appendix 13 or 14 for sample forms.

Substitute authentication is authorized only in emergencies. A brief, temporary absence of the military judge from the situs of the preparation of the record of trial does not justify a substitute authentication. Prolonged absence, including permanent change of station, ordinarily justifies substitute authentication.

The person who authenticates the record of trial instead of the military judge should attach to the record of trial an explanation for the substitute authentication. See R.C.M. 1103(b)(3)(E).

(3) Summary courts-martial. The summary court-martial shall authenticate the summary court-martial record of trial as prescribed in R.C.M. 1305(a).

(b) Service.

(1) General and special courts-martial.

(A) Service of record of trial on accused. In each general and special court-martial, except as provided in subsection (b)(1)(C) or (D) of this rule, the trial counsel shall cause a copy of the record of trial to be served on the accused as soon as the record of trial is authenticated.

(B) Proof of service of record of trial on accused. The trial counsel shall cause the accused's receipt for the copy of the record of trial to be attached to the original record of trial. If it is impracticable to secure a receipt from the accused before the original record of trial is forwarded to the convening authority, the trial counsel shall prepare a certificate indicating that a copy of the record of trial has been transmitted to the accused, including the means of transmission and the address, and cause the certificate to be attached to the original record of trial. In such a case the accused's receipt shall be forwarded to the convening authority as soon as it is obtained.

(C) Substitute service. If it is impracticable to serve the record of trial on the accused because of the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the court-martial or in writing, the accused's copy of the record shall be forwarded to the accused's defense counsel, if any. Trial counsel shall attach a statement to the record explaining why the accused was not served personally. If the accused has more than one counsel, R.C.M. 1106(f)(2) shall apply. If the accused has no counsel and if the accused is absent without authority, the trial counsel shall prepare an explanation for the failure to serve the re-
R.C.M. 1104(b)(1)(C)

cord. The explanation and the accused’s copy of the record shall be forwarded with the original record. The accused shall be provided with a copy of the record as soon as practicable.

Discussion

See Appendix 13 or 14 for sample forms.

(D) Classified information.

(i) Forwarding to convening authority. If the copy of the record of trial prepared for the accused contains classified information, the trial counsel, unless directed otherwise by the convening authority, shall forward the accused’s copy to the convening authority, before it is served on the accused.

(ii) Responsibility of the convening authority. The convening authority shall:

(a) cause any classified information to be deleted or withdrawn from the accused’s copy of the record of trial;

(b) cause a certificate indicating that classified information has been deleted or withdrawn to be attached to the record of trial; and

(c) cause the expurgated copy of the record of trial and the attached certificate regarding classified information to be served on the accused as provided in subsections (b)(1)(A) and (B) of this rule except that the accused’s receipt shall show that the accused has received an expurgated copy of the record of trial.

(iii) Contents of certificate. The certificate regarding deleted or withdrawn classified information shall indicate:

(a) that the original record of trial may be inspected in the Office of the Judge Advocate General concerned under such regulations as the Secretary concerned may prescribe;

(b) the pages of the record of trial from which matter has been deleted;

(c) the pages of the record of trial which have been entirely deleted; and

(d) the exhibits which have been withdrawn.

Discussion

See R.C.M. 1103(h) concerning classified information.

(2) Summary courts-martial. The summary court-martial record of trial shall be disposed of as provided in R.C.M. 1305(e). Subsection (b)(1)(D) of this rule shall apply if classified information is included in the record of trial of a summary court-martial.

(c) Loss of record. If the authenticated record of trial is lost or destroyed, the trial counsel shall, if practicable, cause another record of trial to be prepared for authentication. The new record of trial shall become the record of trial in the case if the requirements of R.C.M. 1103 and this rule are met.

(d) Correction of record after authentication; certificate of correction.

(1) In general. A record of trial found to be incomplete or defective after authentication may be corrected to make it accurate. A record of trial may be returned to the convening authority by superior competent authority for correction under this rule.

Discussion

The record of trial is corrected with a certificate of correction.

See Appendix 13 or 14 for a form for a certificate of correction. A certificate of correction may be used only to make the record of trial correspond to the actual proceedings. If the members were not sworn, for example, the error cannot be cured by a certificate of correction. If the members were sworn but the record did not so reflect, the record could be corrected.

(2) Procedure. An authenticated record of trial believed to be incomplete or defective may be returned to the military judge or summary court-martial for a certificate of correction. The military judge or summary court-martial shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction before authenticating the certificate of correction. All parties shall be given reasonable access to any original reporter’s notes or tapes of the proceedings.

Discussion

The type of opportunity to respond depends on the nature and scope of the proposed correction. In many instances an adequate opportunity can be provided by allowing the respective parties to present affidavits and other documentary evidence to the person authenticating the certificate of correction or by a conference telephone call among the authenticating person, the parties, and the reporter. In other instances, an evidentiary hearing with witnesses may be required. The accused need not be present at any hearing on a certificate of correction.
Authentication of certificate of correction; service on the accused. The certificate of correction shall be authenticated as provided in subsection (a) of this rule and a copy served on the accused as provided in subsection (b) of this rule. The certificate of correction and the accused’s receipt for the certificate of correction shall be attached to each copy of the record of trial required to be prepared under R.C.M. 1103(g).

(e) Forwarding. After every court-martial, including a rehearing and new and other trials, the authenticated record shall be forwarded to the convening authority for initial review and action, provided that in case of a special court-martial in which a bad-conduct discharge was adjudged or a general court-martial, the convening authority shall refer the record to the staff judge advocate or legal officer for a recommendation under R.C.M. 1106 before the convening authority takes action.

Rule 1105. Matters submitted by the accused
(a) In general. After a sentence is adjudged in any court-martial, the accused may submit matters to the convening authority in accordance with this rule.

(b) Matters which may be submitted. The accused may submit to the convening authority any written matters which may reasonably tend to affect the convening authority’s decision whether to disapprove any findings of guilty or to approve the sentence. Such matters are not subject to the Military Rules of Evidence and may include:

(1) Allegations of errors affecting the legality of the findings or sentence;
(2) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial;
(3) Matters in mitigation which were not available for consideration at the court-martial; and

Discussion

For example, post-trial conduct of the accused, such as providing restitution to the victim or exemplary behavior, might be appropriate.

(4) Clemency recommendations by any member, the military judge, or any other person. The defense may ask any person for such a recommendation.
R.C.M. 1105(d)(3)

(3) Written waiver. The accused may expressly waive, in writing, the right to submit matters under this rule. Once filed, such waiver may not be revoked.

(4) Absence of accused. If, as a result of the unauthorized absence of the accused, the record cannot be served on the accused in accordance with R.C.M. 1104(b)(1) and if the accused has no counsel to receive the record, the accused shall be deemed to have waived the right to submit matters under this rule within the time limit which begins upon service on the accused of the record of trial.

Discussion

The accused is not required to raise objections to the trial proceedings in order to preserve them for later review.

Rule 1106. Recommendation of the staff judge advocate or legal officer

(a) In general. Before the convening authority takes action under R.C.M. 1107 on a record of trial by general court-martial or a record or trial by special court-martial which includes a sentence to a bad-conduct discharge, that convening authority's staff judge advocate or legal officer shall, except as provided in subsection (c) of this rule, forward to the convening authority a recommendation under this rule.

(b) Disqualification. No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing or convening authority in the same case.

Discussion

The staff judge advocate or legal officer may also be ineligible when, for example, the staff judge advocate or legal officer; served as the defense counsel in a companion case; testified as to a contested matter (unless the testimony is clearly uncontroverted); has other than an official interest in the same case; or must review that officer's own pretrial action (such as the pretrial advice under Article 34; see R.C.M. 406) when the sufficiency or correctness of the earlier action has been placed in issue.

(c) When the convening authority has no staff judge advocate.

(1) When the convening authority does not have a staff judge advocate or legal officer or that person is disqualified. If the convening authority does not have a staff judge advocate or legal officer, or if the person serving in that capacity is disqualified under subsection (b) of this rule or otherwise, the convening authority shall:

(A) Request the assignment of another staff judge advocate or legal officer to prepare a recommendation under this rule; or

(B) Forward the record for action to any officer exercising general court-martial jurisdiction as provided in R.C.M. 1107(a).

(2) When the convening authority has a legal officer but wants the recommendation of a staff judge advocate. If the convening authority has a legal officer but no staff judge advocate, the convening authority may, as a matter of discretion, request designation of a staff judge advocate to prepare the recommendation.

(d) Form and content of recommendation.

(a) In general. The purpose of the recommendation of the staff judge advocate or legal officer is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative. The staff judge advocate or legal officer shall use the record of trial in the preparation of the recommendation.

(b) Form. The recommendation of the staff judge advocate or legal officer shall be a concise written communication.

(3) Required contents. Except as provided in subsection (e) of this rule, the recommendation of the staff judge advocate or legal officer shall include concise information as to:

(A) The findings and sentence adjudged by the court-martial;

(B) A summary of the accused's service record, to include length and character of service, awards and decorations received, and any records of nonjudicial punishment and previous convictions;

(C) A statement of the nature and duration of any pretrial restraint;

(D) If there is a pretrial agreement, a statement of any action the convening authority is obligated to take under the agreement or a statement of the reasons why the convening authority is not obligated to take specific action under the agreement; and
(E) A specific recommendation as to the action to be taken by the convening authority on the sentence.

(4) Legal errors. The staff judge advocate or legal officer is not required to examine the record for legal errors. However, when the recommendation is prepared by a staff judge advocate, the staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal errors is not required.

(5) Optional matters. The recommendation of the staff judge advocate or legal officer may include, in addition to matters included under subsections (d)(3) and (4) of this rule, any additional matters deemed appropriate by the staff judge advocate or legal officer. Such matter may include matters outside the record.

Discussion

See R.C.M. 1107(b)(3)(B)(iii) if matters adverse to the accused from outside the record are included.

(6) Effect of error. In case of error in the recommendation not otherwise waived under subsection (f)(6) of this rule, appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority.

e) No findings of guilty; findings of not guilty only by reason of lack of mental responsibility. If the proceedings resulted in an acquittal or in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or if, after the trial began, the proceedings were terminated without findings and no further action is contemplated, a recommendation under this rule is not required.

(f) Service of recommendation on defense counsel and accused; defense response.

(1) Service of recommendation on defense counsel and accused. Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused. If it is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the court-martial or in writing, the accused's copy shall be forwarded to the accused's defense counsel. A statement shall be attached to the record explaining why the accused was not served personally.

Discussion

The method of service and the form of the proof of service are not prescribed and may be by any appropriate means. See R.C.M. 1103(b)(3)(G).

(2) Counsel for the accused. The accused may, at trial or in writing to the staff judge advocate or legal officer before the recommendation has been served under this rule, designate which counsel (detailed, individual military, or civilian) will be served with the recommendation. In the absence of such designation, the staff judge advocate or legal officer shall cause the recommendation to be served in the following order of precedence, as applicable, on: (1) civilian counsel; (2) individual military counsel; or (3) detailed defense counsel. If the accused has not retained civilian counsel and the detailed defense counsel and individual military counsel, if any, have been relieved or are not reasonably available to represent the accused, substitute military counsel to represent the accused shall be detailed by an appropriate authority. Substitute counsel shall enter into an attorney-client relationship with the accused before examining the recommendation and preparing any response.

Discussion

When the accused is represented by more than one counsel, the military judge should inquire of the accused and counsel before the end of the court-martial as to who will act for the accused under this rule.

(3) Record of trial. The staff judge advocate or legal officer shall, upon request of counsel for the accused served with the recommendation, provide that
Rule 1107. Action by convening authority

(a) Who may take action. The convening authority shall take action on the sentence and, in the discretion of the convening authority, the findings, unless it is impracticable. If it is impracticable for the convening authority to act, the convening authority shall, in accordance with such regulations as the Secretary concerned may prescribe, forward the case to an officer exercising general court-martial jurisdiction who may take action under this rule.

Discussion

The convening authority may not delegate the function of taking action on the findings or sentence. The convening authority who convened the court-martial may take action on the case regardless whether the accused is a member of or present in the convening authority’s command.

It would be impracticable for the convening authority to take initial action when, for example, a command has been decommissioned or inactivated before the convening authority’s action; when a command has been alerted for immediate overseas movement; or when the convening authority is disqualified because the convening authority has other than an official interest in the case or because a member of the court-martial which tried the accused later became the convening authority.

If the convening authority forwards the case to an officer exercising general court-martial jurisdiction for initial review and action, the record should include a statement of the reasons why the convening authority did not act.

(b) General considerations.

(1) Discretion of convening authority. The action to be taken on the findings and sentence is within the sole discretion of the convening authority. Determining what action to take on the findings and sentence of a court-martial is a matter of command prerogative. The convening authority is not required to review the case for legal errors or factual sufficiency.

Discussion

The action is taken in the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons. If errors are noticed by the convening authority, the convening authority may take corrective action under this rule.

(2) When action may be taken. The convening authority may take action only after the applicable time periods under R.C.M. 1105(c) have expired or the accused has waived the right to present matters under R.C.M. 1105(d), whichever is earlier, subject to regulations of the Secretary concerned.
(3) Matters considered.
    (A) Required matters. Before taking action, the convening authority shall consider:
        (i) The result of trial;
        (ii) The recommendation of the staff judge advocate or legal officer under R.C.M. 1106, if applicable; and
        (iii) Any matters submitted by the accused under R.C.M. 1105 or, if applicable, R.C.M. 1106(f).
    (B) Additional matters. Before taking action the convening authority may consider:
        (i) The record of trial;
        (ii) The personnel records of the accused; and
        (iii) Such other matters as the convening authority deems appropriate. However, if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut.

(4) When proceedings resulted in finding of not guilty or not guilty only by reason of lack of mental responsibility, or there was a ruling amounting to a finding of not guilty. The convening authority shall not take action approving or disapproving a finding of not guilty, a finding of not guilty only by reason of lack of mental responsibility, or a ruling amounting to a finding of not guilty.

(5) Action when accused lacks mental capacity. The convening authority may not approve a sentence while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the convening authority may direct an examination of the accused in accordance with R.C.M. 706 before deciding whether the accused lacks mental capacity, but the examination may be limited to determining the accused’s present capacity to understand and cooperate in the post-trial proceedings. The convening authority may approve the sentence unless it is established, by a preponderance of the evidence—including matters outside the record of trial—that the accused does not have the requisite mental capacity. Nothing in this subsection shall prohibit the convening authority from disapproving the findings of guilty and sentence.

(c) Action on findings. Action on the findings is not required. However, the convening authority may, in the convening authority’s sole discretion:
    (1) Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification; or
    (2) Set aside any finding of guilty and—
        (A) Dismiss the specification and, if appropriate, the charge, or
        (B) Direct a rehearing in accordance with subsection (e) of this rule.

Discussion

The convening authority may for any reason or no reason disapprove a finding of guilty or approve a finding of guilty only of a lesser offense. However, see subsection (e) of this rule if a rehearing is ordered. The convening authority is not required to review the findings for legal or factual sufficiency and is not required to explain a decision to order or not to order a rehearing, except as provided in subsection (e) of this rule. The power to order a rehearing, or to take other corrective action on the findings, is designed solely to provide an expeditious means to correct errors that are identified in the course of exercising discretion under the rule.

(d) Action on the sentence.

    (1) In general. The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. The convening or higher authority may not increase the punishment imposed by a court-martial. The approval or disapproval shall be explicitly stated.

Discussion

A sentence adjudged by a court-martial may be approved if it was within the jurisdiction of the court-martial to adjudge (see R.C.M. 201(f)) and did not exceed the maximum limits prescribed in Part IV and Chapter X of this Part for the offense(s) of which the accused legally has been found guilty.
When mitigating forfeitures, the duration and amounts of forfeiture may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeitures exceeds the jurisdiction of the court-martial. When mitigating confinement on bread and water or diminished rations, confinement, or hard labor without confinement, the convening authority should use the equivalencies at R.C.M. 1003(b)(6), (7), and (9), as appropriate. One form of punishment may be changed to a less severe punishment of a different nature, as long as the changed punishment is one which the court-martial could have adjudged. For example, a bad-conduct discharge adjudged by a special court-martial could be changed to confinement for 6 months (but not vice versa). A pretrial agreement may also affect what punishments may be changed by the convening authority.

See also R.C.M. 810(d) concerning sentence limitations upon a rehearing or new or other trial.

(2) Determining what sentence should be approved. The convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused. When the court-martial has adjudged a mandatory punishment, the convening authority may nevertheless approve a lesser sentence.

Discussion

In determining what sentence should be approved the convening authority should consider all relevant factors including the possibility of rehabilitation, the deterrent effect of the sentence, and all matters relating to clemency, such as pretrial confinement. See also R.C.M. 1001 through 1004.

When an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial and other stoppages or involuntary deductions, unless requested by the accused.

(3) Limitations on sentence based on record of trial. If the record of trial does not meet the requirements of R.C.M. 1103(b)(2)(B) or (c)(1), the convening authority may not approve a sentence in excess of that which may be adjudged by a special court-martial, or one which includes a bad-conduct discharge.

Discussion

See also R.C.M. 1103(f).

(e) Ordering rehearing or other trial.

(1) Rehearing.

(A) In general. Subject to subsections (e)(1)(B) through (e)(1)(E) of this rule, the convening authority may in the convening authority's discretion order a rehearing. A rehearing may be ordered as to some or all offenses of which findings of guilty were entered in the sentence, or as to sentence only.

Discussion

A rehearing may be appropriate when an error substantially affecting the findings or sentence is noticed by the convening authority. The severity of the findings or the sentence of the original court-martial may not be increased at a rehearing unless the sentence prescribed for the offense is mandatory. See R.C.M. 810(d). If the accused is placed under restraint pending a rehearing, see R.C.M. 304; 305.

(B) When the convening authority may order a rehearing. The convening authority may order a rehearing:

(i) When taking action on the court-martial under this rule;

(ii) In cases subject to review by the Court of Military Review, before the case is forwarded under R.C.M. 1111(a)(1) or (b)(1), but only as to any sentence which was approved or findings of guilty which were not disapproved in any earlier action. In such a case, a supplemental action disapproving the sentence and some or all of the findings, as appropriate, shall be taken; or

(iii) When authorized to do so by superior competent authority. If the convening authority finds a rehearing as to any offenses impracticable, the convening authority may dismiss those specifications and, when appropriate, charges.

Discussion

If a superior authority has approved some findings of guilty and has authorized a rehearing as to other offenses and the sentence, the convening authority may, unless otherwise directed, reassess the sentence based on the approved findings of guilty and dismiss the remaining charges.

(C) Limitations.

(i) Sentence approved. A rehearing shall not be ordered if, in the same action, a sentence is approved.

(ii) Lack of sufficient evidence. A rehearing may not be ordered as to findings of guilty when there is a lack of sufficient evidence in the record to
support the findings of guilty of the offense charged or of any lesser included offense. A rehearing may be ordered, however, if the proof of guilt consisted of inadmissible evidence for which there is available an admissible substitute. A rehearing may be ordered as to any lesser offense included in an offense of which the accused was found guilty, provided there is sufficient evidence in the record to support the lesser included offense.

**Discussion**

For example, if proof of absence without leave was by improperly authenticated documentary evidence admitted over the objection of the defense, the convening authority may disapprove the findings of guilty and sentence and order a rehearing if there is reason to believe that properly authenticated documentary evidence or other admissible evidence of guilt will be available at the rehearing. On the other hand, if no proof of unauthorized absence was introduced at trial, a rehearing may not be ordered.

(iii) **Rehearing on sentence only.** A rehearing on sentence only shall not be referred to a different kind of court-martial from that which made the original findings.

(D) **Additional charges.** Additional charges may be referred for trial together with charges as to which a rehearing has been directed.

(E) **Lesser included offenses.** If at a previous trial the accused was convicted of a lesser included offense, a rehearing may be ordered only as to that included offense or as to an offense included in that found. If, however, a rehearing is ordered improperly on the original offense charged and the accused is convicted of that offense at the rehearing, the finding as to the lesser included offense of which the accused was convicted at the original trial may nevertheless be approved.

(2) **“Other” trial.** The convening or higher authority may order an “other” trial if the original proceedings were invalid because of lack of jurisdiction or failure of a specification to state an offense. The authority ordering an “other” trial shall state in the action the basis for declaring the proceedings invalid.

(f) **Contents of action and related matters.**

(1) **In general.** The convening authority shall state in writing and insert in the record of trial the convening authority’s decision as to the sentence, whether any findings of guilty are disapproved, and orders as to further disposition. The action shall be signed personally by the convening authority. The convening authority’s authority to sign shall appear below the signature.

**Discussion**

See Appendix 16 for forms.

(2) **Modification of initial action.** The convening authority may recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified. In addition, in any special court-martial not involving a bad-conduct discharge or any summary court-martial, the convening authority may recall and correct an illegal, erroneous, incomplete, or ambiguous action at any time before completion of review under R.C.M. 1112, as long as the correction does not result in action less favorable to the accused than the earlier action. When so directed by a higher reviewing authority or the Judge Advocate General, the convening authority shall modify any incomplete, ambiguous, void, or inaccurate action noted in review of the record of trial under Article 64, 66, 67, or examination of the record of trial under Article 69. The convening authority shall personally sign any supplementary or corrective action.

(3) **Findings of guilty.** If any findings of guilty are disapproved, the action shall so state. If a rehearing is not ordered, the affected charges and specifications shall be dismissed by the convening authority in the action. If a rehearing or other trial is directed, the reasons for the disapproval shall be set forth in the action.

**Discussion**

If a rehearing or other trial is not directed, the reasons for disapproval need not be stated in the action, but they may be when appropriate. It may be appropriate to state them when the reasons may affect administrative disposition of the accused; for example, when the finding is disapproved because of the lack of mental responsibility of the accused or the running of the statute of limitations.

No express action is necessary to approve findings of guilty. See subsection (c) of this rule.

(4) **Action on sentence.**

(A) **In general.** The action shall state whether the sentence adjudged by the court-martial is ap-
R.C.M. 1107(f)(4)(A)

proved. If only part of the sentence is approved, the action shall state which parts are approved. A rehearing may not be directed if any sentence is approved.

Discussion

See Appendix 16 for forms.
See R.C.M. 1108 concerning suspension of sentences.
See R.C.M. 1113 concerning execution of sentences.

(B) Execution; suspension. The action shall indicate, when appropriate, whether an approved sentence is to be executed or whether the execution of all or any part of the sentence is to be suspended. No reasons need be stated.

(C) Place of confinement. If the convening authority orders a sentence of confinement into execution, the convening authority shall designate the place of confinement in the action, unless otherwise prescribed by the Secretary concerned. If a sentence of confinement is ordered into execution after the initial action of the convening authority, the authority ordering the execution shall designate the place of confinement unless otherwise prescribed by the Secretary concerned.

Discussion

See R.C.M. 1113(d)(2)(C) concerning the place of confinement.

(D) Custody or confinement pending appellate review; capital cases. When a record of trial involves an approved sentence to death, the convening authority shall, unless any approved sentence of confinement has been ordered into execution and a place of confinement designated, provide in the action for the temporary custody or confinement of the accused pending final disposition of the case on appellate review.

(E) Deferment of service of sentence to confinement. Whenever the service of the sentence to confinement is deferred by the convening authority under R.C.M. 1101(c) before or concurrently with the initial action in the case, the action shall include the date on which the deferment became effective. The reason for the deferment need not be stated in the action.

(F) Credit for illegal pretrial confinement. When the military judge has directed that the accused receive credit under R.C.M. 305(k), the convening authority shall so direct in the action.

(G) Reprimand. The convening authority shall include in the action any reprimand which the convening authority has ordered executed.

Discussion

See R.C.M. 1003(b)(1) concerning reprimands.

(5) Action on rehearing or new or other trial.

(A) Rehearing or other trial. In acting on a rehearing or other trial the convening authority shall be subject to the sentence limitations prescribed in R.C.M. 810(d). Except when a rehearing or other trial is combined with a trial on additional offenses and except as otherwise provided in R.C.M. 810(d), if any part of the original sentence was suspended and the suspension was not properly vacated before the order directing the rehearing, the convening authority shall take the necessary suspension action to prevent an increase in the same type of punishment as was previously suspended. The convening authority may approve a sentence adjudged upon a rehearing or other trial regardless whether any kind or amount of the punishment adjudged at the former trial has been served or executed. However, in computing the term or amount of punishment to be actually served or executed under the new sentence, the accused shall be credited with any kind or amount of the former sentence included within the new sentence that was served or executed before the time it was disapproved or set aside. The convening authority shall, if any part of a sentence adjudged upon a rehearing or other trial is approved, direct in the action that any part or amount of the former sentence served or executed between the date it was adjudged and the date it was disapproved or set aside shall be credited to the accused. If, in the action on the record of a rehearing, the convening authority disapproves the findings of guilty of all charges and specifications which were tried at the former hearing and that part of the sentence which was based on these findings, the convening authority shall, unless a further rehearing is ordered, provide in the action that all rights, privileges, and property affected by any executed portion of the sentence adjudged at the for-
mer hearing shall be restored. The convening authority shall take the same restorative action if a court-martial at a rehearing acquits the accused of all charges and specifications which were tried at the former hearing.

(B) New trial. The action of the convening authority on a new trial shall, insofar as practicable, conform to the rules prescribed for rehearsings and other trials in subsection (f)(5)(A) of this rule.

Discussion

See R.C.M. 810 for procedures at other trials.

(g) Incomplete, ambiguous, or erroneous action. When the action of the convening or of a higher authority is incomplete, ambiguous, or contains clerical error, the authority who took the incomplete, ambiguous, or erroneous action may be instructed by an authority acting under Article 64, 66, 67, or 69 to withdraw the original action and substitute a corrected action.

(h) Service on accused. A copy of the convening authority's action shall be served on the accused or on defense counsel. If the action is served on defense counsel, defense counsel shall, by expeditious means, provide the accused with a copy.

Discussion

If the promulgating order is prepared promptly, service of it will satisfy subsection (h).

Rule 1108. Suspension of execution of sentence; remission

(a) In general. Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted. Remission cancels the unexecuted part of a sentence to which it applies.

(b) Who may suspend and remit. The convening authority may, after approving the sentence, suspend the execution of all or any part of the sentence of a court-martial except for a sentence of death. The general court-martial convening authority over the accused at the time of the court-martial may, when taking the action under R.C.M. 1112(f), suspend or remit any part of the sentence. The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President. The commander of the accused who has the authority to convene a court-martial of the kind which adjudged the sentence may suspend or remit any part or amount of the unexecuted part of any sentence by summary court-martial or of any sentence by special court-martial which does not include a bad-conduct discharge regardless of whether the person acting has previously approved the sentence. The "unexecuted part of any sentence" includes that part which has been approved and ordered executed but which has not actually been carried out.

Discussion

See R.C.M. 1113 (execution of sentences); R.C.M. 1201 (action by the Judge Advocate General); R.C.M. 1206 (powers and responsibilities of the Secretary).

The military judge and members of courts-martial may not suspend sentences.

(c) Conditions of suspension. The authority who suspends the execution of the sentence of a court-martial shall:

1. Specify in writing the conditions of the suspension;
2. Cause a copy of the conditions of the suspension to be served on the probationer; and
3. Cause a receipt to be secured from the probationer for service of the conditions of the suspension.

(d) Limitations on suspension. Suspension shall be for a stated period or until the occurrence of an anticipated future event. The period shall not be unreasonably long. The Secretary concerned may further limit by regulations the period for which the execution of a sentence may be suspended.

See R.C.M. 1108(d)
mit any part of the sentence, including a part which has been suspended; reduce the period of suspension; or, subject to R.C.M. 1109, vacate the suspension in whole or in part.

(e) **Termination of suspension by remission.** Expiration of the period provided in the action suspending a sentence or part of a sentence shall remit the suspended portion unless the suspension is sooner vacated. Death or separation which terminates status as a person subject to the code shall result in remission of the suspended portion of the sentence.

**Discussion**

See R.C.M. 1109(b)(4) concerning interruption of the period of suspension.

---

**Rule 1109. Vacation of suspension of sentence**

(a) **In general.** Suspension of execution of the sentence of a court-martial may be vacated for violation of the conditions of the suspension as provided in this rule.

(b) **Timeliness.**

(1) *Violation of conditions.* Vacation shall be based on a violation of the conditions of suspension which occurs within the period of suspension.

(2) *Vacation proceedings.* Vacation proceedings under this rule shall be completed within a reasonable time.

(3) *Order vacating the suspension.* The order vacating the suspension shall be issued before the expiration of the period of suspension.

**Discussion**

The order vacating a suspended sentence must be issued before the end of suspension even though, in certain cases, it may not be effective as an order of execution of the suspended sentence until the completion of appellate review or action by the President or the Secretary concerned. See R.C.M. 1113 concerning execution of sentences.

---

(4) **Interruptions to the period of suspension.** Unauthorized absence of the probationer or the commencement of proceedings under this rule to vacate suspension interrupts the running of the period of suspension.

(c) **Confinement of probationer pending vacation proceedings.**

---

(1) *In general.* A probationer under a suspended sentence to confinement may be confined pending action under subsection (d)(2) of this rule in accordance with the procedures in subsection (e) of this rule.

(2) *Who may order confinement.* Any person who may order confinement under R.C.M. 304(b) may order confinement of a probationer under a suspended sentence to confinement.

(3) *Basis for confinement.* A probationer under a suspended sentence to confinement may be ordered into confinement upon probable cause to believe the probationer violated any conditions of the suspension.

**Discussion**

A determination that confinement is necessary to ensure the presence of the probationer or to prevent further misconduct is not required.

If the violation of the conditions also constitutes an offense under the code for which trial by court-martial is considered, an appropriate form of pretrial restraint may be imposed as an alternative to confinement under this rule. See R.C.M. 304 and 305.

---

(4) **Review of confinement.** Unless proceedings under subsection (d)(1) or (e) of this rule are completed within 7 days of imposition of confinement of the probationer (not including any delays requested by probationer), a preliminary hearing shall be conducted by a neutral and detached officer appointed in accordance with regulations of the Secretary concerned.

(A) *Rights of accused.* Before the preliminary hearing, the accused shall be notified in writing of:

(i) The time, place, and purpose of the hearing, including the alleged violation(s) of the conditions of suspension;

(ii) The right to be present at the hearing;

(iii) The right to be represented at the hearing by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose; and

(iv) The opportunity to be heard, to present witnesses who are reasonably available and other evidence, and the right to confront and cross-examine adverse witnesses unless the hearing officer determines that this would subject these witnesses to risk or harm. For purposes of this subsection, a witness is not reasonably available if the witness requires reim-
bursement by the United States for cost incurred in appearing, cannot appear without unduly delaying the proceedings, or, if a military witness, cannot be excused from other important duties.

(B) **Rules of evidence.** Except for Mil.R.Evid. Section V (Privileges) and Mil.R.Evid. 302 and 305, the Military Rules of Evidence shall not apply to matters considered at the preliminary hearing under this rule.

(C) **Decision.** The hearing officer shall determine whether there is probable cause to believe that the probationer violated the conditions of the probationer's suspension. If the hearing officer determines that probable cause is lacking, the hearing officer shall, in writing, order the probationer released from confinement. If the hearing officer determines that there is probable cause to believe that the probationer violated the conditions of suspension, the hearing officer shall set forth in a written memorandum the decision, the reasons for the decision, and the information relied on. The hearing officer shall forward the original memorandum or release order to the probationer's commander and forward a copy to the probationer and the officer in charge of the confinement facility.

(d) **Vacation of suspended general court-martial sentence or of a suspended special court-martial sentence including a bad-conduct discharge.**

(1) **Action by officer having special court-martial jurisdiction over probationer.**

(A) **In general.** Before vacation of the suspension of any general court-martial sentence, or of a special court-martial sentence which, as approved, includes a bad-conduct discharge, the officer having special court-martial jurisdiction over the probationer shall personally hold a hearing on the alleged violation of the conditions of suspension. If there is no officer having special court-martial jurisdiction over the accused, who is subordinate to the officer having general court-martial jurisdiction over the accused, the officer exercising general court-martial jurisdiction over the accused shall personally hold the hearing under subsection (d)(1) of this rule. In such cases, subsection (d)(1)(D) of this rule shall not apply.

(B) **Notice to probationer.** Before the hearing the authority conducting the hearing shall cause the probationer to be notified in writing of:

(i) The time, place, and purpose of the hearing;

(ii) The right to be present at the hearing;

(iii) The alleged violation(s) of the conditions of suspension and the evidence expected to be relied on;

(iv) The right to be represented at the hearing by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose; and

(v) The opportunity to be heard, to present witnesses and other evidence, and the right to confront and cross-examine adverse witnesses unless the hearing officer determines that there is good cause for not allowing confrontation and cross-examination.

**Discussion**

The notice should be provided sufficiently in advance of the hearing to permit adequate preparation.

(C) **Hearing.** The procedure for the vacation hearing shall follow that prescribed in R.C.M. 405(g), (h)(1), and (i).

(D) **Record; recommendation.** The officer who conducts the vacation proceeding shall make a summarized record of the proceeding and forward the record and that officer's written recommendation concerning vacation to the officer exercising general court-martial jurisdiction over the probationer.

(E) **Release from confinement.** If the special court-martial convening authority finds there is not probable cause to believe that the probationer violated the conditions of the suspension, the special court-martial convening authority shall order the release of the probationer from any confinement ordered under subsection (c) of this rule. The special court-martial convening authority shall, in any event, forward the record and recommendation under subsection (d)(1)(D) of this rule.

**Discussion**

See Appendix 18 for a sample of a Report of Proceedings to Vacate Suspension of a General Court-Martial Sentence or of a Special Court-Martial Sentence Including a Bad-Conduct Discharge under Article 72, UCMJ, and R.C.M. 1109 (DD Form 435).
(2) Action by officer exercising general court-martial jurisdiction over probationer.

(A) In general. The officer exercising general court-martial jurisdiction over the probationer shall, based upon the record produced by and the recommendation of the officer exercising special court-martial jurisdiction over the probationer, decide whether the probationer violated a condition of suspension, and, if so, whether to vacate the suspended sentence. If the officer exercising general court-martial jurisdiction decides to vacate, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating.

(B) Execution. Any unexecuted part of a suspended sentence ordered vacated under this rule shall, subject to R.C.M. 11 13(c), be ordered executed.

(e) Vacation of a suspended special court-martial sentence not including a bad-conduct discharge or of a suspended summary court-martial sentence.

(1) In general. Before vacation of the suspension of a special court-martial sentence not including a bad-conduct discharge or of a summary court-martial sentence, the officer having authority to convene for the command in which the probationer is serving or assigned the same kind of court-martial which imposed the sentence shall cause a hearing to be held on the alleged violation(s) of the conditions of suspension.

(2) Notice to probationer. The person conducting the hearing shall notify the probationer before the hearing of the rights specified in subsections (d)(1)(B)(i), (ii), (iii), and (v) of this rule. The authority conducting the hearing shall also notify the probationer that the probationer has the right to civilian counsel provided by the probationer or, upon request, counsel detailed for that purpose, if the probationer was entitled to such counsel under R.C.M. 506(a) at the court-martial which imposed the sentence.

(3) Hearing. The procedure for the vacation hearing shall follow that prescribed in R.C.M. 405(g), (h)(1), and (i).

(4) Record; recommendation. If the hearing is not held by the commander with authority to vacate the suspension, the person who conducts the vacation proceeding shall make a summarized record of the proceeding and forward the record and that officer's written recommendation concerning vacation to the commander with authority to vacate the suspension.

(5) Decision. If the appropriate authority decides that the probationer violated a condition of suspension, and to vacate, that person shall prepare a record of the hearing and a written statement indicating the decision, the reasons for the decision, and the evidence relied on.

Rule 1110. Waiver or withdrawal of appellate review

(a) In general. After any general court-martial, except one in which the approved sentence includes death, and after any special court-martial in which the approved sentence includes a bad-conduct discharge, the accused may waive or withdraw appellate review.

Discussion

Appellate review is not available for special courts-martial in which a bad-conduct discharge was not adjudged or approved or for summary courts-martial. Cases not subject to appellate review, or in which appellate review is waived or withdrawn, are reviewed by a judge advocate under R.C.M. 1112. Such cases may also be submitted to the Judge Advocate General for review. See R.C.M. 1201(b)(3). Appellate review is mandatory when the approved sentence includes death.

(b) Right to counsel.

(1) In general. The accused shall have the right to consult with counsel qualified under R.C.M. 502(d)(1) before submitting a waiver or withdrawal of appellate review.

(2) Waiver.

(A) Counsel who represented the accused at the court-martial. The accused shall have the right to consult with any civilian, individual military, or detailed counsel who represented the accused at the court-martial concerning whether to waive appellate review unless such counsel has been excused under R.C.M. 505(d)(2)(B).

(B) Associate counsel. If counsel who represented the accused at the court-martial has not been excused but is not immediately available to consult with the accused, because of physical separation or other reasons, associate defense counsel shall be detailed to the accused upon request by the accused. Such counsel shall communicate with counsel who represented the accused at the court-martial, and
shall advise the accused concerning whether to waive appellate review.

(C) Substitute counsel. If counsel who represented the accused at the court-martial has been excused under R.C.M. 505(d)(2)(B), substitute defense counsel shall be detailed to advise the accused concerning waiver of appellate rights.

(3) Withdrawal.

(A) Appellate defense counsel. If the accused is represented by appellate defense counsel, the accused shall have the right to consult with such counsel concerning whether to withdraw the appeal.

(B) Associate defense counsel. If the accused is represented by appellate defense counsel, and such counsel is not immediately available to consult with the accused, because of physical separation or other reasons, associate defense counsel shall be detailed to the accused, upon request by the accused. Such counsel shall communicate with appellate defense counsel and shall advise the accused whether to withdraw the appeal.

(C) No counsel. If appellate defense counsel has not been assigned to the accused, defense counsel shall be detailed for the accused. Such counsel shall advise the accused at the court-martial shall be detailed.

(4) Civilian counsel. Whether or not the accused was represented by civilian counsel at the court-martial, the accused may consult with civilian counsel, at no expense to the United States, concerning whether to waive or withdraw appellate review.

(5) Record of trial. Any defense counsel with whom the accused consults under this rule shall be given reasonable opportunity to examine the record of trial.

Discussion

Ordinarily counsel may use the accused's copy of the record. If this is not possible, as when the accused and counsel are physically separated, another copy should be made available to counsel.

(6) Consult. The right to consult with counsel, as used in this rule, does not require communication in the presence of one another.

(c) Compulsion, coercion, inducement prohibited. No person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review.

(d) Form of waiver or withdrawal. A waiver or withdrawal of appellate review shall:

1. Be written;

2. State that the accused and defense counsel have discussed the accused's right to appellate review and the effect of waiver or withdrawal of appellate review and that the accused understands these matters;

3. State that the waiver or withdrawal is submitted voluntarily; and

4. Be signed by the accused and by defense counsel.

Discussion

See Appendix 19 (DD Form 2330) or Appendix 20 (DD Form 2331) for samples of forms.

(e) To whom submitted.

1. Waiver. A waiver of appellate review shall be filed with the convening authority. The waiver shall be attached to the record of trial.

2. Withdrawal. A withdrawal of appellate review may be filed with the authority exercising general court-martial jurisdiction over the accused, who shall promptly forward it to the Judge Advocate General, or directly with the Judge Advocate General.

(f) Time limit.

1. Waiver. The accused may sign a waiver of appellate review at any time after the sentence is announced. The waiver must be filed within 10 days after the accused or defense counsel is served with a copy of the action under R.C.M. 1107(h). Upon written application of the accused, the convening authority may extend this period for good cause, for not more than 30 days.

2. Withdrawal. The accused may file withdrawal from appellate review at any time before such review is completed.

(g) Effect of waiver or withdrawal; substantial compliance required.

1. In general. A waiver or withdrawal of appellate review under this rule shall bar review by the Judge Advocate General under R.C.M. 1201(b)(1) and by the Court of Military Review. Once submitted, a waiver or withdrawal in compliance with this rule may not be revoked.
(2) **Waiver.** If the accused files a timely waiver of appellate review in accordance with this rule, the record shall be forwarded for review by a judge advocate under R.C.M. 11 112.

(3) **Withdrawal.** Action on a withdrawal of appellate review shall be carried out in accordance with procedures established by the Judge Advocate General, or if the case is pending before a Court of Military Review, in accordance with the rules of such court. If the appeal is withdrawn, the Judge Advocate General shall forward the record to an appropriate authority for compliance with R.C.M. 11 112.

(4) **Substantial compliance required.** A purported waiver or withdrawal of an appeal which does not substantially comply with this rule shall have no effect.

**Rule 1111. Disposition of the record of trial after action**

(a) **General courts-martial.**

   (1) **Cases forwarded to the Judge Advocate General.** A record of trial by general court-martial and the convening authority's action shall be sent directly to the Judge Advocate General concerned if the approved sentence includes death or if the accused has not waived review under R.C.M. 11 110. Unless otherwise prescribed by regulations of the Secretary concerned, 10 copies of the order promulgating the result of trial as to each accused shall be forwarded with the original record of trial. Two additional copies of the record of trial shall accompany the original record if the approved sentence includes death or if it includes dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more and the accused has not waived appellate review.

   (2) **Cases forwarded to a judge advocate.** A record of trial by general court-martial and the convening authority's action shall be sent directly to a judge advocate for review under R.C.M. 11 112 if the sentence does not include death and if the accused has waived appellate review under R.C.M. 11 110. Unless otherwise prescribed by the Secretary concerned, 4 copies of the order promulgating the result of trial shall be forwarded with the original record of trial.

(b) **Special courts-martial.**

   (1) **Cases including an approved bad-conduct discharge.** If the approved sentence of a special court-martial includes a bad-conduct discharge, the record shall be disposed of as provided in subsection (a) of this rule for records of trial by general court-martial.

   (2) **Other cases.** The record of trial by a special court-martial in which the approved sentence does not include a bad-conduct discharge shall be forwarded directly to a judge advocate for review under R.C.M. 11 112. Four copies of the order promulgating the result of trial shall be forwarded with the record of trial, unless otherwise prescribed by regulations of the Secretary concerned.

(c) **Summary courts-martial.** The convening authority shall dispose of a record of trial by summary court-martial as provided by R.C.M. 13 06.

**Discussion**

See DD Form 494 (Court-Martial Data Sheet).

**Rule 1112. Review by a judge advocate**

(a) **In general.** Except as provided in subsection (b) of this rule, under regulations of the Secretary concerned, a judge advocate shall review:

   (1) Each general court-martial in which the accused has waived or withdrawn appellate review under R.C.M. 11 110.

   (2) Each special court-martial in which the accused has waived or withdrawn appellate review under R.C.M. 11 110 or in which the approved sentence does not include a bad-conduct discharge; and

   (3) Each summary court-martial.

(b) **Exception.** If the accused was found not guilty or not guilty only by reason of lack of mental responsibility of all offenses or if the convening authority disapproved all findings of guilty, no review under this rule is required.

(c) **Disqualification.** No person may review a case under this rule if that person has acted in the same case as an accuser, investigating officer, member of the court-martial, military judge, or counsel, or has otherwise acted on behalf of the prosecution or defense.

(d) **Form and content of review.** The judge advocate's review shall be in writing and shall contain the following:

   (1) Conclusions as to whether—

      (A) The court-martial had jurisdiction over the accused and each offense as to which there is a finding of guilty which has not been disapproved;
(B) Each specification as to which there is a finding of guilty which has not been disapproved stated an offense; and

(C) The sentence was legal;

(2) A response to each allegation of error made in writing by the accused. Such allegations may be filed under R.C.M. 1105, 1106(f), or directly with the judge advocate who reviews the case; and

(3) If the case is sent for action to the officer exercising general court-martial jurisdiction under subsection (e) of this rule, a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

Copies of the judge advocate’s review under this rule shall be attached to the original and all copies of the record of trial. A copy of the review shall be forwarded to the accused.

(e) Forwarding to officer exercising general court-martial jurisdiction. In cases reviewed under subsection (a) of this rule, the record of trial shall be sent for action to the officer exercising general court-martial convening authority over the accused at the time the court-martial was held (or to that officer’s successor) when:

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

(2) The sentence approved by the convening authority includes dismissal, a dishonorable or bad-conduct discharge, or confinement for more than 6 months; or

(3) Such action is otherwise required by regulations of the Secretary concerned.

(f) Action by officer exercising general court-martial jurisdiction.

(1) Action. The officer exercising general court-martial jurisdiction who receives a record under subsection (e) of this rule may—

(A) Disapprove or approve the findings or sentence in whole or in part;

(B) Remit, commute, or suspend the sentence in whole or in part;

(C) Except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

(D) Dismiss the charges.

Discussion

See R.C.M. 1113 concerning when the officer exercising general court-martial jurisdiction may order parts of the sentence executed. See R.C.M. 1114 concerning orders promulgating the action of the officer exercising general court-martial jurisdiction. See also Appendix 16 (Forms for actions) and Appendix 17 (Forms for court-martial orders).

(2) Rehearing. If the officer exercising general court-martial jurisdiction orders a rehearing, but the convening authority finds a rehearing impracticable, the convening authority shall dismiss the charges.

(3) Notification. After the officer exercising general court-martial jurisdiction has taken action, the accused shall be notified of the action and the accused shall be provided with a copy of the judge advocate’s review.

(g) Forwarding following review under this rule.

(1) Records forwarded to the Judge Advocate General. If the judge advocate who reviews the case under this rule states that corrective action is required as a matter of law, and the officer exercising general court-martial jurisdiction does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and the action thereon shall be forwarded to the Judge Advocate General concerned for review under R.C.M. 1201(b)(2).

(2) Sentence including dismissal. If the approved sentence includes dismissal, the record shall be forwarded to the Secretary concerned.

Discussion

A dismissal may not be ordered executed until approved by the Secretary or the Secretary’s designee. See R.C.M. 1206.

(3) Other records. Records reviewed under this rule which are not forwarded under subsection (g)(1) of this rule shall be disposed of as prescribed by the Secretary concerned.

Discussion

A dismissal may not be ordered executed until approved by the Secretary or the Secretary’s designee under R.C.M. 1206.
Rule 1113. Execution of sentences

(a) In general. No sentence of a court-martial may be executed unless it has been approved by the convening authority.

Discussion

An order executing the sentence directs that the sentence be carried out. Except as provided in subsections (d)(2), (3), and (5) of this rule, no part of a sentence may be carried out until it is ordered executed.

(b) Punishments which the convening authority may order executed in the initial action. Except as provided in subsection (c) of this rule, the convening authority may order all or part of the sentence of a court-martial executed when the convening authority takes initial action under R.C.M. 1107.

(c) Punishments which the convening authority may not order executed in the initial action.

(1) Dishonorable or a bad-conduct discharge. Except as may otherwise be prescribed by the Secretary concerned, a dishonorable or a bad-conduct discharge may be ordered executed only by:

(A) The officer who reviews the case under R.C.M. 1112(f), as part of the action approving the sentence, except when that action must be forwarded under R.C.M. 1112(g)(1); or

(B) The officer then exercising general court-martial jurisdiction over the accused.

A dishonorable or bad-conduct discharge may be ordered executed only after a final judgment within the meaning of R.C.M. 1209 has been rendered in the case. If on the date of final judgement a servicemember is not on appellate leave and more than 6 months have elapsed since approval of the sentence by the convening authority, before a dishonorable or a bad-conduct discharge may be executed, the officer exercising general court-martial jurisdiction over the servicemember shall consider the advice of that officer’s staff judge advocate as to whether retention of the servicemember would be in the best interest of the service. Such advice shall include the findings and sentence as finally approved, the nature and character of duty since approval of the sentence by the convening authority, and a recommendation whether the discharge should be executed.

(2) Dismissal of a commissioned officer, cadet, or midshipman. Dismissal of a commissioned officer, cadet, or midshipman may be approved and ordered executed only by the Secretary concerned or such Under Secretary or Assistant Secretary as the Secretary concerned may designate.

Discussion

See R.C.M. 1206(a) concerning approval by the Secretary

(3) Sentences extending to death. A punishment of death may be ordered executed only by the President.

Discussion

See R.C.M. 1207 concerning approval by the President.

(d) Other considerations concerning the execution of certain sentences.

(1) Death.

(A) Manner carried out. A sentence to death which has been finally ordered executed shall be carried out in the manner prescribed by the Secretary concerned.

(B) Action when accused lacks mental capacity. An accused lacking the mental capacity to understand the punishment to be suffered or the reason for imposition of the death sentence may not be put to death during any period when such incapacity exists. The accused is presumed to have such mental capacity. If a substantial question is raised as to whether the accused lacks capacity, the convening authority then exercising general court-martial jurisdiction over the accused shall order a hearing on the question. A military judge, counsel for the government, and counsel for the accused shall be detailed. The convening authority shall direct an examination of the accused in accordance with R.C.M. 706, but the examination may be limited to determining whether the accused understands the punishment to be suffered and the reason therefore. The military judge shall consider all evidence presented, including evidence provided by the accused. The accused has the burden of proving such lack of capacity by a preponderance of the evidence. The military judge shall make findings of fact, which will then be forwarded to the convening authority ordering the hearing. If the accused is found to lack capacity, the convening authority shall stay the execution until the accused regains appropriate capacity.
Discussion

A verbatim transcript of the hearing should accompany the findings of fact.

(2) Confinement.

(A) Effective date of confinement. Any period of confinement included in the sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but the following shall be excluded in computing the service of the term of confinement:

(i) Periods during which the sentence to confinement is suspended or deferred;

(ii) Periods during which the accused is in custody of civilian authorities under Article 14 from the time of the delivery to the return to military custody, if the accused was convicted in the civilian court;

(iii) Periods during which the accused has escaped or is absent without authority, or is absent under a parole which proper authority has later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon the prisoner’s petition for a writ of habeas corpus under a court order which is later reversed; and

(iv) Periods during which another sentence by court-martial to confinement is being served.

When a prisoner serving a court-martial sentence to confinement is later convicted by a court-martial of another offense and sentenced to confinement, the later sentence interrupts the running of the earlier sentence. Any unremitting remaining portion of the earlier sentence will be served after the later sentence is fully executed.

(B) Nature of the confinement. The omission of "hard labor" from any sentence of a court-martial which has adjudged confinement shall not prohibit the authority who orders the sentence executed from requiring hard labor as part of the punishment.

(C) Place of confinement. The authority who orders a sentence to confinement into execution shall designate the place of confinement under regulations prescribed by the Secretary concerned, unless otherwise prescribed by the Secretary concerned. Under such regulations as the Secretary concerned may prescribe, a sentence to confinement adjudged by a court-martial or other military tribunal, regardless whether the sentence includes a punitive discharge or dismissal and regardless whether the punitive discharge or dismissal has been executed, may be ordered to be served in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated. When the service of a sentence to confinement has been deferred and the deferment is later rescinded, the convening authority shall designate the place of confinement in the initial action on the sentence or in the order rescinding the deferment. No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces. The Secretary concerned may prescribe regulations governing the place and conditions of confinement.

Discussion

See R.C.M. 1101(c) concerning deferment of a sentence to confinement.

(3) Confinement in lieu of fine. Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government’s interest in appropriate punishment.

(4) Restriction; hard labor without confinement. When restriction and hard labor without confinement are included in the same sentence, they shall, unless one is suspended, be executed concurrently.

(5) Confinement on bread and water or diminished rations. A sentence to confinement on bread and water or diminished rations may be executed only if a medical officer examines the accused and the place of confinement and certifies in writing that service of such a sentence will not, in that officer’s opinion, produce serious injury to the health of the
accused. A sentence of confinement on bread and water or diminished rations may be executed in a place where the accused can communicate only with authorized personnel.

(6) More than one sentence. If at the time forfeitures may be ordered executed, the accused is already serving a sentence to forfeitures by another court-martial, the authority taking action may order that the later forfeitures will be executed when the earlier sentence to forfeitures is completed.

Rule 1114. Promulgating orders

(a) In general.

(1) Scope of rule. Unless otherwise prescribed by the Secretary concerned, orders promulgating the result of trial and the actions of the convening or higher authorities on the record shall be prepared, issued, and distributed as prescribed in this rule.

(2) Purpose. A promulgating order publishes the result of the court-martial and the convening authority’s action and any later action taken on the case.

(3) Summary courts-martial. An order promulgating the result of a trial by summary court-martial need not be issued.

(b) By whom issued.

(1) Initial orders. The order promulgating the result of trial and the initial action of the convening authority shall be issued by the convening authority.

(2) Orders issued after the initial action. Any action taken on the case subsequent to the initial action shall be promulgated in supplementary orders. The subsequent action and the supplementary order may be the same document if signed personally by the appropriate convening or higher authority.

(A) When the President or the Secretary concerned has taken final action. General court-martial orders publishing the final result in cases in which the President or the Secretary concerned has taken final action shall be promulgated as prescribed by regulations of the Secretary concerned.

(B) Other cases. In cases other than those in subsection (b)(2)(A) of this rule, the final action may be promulgated by an appropriate convening authority.

(c) Contents.

(1) In general. The order promulgating the initial action shall set forth: the type of court-martial and the command by which it was convened; the charges and specifications, or a summary thereof, on which the accused was arraigned; the accused’s pleas; the findings or other disposition of each charge and specification; the sentence, if any; and the action of the convening authority, or a summary thereof. Supplementary orders shall recite, verbatim, the action or order of the appropriate authority, or a summary thereof.

(2) Dates. A promulgating order shall bear the date of the initial action, if any, of the convening authority. An order promulgating an acquittal, a court-martial terminated before findings, a court-martial resulting in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or action on the findings or sentence taken after the initial action of the convening authority shall bear the date of its publication. A promulgating order shall state the date the sentence was adjudged, the date on which the acquittal was announced, or the date on which the proceedings were otherwise terminated.

(d) Orders containing classified information. When an order contains information which must be classified, only the order retained in the unit files and those copies which accompany the record of trial shall be complete and contain the classified information. The order shall be assigned the appropriate security classification. Asterisks shall be substituted for the classified information in the other copies of the order.

(e) Authentication. The promulgating order shall be authenticated by the signature of the convening or other competent authority acting on the case, or a
person acting under the direction of such authority. A promulgating order prepared in compliance with this rule shall be presumed authentic.

(f) Distribution. Promulgating orders shall be distributed as provided in regulations of the Secretary concerned.
CHAPTER XII. APPEALS AND REVIEW

Rule 1201. Action by the Judge Advocate General

(a) Cases required to be referred to a Court of Military Review. The Judge Advocate General shall refer to a Court of Military Review the record in each trial by court-martial:

1. In which the sentence, as approved, extends to death; or
2. In which—
   A. The sentence, as approved, extends to dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for 1 year or longer; and
   B. The accused has not waived or withdrawn appellate review.

Discussion

See R.C.M. 1110 concerning waiver or withdrawal of appellate review.

See also subsection (b)(1) of this rule concerning cases reviewed by the Judge Advocate General which may be referred to a Court of Military Review.

See R.C.M. 1203 concerning review by the Court of Military Review and the powers and responsibilities of the Judge Advocate General after such review. See R.C.M. 1202 concerning appellate counsel.

(b) Cases reviewed by the Judge Advocate General.

1. Mandatory examination of certain general courts-martial. Except when the accused has waived the right to appellate review or withdrawn such review, the record of trial by a general court-martial in which there has been a finding of guilty and a sentence, the appellate review of which is not provided for in subsection (a) of this rule, shall be examined in the office of the Judge Advocate General. If any part of the findings or sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both. If the Judge Advocate General so directs, the record shall be reviewed by a Court of Military Review in accordance with R.C.M. 1203. If the case is forwarded to a Court of Military Review, the accused shall be informed and shall have the rights under R.C.M. 1202(b)(2).

Discussion

When a case is forwarded to a Court of Military Review under this subsection, it is not subject to further review by the Court of Military Appeals, except when forwarded by the Judge Advocate General under R.C.M. 1203(c)(1).

2. Mandatory review of cases forwarded under R.C.M. 1112(g)(1). The Judge Advocate General shall review each case forwarded under R.C.M. 1112(g)(1). On such review, the Judge Advocate General may vacate or modify, in whole or in part, the findings or sentence, or both, of a court-martial on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

3. Review by the Judge Advocate General after final review.

A. In general. Notwithstanding R.C.M. 1209, the Judge Advocate General may, sua sponte or upon application of the accused or a person with authority to act for the accused, vacate or modify, in whole or in part, the findings, sentence, or both of a court-martial which has been finally reviewed, but has not been reviewed either by a Court of Military Review or by the Judge Advocate General under subsection (b)(1) of this rule, on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

Discussion

See R.C.M. 1210 concerning petition for new trial. Review of a case by a Judge Advocate General under this subsection is not part of appellate review within the meaning of Article 76 or R.C.M. 1209.

Review of a finding of not guilty only by reason of lack of mental responsibility under this rule may not extend to the determination of lack of mental responsibility. Thus, modification of a finding of not guilty only by reason of lack of mental responsibility under this rule is limited to changing the finding to not guilty or not guilty only by reason of lack of mental responsibility of a lesser included offense.

B. Procedure. Each Judge Advocate General shall provide procedures for considering all cases properly submitted under subsection (b)(3) of this rule and may prescribe the manner by which an application for relief under subsection (b)(3) of this rule may be made and, if submitted by a person...
other than the accused, may require that the applicant show authority to act on behalf of the accused.

Discussion

See R.C.M. 1114 concerning orders promulgating action under this rule.

(C) Time limits on applications. Any application for review by the Judge Advocate General under Article 69 must be made on or before the last day of the two year period beginning on the date the sentence is approved by the convening authority or the date the findings are announced for cases which do not proceed to sentencing, unless the accused establishes good cause for failure to file within that time.

(4) Rehearing. If the Judge Advocate General sets aside the findings or sentence, the Judge Advocate General may, except when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If the Judge Advocate General sets aside the findings and sentence and does not order a rehearing, the Judge Advocate General shall order that the charges be dismissed. If the Judge Advocate General orders a rehearing but the convening authority finds a rehearing impractical, the convening authority shall dismiss the charges.

(c) Remission and suspension. The Judge Advocate General may, when so authorized by the Secretary concerned under Article 74, at any time remit or suspend the unexecuted part of any sentence, other than a sentence approved by the President.

Rule 1202. Appellate counsel

(a) In general. The Judge Advocate General concerned shall detail one or more commissioned officers as appellate Government counsel and one or more commissioned officers as appellate defense counsel who are qualified under Article 27(b)(1).

(b) Duties.

(1) Appellate Government counsel. Appellate Government counsel shall represent the United States before the Court of Military Review or the United States Court of Military Appeals when directed to do so by the Judge Advocate General concerned. Appellate Government counsel may represent the United States before the United States Supreme Court when requested to do so by the Attorney General.

(2) Appellate defense counsel. Appellate defense counsel shall represent the accused before the Court of Military Review, the Court of Military Appeals, or the Supreme Court when the accused is a party in the case before such court and:

(A) The accused requests to be represented by appellate defense counsel;

(B) The United States is represented by counsel;

(C) The Judge Advocate General has sent the case to the United States Court of Military Appeals. Appellate defense counsel is authorized to communicate directly with the accused. The accused is a party in the case when named as a party in pleadings before the court or, even if not so named, when the military judge is named as respondent in a petition by the Government for extraordinary relief from a ruling in favor of the accused at trial.

Discussion

For a discussion of the duties of the trial defense counsel concerning post-trial and appellate matters, see R.C.M. 502(d)(6) Discussion (E). Appellate defense counsel may communicate with trial defense counsel concerning the case. See also Mil.R.Evid. 502 (privileges).

If all or part of the findings and sentence are affirmed by the Court of Military Review, appellate defense counsel should advise the accused whether the accused should petition for further review in the United States Court of Military Appeals and concerning which issues should be raised.

The accused may be represented by civilian counsel before the Court of Military Review, the Court of Military Appeals, and the Supreme Court. Such counsel will not be provided at the expense of the United States. Civilian counsel may represent the accused before these courts in addition to or instead of military counsel.

If, after any decision of the Court of Military Appeals, the accused may apply for a writ of certiorari (see R.C.M. 1205), appellate defense counsel should advise the accused whether to apply for review by the Supreme Court and which issues might be raised. If authorized to do so by the accused, appellate defense counsel may prepare and file a petition for a writ of certiorari on behalf of the accused.

The accused has no right to select appellate defense counsel. Under some circumstances, however, the accused may be entitled to request that the detailed appellate defense counsel be replaced by another appellate defense counsel.

See also R.C.M. 1204(b)(1) concerning detailing counsel with respect to the right to petition the Court of Military Appeals for review.
Rule 1203. Review by a Court of Military Review

(a) In general. Each Judge Advocate General shall establish a Court of Military Review composed of appellate military judges.

Discussion

See Article 66 concerning the composition of the Courts of Military Review, the qualifications of appellate military judges, the grounds for their ineligibility, and restrictions upon the official relationship of the members of the court to other members. Uniform rules of court for the Courts of Military Review prescribed by the Judge Advocates General.

(b) Cases reviewed by a Court of Military Review. A court of Military Review shall review cases referred to it by the Judge Advocate General under R.C.M. 1201(a) or (b)(1).

Discussion

See R.C.M. 1110 concerning withdrawal of a case pending before a Court of Military Review.

See R.C.M. 908 concerning procedures for interlocutory appeals by the Government.

In cases referred to it under R.C.M. 1201, a Court of Military Review may act only with respect to the findings and sentence as approved by proper authority. It may affirm only such findings of guilty or such part of a finding of guilty as includes an included offense, as it finds correct in law and fact and determines on the basis of the entire record should be approved. A Court of Military Review has generally the same powers as the convening authority to modify a sentence (see R.C.M. 1107), but it may not suspend all or part of a sentence. However, it may reduce the period of a suspension prescribed by a convening authority. It may not defer service of a sentence to confinement. (See R.C.M. 1101(c)). It may, however, review a decision by a convening authority concerning deferral, to determine whether that decision was an abuse of the convening authority’s discretion.

In considering the record of a case referred to it under R.C.M. 1201, a Court of Military Review may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the court-martial saw and heard the evidence. A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused. Article 59(a).

If a Court of Military Review sets aside any findings of guilty or the sentence, it may, except as to findings set aside for lack of sufficient evidence in the record to support the findings, order an appropriate type of rehearing or reassess the sentence as appropriate. See R.C.M. 810 concerning rehearings. If the Court of Military Review sets aside all the findings and the sentence and does not order a rehearing, it must order the charges dismissed. See Articles 59(a) and 66.

A Court of Military Review may on petition for extraordinary relief issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law. Any party may petition a Court of Military Review for extraordinary relief.

(c) Action on cases reviewed by a Court of Military Review.

(1) Forwarding by the Judge Advocate General to the Court of Military Appeals. The Judge Advocate General may forward the decision of the Court of Military Review to the Court of Military Appeals for review with respect to any matter of law. In such a case, the Judge Advocate General shall cause a copy of the decision of the Court of Military Review and the order forwarding the case to be served on the accused and on appellate defense counsel.

(2) Action when sentence is set aside. In a case reviewed by it under this rule in which the Court of Military Review has set aside the sentence and which is not forwarded to the Court of Military Appeals under subsection (c)(1) of this rule, the Judge Advocate General shall instruct an appropriate convening authority to take action in accordance with the decision of the Court of Military Review. If the Court of Military Review has ordered a rehearing, the record shall be sent to an appropriate convening authority. If that convening authority finds a rehearing impracticable that convening authority may dismiss the charges.

Discussion

If charges are dismissed, see R.C.M. 1208 concerning restoration of rights, privileges, and property. See R.C.M. 1114 concerning promulgating orders.

(3) Action when sentence is affirmed in whole or part.

(A) Sentence requiring approval by the President. If the Court of Military Review affirms any sentence which includes death, the Judge Advocate General shall transmit the record of trial and the decision of the Court of Military Review directly to the Court of Military Appeals when any period for reconsideration provided by the rules of the Courts of Military Review has expired.

(B) Other cases. If the Court of Military Review affirms any sentence other than one which includes death, the Judge Advocate General shall
cause a copy of the decision of the Court of Military Review to be served on the accused in accordance with subsection (d) of this rule.

(4) Remission or suspension. If the Judge Advocate General believes that a sentence as affirmed by the Court of Military Review, other than one which includes death, should be remitted or suspended in whole or part, the Judge Advocate General may, before taking action under subsections (c)(1) or (3) of this rule, transmit the record of trial and the decision of the Court of Military Review to the secretary concerned with a recommendation for action under Article 74 or may take such action as may be authorized by the Secretary concerned under Article 74(a).

Discussion
See R.C.M. 1201(c); 1206.

(5) Action when accused lacks mental capacity. An appellate authority may not affirm the proceedings while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the appellate authority may direct that the record be forwarded to an appropriate authority for an examination of the accused in accordance with R.C.M. 706, but the examination may be limited to determining the accused's present capacity to understand and cooperate in the appellate proceedings. The order of the appellate authority will instruct the appropriate authority as to permissible actions that may be taken to dispose of the matter. If the record is thereafter returned to the appellate authority, the appellate authority may affirm part or all of the findings or sentence unless it is established, by a preponderance of the evidence—including matters outside the record of trial—that the accused does not have the requisite mental capacity. If the accused does not have the requisite mental capacity, the appellate authority shall stay the proceedings until the accused regains appropriate capacity, or take other appropriate action. Nothing in this subsection shall prohibit the appellate authority from making a determination in favor of the accused which will result in the setting aside of a conviction.

(d) Notification to accused.

(1) Notification of decision. The accused shall be notified of the decision of the Court of Military Review in accordance with regulations of the Secretary concerned.

Discussion
The accused may be notified personally, or a copy of the decision may be sent, after service on appellate counsel of record, if any, by first class certified mail to the accused at an address provided by the accused, or, if no such address has been provided by the accused, at the latest address listed for the accused in the accused's official service record.

If the Judge Advocate General has forwarded the case to the Court of Military Appeals, the accused should be so notified. See subsection (c)(1) of this rule.

(2) Notification of right to petition the Court of Military Appeals for review. If the accused has the right to petition the Court of Military Appeals for review, the accused shall be provided with a copy of the decision of the Court of Military Review bearing an endorsement notifying the accused of this right. The endorsement shall inform the accused that such a petition:

(A) May be filed only within 60 days from the time the accused was in fact notified of the decision of the Court of Military Review or the mailed copy of the decision was postmarked, whichever is earlier; and

(B) May be forwarded through the officer immediately exercising general court-martial jurisdiction over the accused and through the appropriate Judge Advocate General or filed directly with the Court of Military Appeals.

Discussion
See Article 67(c).
See also R.C.M. 1204(b).
The accused may petition the Court of Military Appeals for review, as to any matter of law, of any decision of the Court of Military Review except: (1) a case which was referred to the Court of Military Review by the Judge Advocate General under R.C.M. 1201(b)(1); (2) a case in which the Court of Military Review has set aside the sentence; and (3) a case in which the sentence includes death (because review by the Court of Military Appeals is mandatory).

The placing of a petition for review in proper military channels divests the Court of Military Review of jurisdiction over the
case, and jurisdiction is thereby conferred on the Court of Military Appeals. See R.C.M. 1113 concerning action to be taken if the accused does not file or the Court of Military Appeals denies a petition for review.

(3) Receipt by the accused—disposition. When the accused has the right to petition the Court of Military Appeals for review, the receipt of the accused for the copy of the decision of the Court of Military Review, a certificate of service on the accused, or the postal receipt for delivery of certified mail shall be transmitted in duplicate by expeditious means to the appropriate Judge Advocate General. If the accused is personally served, the receipt or certificate of service shall show the date of service. The Judge Advocate General shall forward one copy of the receipt, certificate, or postal receipt to the clerk of the Court of Military Appeals when required by the court.

(e) Cases not reviewed by the Court of Military Appeals. If the decision of the Court of Military Review is not subject to review by the Court of Military Appeals, or if the Judge Advocate General has not forwarded the case to the Court of Military Appeals and the accused has not filed or the Court of Military Appeals has denied a petition for review, the Judge Advocate General shall—

(1) If the sentence affirmed by the Court of Military Review includes a dismissal, transmit the record, the decision of the Court of Military Review, and the Judge Advocate General's recommendation to the Secretary concerned for action under R.C.M. 1206; or

(2) If the sentence affirmed by the Court of Military Review does not include a dismissal, notify the convening authority, the officer exercising general court-martial jurisdiction over the accused, or the Secretary concerned, as appropriate, who, subject to R.C.M. 1113(c)(1), may order into execution any unexecuted sentence affirmed by the Court of Military Review or take other action, as authorized.

Discussion

See R.C.M. 1113, 1206, and Article 74(a) concerning the authority of the Secretary and others to take action.

(f) Scope. Except as otherwise expressly provided in this rule, this rule does not apply to appeals by the Government under R.C.M. 908.

Rule 1204. Review by the Court of Military Appeals

(a) Cases reviewed by the Court of Military Appeals. Under such rules as it may prescribe, the Court of Military Appeals shall review the record in all cases:

(1) In which the sentence, as affirmed by a Court of Military Review, extends to death;

(2) Reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and

(3) Reviewed by a Court of Military Review, except those referred to it by the Judge Advocate General under R.C.M. 1201(b)(1), in which, upon petition by the accused and on good cause shown, the Court of Military Appeals has granted a review.

Discussion

See Article 67(a) concerning the composition of the Court of Military Appeals. In any case reviewed by it, the Court of Military Appeals may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Military Review. See Article 67(d) and (e). The rules of practice and procedure before the Court of Military Appeals are published in the Military Justice Reporter.

The Court of Military Appeals may entertain petitions for extraordinary relief and may issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law. Any party may petition the Court of Military Appeals for extraordinary relief. However, in the interest of judicial economy, such petitions usually should be filed with and adjudicated before the appropriate Court of Military Review prior to submission to the Court of Military Appeals.

(b) Petition by the accused for review by the Court of Military Appeals.

(1) Counsel. When the accused is notified of the right to forward a petition for review by the Court of Military Appeals, if requested by the accused, associate counsel qualified under R.C.M. 502(d)(1) shall be detailed to advise and assist the accused in connection with preparing a petition for further appellate review.

Discussion

If reasonably available, the counsel who conducted the defense at trial may perform these duties. The counsel detailed to represent the accused should communicate with the appellate defense counsel representing the accused. See R.C.M. 1202.
(2) **Forwarding petition.** The accused shall file any petition for review by the Court of Military Appeals under subsection (a)(3) of this rule directly with the Court of Military Appeals.

**Discussion**

See Article 67(c) and R.C.M. 1203(d)(2) concerning notifying the accused of the right to petition the Court of Military Appeals for review and the time limits for submitting a petition. See also the rules of the Court of Military Appeals concerning when the time for filing a petition begins to run and when a petition is now timely.

(c) **Action on decision by the Court of Military Appeals.**

(1) **In general.** After it has acted on a case, the Court of Military Appeals may direct the Judge Advocate General to return the record to the Court of Military Review for further proceedings in accordance with the decision of the court. Otherwise, unless the decision is subject to review by the Supreme Court, or there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the Court has ordered a rehearing, but the convening authority to whom the record is transmitted finds a rehearing impracticable, the convening authority may dismiss the charges.

**Discussion**

See R.C.M. 1114 concerning final orders in the case. See also R.C.M. 1206 and Article 74(a).

(2) **Sentence requiring approval of the President.** If the Court of Military Appeals has affirmed a sentence which must be approved by the President before it may be executed, the Judge Advocate General shall transmit the record of trial, the decision of the Court of Military Review, the decision of the Court of Military Appeals, and the recommendation of the Judge Advocate General to the Secretary concerned for the action of the President.

**Discussion**

See Article 71(a) and R.C.M. 1207.

(3) **Sentence requiring approval of the Secretary concerned.** If the Court of Military Appeals has affirmed a sentence which requires approval of the Secretary concerned before it may be executed, the Judge Advocate General shall follow the procedure in R.C.M. 1203(e)(1).

**Discussion**

See Article 71(b) and R.C.M. 1206.

(4) **Decision subject to review by the Supreme Court.** If the decision of the Court of Military Appeals is subject to review by the Supreme Court, the Judge Advocate General shall take no action under subsections (c)(1), (2), or (3) of this rule until: (A) the time for filing a petition for a writ of certiorari with the Supreme Court has expired; or (B) the Supreme Court has denied any petitions for writ of certiorari filed in the case. After (A) or (B) has occurred, the Judge Advocate General shall take action under subsection (c)(1), (2), or (3). If the Supreme Court grants a writ of certiorari, the Judge Advocate General shall take action under R.C.M. 1205(b).

**Rule 1205. Review by the Supreme Court**

(a) **Cases subject to review by the Supreme Court.** Under 28 U.S.C. § 1259 and Article 67(h), decisions of the Court of Military Appeals may be reviewed by the Supreme Court by writ of certiorari in the following cases:

1. Cases reviewed by the Court of Military Appeals under Article 67(b)(1);
2. Cases certified to the Court of Military Appeals by the Judge Advocate General under Article 67(b)(2);
3. Cases in which the Court of Military Appeals granted a petition for review under Article 67(b)(3); and
4. Cases other than those described in subsections (a)(1), (2), and (3) of this rule in which the Court of Military Appeals granted relief.

The Supreme Court may not review by writ of certiorari any action of the Court of Military Appeals in refusing to grant a petition for review.

(b) **Action by the Supreme Court.** After the Supreme Court has taken action, other than denial of a petition for writ of certiorari, in any case, the Judge Ad-
vocate General shall, unless the case is returned to the Court of Military Appeals for further proceedings, forward the case to the President or the Secretary concerned in accordance with R.C.M. 1204(c)(2) or (3) when appropriate, or instruct the convening authority to take action in accordance with the decision.

Rule 1206. Powers and responsibilities of the Secretary

(a) **Sentences requiring approval by the Secretary.** No part of a sentence extending to dismissal of a commissioned officer, cadet, or midshipman may be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary.

(b) **Remission and suspension.**

   (1) **In general.** The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or commander may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures, other than a sentence approved by the President.

   (2) **Substitution of discharge.** The Secretary concerned may, for good cause, substitute an administrative discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

   (3) **Sentence commuted by the President.** When the President has commuted a death sentence to a lesser punishment, the Secretary concerned may remit or suspend any remaining part or amount of the unexecuted portion of the sentence of a person convicted by a military tribunal under Secretary’s jurisdiction.

Rule 1207. Sentences requiring approval by the President

No part of a court-martial sentence extending to death may be executed until approved by the President.

**Discussion**

See Article 71(b).
(A) The accused does not file a timely petition for review by the Court of Military Appeals and the case is not otherwise under review by that court;

(B) A petition for review is denied or otherwise rejected by the Court of Military Appeals; or

(C) Review is completed in accordance with the judgment of the Court of Military Appeals and—

(i) A petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court,

(ii) A petition for writ of certiorari is denied or otherwise rejected by the Supreme Court, or

(iii) Review is otherwise completed in accordance with the judgment of the Supreme Court; or

Discussion

See R.C.M. 1201, 1203, 1204, and 1205 concerning cases subject to review by a Court of Military Review, the Court of Military Appeals, and the Supreme Court. See also R.C.M. 1110.

(2) In cases not reviewed by a Court of Military Review—

(A) The findings and sentence have been found legally sufficient by a judge advocate and, when action by such officer is required, have been approved by the officer exercising general court-martial jurisdiction over the accused at the time the court-martial was convened (or that officer’s successor); or

(B) The findings and sentence have been affirmed by the Judge Advocate General when review by the Judge Advocate General is required under R.C.M. 1112(g)(1) or 1201(b)(1).

(b) Effect of finality. The appellate review of records of trial provided by the code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by the code, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by the code, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial under Article 73, to action by the Judge Advocate General under Article 69(b), to action by the Secretary concerned as provided in Article 74, and the authority of the President.

Rule 1210. New trial

(a) In general. At any time within 2 years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court-martial. A petition may not be submitted after the death of the accused.

(b) Who may petition. A petition for a new trial may be submitted by the accused personally, or by accused’s counsel, regardless whether the accused has been separated from the service.

(c) Form of petition. A petition for a new trial shall be written and shall be signed under oath or affirmation by the accused, by a person possessing the power of attorney of the accused for that purpose, or by a person with the authorization of an appropriate court to sign the petition as the representative of the accused. The petition shall contain the following information, or an explanation why such matters are not included:

(1) The name, service number, and current address of the accused;

(2) The date and location of the trial;

(3) The type of court-martial and the title or position of the convening authority;

(4) The request for the new trial;

(5) The sentence or a description thereof as approved or affirmed, with any later reduction thereof by clemency or otherwise;

(6) A brief description of any finding or sentence believed to be unjust;

(7) A full statement of the newly discovered evidence or fraud on the court-martial which is relied upon for the remedy sought;

(8) Affidavits pertinent to the matters in subsection (c)(6) of this rule; and

(9) The affidavit of each person whom the accused expects to present as a witness in the event of a new trial. Each such affidavit should set forth briefly the relevant facts within the personal knowledge of the witness.

(d) Effect of petition. The submission of a petition for a new trial does not stay the execution of a sentence.

(e) Who may act on petition. If the accused’s case is pending before a Court of Military Review or the Court of Military Appeals, the Judge Advocate General shall refer the petition to the appropriate
court for action. Otherwise, the Judge Advocate General of the armed force which reviewed the previous trial shall act on the petition, except that petitions submitted by persons who, at the time of trial and sentence from which the petitioner seeks relief, were members of the Coast Guard, and who, and who were members of the Coast Guard at the time the petition is submitted, shall be acted on in the Department in which the Coast Guard is serving at the time the petition is so submitted.

(f) Grounds for new trial.

(1) In general. A new trial may be granted only on grounds of newly discovered evidence or fraud on the court-martial.

(2) Newly discovered evidence. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:

(A) The evidence was discovered after the trial;

(B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

(C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

(3) Fraud on court-martial. No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged.

Discussion

Examples of fraud on a court-martial which may warrant granting a new trial are: confessed or proved perjury in testimony or forgery of documentary evidence which clearly had a substantial contributing effect on a finding of guilty and without which there probably would not have been a finding of guilty of the offense; willful concealment by the prosecution from the defense of evidence favorable to the defense which, if presented to the court-martial, would probably have resulted in a finding of not guilty; and willful concealment of a material ground for challenge of the military judge or any member or of the disqualification of counsel or the convening authority, when the basis for challenge or disqualification was not known to the defense at the time of trial (see R.C.M. 912).

(g) Action on the petition.

(1) In general. The authority considering the petition may cause such additional investigation to be made and such additional information to be secured as that authority believes appropriate. Upon written request, and in its discretion, the authority considering the petition may permit oral argument on the matter.

(2) Courts of Military Review: Court of Military Appeals. The Courts of Military Review and the Court of Military Appeals shall act on a petition for a new trial in accordance with their respective rules.

(3) The Judge Advocates General. When a petition is considered by the Judge Advocate General, any hearing may be before the Judge Advocate General or before an officer or officers designated by the Judge Advocate General. If the Judge Advocate General believes meritorious grounds for relief under Article 74 have been established but that a new trial is not appropriate, the Judge Advocate General may act under Article 74 if authorized to do so, or transmit the petition and related papers to the Secretary concerned with a recommendation. The Judge Advocate General may also, in cases which have been finally reviewed but have not been reviewed by a Court of Military Review, act under Article 69.

Discussion

See also R.C.M. 1201(b)(3).

(h) Action when new trial is granted.

(1) Forwarding to convening authority. When a petition for a new trial is granted, the Judge Advocate General shall select and forward the case to a convening authority for disposition.

(2) Charges at new trial. At a new trial, the accused may not be tried for any offense of which the accused was found not guilty or upon which the accused was not tried at the earlier court-martial.

Discussion

See also R.C.M. 810 concerning additional special rules which apply at a new trial. In other respects a new trial is conducted like any other court-martial.

(3) Action by convening authority. The convening authority's action on the record of a new trial is the same as in other courts-martial.

(4) Disposition of record. The disposition of the record of a new trial is the same as for other courts-martial.
(5) Court-martial orders. Court-martial orders promulgating the final action taken as a result of a new trial, including any restoration of rights, privileges, and property, shall be promulgated in accordance with R.C.M. 1114.

Discussion

See Article 75 and R.C.M. 1208 concerning restoration of rights when the executed portion of a sentence is not sustained in a new trial or action following it.

(6) Action by persons charged with execution of the sentence. Persons charged with the administrative duty of executing a sentence adjudged upon a new trial after it has been ordered executed shall credit the accused with any executed portion or amount of the original sentence included in the new sentence in computing the term or amount of punishment actually to be executed pursuant to the sentence.
CHAPTER XIII. SUMMARY COURTS-MARTIAL

Rule 1301. Summary courts-martial generally
(a) Composition. A summary court-martial is composed of one commissioned officer on active duty. Unless otherwise prescribed by the Secretary concerned a summary court-martial shall be of the same armed force as the accused. Whenever practicable, a summary court-martial should be an officer whose grade is not below lieutenant of the Navy or Coast Guard or captain of the Army, Air Force, or Marine Corps. When only one commissioned officer is present with a command or detachment, that officer shall be the summary court-martial of that command or detachment. When more than one commissioned officer is present with a command or detachment, the convening authority may not be the summary court-martial of that command or detachment.

(b) Function. The function of the summary court-martial is to promptly adjudicate minor offenses under a simple procedure. The summary court-martial shall thoroughly and impartially inquire into both sides of the matter and shall ensure that the interests of both the Government and the accused are safeguarded and that justice is done. A summary court-martial may seek advice a judge advocate or legal officer on questions of law, but the summary court-martial may not seek advice from any person on factual conclusions which should be drawn from evidence or the sentence which should be imposed, as the summary court-martial has the independent duty to make these determinations.

Discussion
For a definition of "minor offenses," see paragraph 1e, Part v.

(c) Jurisdiction. Subject to Chapter II, summary courts-martial have the power to try persons subject to the code, except commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by the code.

Discussion
See R.C.M. 103(3) for a definition of capital offenses.

(d) Punishments.
(1) Limitations—amount. Subject to R.C.M. 1003, summary courts-martial may adjudge any punishment not forbidden by the code except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than 1 month, hard labor without confinement for more than 45 days, restriction to specified limits for more than 2 months, or forfeiture of more than two-thirds of 1 month's pay.

Discussion
The maximum penalty which can be adjudged in a summary court-martial if the accused is not attached to or embarked in a vessel is confinement for 30 days, forfeiture of two-thirds pay per month for one month, and reduction to the lowest pay grade. If the accused is attached to or embarked in a vessel, the maximum penalty is confinement for 3 days on bread and water or diminished rations, confinement for 24 days (30 days if no confinement on bread and water or diminished rations is adjudged), forfeiture of two-thirds pay per month for one month, and reduction to the lowest pay grade. See subsection (2) below for additional limits on enlisted persons serving in pay grades above the fourth enlisted pay grade.

A summary court-martial may not suspend all or part of a sentence, although the summary court-martial may recommend to the convening authority that all or part of a sentence be suspended. If a sentence includes both reduction in grade and forfeitures, the maximum forfeiture is calculated at the grade to which reduced. See also R.C.M. 1003 concerning other punishments which may be adjudged, the effects of certain types of punishment, and combination of certain types of punishment. The summary court-martial should ascertain the effect of Article 58a in that armed force.

(2) Limitations—pay grade. In the case of enlisted members above the fourth enlisted pay grade, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next pay grade.

Discussion
The provisions of this subsection apply to an accused in the fifth enlisted pay grade who is reduced to the fourth enlisted pay grade by the summary court-martial.

(e) Counsel. The accused at a summary court-martial does not have the right to counsel. If the accused has civilian counsel provided by the accused and qualified under R.C.M. 502(d)(3), that counsel shall be permitted to represent the accused at the sum-
mary court-martial if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.

**Discussion**

Neither the Constitution nor any statute establishes any right to counsel at summary courts-martial. Therefore, it is not error to deny an accused the opportunity to be represented by counsel at a summary court-martial. However, appearance of counsel is not prohibited. The detailing authority may, as a matter of discretion, detail, or otherwise make available, a military attorney to represent the accused at a summary court-martial.

(f) **Power to obtain witnesses and evidence.** A summary court-martial may obtain evidence pursuant to R.C.M. 703.

**Discussion**

The summary court-martial must obtain witnesses for the prosecution and the defense pursuant to the standards in R.C.M. 703. The summary court-martial rules on any request by the accused for witnesses or evidence in accordance with the procedure in R.C.M. 703(c) and (f).

(g) **Secretarial limitations.** The Secretary concerned may prescribe procedural or other rules for summary courts-martial not inconsistent with this Manual or the code.

**Rule 1302. Convening a summary court-martial**

(a) **Who may convene summary courts-martial.** Unless limited by competent authority summary courts-martial may be convened by:

1. Any person who may convene a general or special court-martial;
2. The commander of a detached company or other detachment of the Army;
3. The commander of a detached squadron or other detachment of the Air Force;
4. The commander or officer in charge of any other command when empowered by the Secretary concerned; or
5. A superior competent authority to any of the above.

(b) **When convening authority is accuser.** If the convening authority or the summary court-martial is the accuser, it is discretionary with the convening authority whether to forward the charges to a superior authority with a recommendation to convene the summary court-martial. If the convening authority or the summary court-martial is the accuser, the jurisdiction of the summary court-martial is not affected.

(c) **Procedure.** After the requirements of Chapters III and IV of this Part have been satisfied, summary courts-martial shall be convened in accordance with R.C.M. 504(d)(2). The convening order may be by notation signed by the convening authority on the charge sheet. Charges shall be referred to summary courts-martial in accordance with R.C.M. 601.

**Discussion**

When the convening authority is the summary court-martial because the convening authority is the only commissioned officer present with the command or detachment, see R.C.M. 1301(a), that fact should be noted on the charge sheet.

**Rule 1303. Right to object to trial by summary court-martial**

No person who objects thereto before arraignment may be tried by summary court-martial even if that person also refused punishment under Article 15 and demanded trial by court-martial for the same offenses.

**Discussion**

If the accused objects to trial by summary court-martial, the convening authority may dispose of the case in accordance with R.C.M. 401.

**Rule 1304. Trial procedure**

(a) **Pretrial duties.**

1. **Examination of file.** The summary court-martial shall carefully examine the charge sheet, allied papers, and immediately available personnel records of the accused before trial.

**Discussion**

"Personnel records" are those personnel records of the accused which are maintained locally and are immediately available. "Allied papers" in a summary court-martial include convening orders, investigative reports, correspondence relating to the case, and witness statements.
R.C.M. 1304(a)(2)

(2) Report of irregularity. The summary court-martial shall report to the convening authority any substantial irregularity in the charge sheet, allied papers, or personnel records.

Discussion

The summary court-martial should examine the charge sheet, allied papers, and personnel records to ensure that they are complete and free from errors or omissions which might affect admissibility. The summary court-martial should check the charges and specifications to ensure that each alleges personal jurisdiction over the accused (see R.C.M. 202) and an offense under the code (see R.C.M. 203 and Part IV). Substantial defects or errors in the charges and specifications must be reported to the convening authority, since such defects cannot be corrected except by preferring and referring the affected charge and specification anew in proper form. A defect or error is substantial if correcting it would state an offense not otherwise stated, or include an offense, person, or matter not fairly included in the specification as preferred. See subsection (3) below concerning minor errors.

(3) Correction and amendment. The summary court-martial may, subject to R.C.M. 603, correct errors on the charge sheet and amend charges and specifications. Any such corrections or amendments shall be initialed.

(b) Summary court-martial procedure.

Discussion

A sample guide is at Appendix 9. The summary court-martial should review and become familiar with the guide used before proceeding.

(1) Preliminary proceeding. After complying with R.C.M. 1304(a), the summary court-martial shall hold a preliminary proceeding during which the accused shall be given a copy of the charge sheet and informed of the following:

(A) The general nature of the charges;
(B) The fact that the charges have been referred to a summary court-martial for trial and the date of referral;
(C) The identity of the convening authority;
(D) The name(s) of the accuser(s);
(E) The names of the witnesses who could be called to testify and any documents or physical evidence which the summary court-martial expects to introduce into evidence;
(F) The accused's right to inspect the allied papers and immediately available personnel records;
(G) That during the trial the summary court-martial will not consider any matters, including statements previously made by the accused to the officer detailed as summary court-martial unless admitted in accordance with the Military Rules of Evidence;
(H) The accused's right to plead not guilty or guilty;
(I) The accused's right to cross-examine witnesses and have the summary court-martial cross-examine witnesses on behalf of the accused;
(J) The accused's right to call witnesses and produce evidence with the assistance of the summary court-martial as necessary;
(K) The accused's right to testify on the merits, or to remain silent with the assurance that no adverse inference will be drawn by the summary court-martial from such silence;
(L) If any findings of guilty are announced, the accused's rights to remain silent, to make an unsworn statement, oral or written or both, and to testify, and to introduce evidence in extenuation or mitigation;
(M) The maximum sentence which the summary court-martial may adjudge if the accused is found guilty of the offense or offenses alleged; and
(N) The accused's right to object to trial by summary court-martial.

(2) Trial proceeding.

(A) Objection to trial. The summary court-martial shall give the accused a reasonable period of time to decide whether to object to trial by summary court-martial. The summary court-martial shall thereafter record the response. If the accused objects to trial by summary court-martial, the summary court-martial shall return the charge sheet, allied papers, and personnel records to the convening authority. If the accused fails to object to trial by summary court-martial, trial shall proceed.

(B) Arraignment. After complying with R.C.M. 1304(b)(1) and (2)(A), the summary court-martial shall read and show the charges and specifications to the accused and, if necessary, explain them. The accused may waive the reading of the charges. The summary court-martial shall then ask the accused to plead to each specification and charge.

(C) Motions. Before receiving pleas the summary court-martial shall allow the accused to make
motions to dismiss or for other relief. The summary court-martial shall take action on behalf of the accused, if requested by the accused, or if it appears necessary in the interests of justice.

(D) Pleas.

(i) Not guilty pleas. When a not guilty plea is entered, the summary court-martial shall proceed to trial.

(ii) Guilty pleas. If the accused pleads guilty to any offense, the summary court-martial shall comply with R.C.M. 910.

(iii) Rejected guilty pleas. If the summary court-martial is in doubt that the accused's pleas of guilty are voluntarily and understandably made, or if at any time during the trial any matter inconsistent with pleas of guilty arises, which inconsistency cannot be resolved, the summary court-martial shall enter not guilty pleas as to the affected charges and specifications.

(iv) No plea. If the accused refuses to plead, the summary court-martial shall enter not guilty pleas.

(v) Changed pleas. The accused may change any plea at any time before findings are announced. The accused may change pleas from guilty to not guilty after findings are announced only for good cause.

(E) Presentation of evidence.

(i) The Military Rules of Evidence (Part III) apply to summary courts-martial.

(ii) The summary court-martial shall arrange for the attendance of necessary witnesses for the prosecution and defense, including those requested by the accused.

Discussion

See R.C.M. 703. Ordinarily witnesses should be excluded from the courtroom until called to testify. See Mil.R.Evid. 615.

(iii) Witnesses for the prosecution shall be called first and examined under oath. The accused shall be permitted to cross-examine these witnesses. The summary court-martial shall aid the accused in cross-examination if such assistance is requested or appears necessary in the interests of justice. The witnesses for the accused shall then be called and similarly examined under oath.

(iv) The summary court-martial shall obtain evidence which tends to disprove the accused's guilt or establishes extenuating circumstances.

(F) Findings and sentence.

(i) The summary court-martial shall apply the principles in R.C.M. 918 in determining the findings. The summary court-martial shall announce the findings to the accused in open session.

(ii) The summary court-martial shall follow the procedures in R.C.M. 1001 and apply the principles in the remainder of Chapter X in determining a sentence. The summary court-martial shall announce the sentence to the accused in open session.

(iii) If the sentence includes confinement, the summary court-martial shall advise the accused of the right to apply to the convening authority for deferment of the service of the confinement.

(iv) If the accused is found guilty, the summary court-martial shall advise the accused of the rights under R.C.M. 1306(a) and (d) after the sentence is announced.

(v) The summary court-martial shall, as soon as practicable, inform the convening authority of the findings, sentence, recommendations, if any, for suspension of the sentence, and any deferment request.

(vi) If the sentence includes confinement, the summary court-martial shall cause the delivery of the accused to the accused's commanding officer or the commanding officer's designee.

Discussion

If the accused's immediate commanding officer is not the convening authority, the summary court-martial should ensure that the immediate commanding officer is informed of the findings, sentence, and any recommendations pertaining thereto. See R.C.M. 1101 concerning post-trial confinement.

Rule 1305. Record of trial

(a) In general. The record of trial of a summary court-martial shall be prepared as prescribed in subsection (b) of this rule. The convening or higher au-
R.C.M. 1305(a)

authority may prescribe additional requirements for the record of trial.

Discussion

See Appendix 15 for a sample of a Record of Trial by Summary Court-Martial (DD Form 2329).

Any petition submitted under R.C.M. 1306(a) should be appended to the record of trial.

(b) Contents. The summary court-martial shall prepare an original and at least two copies of the record of trial, which shall include:

1. The pleas, findings, and sentence, and if the accused was represented by counsel at the summary court-martial, a notation to that effect;
2. The fact that the accused was advised of the matters set forth in R.C.M. 1304(b)(1);
3. If the summary court-martial is the convening authority, a notation to that effect.

(c) Authentication. The summary court-martial shall authenticate the record by signing each copy.

“Authentication” means attesting that the record accurately reports the proceedings. See R.C.M. 1104(a).

(d) Medical certificate. If the sentence ordered executed includes confinement on bread and water or diminished rations, the convening authority shall cause the medical certificate required by R.C.M. 1113(d)(5) to be attached to the original copy of the record of trial.

(e) Forwarding copies of the record.

1. Accused’s copy.
   (A) Service. The summary court-martial shall cause a copy of the record of trial to be served on the accused as soon as it is authenticated.
   (B) Receipt. The summary court-martial shall cause the accused’s receipt for the copy of the record of trial to be obtained and attached to the original record of trial or shall attach to the original record of trial a certificate that the accused was served a copy of the record. If the record of trial was not served on the accused personally, the summary court-martial shall attach a statement explaining how and when such service was accomplished. If the accused was represented by counsel, such counsel may be served with the record of trial.

(C) Classified information. If classified information is included in the record of trial of a summary court-martial, R.C.M. 1104(b)(1)(D) shall apply.

2. Forwarding to the convening authority. The original and one copy of the record of trial shall be forwarded to the convening authority after compliance with subsection (e)(1) of this rule.

3. Further disposition. After compliance with R.C.M. 1306(b) and (c), the record of trial shall be disposed of under regulations prescribed by the Secretary concerned.

Rule 1306. Post-trial procedure

(a) Matters submitted by the accused. After a sentence is adjudged, the accused may submit written matters to the convening authority in accordance with R.C.M. 1105.

(b) Convening authority’s action.

1. Who shall act. Except as provided herein, the convening authority shall take action in accordance with R.C.M. 1107. The convening authority shall not take action before the period prescribed in R.C.M. 1105(c)(3) has expired, unless the right to submit matters has been waived under R.C.M. 1105(d).

2. Action. The action of the convening authority shall be shown on all copies of the record of trial except that provided the accused if the accused has retained that copy. An order promulgating the result of a trial by summary court-martial need not be issued. A copy of the action shall be forwarded to the accused.

3. Signature. The action on the original record of trial shall be signed by the convening authority. The convening authority’s action on other copies of the record of trial shall either be signed by the convening authority or be prepared and certified as true copies of the original.

4. Subsequent action. Any action taken on a summary court-martial after the initial action by the convening authority shall be in writing, signed by the authority taking the action, and promulgated in appropriate orders.

Discussion

See R.C.M. 1114 concerning promulgating orders.
(c) **Review by a judge advocate.** Unless otherwise prescribed by regulations of the Secretary concerned, the original record of the summary court-martial shall be reviewed by a judge advocate in accordance with R.C.M. 1112.

(d) **Review by the Judge Advocate General.** The accused may request review of a final conviction by summary court-martial by the Judge Advocate General in accordance with R.C.M. 1201(b)(3).
PART III
MILITARY RULES OF EVIDENCE

SECTION I
GENERAL PROVISIONS

Rule 101. Scope
(a) Applicability. These rules are applicable in courts-martial, including summary courts-martial, to the extent and with the exceptions stated in Mil.R.Evid. 1101.
(b) Secondary Sources. If not otherwise prescribed in this Manual or these rules, and insofar as practicable and not inconsistent with or contrary to the code or this Manual, courts-martial shall apply:
(1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and
(2) Second, when not inconsistent with subdivision (b)(1), the rules of evidence at common law.
(c) Rule of construction. Except as otherwise provided in these rules, the term "military judge" includes the president of a special court-martial without a military judge and a summary court-martial officer.

Rule 102. Purpose and construction
These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 103. Ruling on evidence
(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and
(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked.

The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United States as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard.
(b) Record of offer and ruling. The military judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The military judge may direct the making of an offer in question and answer form.
(c) Hearing of members. In a court-martial composed of a military judge and members, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the members.
(d) Plain error. Nothing in this rule precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

Rule 104. Preliminary questions
(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges.
(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except
where these rules or this Manual provide expressly
to the contrary.

(c) Hearing of members. Except in cases tried before
a special court-martial without a military judge,
hearings on the admissibility of statements of an ac-
cused under Mil.R.Evid. 301–306 shall in all cases
be conducted out of the hearing of the members.
Hearings on other preliminary matters shall be so
conducted when the interests of justice require or,
when an accused is a witness, if the accused so re-
quests.

(d) Testimony by accused. The accused does not, by
testifying upon a preliminary matter, become sub-
ject to cross-examination as to other issues in the
case.

(e) Weight and credibility. This rule does not limit
the right of a party to introduce before the members
evidence relevant to weight or credibility.

Rule 105. Limited admissibility

When evidence which is admissible as to one
party or for one purpose but not admissible as to an-
other party or for another purpose is admitted, the
military judge, upon request, shall restrict the evi-
dence to its proper scope and instruct the members
accordingly.

Rule 106. Remainder of or related writings or
recorded statements

When a writing or recorded statement or part
thereof is introduced by a party, an adverse party
may require that party at that time to introduce any
other part or any other writing or recorded state-
ment which ought in fairness to be considered con-
temporaneously with it.

SECTION II

JUDICIAL NOTICE

Rule 201. Judicial notice of adjudicative
facts

(a) Scope of rule. This rule governs only judicial no-
tice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be
one not subject to reasonable dispute in that it is ei-
ther (1) generally known universally, locally, or in
the area pertinent to the event or (2) capable of accu-
rate and ready determination by resort to sources
whose accuracy cannot reasonably be questioned.

(c) When discretionary. The military judge may
take judicial notice, whether requested or not. The
parties shall be informed in open court when, with-
out being requested, the military judge takes judicial
notice of an adjudicative fact essential to establish-
ing an element of the case.

(d) When mandatory. The military judge shall take
judicial notice if requested by a party and supplied
with the necessary information.

(e) Opportunity to be heard. A party is entitled upon
timely request to an opportunity to be heard as to
the propriety of taking judicial notice and the tenor
of the matter noticed. In the absence of prior notifi-
cation, the request may be made after judicial notice
has been taken.

(f) Time of taking notice. Judicial notice may be
taken at any stage of the proceeding.

(g) Instructing members. The military judge shall
instruct the members that they may, but are not re-
quired to, accept as conclusive any matter judicially
noticed.

Rule 201A. Judicial notice of law

(a) Domestic law. The military judge may take judi-
cial notice of domestic law. Insofar as a domestic law
is a fact that is of consequence to the determination
of the action, the procedural requirements of
Mil.R.Evid. 201—except Mil.R.Evid. 201(g)—apply.

(b) Foreign law. A party who intends to raise an is-
ssue concerning the law of a foreign country shall
give reasonable written notice. The military judge, in
determining foreign law, may consider any relevant
material or source including testimony whether or
not submitted by a party or admissible under these
rules. Such a determination shall be treated as a rul-
ing on a question of law.

SECTION III

EXCLUSIONARY RULES AND RELATED
MATTERS CONCERNING SELF-
INCrimINATION, SEARCH AND SEIZURE,
AND EYEWITNESS IDENTIFICATION

Rule 301. Privilege concerning compulsory
self-incrimination

(a) General rule. The privileges against self-incrimi-
nation provided by the Fifth Amendment to the
Constitution of the United States and Article 31 are
applicable only to evidence of a testimonial or communicative nature. The privilege most beneficial to the individual asserting the privilege shall be applied.

(b) Standing.

(1) In general. The privilege of a witness to refuse to respond to a question the answer to which may tend to incriminate the witness is a personal one that the witness may exercise or waive at the discretion of the witness.

(2) Judicial advice. If a witness who is apparently uninformed of the privileges under this rule appears likely to incriminate himself or herself, the military judge should advise the witness of the right to decline to make any answer that might tend to incriminate the witness and that any self-incriminating answer the witness might make can later be used as evidence against the witness. Counsel for any party or for the witness may request the military judge to so advise a witness provided that such a request is made out of the hearing of the witness and, except in a special court-martial without a military judge, the members. Failure to so advise a witness does not make the testimony of the witness inadmissible.

(c) Exercise of the privilege. If a witness states that the answer to a question may tend to incriminate him or her, the witness may not be required to answer unless facts and circumstances are such that no answer the witness might make to the question could have the effect of tending to incriminate the witness or that the witness has, with respect to the question, waived the privilege against self-incrimination. A witness may not assert the privilege if the witness is not subject to criminal penalty as a result of an answer by reason of immunity, running of the statute of limitations, or similar reason.

(1) Immunity generally. The minimum grant of immunity adequate to overcome the privilege is that which under either R.C.M. 704 or other proper authority provides that neither the testimony of the witness nor any evidence obtained from that testimony may be used against the witness at any subsequent trial other than in a prosecution for perjury, false swearing, the making of a false official statement, or failure to comply with an order to testify after the military judge has ruled that the privilege may not be asserted by reason of immunity.

(2) Notification of immunity or leniency. When a prosecution witness before a court-martial has been granted immunity or leniency in exchange for testimony, the grant shall be reduced to writing and shall be served on the accused prior to arraignment or within a reasonable time before the witness testifies. If notification is not made as required by this rule, the military judge may grant a continuance until notification is made, prohibit or strike the testimony of the witness, or enter such other order as may be required.

(d) Waiver by a witness. A witness who answers a question without having asserted the privilege against self-incrimination and thereby admits a self-incriminating fact may be required to disclose all information relevant to that fact except when there is a real danger of further self-incrimination. This limited waiver of the privilege applies only at the trial in which the answer is given, does not extend to a rehearing or new or other trial, and is subject to Mil.R.Evid. 608(b).

(e) Waiver by the accused. When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies. If the accused is on trial for two or more offenses and on direct examination testifies concerning the issue of guilt or innocence as to only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified. This waiver is subject to Mil.R.Evid. 608(b).

(f) Effect of claiming the privilege.

(1) Generally. The fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the government.

(2) On cross-examination. If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, unless the matters to which the witness refuses to testify are purely collateral.

(3) Pretrial. The fact that the accused during official questioning and in exercise of rights under the Fifth Amendment to the Constitution of the United States or Article 31, remained silent, refused to answer a certain question, requested counsel, or re-
quested that the questioning be terminated is inadmissible against the accused.

(g) **Instructions.** When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel’s election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice.

**Rule 302. Privilege concerning mental examination of an accused**

(a) **General rule.** The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under R.C.M. 706 and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by Mil.R.Evid. 305 at the examination.

(b) **Exceptions.**

(1) There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence.

(2) An expert witness for the prosecution may testify as to the reasons for the expert’s conclusions and the reasons therefor as to the mental state of the accused if expert testimony offered by the defense as to the mental condition of the accused has been received in evidence, but such testimony may not extend to statements of the accused except as provided in (1).

(c) **Release of evidence.** If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to R.C.M. 706. If the defense offers statements made by the accused at such examination, the military judge may upon motion order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

(d) **Noncompliance by the accused.** The military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under R.C.M. 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination.

(e) **Procedure.** The privilege in this rule may be claimed by the accused only under the procedure set forth in Mil.R.Evid. 304 for an objection or a motion to suppress.

**Rule 303. Degrading questions**

No person may be compelled to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade that person.

**Rule 304. Confessions and admissions**

(a) **General rule.** Except as provided in subsection (b), an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.

(b) **Exceptions.**

(1) Where the statement is involuntary only in terms of noncompliance with the requirements of Mil.R.Evid. 305(c) or 305(f), or the requirements concerning counsel under Mil.R.Evid. 305(d), 305(e), and 305(g), this rule does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

(2) Evidence that was obtained as a result of an involuntary statement may be used when the evidence would have been obtained even if the involuntary statement had not been made.

(3) **Derivative evidence.** Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the evidence would have been obtained even if the statement had not been made.

(c) **Definitions.** As used in these rules:

(1) **Confession.** A “confession” is an acknowledgment of guilt.
Admission. An “admission” is a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory.

Involuntary. A statement is “involuntary” if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.

Procedure.

Disclosure. Prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces.

Motions and objections.

(A) Motions to suppress or objections under this rule or Mil.R.Evid. 302 or 305 to statements that have been disclosed shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

(B) If the prosecution intends to offer against the accused a statement made by the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interests of justice.

(C) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule or Mil.R.Evid. 302 or 305 shall be made in accordance with the procedure for challenging a statement under (A). If such evidence has not been so disclosed prior to arraignment, the requirements of (B) apply.

Specificity. The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement, the military judge may make any order required in the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

Rulings. A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at trial, but no such determination shall be deferred if a party’s right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

Effect of guilty plea. Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all privileges against self-incrimination and all motions and objections under this rule with respect to that offense regardless of whether raised prior to plea.

Burden of proof. When an appropriate motion or objection has been made by the defense under this rule, the prosecution has the burden of establishing the admissibility of the evidence. When a specific motion or objection has been required under subdivision (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

In general. The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. When trial is by a special court-martial without a military judge, a determination by the president of the court that a statement was made voluntarily is subject to objection by any member of the court. When such objection is made, it shall be resolved pursuant to R.C.M. 801(e)(3)(C).

Weight of the evidence. If a statement is admitted into evidence, the military judge shall permit the defense to present relevant evidence with respect to the voluntariness of the statement and shall instruct the members to give such weight to the statement as it deserves under all the circumstances. When trial is by military judge without members, the military judge shall determine the appropriate weight to give the statement.

Derivative evidence. Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence...
was not obtained by use of the statement, or that the evidence would have been obtained even if the statement had not been made.

(f) Defense evidence. The defense may present evidence relevant to the admissibility of evidence as to which there has been an objection or motion to suppress under this rule. An accused may testify for the limited purpose of denying that the accused made the statement or that the statement was made voluntarily. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(g) Corroboration. An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(1) Quantum of evidence needed. The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

(2) Procedure. The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

(h) Miscellaneous.

(1) Oral statements. A voluntary oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing is not accounted for.

(2) Completeness. If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement.

(3) Certain admissions by silence. A person's failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation.

(4) Refusal to obey order to submit body substance. If an accused refuses a lawful order to submit for chemical analysis a sample of his or her blood, breath, urine or other body substance, evidence of such refusal may be admitted into evidence on:

(A) A charge of violating an order to submit such a sample; or

(B) Any other charge on which the results of the chemical analysis would have been admissible.

Rule 305. Warnings about rights

(a) General rule. A statement obtained in violation of this rule is involuntary and shall be treated under Mil.R.Evid. 304.

(b) Definitions. As used in this rule:

(1) Person subject to the code. A “person subject to the code” includes a person acting as a knowing agent of a military unit or of a person subject to the code.

(2) Interrogation. “Interrogation” includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.
(c) **Warnings concerning the accusation, right to remain silent, and use of statements.** A person subject to the code who is required to give warnings under Article 31 may not interrogate or request any statement from an accused or a person suspected of an offense without first:

(1) informing the accused or suspect of the nature of the accusation;

(2) advising the accused or suspect that the accused or suspect has the right to remain silent; and

(3) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

(d) **Counsel rights and warnings.**

(1) **General rule.** When evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment to the Constitution of the United States either is sought or is a reasonable consequence of an interrogation, an accused or a person suspected of an offense is entitled to consult with counsel as provided by paragraph (2) of this subdivision, to have such counsel present at the interrogation, and to be warned of these rights prior to the interrogation if—

(A) The interrogation is conducted by a person subject to the code who is required to give warnings under Article 31 and the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way; or

(B) The interrogation is conducted by a person subject to the code acting in a law enforcement capacity, or an agent of such a person, the interrogation is conducted subsequent to preferral of charges or the imposition of pretrial restraint under R.C.M. 304, and the interrogation concerns the offenses or matters that were the subject of the preferral of charges or were the cause of the imposition of pretrial restraint.

(2) **Counsel.** When a person entitled to counsel under this rule requests counsel, a judge advocate or an individual certified in accordance with Article 27(b) shall be provided by the United States at no expense to the person and without regard to the person's indigency or lack thereof before the interrogation may proceed. In addition to counsel supplied by the United States, the person may retain civilian counsel at no expense to the United States. Unless otherwise provided by regulations of the Secretary concerned, an accused or suspect does not have a right under this rule to have military counsel of his or her own selection.

(e) **Notice to Counsel.** When a person subject to the code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.

(f) **Exercise of rights.** If a person chooses to exercise the privilege against self-incrimination or the right to counsel under this rule, questioning must cease immediately.

(g) **Waiver.**

(1) **General rule.** After receiving applicable warnings under this rule, a person may waive the rights described therein and in Mil.R.Evid. 301 and make a statement. The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused or suspect must acknowledge affirmatively that he or she understands the rights involved, affirmatively decline the right to counsel and affirmatively consent to making a statement.

(2) **Counsel.** If the right to counsel in subdivision (d) is applicable and the accused or suspect does not decline affirmatively the right to counsel, the prosecution must demonstrate by a preponderance of the evidence that the individual waived the right to counsel. In addition, if the notice to counsel in subdivision (e) is applicable, a waiver of the right to counsel is not effective unless the prosecution demonstrates by a preponderance of the evidence that reasonable efforts to notify the counsel were unavailing or that the counsel did not attend an interrogation scheduled within a reasonable period of time after the required notice was given.

(h) **Nonmilitary interrogations.**

(1) **General rule.** When a person subject to the code is interrogated by an official or agent of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States, or any political subdivision of such a State, Commonwealth, or possession, and such official or agent is not required to give warning under subdivision (c), the person's entitlement to rights warnings
and the validity of any waiver of applicable rights shall be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar interrogations.

(2) Foreign interrogations. Neither warnings under subdivisions (c) or (d), nor notice to counsel under subdivision (e) are required during an interrogation conducted abroad by officials of a foreign government or their agents unless such interrogation is conducted, instigated, or participated in by military personnel or their agents or by those officials or agents listed in subdivision (h)(1). A statement obtained during such an interrogation is involuntary within the meaning of Mil.R.Evid. 304(b)(3) if it is obtained through the use of coercion, unlawful influence, or unlawful inducement. An interrogation is not “participated in” by military personnel or their agents or by the officials or agents listed in subdivision (h)(1) merely because such a person was present at an interrogation conducted in a foreign nation by officials of a foreign government or their agents, or because such a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign interrogation.

Rule 306. Statements by one of several accused

When two or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible only against him or her or only against some but not all of the accused may not be received in evidence unless all references inculpating an accused against whom the statement is inadmissible are deleted effectively or the maker of the statement is subject to cross-examination.

Rule 311. Evidence obtained from unlawful searches and seizures

(a) General rule. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) Objection. The accused makes a timely motion to suppress or an objection to the evidence under this rule; and

(2) Adequate interest. The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

(b) Exceptions.

(1) Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

(2) Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.

(3) Evidence that was obtained as a result of an unlawful search or seizure may be used if:

(A) The search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil.R.Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;

(B) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

(C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

(c) Nature of search or seizure. A search or seizure is “unlawful” if it was conducted, instigated, or participated in by:

(1) Military personnel. Military personnel or their agents and was in violation of the Constitution of the United States as applied to members of the armed forces, an Act of Congress applicable to trials by court-martial that requires exclusion of evidence obtained in violation thereof, or Mil.R.Evid. 312–317;

(2) Other officials. Other officials or agents of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States or any political subdivision of such a State, Commonwealth, or possession and was in violation of the Constitution of the United States, or is unlawful under the principles of law generally applied in the trial of criminal cases in the United States district courts involving a similar search or seizure; or
(3) **Officials of a foreign government.** Officials of a foreign government or their agents and was obtained as a result of a foreign search or seizure which subjected the accused to gross and brutal maltreatment. A search or seizure is not "participated in" merely because a person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure.

(d) **Motions to suppress and objections.**

(1) **Disclosure.** Prior to arraignment, the prosecution shall disclose to the defense all evidence seized from the person or property of the accused, or believed to be owned by the accused, that it intends to offer into evidence against the accused at trial.

(2) **Motion or objection.**

(A) When evidence has been disclosed under subdivision (d)(1), any motion to suppress or objection under this rule shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the motion or objection.

(B) If the prosecution intends to offer evidence seized from the person or property of the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

(C) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule shall be made in accordance with the procedure for challenging evidence under (A). If such evidence has not been so disclosed prior to arraignment, the requirements of (B) apply.

(3) **Specificity.** The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the search or seizure, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or a general objection.

(4) **Rulings.** A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at the trial of the general issue or until after findings, but no such determination shall be deferred if a party’s right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

(e) **Burden of proof.**

(1) **In general.** When an appropriate motion or objection has been made by the defense under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant.

(2) **Derivative evidence.** Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence ultimately would have been obtained by lawful means even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant. Notwithstanding other provisions of this Rule, an apprehension made in a dwelling in a manner that violates R.C.M. 302 (d)(2) and (e) does not preclude the admission into evidence of a statement of an individual apprehended provided (1) that the apprehension was based on probable cause, (2) that the statement was made subsequent to the apprehension at a location outside the dwelling, and (3) that the statement was otherwise in compliance with these rules.

(3) **Specific motions or objections.** When a specific motion or objection has been required under subdivision (d)(3), the burden on the prosecution extends
only to the grounds upon which the defense moved
to suppress or object to the evidence.

(f) Defense evidence. The defense may present evi-
dence relevant to the admissibility of evidence as to
which there has been an appropriate motion or ob-
jection under this rule. An accused may testify for
the limited purpose of contesting the legality of the
search or seizure giving rise to the challenged evi-
dence. Prior to the introduction of such testimony
by the accused, the defense shall inform the military
judge that the testimony is offered under this subdi-
vision. When the accused testifies under this subdi-
vision, the accused may be cross-examined only as to
the matter on which he or she testifies. Nothing said
by the accused on either direct or cross-examination
may be used against the accused for any purpose
other than in a prosecution for perjury, false swear-
ing, or the making of a false official statement.

(g) Scope of motions and objections challenging
probable cause.

(1) Generally. If the defense challenges evidence
seized pursuant to a search warrant or search au-
thorization on the grounds that the warrant or au-
thorization was not based upon probable cause, the
evidence relevant to the motion is limited to evi-
dence concerning the information actually presented
to or otherwise known by the authorizing officer, ex-
cept as provided in paragraph (2).

(2) False statements. If the defense makes a sub-
stantial preliminary showing that a government
agent included a false statement knowingly and in-
tentionally or with reckless disregard for the truth in
the information presented to the authorizing officer,
and if the allegedly false statement is necessary to
the finding of probable cause, the defense, upon re-
quest, shall be entitled to a hearing. At the hearing,
the defense has the burden of establishing by a pre-
ponderance of the evidence the allegation of falsity
or reckless disregard for the truth. If the defense
meets its burden, the prosecution has the burden of pro-
ving by a preponderance of the evidence that the remaining
information presented to the authorizing officer is suf-
ficient to establish probable cause. If the prosecution
does not meet its burden, the objection or motion
shall be granted unless the search is otherwise lawful
under these rules.

(h) Objections to evidence seized unlawfully. If a de-
fense motion or objection under this rule is sustained
in whole or in part, the members may not be in-
formed of that fact except insofar as the military
judge must instruct the members to disregard evi-
dence.

(i) Effect of guilty plea. Except as otherwise ex-
pressly provided in R.C.M. 910(a)(2), a plea of
guilty to an offense that results in a finding of guilty
waives all issues under the Fourth Amendment to
the Constitution of the United States and
Mil.R.Evid. 311-317 with respect to the offense
whether or not raised prior to plea.

Rule 312. Body views and intrusions

(a) General rule. Evidence obtained from body
views and intrusions conducted in accordance with
this rule is admissible at trial when relevant and not
otherwise inadmissible under these rules.

(b) Visual examination of the body.

(1) Consensual. Visual examination of the un-
clothed body may be made with the consent of the
individual subject to the inspection in accordance
with Mil.R.Evid. 314(e).

(2) Involuntary. An involuntary display of the
unclothed body, including a visual examination of
body cavities, may be required only if conducted in
reasonable fashion and authorized under the follow-
ing provisions of the Military Rules of Evidence: in-
spections and inventories under Mil.R.Evid. 313;
searches under Mil.R.Evid. 314(b) and 314(c) if
there is a reasonable suspicion that weapons, contra-
band, or evidence of crime is concealed on the body
of the person to be searched; searches within jails
and similar facilities under Mil.R.Evid. 314(h) if
reasonably necessary to maintain the security of the
institutions or its personnel; searches incident to law-
ful apprehension under Mil.R.Evid. 314(g); emer-
gency searches under Mil.R.Evid. 314(i); and proba-
ble cause searches under Mil.R.Evid. 315. An
examination of the unclothed body under this rule
should be conducted whenever practicable by a per-
son of the same sex as that of the person being ex-
amined; provided, however, that failure to comply
with this requirement does not make an examination
an unlawful search within the meaning of
Mil.R.Evid. 311.

(c) Intrusion into body cavities. A reasonable non-
consensual physical intrusion into the mouth, nose,
and ears may be made when a visual examination of
the body under subdivision (b) is permissible. Non-

III-10
consensual intrusions into other body cavities may be made:

(1) *For purposes of seizure.* When there is a clear indication that weapons, contraband, or other evidence or crime is present, to remove weapons, contraband, or evidence of crime discovered under subdivisions (b) and (c)(2) of this rule or under Mil.R.Evid. 316(d)(4)(C) if such intrusion is made in a reasonable fashion by a person with appropriate medical qualifications; or

(2) *For purposes of search.* To search for weapons, contraband, or evidence of crime if authorized by a search warrant or search authorization under Mil.R.Evid. 315 and conducted by a person with appropriate medical qualifications.

Notwithstanding this rule, a search under Mil.R.Evid. 314(h) may be made without a search warrant or authorization if such search is based on a reasonable suspicion that the individual is concealing weapons, contraband, or evidence of crime.

(d) *Extraction of body fluids.* Nonconsensual extraction of body fluids, including blood and urine, may be made from the body of an individual pursuant to a search warrant or a search authorization under Mil.R.Evid. 315. Nonconsensual extraction of body fluids may be made without such warrant or authorization, notwithstanding Mil.R.Evid. 315(g), only when there is clear indication that evidence of crime will be found and that there is reason to believe that the delay that would result if a warrant or authorization were sought could result in the destruction of the evidence. Involuntary extraction of body fluids under this rule must be done in a reasonable fashion by a person with appropriate medical qualifications.

(e) *Other intrusive searches.* Nonconsensual intrusive searches of the body made to locate or obtain weapons, contraband, or evidence of crime and not within the scope of subdivisions (b) or (c) may be made only upon search warrant or search authorization under Mil.R.Evid. 315 and only if such search is conducted in a reasonable fashion by a person with appropriate medical qualifications and does not endanger the health of the person to be searched. Compelling a person to ingest substances for the purposes of locating the property described above or to compel the bodily elimination of such property is a search within the meaning of this section. Notwithstanding this rule, a person who is neither a suspect nor an accused may not be compelled to submit to an intrusive search of the body for the sole purpose of obtaining evidence of crime.

(f) *Intrusions for valid medical purposes.* Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil.R.Evid. 311.

(g) *Medical qualifications.* The Secretary concerned may prescribe appropriate medical qualifications for persons who conduct searches and seizures under this rule.

**Rule 313. Inspections and inventories in the armed forces**

(a) *General rule.* Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Inspections.* An “inspection” is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to an examination to determine and to ensure that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed
immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Mil.R.Evid. 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.  

(c) **Inventories.** Unlawful weapons, contraband, or other evidence of crime discovered in the process of an inventory, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with Mil.R.Evid. 312, if applicable. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.  

**Rule 314. Searches not requiring probable cause**  

(a) **General rule.** Evidence obtained from reasonable searches not requiring probable cause conducted pursuant to this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.  

(b) **Border searches.** Border searches for customs or immigration purposes may be conducted when authorized by Act of Congress.  

(c) **Searches upon entry to or exit from United States installations, aircraft, and vessels abroad.** In addition to the authority to conduct inspections under Mil.R.Evid. 313(b), a commander of a United States military installation, enclave, or aircraft on foreign soil, or in foreign or international airspace, or a United States vessel in foreign or international waters, may authorize appropriate personnel to search persons or the property of such persons upon entry to or exit from the installation, enclave, aircraft, or vessel to ensure the security, military fitness, or good order and discipline of the command. Such searches may not be conducted at a time or in a manner contrary to an express provision of a treaty or agreement to which the United States is a party. Failure to comply with a treaty or agreement, however, does not render a search unlawful within the meaning of Mil.R.Evid. 311. A search made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceeding is not authorized by this subdivision.  

(d) **Searches of government property.** Government property may be searched under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. Wall or floor lockers in living quarters issued for the purpose of storing personal possessions normally are issued for personal use; but the determination as to whether a person has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search.  

(e) **Consent searches.**  

(1) **General rule.** Searches may be conducted of any person or property with lawful consent.  

(2) **Who may consent.** A person may consent to a search of his or her person or property, or both, unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property.  

(3) **Scope of consent.** Consent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property and may be withdrawn at any time.  

(4) **Voluntariness.** To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances. Although a person's knowledge of the right to refuse to give consent is a factor to be considered in determining voluntariness, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not a voluntary consent.
(5) **Burden of proof.** Consent must be shown by clear and convincing evidence. The fact that a person was in custody while granting consent is a factor to be considered in determining the voluntariness of consent, but it does not affect the burden of proof.

(f) **Searches incident to a lawful stop.**

(1) **Stops.** A person authorized to apprehend under R.C.M. 302(b) and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot. The purpose of the stop must be investigatory in nature.

(2) **Frisks.** When a lawful stop is performed, the person stopped may be frisked for weapons when that person is reasonably believed to be armed and presently dangerous. Contraband or evidence located in the process of a lawful frisk may be seized.

(3) **Motor vehicles.** When a person lawfully stopped is the driver or a passenger in a motor vehicle, the passenger compartment of the vehicle may be searched for weapons if the official who made the stop has a reasonable belief that the person stopped is dangerous and that the person stopped may gain immediate control of a weapon.

(h) **Searches within jails, confinement facilities, or similar facilities.** Searches within jails, confinement facilities, or similar facilities may be authorized by persons with authority over the institution.

(i) **Emergency searches to save life or for related purposes.** In emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury.

(j) **Searches of open fields or woodlands.** A search of open fields or woodlands is not an unlawful search within the meaning of Mil.R.Evid. 311.

(k) **Other searches.** A search of a type not otherwise included in this rule and not requiring probable cause under Mil.R.Evid. 315 may be conducted when permissible under the Constitution of the United States as applied to members of the armed forces.

**Rule 315. Probable cause searches**

(a) **General rule.** Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) **Definitions.** As used in these rules:

(1) **Authorization to search.** An “authorization to search” is an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

(2) **Search warrant.** A “search warrant” is an express permission to search and seize issued by competent civilian authority.

(c) **Scope of authorization.** A search authorization may be issued under this rule for a search of:

(1) **Persons.** The person of anyone subject to military law or the law of war wherever found;

(2) **Military property.** Military property of the United States or of nonappropriated fund activities of an armed force of the United States wherever located;
(3) **Persons and property within military control.** Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located; or

(4) **Nonmilitary property within a foreign country.**

(A) Property owned, used, occupied by, or in the possession of an agency of the United States other than the Department of Defense when situated in a foreign country. A search of such property may not be conducted without the concurrence of an appropriate representative of the agency concerned. Failure to obtain such concurrence, however, does not render a search unlawful within the meaning of Mil.R.Evid. 311.

(B) Other property situated in a foreign country. If the United States is a party to a treaty or agreement that governs a search in a foreign country, the search shall be conducted in accordance with the treaty or agreement. If there is no treaty or agreement, concurrence should be obtained from an appropriate representative of the foreign country with respect to a search under paragraph (4)(B) of this subdivision. Failure to obtain such concurrence or noncompliance with a treaty or agreement, however, does not render a search unlawful within the meaning of Mil.R.Evid. 311.

(d) **Power to authorize.** Authorization to search pursuant to this rule may be granted by an impartial individual in the following categories:

1. **Commander.** A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war; or

2. **Military judge.** A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned. An otherwise impartial authorizing official does not lose the character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

(e) **Power to search.** Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any such person, may conduct or authorize a search when a search authorization has been granted under this rule or a search would otherwise be proper under subdivision (g).

(f) **Basis for Search authorizations.**

1. **Probable cause requirement.** A search authorization issued under this rule must be based upon probable cause.

2. **Probable cause determination.** Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be search. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule shall be based upon any or all of the following:
   
   A. Written statements communicated to the authorizing officer;

   B. Oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or

   C. Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion. The Secretary of Defense or the Secretary concerned may prescribe additional requirements.

3. **Exigencies.** A search warrant or search authorization is not required under this rule for a search based on probable cause when:

   1. **Insufficient time.** There is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought;

   2. **Lack of communications.** There is a reasonable belief that the delay necessary to obtain a search warrant or search authorization and there is a reasonable belief that the delay necessary to obtain a search warrant or search
authorization would result in the removal, destruction, or concealment of the property or evidence sought;

(3) Search of operable vehicle. An operable vehicle is to be searched, except in the circumstances where a search warrant or authorization is required by the Constitution of the United States, this Manual, or these rules; or

(4) Not required by the Constitution. A search warrant or authorization is not otherwise required by the Constitution of the United States as applied to members of the armed forces. For purpose of this rule, a vehicle is “operable” unless a reasonable person would have known at the time of search that the vehicle was not functional for purposes of transportation.

(h) Execution.

(1) Notice. If the person whose property is to be searched is present during a search conducted pursuant to a search authorization granted under this rule, the person conducting the search should when possible notify him or her of the act of authorization and the general substance of the authorization. Such notice may be made prior to or contemporaneously with the search. Failure to provide such notice does not make a search unlawful within the meaning of Mil.R.Evid. 311.

(2) Inventory. Under regulations prescribed by the Secretary concerned, and with such exceptions as may be authorized by the Secretary, an inventory of the property seized shall be made at the time of a seizure under this rule or as soon as practicable thereafter. At an appropriate time, a copy of the inventory shall be given to a person from whose possession or premises the property was taken. Failure to make an inventory, furnish a copy thereof, or otherwise comply with this paragraph does not render a search or seizure unlawful within the meaning of Mil.R.Evid. 311.

(3) Foreign searches. Execution of a search authorization outside the United States and within the jurisdiction of a foreign nation should be in conformity with existing agreements between the United States and the foreign nation. Noncompliance with such an agreement does not make an otherwise lawful search unlawful.

(4) Search warrants. Any civilian or military criminal investigator authorized to request search warrants pursuant to applicable law or regulation is authorized to serve and execute search warrants. The execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or an applicable Act of Congress.

Rule 316. Seizures

(a) General rule. Evidence obtained from seizures conducted in accordance with this rule is admissible at trial if the evidence was not obtained as a result of an unlawful search and if the evidence is relevant and not otherwise inadmissible under these rules.

(b) Seizure of property. Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape.

c) Apprehension. Apprehension is governed by R.C.M. 302.

(d) Seizure of property or evidence.

(1) Abandoned property. Abandoned property may be seized without probable cause and without a search warrant or search authorization. Such seizure may be made by any person.

(2) Consent. Property or evidence may be seized with consent consistent with the requirements applicable to consensual searches under Mil.R.Evid. 314.

(3) Government property. Government property may be seized without probable cause and without a search warrant or search authorization by any person listed in subdivision (e), unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein, as provided in Mil.R.Evid. 314(d), at the time of the seizure.

(4) Other property. Property or evidence not included in paragraph (1)-(3) may be seized for use in evidence by any person listed in subdivision (e) if:

(A) Authorization. The person is authorized to seize the property or evidence by a search warrant or a search authorization under Mil.R.Evid. 315;

(B) Exigent circumstances. The person has probable cause to seize the property or evidence and under Mil.R.Evid. 315(g) a search warrant or search authorization is not required; or

(C) Plain view. The person while in the course of otherwise lawful activity observes in a reasonable fashion property or evidence that the person has probable cause to seize.
M.R.E. 316(d)(5)

(5) Temporary detention. Nothing in this rule shall prohibit temporary detention of property on less than probable cause when authorized under the Constitution of the United States.

(e) Power to seize. Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or individual designated by proper authority to perform guard or police duties, or any agent of any such person, may seize property pursuant to this rule.

(f) Other seizures. A seizure of a type not otherwise included in this rule may be made when permissible under the Constitution of the United States as applied to members of the armed forces.

Rule 317. Interception of wire and oral communications

(a) General rule. Wire or oral communications constitute evidence obtained as a result of an unlawful search or seizure within the meaning of Mil.R.Evid. 311 when such evidence must be excluded under the Fourth Amendment to the Constitution of the United States as applied to members of the armed forces or if such evidence must be excluded under a statute applicable to members of the armed forces.

(b) Authorization for judicial applications in the United States. Under 18 U.S.C. § 2516(1), the Attorney General, or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a federal judge of competent jurisdiction for, and such judge may grant in conformity with 18 U.S.C. § 2518, an order authorizing or approving the interception of wire or oral communications by the Department of Defense, the Department of Transportation, or any Military Department for purposes of obtaining evidence concerning the offenses enumerated in 18 U.S.C. § 2516(1), to the extent such offenses are punishable under the Uniform Code of Military Justice.

(c) Regulations. Notwithstanding any other provision of these rules, members of the armed forces or their agents may not intercept wire or oral communications for law enforcement purposes unless such interception:

(1) takes place in the United States and is authorized under subdivision (b);

(2) takes place outside the United States and is authorized under regulations issued by the Secretary of Defense or the Secretary concerned; or

(3) is authorized under regulations issued by the Secretary of Defense or the Secretary concerned and is not unlawful under 18 U.S.C. § 2511.

Rule 321. Eyewitness identification

(a) General rule.

(1) Admissibility. Testimony concerning a relevant out of court identification by any person is admissible, subject to an appropriate objection under this rule, if such testimony is otherwise admissible under these rules. The witness making the identification and any person who has observed the previous identification may testify concerning it. When in testimony a witness identifies the accused as being, or not being, a participant in an offense or makes any other relevant identification concerning a person in the courtroom, evidence that on a previous occasion the witness made a similar identification is admissible to corroborate the witness’ testimony as to identity even if the credibility of the witness has not been attacked directly, subject to appropriate objection under this rule.

(2) Exclusionary rule. An identification of the accused as being a participant in an offense, whether such identification is made at the trial or otherwise, is inadmissible against the accused if:

(A) The accused makes a timely motion to suppress or an objection to the evidence under this rule and if the identification is the result of an unlawful lineup or other unlawful identification process conducted by the United States or other domestic authorities; or

(B) Exclusion of the evidence is required by the due process clause of the Fifth Amendment to the Constitution of the United States as applied to members of the armed forces. Evidence other than an identification of the accused that is obtained as a result of the unlawful lineup or unlawful identification process is inadmissible against the accused if the accused makes a timely motion to suppress or an objection to the evidence under this rule and if exclusion of the evidence is required under the Constitution of the United States as applied to members of the armed forces.
(b) **Definition of “unlawful”.**

(1) **Lineups and other identification processes.** A lineup or other identification process is “unlawful” if the identification is unreliable. An identification is unreliable if the lineup or other identification process, under the circumstances, is so suggestive as to create a substantial likelihood of misidentification.

(2) **Lineups: right to counsel.** A lineup is “unlawful” if it is conducted in violation of the following rights to counsel:

(A) **Military lineups.** An accused or suspect is entitled to counsel if, after preferral of charges or imposition of pretrial restraint under R.C.M. 304 for the offense under investigation, the accused is subjected by persons subject to the code or their agents to a lineup for the purpose of identification. When a person entitled to counsel under this rule requests counsel, a judge advocate or a person certified in accordance with Article 27(b) shall be provided by the United States at no expense to the accused or suspect and without regard to indigency or lack thereof before the lineup may proceed. The accused or suspect may waive the rights provided in this rule if the waiver is freely, knowingly, and intelligently made.

(B) **Nonmilitary lineups.** When a person subject to the code is subjected to a lineup for purposes of identification by an official or agent of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States, or any political subdivision of such a State, Commonwealth, or possession, and the provisions of paragraph (A) do not apply, the person’s entitlement to counsel and the validity of any waiver of applicable rights shall be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar lineups.

(c) **Motions to suppress and objections.**

(1) **Disclosure.** Prior to arraignment, the prosecution shall disclose to the defense all evidence of a prior identification of the accused as a lineup or other identification process that it intends to offer into evidence against the accused at trial.

(2) **Motion or objection.**

(A) When such evidence has been disclosed, any motion to suppress or objection under this rule shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move constitutes a waiver of the motion or objection.

(B) If the prosecution intends to offer such evidence and the evidence was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interests of justice.

(C) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule shall be made in accordance with the procedure for challenging evidence under (A). If such evidence has not been so disclosed prior to arraignment, the requirements of (B) apply.

(3) **Specificity.** The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the lineup or other identification process, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or a general objection.

(d) **Burden of proof.** When a specific motion or objection has been required under subdivision (c)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence. When an appropriate objection under this rule has been made by the defense, the issue shall be determined by the military judge as follows:

(1) **Right to counsel.** When an objection raises the right to presence of counsel under this rule, the prosecution must prove by a preponderance of the evidence that counsel was present at the lineup or that the accused, having been advised of the right to the presence of counsel, voluntarily and intelligently waived that right prior to the lineup. When the military judge determines that an identification is the result of a lineup conducted without the presence of counsel or an appropriate waiver, any later identification by one present at such unlawful lineup is also a result thereof unless the military judge determines
that the contrary has been shown by clear and convincing evidence.

(2) **Unreliable identification.** When an objection raises the issue of an unreliable identification, the prosecution must prove by a preponderance of the evidence that the identification was reliable under the circumstances; provided, however, that if the military judge finds the evidence of identification inadmissible under this subdivision, a later identification may be admitted if the prosecution proves by clear and convincing evidence that the later identification is not the result of the inadmissible identification.

(e) **Defense evidence.** The defense may present evidence relevant to the issue of the admissibility of evidence as to which there has been an appropriate motion or objection under this rule. An accused may testify for the limited purpose of contesting the legality of the lineup or identification process giving rise to the challenged evidence. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(f) **Rulings.** A motion to suppress or an objection to evidence made prior to plea under this rule shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at the trial of the general issue or until after findings, but no such determination shall be deferred if a party’s right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state his or her essential findings of fact on the record.

(g) **Effect of guilty pleas.** Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all issues under this rule with respect to that offense whether or not raised prior to the plea.

**SECTION IV**

**RELEVANCY AND ITS LIMITS**

**Rule 401. Definition of “relevant evidence”**

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.

**Rule 402. Relevant evidence general admissible; irrelevant evidence inadmissible**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

**Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes**

(a) **Character evidence generally.** Evidence of a person’s character or a trait of a person’s character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) **Character of the accused.** Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide or assault case to rebut evidence that the victim was an aggressor;
(3) Character of witness. Evidence of the character of a witness, as provided in Mil.R.Evid. 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 405. Methods of proving character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of an offense or defense, proof may also be made of specific instances of the person's conduct.

(c) Affidavits. The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this subdivision, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.

(d) Definitions. "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. "Community" in the armed forces includes a post, camp, ship, station, or other military organization regardless of size.

Rule 406. Habit; routine practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 407. Subsequent remedial measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility or precautionary measures, if controverted, or impeachment.

Rule 408. Compromise and offer to compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Payment of medical and similar expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410. Inadmissibility of pleas, plea discussions, and related statements

(a) In general. Except as otherwise provided in this rule, evidence of the following is not admissible in any court-martial proceeding against the accused who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;
(2) a plea of nolo contendere;
(3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the Government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding where in another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a court-martial proceedings for perjury or false statement if the statement was made by the accused under oath, on the record and in the presence of counsel.

(b) Definitions. A "statement made in the course of plea discussions" includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial; "on the record" includes the written statement submitted by the accused in furtherance of such request.

Rule 411. Liability insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 412. Nonconsensual sexual offenses; relevance of victim's past behavior

(a) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, reputation or opinion evidence of the part sexual behavior of an alleged victim of such nonconsensual sexual offense is not admissible.

(b) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the nonconsensual sexual offense is alleged.

(c)(1) If the person accused of committing a nonconsensual sexual offense intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall serve notice thereof on the military judge and the trial counsel.

(c)(2) The notice described in paragraph (1) shall be accompanied by an offer of proof. If the military judge determines that the offer of proof contains evidence described in subdivision (b), the military judge shall conduct a hearing, which may be closed, to determine if such evidence is admissible. At such hearings the parties may call witnesses, including the alleged victim, and offer relevant evidence. In a case before a court-martial composed of a military judge and members, the military judge shall conduct such hearings outside the presence of the members pursuant to Article 39(a).

(c)(3) If the military judge determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which a nonconsensual sexual offense is alleged.
(e) A “nonconsensual sexual offense” is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempt to commit such offenses.

SECTION V

PRIVILEGES

Rule 501. General rule

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) The Constitution of the United States as applied to members of the armed forces;
(2) An Act of Congress applicable to trials by courts-martial;
(3) These rules or this Manual; or
(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual.

(b) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

(1) Refuse to be a witness;
(2) Refuse to disclose any matter;
(3) Refuse to produce any object or writing; or
(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

(c) The term “person” includes an appropriate representative of the Federal Government, a State, or political subdivision thereof, or any other entity claiming to be the holder of a privilege.

(d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

Rule 502. Lawyer-client privilege

(a) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client’s representative and the lawyer or the lawyer’s representative, (2) between the lawyer and the lawyer’s representative, (3) by the client or the client’s lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(b) Definitions. As used in this rule:

(1) A “client” is a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law; or a member of the armed forces detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding. The term “lawyer” does not include a member of the armed forces serving in a capacity other than as a judge advocate, legal officer, or law specialist as defined in Article 1, unless the member: (a) is detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding; (b) is authorized by the armed forces, or reasonably believed by the client to be authorized, to render professional legal services to members of the armed forces; or (c) is authorized to practice law and renders professional legal services during off-duty employment.

(3) A “representative” of a lawyer is a person employed by or assigned to assist a lawyer in providing professional legal services.

(4) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) Who may claim the privilege. The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The law-
yer or the lawyer's representative who received the communication may claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule under the following circumstances:

(1) Crime or fraud. If the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Rule 503. Communications to clergy

(a) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) Definitions. As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

(2) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(c) Who may claim the privilege. The privilege may be claimed by the person, by the guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

Rule 504. Husband-wife privilege

(a) Spousal incapacity. A person has a privilege to refuse to testify against his or her spouse.

(b) Confidential communication made during marriage.

(1) General rule of privilege. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

(2) Definition. A communication is "confidential" if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

(3) Who may claim the privilege. The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

(c) Exceptions.

(1) Spousal incapacity only. There is no privilege under subdivision (a) when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against the other party, the parties are divorced or the marriage has been annulled.

(2) Spousal incapacity and confidential communications. There is no privilege under subdivisions (a) or (b):

(A) In proceedings in which one spouse is charged with a crime against the person or property
of the other spouse or a child of either, or with a
crime against the person or property of a third per-
son committed in the course of committing a crime
against the other spouse;

(B) When the marital relationship was entered
into with no intention of the parties to live together
as spouses, but only for the purpose of using the pur-
ported marital relationship as a sham, and with re-
spect to the privilege in subdivision (a), the relation-
ship remains a sham at the time the testimony or
statement of one of the parties is to be introduced
against the other; or with respect to the privilege in
subdivision (b), the relationship was a sham at the
time of the communication; or

(C) In proceedings in which a spouse is
charged, in accordance with Article 133 or 134, with
importing the other spouse as an alien for prostitu-
tion or other immoral purpose in violation of 8
U.S.C. § 1328; with transporting the other spouse in
interstate commerce for immoral purposes or other
offense in violation of 18 U.S.C. §§ 2421–2424; or
with violation of such other similar statutes under
which such privilege may not be claimed in the trial
of criminal cases in the United States district courts.

Rule 505. Classified information
(a) General rule of privilege. Classified information
is privileged from disclosure if disclosure would be
detrimental to the national security. As with other
rules of privilege this rule applies to all stages of the
proceedings.
(b) Definitions. As used in this rule:

(1) Classified information. “Classified informa-
tion” means any information or material that has
been determined by the United States Government
pursuant to an executive order, statute, or regula-
tions, to require protection against unauthorized
disclosure for reasons of national security, and any
restricted data, as defined in 42 U.S.C. § 2014(y).

(2) National security. “National security” means
the national defense and foreign relations of the
United States.

(c) Who may claim the privilege. The privilege may
be claimed by the head of the executive or military
department or government agency concerned based
on a finding that the information is properly classi-
ﬁed and that disclosure would be detrimental to the
national security. A person who may claim the privi-
lege may authorize a witness or trial counsel to claim
the privilege on his or her behalf. The authority of
the witness or trial counsel to do so is presumed in
the absence of evidence to the contrary.

(d) Action prior to referral of charges. Prior to refer-
ral of charges, the convening authority shall respond
in writing to a request by the accused for classified
information if the privilege in this rule is claimed for
such information. The convening authority may:

(1) Delete specified items of classified informa-
tion from documents made available to the accused;

(2) Substitute a portion or summary of the infor-
mation for such classified documents;

(3) Substitute a statement admitting relevant
facts that the classified information would tend to
prove;

(4) Provide the document subject to conditions
that will guard against the compromise of the informa-
tion disclosed to the accused; or

(5) Withhold disclosure if actions under (1)
through (4) cannot be taken without causing identi-
fiable damage to the national security.

Any objection by the accused to withholding of
information or to the conditions of disclosure shall
be raised through a motion for appropriate relief at a
pretrial session.

(e) Pretrial session. At any time after referral of
charges and prior to arraignment, any party may
move for a session under Article 39(a) to consider
matters relating to classified information that may
arise in connection with the trial. Following such
motion or sua sponte, the military judge promptly
shall hold a session under Article 39(a) to establish
the timing of requests for discovery, the provision of
notice under subdivision (h), and the initiation of the
procedure under subdivision (i). In addition, the
military judge may consider any other matters that
relate to classified information or that may promote
a fair and expeditious trial.

(f) Action after referral of charges. If a claim of privi-
lege has been made under this rule with respect to
classified information that apparently contains evi-
dence that is relevant and necessary to an element of
the offense or a legally cognizable defense and is oth-
erwise admissible in evidence in the court-martial
proceeding, the matter shall be reported to the con-
vning authority. The convening authority may:

(1) institute action to obtain the classified informa-
tion for the use by the military judge in making a
determination under subdivision (i);
(2) dismiss the charges;
(3) dismiss the charges or specifications or both to which the information relates; or
(4) take such other action as may be required in the interests of justice.

If, after a reasonable period of time, the information is not provided to the military judge in circumstances where proceeding with the case without such information would materially prejudice a substantial right of the accused, the military judge shall dismiss the charges or specifications or both to which the classified information relates.

(g) Disclosure of classified information to the accused.

(1) Protective order. If the Government agrees to disclose classified information to the accused, the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

(A) Prohibiting the disclosure of the information except as authorized by the military judge;
(B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;
(C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;
(D) All persons requiring security clearances shall cooperate with investigatory personnel in any investigations which are necessary to obtain a security clearance.

(E) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;

(F) Regulating the making and handling of notes taken from material containing classified information; or

(G) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(2) Limited disclosure. The military judge, upon motion of the Government, shall authorize (A) the deletion of specified items of classified information from documents to be made available to the defendant, (B) the substitution of a portion or summary of the information for such classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused.

(3) Disclosure at trial of certain statements previously made by a witness.

(A) Scope. After a witness called by the Government has testified on direct examination, the military judge, on motion of the accused, may order production of statements in the possession of the United States under R.C.M. 914. This provision does not preclude discovery or assertion of a privilege otherwise authorized under these rules or this Manual.

(B) Closed session. If the privilege in this rule is invoked during consideration of a motion under R.C.M. 914, the Government may deliver such statement for the inspection only by the military judge in camera and may provide the military judge with an affidavit identifying the portions of the statement that are classified and the basis for the classification assigned. If the military judge finds that disclosure of any portion of the statement identified by the Government as classified could reasonably be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation and that such portion of the statement is consistent with the witness' testimony, the military judge shall excise the portion from the statement. With such material excised, the military judge shall then direct delivery of such statement to the accused for use by the accused. If the military judge finds that such portion of the statement is inconsistent with the witness' testimony, the Government may move for a proceeding under subdivision (i).

(4) Record of trial. If, under this subdivision, any information is withheld from the accused, the accused objects to such withholding, and the trial is continued to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as the Government's motion and any materials submitted in support thereof shall be sealed and
attached to the record of trial as an appellate exhibit. Such material shall be made available to reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(h) Notice of the accused's intention to disclose classified information.

(1) Notice by the accused. If the accused reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a court-martial proceeding, the accused shall notify the trial counsel in writing of such intention and file a copy of such notice with the military judge. Such notice shall be given within the time specified by the military judge under subdivision (e) or, if no time has been specified, prior to arraignment of the accused.

(2) Continuing duty to notify. Whenever the accused learns of classified information not covered by a notice under (1) that the accused reasonably expects to disclose at any such proceeding, the accused shall notify the trial counsel and the military judge in writing as soon as possible thereafter.

(3) Content of notice. The notice required by this subdivision shall include a brief description of the classified information. The description, to be sufficient, must be more than a mere general statement of the areas about which evidence may be introduced. The accused must state, with particularity, which items of classified information he reasonably expects will be revealed by his defense.

(4) Prohibition against disclosure. The accused may not disclose any information known or believed to be classified until notice has been given under this subdivision and until the Government has been afforded a reasonable opportunity to seek a determination under subdivision (i).

(5) Failure to comply. If the accused fails to comply with the requirements of this subdivision, the military judge may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the accused of any witness with respect to any such information.

(i) In camera proceedings for cases involving classified information.

(1) Definition. For purposes of this subdivision, an "in camera proceeding" is a session under Article 39(a) from which the public is excluded.

(2) Motion for in camera proceeding. Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an in camera proceeding concerning the use at any proceeding of any classified information. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege under this rule may grant the Government leave to move for an in camera proceeding concerning the use of additional classified information.

(3) Demonstration of national security nature of the information. In order to obtain an in camera proceeding under this rule, the Government shall submit the classified information and an affidavit ex parte for examination by the military judge only. The affidavit shall demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation.

(4) In camera proceeding.

(A) Procedure. Upon finding that the Government has met the standard set forth in subdivision (i)(3) with respect to some or all of the classified information at issue, the military judge shall conduct an in camera proceeding. Prior to the in camera proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the classified information when the Government has not previously made the information available to the accused in connection with pretrial proceedings. Following briefing and argument by the parties in the in camera proceeding the military judge shall determine whether the information may be disclosed at the court-martial proceeding. Where the Government's motion under this subdivision is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to the commencement of the relevant proceeding.

(B) Standard. Classified information is not subject to disclosure under this subdivision unless the information is relevant and necessary to an element of the offense or a legally cognizable defense
and is otherwise admissible in evidence. In presentencing proceedings, relevant and material classified information pertaining to the appropriateness of, or the appropriate degree of, punishment shall be admitted only if no unclassified version of such information is available.

(C) Ruling. Unless the military judge makes a written determination that the information meets the standard set forth in (B), the information may not be disclosed or otherwise elicited at a court-martial proceeding. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

(D) Alternatives to full disclosure. If the military judge makes a determination under this subdivision that would permit disclosure of the information or if the Government elects not to contest the relevance, necessity, and admissibility of any classified information, the Government may proffer a statement admitting for purposes of the proceeding any relevant facts such information would tend to prove or may submit a portion of summary to be used in lieu of the information. The military judge shall order that such statement, portion, or summary by used by the accused in place of the classified information itself is necessary to afford the accused a fair trial.

(E) Sanctions. If the military judge determines that alternatives to full disclosure may not be used and the Government continues to object to disclosure of the information, the military judge shall issue any order that the interests of justice require. Such an order may include an order:

(i) striking or precluding all or part of the testimony of a witness;
(ii) declaring a mistrial;
(iii) finding against the Government on any issue as to which the evidence is relevant and material to the defense;
(iv) dismissing the charges, with or without prejudice; or
(v) dismissing the charges or specifications or both to which the information relates.

Any such order shall permit the Government to avoid the sanction for nondisclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding.

(j) Introduction of classified information.

(1) Classification status. Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(2) Precautions by the military judge. In order to prevent unnecessary disclosure of classified information, the military judge may order admission into evidence of only part of a writing, recording, or photograph or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein.

(3) Contents of writing, recording, or photograph. The military judge may permit proof of the contents of a writing, recording, or photograph that contains classified information without requiring introduction into evidence of the original or a duplicate.

(4) Taking of testimony. During the examination of a witness, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be relevant and necessary to the defense. Following such an objection, the military judge shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring the Government to provide the military judge with a proffer or the witness' response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

(5) Closed session. The military judge may exclude the public during that portion of the presentation of evidence that discloses classified information.

(6) Record of trial. The record of trial with respect to any classified matter will be prepared under R.C.M. 1103(h) and 1104(b)(1)(D).

(k) Security procedures to safeguard against compromise of classified information disclosed to courts-martial. The Secretary of Defense may prescribe security procedures for protection against the compromise of classified information submitted to court-martial and appellate authorities.
Rule 506. Government information other than classified information

(a) General rule of privilege. Except where disclosure is required by an Act of Congress, government information is privileged from disclosure if disclosure would be detrimental to the public interest.

(b) Scope. “Government information” includes official communication and documents and other information within the custody or control of the Federal Government. This rule does not apply to classified information (Mil.R.Evid. 505) or to the identity of an informant (Mil.R.Evid. 507).

(c) Who may claim the privilege. The privilege may be claimed by the head of the executive or military department or government agency concerned. The privilege for records and information of the Inspector General may be claimed by the immediate superior of the inspector general officer responsible for creation of the records or information, the Inspector General, or any other superior authority. A person who may claim the privilege may authorize a witness or the trial counsel to claim the privilege on his or her behalf. The authority of a witness or the trial counsel to do so is presumed in the absence of evidence to the contrary.

(d) Action prior to referral of charges. Prior to referral of charges, the Government shall respond in writing to a request for government information if the privilege in this rule is claimed for such information. The Government shall:

(1) delete specified items of government information claimed to be privileged from documents made available to the accused;

(2) substitute a portion or summary of the information for such documents;

(3) substitute a statement admitting relevant facts that the government information would tend to prove;

(4) provide the document subject to conditions similar to those set forth in subdivision (g) of this rule; or

(5) withhold disclosure if actions under (1) through (4) cannot be taken without causing identifiable damage to the public interest.

(e) Action after referral of charges. After referral of charges, if a claim of privilege has been made under this rule with respect to government information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter shall be reported to the convening authority. The convening authority may:

(1) institute action to obtain the information for use by the military judge in making a determination under subdivision (i);

(2) dismiss the charges;

(3) dismiss the charges or specifications or both to which the information relates; or

(4) take other action as may be required in the interests of justice.

If, after a reasonable period of time, the information is not provided to the military judge, the military judge shall dismiss the charges or specifications or both to which the information relates.

(f) Pretrial session. At any time after referral of charges and prior to arraignment any party may move for a session under Article 39(a) to consider matters relating to government information that may arise in connection with the trial. Following such motion, or sua sponte, the military judge promptly shall hold a pretrial session under Article 39(a) to establish the timing of requests for discovery, the provision of notice under subdivision (h), and the initiation of the procedure under subdivision (i). In addition, the military judge may consider any other matters that relate to government information or that may promote a fair and expeditious trial.

(g) Disclosure of government information to the accused. If the Government agrees to disclose government information to the accused subsequent to a claim of privilege under this rule, the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

(1) Prohibiting the disclosure of the information except as authorized by the military judge;

(2) Requiring storage of the material in a manner appropriate for the nature of the material to be disclosed; upon reasonable notice;

(3) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(4) Requiring the maintenance of logs recording access by persons authorized by the military judge to
have access to the government information in connection with the preparation of the defense;

(5) Regulating the making and handling of notes taken from material containing government information; or

(6) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(h) Prohibition against disclosure. The accused may not disclose any information known or believed to be subject to a claim of privilege under this rule until the Government has been afforded a reasonable opportunity to seek a determination under subdivision (i).

(i) In camera proceedings.

(1) Definition. For the purpose of this subdivision, an "in camera proceeding" is a closed session under Article 39(a).

(2) Motion for in camera proceeding. Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an in camera proceeding concerning the use at any proceeding of any government information that may be subject to a claim of privilege. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege may grant the Government leave to move for an in camera proceeding concerning the use of additional government information.

(3) Demonstration of public interest nature of the information. In order to obtain an in camera proceeding under this rule, the Government shall demonstrate through submission of affidavits and the information for examination only by the military judge that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest.

(4) In camera proceeding

(A) Procedure. Upon finding that the disclosure of some or all of the information submitted by the Government under subsection (1) reasonably could be expected to cause identifiable damage to the public interest, the military judge shall conduct an in camera proceeding. Prior to the in camera proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the specific information of concern to the Government when the Government has not previously made the information available to the accused in connection with pretrial proceedings. Following briefing and argument by the parties in the in camera proceeding, the military judge shall determine whether the information may be disclosed at the court-martial proceeding. When the Government's motion under this subdivision is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to commencement of the relevant proceeding.

(B) Standard. Government information is subject to disclosure under the subdivision if the party making the request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence of the accused and otherwise admissible in the court-martial proceeding.

(C) Ruling. Unless the military judge makes a written determination that the information is not subject to disclosure under the standard set forth in (B), the information may be disclosed at the court-martial proceeding. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

(D) Sanction. If the military judge makes a determination under this subdivision that permits disclosure of the information and the Government continues to object to disclosure of the information, the military judge shall dismiss the charges or specifications or both to which the information relates.

(j) Introduction of government information subject to a claim of privilege.

(1) Precautions by military judge. In order to prevent unnecessary disclosure of government information after there has been a claim of privilege under this rule, the military judge may order admission into evidence of only part of a writing, recording, or photograph or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the government information contained therein.
(2) **Contents of writing, recording, or photograph.** The military judge may permit proof of the contents of a writing, recording, or photograph that contains government information that is the subject of a claim of privilege under this rule without requiring introduction into evidence of the original or a duplicate.

(3) **Taking of testimony.** During examination of a witness, the prosecution may object to any question or line of inquiry that may require the witness to disclose government information not previously found relevant and necessary to the defense if such information has been or is reasonably likely to be the subject of a claim of privilege under this rule. Following such an objection, the military judge shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any government information. Such action may include requiring the Government to provide the military judge with a proffer of the witness’ response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

(k) **Procedures to safeguard against compromise of government information disclosed to courts-martial.** The Secretary of Defense may prescribe procedures for protection against the compromise of government information submitted to courts-martial and appellate authorities after a claim of privilege.

**Rule 507. Identity of informant**

(a) **Rule of privilege.** The United States or a State or subdivision thereof has a privilege to refuse to disclose the identity of an informant. An “informant” is a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of crime. Unless otherwise privileged under these rules, the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant’s identity.

(b) **Who may claim the privilege.** The privilege may be claimed by an appropriate representative of the United States, regardless of whether information was furnished to an officer of the United States or a State or subdivision thereof. The privilege may be claimed by an appropriate representative of a State or subdivision if the information was furnished to an officer thereof, except the privilege shall not be allowed if the prosecution objects.

(c) **Exceptions.**

(1) **Voluntary disclosures; informant as witness.** No privilege exists under this rule: (A) if the identity of the informant has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informant’s own action; or (B) if the informant appears as a witness for the prosecution.

(2) **Testimony on the issue of guilt or innocence.** If a claim of privilege has been made under this rule, the military judge shall, upon motion by the accused, determine whether disclosure of the identity of the informant is necessary to the accused’s defense on the issue of guilt or innocence. Whether such a necessity exists will depend on the particular circumstances of each case, taking into consideration the offense charged, the possible defense, the possible significance of the informant’s testimony, and other relevant factors. If it appears from the evidence in the case or from other showing by a party that an informant may be able to give testimony necessary to the accused’s defense on the issue of guilt or innocence, the military judge may make any order required by the interests of justice.

(3) **Legality of obtaining evidence.** If a claim of privilege has been made under this rule with respect to a motion under Mil.R.Evid. 311, the military judge shall, upon motion of the accused, determine whether disclosure of the identity of the informant is required by the Constitution of the United States as applied to members of the armed forces. In making this determination, the military judge may make any order required by the interests of justice.

(d) **Procedures.** If a claim of privilege has been made under this rule, the military judge may make any order required by the interests of justice. If the military judge determines that disclosure of the identity of the informant is required under the standards set forth in this rule, and the prosecution elects not to disclose the identity of the informant, the matter shall be reported to the convening authority. The convening authority may institute action to secure disclosure of the identity of the informant, terminate the proceedings, or take such other action as may be appropriate under the circumstances. If, after a reasonable period of time disclosure is not made, the
M.R.E. 507(d)

military judge, *sua sponte* or upon motion of either counsel and after a hearing if requested by either party, may dismiss the charge or specifications or both to which the information regarding the informant would relate if the military judge determines that further proceedings would materially prejudice a substantial right of the accused.

Rule 508. Political vote

A person has a privilege to refuse to disclose the tenor of the person’s vote at a political election conducted by secret ballot unless the vote was cast illegally.

Rule 509. Deliberations of courts and juries

Except as provided in Mil.R.Evid. 606, the deliberations of courts and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged.

Rule 510. Waiver of privilege by voluntary disclosure

(a) A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person’s predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This rule does not apply if the disclosure is itself a privileged communication.

(b) Unless testifying voluntarily concerning a privileged matter or communication, an accused who testifies in his or her own behalf or a person who testifies under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege to which he or she may be entitled pertaining to the confidential matter or communication.

Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege

(a) Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.

(b) The telephonic transmission of information otherwise privileged under these rules does not affect its privileged character. Use of electronic means of communication other than the telephone for transmission of information otherwise privileged under these rules does not affect the privileged character of such information if use of such means of communication is necessary and in furtherance of the communication.

Rule 512. Comment upon or inference from claim of privilege; instruction

(a) *Comment or inference not permitted.*

(1) The claim of a privilege by the accused whether in the present proceeding or upon a prior occasion is not a proper subject of comment by the military judge or counsel for any party. No inference may be drawn therefrom.

(2) The claim of a privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn therefrom except when determined by the military judge to be required by the interests of justice.

(b) *Claiming privilege without knowledge of members.* In a trial before a court-martial with members, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the members. This subdivision does not apply to a special court-martial without a military judge.

(c) *Instruction.* Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom except as provided in subdivision (a)(2).

SECTION VI

WITNESSES

Rule 601. General rule of competency

Every person is competent to be a witness except as otherwise provided in these rules.
Rule 602. Lack of personal knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Mil.R.Evid. 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualifications as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.

Rule 605. Competency of military judge as witness

(a) The military judge presiding at the court-martial may not testify in that court-martial as a witness. No objection need be made to preserve the point.
(b) This rule does not preclude the military judge from placing on the record matters concerning docketing of the case.

Rule 606. Competency of court member as witness

(a) At the court-martial. A member of the court-martial may not testify as a witness before the other members in the trial of the case in which the member is sitting. If the member is called to testify, the opposing party, except in a special court-martial without a military judge, shall be afforded an opportunity to object out of the presence of the members.
(b) Inquiry into validity of findings or sentence. Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

Rule 607. Who may impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608. Evidence of character, conduct, and bias of witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
(b) Specific instances of conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in Mil.R.Evid. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.
(c) Evidence of bias. Bias, prejudice, or any motive to misrepresent may be shown to impeach the wit-
ness either by examination of the witness or by evidence otherwise adduced.

**Rule 609. Impeachment by evidence of conviction of crime**

(a) **General rule.** For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Mil. R. Evid. 403, if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(b) **Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) **Effect of pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of innocence. (d) **Juvenile adjudications.** Evidence of juvenile adjudications is generally not admissible under this rule. The military judge, however, may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the military judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) **Pendency of appeal.** The pendency of an appeal therefrom does not render evidence of a conviction inadmissible except that a conviction by summary court-martial or special court-martial without a military judge may not be used for purposes of impeachment until review has been completed pursuant to Article 64 or Article 66 if applicable. Evidence of the pendency of an appeal is admissible.

(f) **Definition.** For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

**Rule 610. Religious beliefs or opinions**

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the credibility of the witness is impaired or enhanced.

**Rule 611. Mode and order of interrogation and presentation**

(a) **Control by the military judge.** The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) **Leading questions.** Leading questions should not be used on the direct examination of a witness except
as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 612. Writing used to refresh memory

If a witness uses a writing to refresh his or her memory for the purpose of testifying, either

(1) while testifying, or

(2) before testifying, if the military judge determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing in camera, excise any privileged information or portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be attached to the record of trial as an appellate exhibit. If a writing is not produced or delivered pursuant to order under this rule, the military judge shall make any order justice requires, except that when the prosecution elects not to comply, the order shall be one striking the testimony or, if in discretion of the military judge it is determined that the interests of justice so required, declaring a mistrial. This rule does not preclude disclosure of information required to be disclosed under other provisions of these rules or this Manual.

Rule 613. Prior statements of witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Mil.R.Evid. 801(d)(2).

Rule 614. Calling and interrogation of witnesses by the court-martial

(a) Calling by the court-martial. The military judge may, sua sponte, or at the request of the members or the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. When the members wish to call or recall a witness, the military judge shall determine whether it is appropriate to do so under these rules or this Manual.

(b) Interrogation by the court-martial. The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

(c) Objections. Objections to the calling of witnesses by the military judge or the members or to the interrogation by the military judge or the members may be made at the time or at the next available opportunity when the members are not present.

Rule 615. Exclusion of witnesses

At the request of the prosecution or defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the order sua sponte. This rule does not authorize exclusion of (1) the accused, or (2) a member of an armed service or an employee of the United States designated as representative of the United States by the trial counsel, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's case.
SECTION VII
OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses

If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness of the determination of a fact in issue.

Rule 702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703. Bases of opinion testimony by experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704. Opinion on ultimate issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. Disclosure of facts or data underlying expert opinion

The expert may testify in terms of opinion or inference and give the expert’s reasons therefor without prior disclosure of the underlying facts or data, unless the military judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court appointed experts

(a) Appointment and compensation. The trial counsel, the defense counsel, and the court-martial have equal opportunity to obtain expert witnesses under Article 46. The employment and compensation of expert witnesses is governed by R.C.M. 703.

(b) Disclosure of employment. In the exercise of discretion, the military judge may authorize disclosure to the members of the fact that the military judge called an expert witness.

(c) Accused’s experts of own selection. Nothing in this rule limits the accused in calling expert witnesses of the accused’s own selection and at the accused’s own expense.

Rule 707. Polygraph Examinations

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

SECTION VIII
HEARSAY

Rule 801. Definitions

The following definitions apply under this section:

(a) Statement. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A “declarant” is a person who makes a statement.

(c) Hearsay. “Hearsay” is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant’s testimony and is offered to rebut an ex-
press or implied charge against the declarant of recent fabrication or improper influence or motive, or 
(C) one of identification of a person made after perceiving the person; or 

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either the party’s individual or representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment of the agent or servant, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 802. Hearsay rule

Hearsay is not admissible except as provided by these rules or by any Act of Congress applicable in trials by court-martial.

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while declarant was perceiving the event or condition or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensa-

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence, but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilation normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonconcurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of
information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other personnel acting in a law enforcement capacity, or (C) against the government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. Notwithstanding (B), the following are admissible under this paragraph as a record of a fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record such fact or event: enlistment papers, physical examination papers, outline figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, records of court-martial convictions, logs, unit personnel diaries, individual equipment records, guard reports, daily strength records of prisoners, and rosters of prisoners.

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation in any form, or the nonconcurrency or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Mil.R.Evid. 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) **Records of religious organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious organization.

(12) **Marriage, baptismal, and similar certificates.** Statements of fact obtained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a time thereafter.

(13) **Family records.** Statements of facts concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscription on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of the kind in that office.

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market reports, commercial publications.** Market quotations, tabulations, directories, lists (including government price lists), or other published compilations generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.
(19) **Reputation concerning personal or family history.** Reputation among members of the person's family by blood, adoption, or marriage, or among the person's associates, or in the community, concerning the person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of the person's personal or family history.

(20) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) **Reputation as to character.** Reputation of a person's character among the person's associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death, dishonorable discharge, or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(23) **Judgment as to personal, family or general history, or boundaries.** Judgments as proof of matters of personal, family, or general history, or boundaries essential to the judgment, if the same would be provable by evidence of reputation.

(24) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

**Rule 804. Hearsay exceptions; declarant unavailable**

(a) **Definitions of unavailability.** “Unavailability as a witness” includes situations in which the declarant—

   (1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
   
   (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or
   
   (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
   
   (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
   
   (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means; or
   
   (6) is unavailable within the meaning of Article 49(d)(2). A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

   (1) **Former testimony.** Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect ex-
amination. A record of testimony given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article 32 is admissible under this subdivision if such a record is a verbatim record. This paragraph is subject to the limitations set forth in Articles 49 and 50.

(2) Statement under belief of impending death. In a prosecution for homicide or for any offense resulting in the death of the alleged victim, a statement made by a declarant while believing that the declarant’s death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant’s impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant’s own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other’s family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the military judge determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative of the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 805. Hearsay within hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806. Attacking and supporting credibility of declarant

When a hearsay statement, or a statement defined in Mil.R.Evid. 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant’s hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

SECTION IX
AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of authentication or identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.
(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular persons or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress, by rules prescribed by the Supreme Court pursuant to statutory authority, or by applicable regulations prescribed pursuant to statutory authority.

**Rule 902. Self-authentication**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution of attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report of entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make
the certification, by certificate complying with paragraphs (1), (2), or (3) of this rule or complying with any Act of Congress, rule prescribed by the Supreme Court pursuant to statutory authority, or an applicable regulation prescribed pursuant to statutory authority.

(4a) Documents or records of the United States accompanied by attesting certificates. Documents or records kept under the authority of the United States by any department, bureau, agency, office, or court thereof when attached to or accompanied by an attesting certificate of the custodian of the document or record without further authentication.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed material purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress and regulations. Any signature, document, or other matter declared by Act of Congress or by applicable regulation prescribed pursuant to statutory authority to be presumptively or prima facie genuine or authentic.

Rule 1001. Definitions

For purposes of this section the following definitions are applicable:

(1) Writings and recordings. “Writings” and “recordings” consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. “Photographs” include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original.”

(4) Duplicate. A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

Rule 1002. Requirement of an original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, this Manual, or by Act of Congress.

Rule 1003. Admissibility of duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of other evidence of contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
(1) **Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) **Original not obtainable.** No original can be obtained by any available judicial process or procedure; or

(3) **Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

(4) **Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.

**Rule 1005. Public records**

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct or attested to in accordance with Mil.R.Evid. 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

**Rule 1006. Summaries**

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The military judge may order that they be produced in court.

**Rule 1007. Testimony or written admission of party**

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by the party’s written admission, without accounting for the nonproduction of the original.

**Rule 1008. Functions of military judge and members**

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the military judge to determine in accordance with the provisions of Mil.R.Evid. 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

**SECTION XI**

**MISCELLANEOUS RULES**

**Rule 1101. Applicability of rules**

(a) **Rules applicable.** Except as otherwise provided in this Manual, these rules apply generally to all courts-martial, including summary courts-martial; to proceedings pursuant to Article 39(a); to limited factfinding proceedings ordered on review; to proceedings in revision; and to contempt proceedings except those in which the judge may act summarily.

(b) **Rules of privilege.** The rules with respect to privileges in Section III and V apply at all stages of all actions, cases, and proceedings.

(c) **Rules relaxed.** The application of these rules may be relaxed in sentencing proceedings as provided under R.C.M. 1001 and otherwise as provided in this Manual.

(d) **Rules inapplicable.** These rules (other than with respect to privileges and Mil. R. Evid. 412) do not apply in investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence pursuant to Article 72; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the code or this Manual and not listed in subdivision (a).

**Rule 1102. Amendments**

Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 180 days after the effective date of such amendments unless action to the contrary is taken by the President.
M.R.E. 1103

Rule 1103. Title

These rules may be known and cited as the Military Rules of Evidence.
PART IV
PUNITIVE ARTICLES

Discussion

Paragraphs 1 and 2 discuss the two articles of the code that are located in the punitive article subchapter of the code, but which are not punitive as such: Article 77, principals; and Article 79, lesser included offenses.

R.C.M. 307 prescribes rules for preferral of charges. The discussion under that rule explains how to allege violations under the code using the format of charge and specification.

Beginning with paragraph 3, the punitive articles of the code are discussed using the following sequence:

a. Text of the article
b. Elements of the offense or offenses
c. Explanation
d. Lesser included offenses
e. Maximum punishment
f. Sample specifications

The term "elements," as used in Part IV, includes both the statutory elements of the offense and any aggravating factors listed under the President's authority which increases the maximum permissible punishment when specified aggravating factors are pleaded and proven.

The prescriptions of maximum punishments in subparagraph e of each paragraph of this part must be read in conjunction with R.C.M. 1003, which prescribes additional punishments that may be available and additional limitations on punishments. The sample specifications provided in subparagraph f of each paragraph in this part are guides. The specifications may be varied in form and content as necessary. See R.C.M. 307 for additional guidance.

1. Article 77—Principals

   a. Text. "Any person punishable under this chapter who—

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

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

   b. Explanation.

      (1) Purpose. Article 77 does not define an offense. Its purpose is to make clear that a person need not personally perform the acts necessary to constitute an offense to be guilty of it. A person who aids, abets, counsels, commands, or procures the commission of an offense, or who causes an act to be done which, if done by that person directly, would be an offense is equally guilty of the offense as one who commits it directly, and may be punished to the same extent.

      Article 77 eliminates the common law distinctions between principal in the first degree ("perpetrator"); principal in the second degree (one who aids, counsels, commands, or encourages the commission of an offense and who is present at the scene of the crime—commonly known as an "aider and abettor"); and accessory before the fact (one who aids, counsels, commands, or encourages the commission of an offense and who is not present at the scene of the crime). All of these are now "principals."

      (2) Who may be liable for an offense.

         (a) Perpetrator. A perpetrator is one who actually commits the offense, either by the perpetrator's own hand, or by causing an offense to be committed by knowingly or intentionally inducing or setting in motion acts by an animate or inanimate agency or instrumentality which result in the commission of an offense. For example, a person who knowingly conceals contraband drugs in an automobile, and then induces another person, who is unaware and has no reason to know of the presence of drugs, to drive the automobile onto a military installation, is, although not present in the automobile, guilty of wrongful introduction of drugs onto a military installation. (On these facts, the driver would be guilty of no crime.) Similarly, if, upon orders of a superior, a soldier shot a person who appeared to the soldier to be an enemy, but was known to the superior as a friend, the superior would be guilty of murder (but the soldier would be guilty of no offense).

         (b) Other Parties. If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must:
§1b(2)(b)(i)

(i) Assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and

(ii) Share in the criminal purpose of design.

One who, without knowledge of the criminal venture or plan, unwittingly encourages or renders assistance to another in the commission of an offense is not guilty of a crime. See the parentheticals in the examples in paragraph 1b(2)(a) above. In some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person (for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime if such a noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(3) Presence.

(a) Not necessary. Presence at the scene of the crime is not necessary to make one a party to the crime and liable as a principal. For example, one who, knowing that person intends to shoot another person, provides the person with a pistol, is guilty of assault when the offense is committed, even though not present at the scene.

(b) Not sufficient. Mere presence at the scene of a crime does not make one a principal unless the requirements of paragraph 1b(2)(a) or (b) have been met.

(4) Parties whose intent differs from the perpetrator’s. When an offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must prove that the accused had that intent or state of mind, whether the accused is charged as a perpetrator or an “other party” to crime. It is possible for a party to have a state of mind more or less culpable than the perpetrator of the offense. In such a case, the party may be guilty of a more or less serious offense than that committed by the perpetrator. For example, when a homicide is committed, the perpetrator may act in the heat of sudden passion caused by adequate provocation and be guilty of manslaughter, while the party who, without such passion, hands the perpetrator a weapon and encourages the perpetrator to kill the victim, would be guilty of murder. On the other hand, if a party assists a perpetrator in an assault on a person who, known only to the perpetrator, is an officer, the party would be guilty only of assault, while the perpetrator would be guilty of assault on an officer.

(5) Responsibility for other crimes. A principal may be convicted of crimes committed by another principal if such crimes are likely to result as a natural and probable consequence of the criminal venture or design. For example, the accused who is a party to a burglary is guilty as a principal not only of the offense of burglary, but also, if the perpetrator kills an occupant in the course of the burglary, of murder. (See also paragraph 5 concerning liability for offenses committed by co-conspirators.)

(6) Principals independently liable. One may be a principal, even if the perpetrator is not identified or prosecuted, or is acquitted.

(7) Withdrawal. A person may withdraw from a common venture or design and avoid liability for any offenses committed after the withdrawal. To be effective, the withdrawal must meet the following requirements:

(a) It must occur before the offense is committed;

(b) The assistance, encouragement, advice, instigation, counsel, command, or procurement given by the person must be effectively countermanded or negated; and

(c) The withdrawal must be clearly communicated to the would-be perpetrators or to appropriate law enforcement authorities in time for the perpetrators to abandon the plan or for law enforcement authorities to prevent the offense.

2. Article 78—Accessory after the fact

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

b. Elements.

(1) That an offense punishable by the code was committed by a certain person;

(2) That the accused knew that this person had committed such offense;

(3) That thereafter the accused received, comforted, or assisted the offender; and

IV-2
(4) That the accused did so for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

c. Explanation.

(1) In general. The assistance given a principal by an accessory after the fact is not limited to assistance designed to effect the escape or concealment of the principal, but also includes acts performed to conceal the commission of the offense by the principal (for example, by concealing evidence of the offense).

(2) Failure to report offense. The mere failure to report a known offense will not make one an accessory after the fact. Such failure may violate a general order or regulation, however, and thus constitute an offense under Article 92. See paragraph 16. If the offense involved is a serious offense, failure to report it may constitute the offense of misprision of a serious offense, under Article 134. See paragraph 95.

(3) Offense punishable by the code. The term “offense punishable by this chapter” in the text of the article means any offense described in the code.

(4) Status of principal. The principal who committed the offense in question need not be subject to the code, but the offense committed must be punishable by the code.

(5) Conviction or acquittal of principal. The prosecution must prove that a principal committed the offense to which the accused is allegedly an accessory after the fact. However, evidence of the conviction or acquittal of the principal in a separate trial is not admissible to show that the principal did or did not commit the offense. Furthermore, an accused may be convicted as an accessory after the fact despite the acquittal in a separate trial of the principal whom the accused allegedly comforted, received, or assisted.

(6) Accessory after the fact not a lesser included offense. The offense of being an accessory after the fact is not a lesser included offense of the primary offense.

(7) Actual knowledge. Actual knowledge is required but may be proved by circumstantial evidence.

d. Lesser included offense. Article 80- attempts

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

f. Sample specification.

In that ___________ (personal jurisdiction data), knowing that (at/on board—location), on or about ______________ 19____________, _____________ had committed an offense punishable by the Uniform Code of Military Justice, to wit: _____________, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ______________ 19____________, in order to (hinder) (prevent) the (apprehension) (trial) (punishment) of the said _____________, (receive) (comfort) (assist) the said _____________ by ___________.

3. Article 79—Conviction of lesser included offenses

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

b. Explanation.

(1) In general. A lesser offense is included in a charged offense when the specification contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it in addition to the offense specifically charged. This requirement of notice may be met when:

(a) All of the elements of the lesser offense are included in the greater offense, and the common elements are identical (for example, larceny as a lesser included offense of robbery);

(b) All of the elements of the lesser offense are included in the greater offense, but one or more elements is legally less serious (for example, housebreaking as lesser included offense of burglary); or

(c) All of the elements of the lesser offense are included and necessary parts of the greater offense, but the mental element is legally less serious (for example, wrongful appropriation as a lesser included offense of larceny).

The notice requirement may also be met, depending on the allegations in the specification, even though
an included offense requires proof of an element not required in the offense charged. For example, assault with a dangerous weapon may be included in a robbery.

(2) Multiple lesser included offenses. When the offense charged is a compound offense comprising two or more included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged. For example, robbery includes both larceny and assault. Therefore, in a proper case, a court-martial may find an accused not guilty of robbery, but guilty of wrongful appropriation and assault.

(3) Findings of guilty to a lesser included offense. A court-martial may find an accused not guilty of the offense charged, but guilty of a lesser included offense by the process of exception and substitution. The court-martial may except (that is, delete) the words in the specification that pertain to the offense charged and, if necessary, substitute language appropriate to the lesser included offense. For example, the accused is charged with murder in violation of Article 118, but found guilty of voluntary manslaughter in violation of Article 119. Such a finding may be worded as follows:

Of the Specification: Guilty, except the word "murder," substituting therefor the words "willfully and unlawfully kill", of the excepted word, not guilty, of the substituted words, guilty.

Of the Charge: Not guilty, but guilty of a violation of Article 119.

If a court-martial finds an accused guilty of a lesser included offense, the finding as to the charge shall state a violation of the specific punitive article violated and not a violation of Article 79.

(4) Specific lesser included offenses. Specific lesser included offenses, if any, are listed for each offense discussed in this Part, but the lists are not all-inclusive.

4. Article 80—Attempts

a. Text.

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

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

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

b. Elements.

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

c. Explanation.

(1) In general. To constitute an attempt there must be a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose.

(2) More than preparation. Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson by applying a burning match to a haystack, even if no fire results. The overt act need not be the last act essential to the consummation of the offense. For example, an accused could commit an overt act, and then voluntarily decide not to go through with the intended offense. An attempt would nevertheless have been committed, for the combination of a specific intent to commit an offense, plus the commission of an overt act directly tending to accomplish it, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(3) Factual impossibility. A person who purposely engages in conduct which would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt. For example, if A, without justification or excuse and with intent to kill B, points a gun at B and pulls the trigger, A is guilty of attempt to murder,
even though, unknown to A, the gun is defective and will not fire. Similarly, a person who reaches into the pocket of another with the intent to steal that person’s billfold is guilty of an attempt to commit larceny, even though the pocket is empty.

(4) Solicitation. Soliciting another to commit an offense does not constitute an attempt. See paragraph 6 for a discussion of article 82, solicitation.

(5) Attempts not under Article 80. While most attempts should be charged under Article 80, the following attempts are specifically addressed by some other article, and should be charged accordingly:

(a) Article 85—desertion
(b) Article 94—mutiny or sedition
(c) Article 100—subordinate compelling
(d) Article 104—aiding the enemy
(e) Article 106a—espionage
(f) Article 128—assault

(6) Regulations. An attempt to commit conduct which would violate a lawful general order or regulation under Article 92 (see paragraph 16) should be charged under Article 80. It is not necessary in such cases to prove that the accused intended to violate the order or regulation, but it must be proved that the accused intended to commit the prohibited conduct.

d. Lesser included offenses. If the accused is charged with an attempt under Article 80, and the offense attempted has a lesser included offense, then the offense of attempting to commit the lesser included offense would ordinarily be a lesser included offense to the charge of attempt. For example, if an accused was charged with attempted larceny, the offense of attempted wrongful appropriation would be a lesser included offense, although it, like the attempted larceny, would be a violation of Article 80.

e. Maximum punishment. Any person subject to the code who is found guilty of an attempt under Article 80 to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be adjudged, nor shall any mandatory minimum punishment provisions apply; and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged.

f. Sample specification.

In that __________________ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________________ 19 ____________, attempt to (describe offense with sufficient detail to include expressly or by necessary implication every element).

5. Article 81—Conspiracy

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

b. Elements.

(1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

c. Explanation.

(1) Co-conspirators. Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the criminal purpose need not be established. The accused must be subject to the code, but the other co-conspirators need not be. A person may be guilty of conspiracy although incapable of committing the intended offense. For example, a bedridden conspirator may knowingly furnish the car to be used in a robbery. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. However, the conspirator who joined an existing conspiracy can be convicted of this offense only if, at or after the time of joining the conspiracy, an overt act in furtherance of the object of the agreement is committed.

(2) Agreement. The agreement in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play.
(3) **Object of the agreement.** The object of the agreement must, at least in part, involve the commission of one or more offenses under the code. An agreement to commit several offenses is ordinarily but a single conspiracy. Some offenses require two or more culpable actors acting in concert. There can be no conspiracy where the agreement exists only between the persons necessary to commit such an offense. Examples include dueling, bigamy, incest, adultery, and bribery.

(4) **Overt act.**
   
   (a) The overt act must be independent of the agreement to commit the offense; must take place at the time of or after the agreement; must be done by one or more of the conspirators, but not necessarily the accused; and must be done to effectuate the object of the agreement.

   (b) The overt act need not be itself criminal, but it must be a manifestation that the agreement is being executed. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. Any overt act is enough, no matter how preliminary or preparatory in nature, as long as it is a manifestation that the agreement is being executed.

   (c) An overt act by one conspirator becomes the act of all without any new agreement specifically directed to that act and each conspirator is equally guilty even though each does not participate in, or have knowledge of, all of the details of the execution of the conspiracy.

(5) **Liability for offenses.** Each conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to it.

(6) **Withdrawal.** A party to the conspiracy who abandons or withdraws from the agreement to commit the offense before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement and which shows that the party has severed all connection with the conspiracy. A conspirator who effectively abandons or withdraws from the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the abandonment or withdrawal. However, a person who has abandoned or withdrawn from the conspiracy is not liable for offenses committed thereafter by the remaining conspirators. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) **Factual impossibility.** It is not a defense that the means adopted by the conspirators to achieve their object, if apparently adapted to that end, were actually not capable of success, or that the conspirators were not physically able to accomplish their intended object.

(8) **Conspiracy as a separate offense.** A conspiracy to commit an offense is a separate and distinct offense from the offense which is the object of the conspiracy, and both the conspiracy and the consummated offense which was its object may be charged, tried, and punished. The commission of the intended offense may also constitute the overt act which is an element of the conspiracy to commit that offense.

(9) **Special conspiracies under Article 134.** The United States Code prohibits conspiracies to commit certain specific offenses which do not require an overt act. These conspiracies should be charged under Article 134. Examples include conspiracies to impede or injure any Federal officer in the discharge of duties under 18 U.S.C. § 372, conspiracies against civil rights under 18 U.S.C. § 241, and certain drug conspiracies under 21 U.S.C. § 846. See paragraph 60c(4)(c)(ii).

d. **Lesser included offense.** Article 80—attempts 
e. **Maximum punishment.** Any person subject to the code who is found guilty of conspiracy shall be subject to the maximum punishment authorized for the offense which is the object of the conspiracy, except that in no case shall the death penalty be imposed.

f. **Sample specification.**

   In that _______ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________, 19________, conspire with _________ (and _________) to commit an offense under the Uniform Code of Military Justice, to wit: (larceny of ___________, of a value of (about) $ __________, the property of ___________), and in order to effect the object of the conspiracy the said ____________ (and ____________) did ____________. 

IV-6
6. Article 82—Solicitation

a. Text.

“(a) Any person subject to this chapter who solicits or advises another or other to desert in violation of section 885 of this title (Article 85) or mutiny in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of section 899 of this title (Article 99) or sedition in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.”

b. Elements.

(1) That the accused solicited or advised a certain person or persons to commit any of the four offenses named in Article 82; and

(2) That the accused did so with the intent that the offense actually be committed.

[Note: If the offense solicited or advised was attempted or committed, add the following element]

(3) That the offense solicited or advised was (committed) (attempted) as the proximate result of the solicitation.

c. Explanation.

(1) Instantaneous offense. The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to influence another or others to commit any of the four offenses named in Article 82. It is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice.

(2) Form of solicitation. Solicitation may be by means other than word of mouth or writing. Any act or conduct which reasonably may be construed as a serious request or advice to commit one of the four offenses named in Article 82 may constitute solicitation. It is not necessary that the accused act alone in the solicitation or in the advising; the accused may act through other persons in committing this offense.

(3) Solicitations in violation of Article 134. Solicitation to commit offenses other than violations of the four offense named in Article 82 may be charged as violations of Article 134. See paragraph 105. However, some offenses require, as an element of proof, some act of solicitation by the accused. These offenses are separate and distinct from solicitations under Articles 82 and 134. When the accused's act of solicitation constitutes, by itself, a separate offense, the accused should be charged with that separate, distinct offense—for example, pandering (see paragraph 97) and obstruction of justice (see paragraph 96) in violation of Article 134.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment. If the offense solicited or advised is committed or (in the case of soliciting desertion or mutiny) attempted, then the accused shall be punished with the punishment provided for the commission of the offense solicited or advised. If the offense solicited or advised is not committed or (in the case of soliciting desertion or mutiny) attempted, then the following punishment may be imposed:

(1) To desert—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) To mutiny—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) To commit an act of misbehavior before the enemy—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(4) To commit an act of sedition—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. Sample specifications.

(1) For soliciting desertion (Article 85) or mutiny (Article 94).

In that ____________ (personal jurisdiction data), did, (at/on board—location), on or about ____________ 19___________, (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise) ____________ (and ____________) to (desert in violation of Article 85) (mutiny in violation of Article 94)

[Note: If the offense solicited or advised is attempted or committed, add the following at the end of the specification:]

IV-7
and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about __________, 19__________, (at/on board—location), (attempted) (committed) by __________ (and __________). 

(2) For soliciting an act of misbehavior before the enemy (Article 99) or sedition (Article 94). 
In that __________ (personal jurisdiction data) did, (at/on board—location), on or about __________ 19__________, (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise), __________ (and __________) to commit (an act of misbehavior before the enemy in violation of Article 99) (sedition in violation of Article 94) [Note: If the offense solicited or advised is committed, add the following at the end of the specification:] and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about __________, 19__________, (at/on board—location), committed by __________ (and __________).

7. Article 83—Fraudulent enlistment, appointment, or separation
a. Text.
"Any person who—

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

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

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

b. Elements.
(1) Fraudulent enlistment or appointment.
(a) That the accused was enlisted or appointed in an armed force;
(b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts regarding qualifications of the accused for enlistment or appointment;
(c) That the accused's enlistment or appointment was obtained or procured by that knowingly false representation or deliberate concealment; and
(d) That under this enlistment or appointment that accused received pay or allowances or both.
(2) Fraudulent separation.
(a) That the accused was separated from an armed force;
(b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts about the accused's eligibility for separation; and
(c) That the accused's separation was obtained or procured by that knowingly false representation or deliberate concealment.
c. Explanation.

(1) In general. A fraudulent enlistment, appointment, or separation is one procured by either a knowingly false representation as to any of the qualifications prescribed by law, regulation, or orders for the specific enlistment, appointment, or separation, or a deliberate concealment as to any of those disqualifications. Matters that may be material to an enlistment, appointment, or separation include any information used by the recruiting, appointing, or separating officer in reaching a decision as to enlistment, appointment, or separation in any particular case, and any information that normally would have been so considered had it been provided to that officer.

(2) Receipt of pay or allowances. A member of the armed forces who enlists or accepts an appointment without being regularly separated from a prior enlistment or appointment should be charged under Article 83 only if that member has received pay or allowances under the fraudulent enlistment or appointment. Acceptance of food, clothing, shelter, or transportation from the government constitutes receipt of allowances. However, whatever is furnished the accused while in custody, confinement, arrest, or other restraint pending trial for fraudulent enlistment or appointment is not considered an allowance. The receipt of pay or allowances may be proved by circumstantial evidence.

(3) One offense. One who procures one's own enlistment, appointment, or separation by several misrepresentations or concealment as to qualifications for the one enlistment, appointment, or separation so procured, commits only one offense under Article 83.
d. Lesser included offense. Article 80—attempts
e. Maximum punishment.
Fraudulent enlistment or appointment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

Fraudulent separation. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) For fraudulent enlistment or appointment.

In that _______________ (personal jurisdiction data), did, (at/on board—location), on or about _______________ 19______________, by means of (knowingly false representations that (here state the fact or facts material to qualification for enlistment or appointment which were represented), when in fact (here state the true fact of facts)) (deliberate concealment of the fact that (here state the fact or facts disqualifying the accused for enlistment or appointment which were concealed)), procure himself/herself to be (enlisted as a _______________) (appointed as a _______________) in the (here state the armed force in which the accused procured the enlistment or appointment), and did thereafter, (at/on board—location), receive (pay) (allowances) (pay and allowances) under the enlistment) (appointment) so procured.

(2) For fraudulent separation.

In that _______________ (personal jurisdiction data), did, (at/on board—location), on or about _______________ 19______________, by means of (knowingly false representations that (here state the fact or facts material to eligibility for separation which were represented), when in fact (here state the true fact of facts)) (deliberate concealment of the fact that (here state the fact or facts concealed which made the accused ineligible for separation)), procure himself/herself to be separated from the (here state the armed force from which the accused procured his/her separation).

8. Article 84—Effecting unlawful enlistment, appointment, or separation

a. Text.

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

b. Elements.

(1) That the accused effected the enlistment, appointment, or separation of the person named;

(2) That this person was ineligible for this enlistment, appointment, or separation because it was prohibited by law, regulation, or order; and

(3) That the accused knew of the ineligible at the time of the enlistment, appointment, or separation.

c. Explanation. It must be proved that the enlistment, appointment, or separation was prohibited by law, regulation, or order when effected and that the accused then knew that the person enlisted, appointed, or separated was ineligible for the enlistment, appointment, or separation.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.

In that _______________ (personal jurisdiction data), did, (at/on board—location), on or about _______________ 19______________, effect (the enlistment) (appointment) of _______________ as a _______________ in (here state the armed force in which the person was enlisted or appointed) (the separation of _______________ from (here state the armed force from which the person was separated)), then well knowing that the said _______________ was ineligible for such (enlistment) (appointment) (separation) because (here state facts whereby the enlistment, appointment, or separation was prohibited by law, regulation, or order).

9. Article 85—Desertion

a. Text.

"(a) Any member of the armed forces who—

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

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

(3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States..."
§9a.

[Note: This provision has been held not to state a separate offense by the United States Court of Military Appeals in United States v. Huff, 7 U.S.C.M.A. 247, 22 C.M.R. 37 (1956)]; is guilty of desertion.

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

(c) Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment, other than death, as a court-martial may direct.”

b. Elements.

(1) Desertion with intent to remain away permanently.

(a) That the accused absented himself or herself from his or her unit, organization, or place of duty;

(b) That such absence was without authority;

(c) That the accused, at the time the absence began or at some time during the absence, intended to remain away from his or her unit, organization, or place of duty permanently; and

(d) That the accused remained absent until the date alleged.

[Note: If the absence was terminated by apprehension, add the following element]

(e) That the accused’s absence was terminated by apprehension.

(2) Desertion with intent to avoid hazardous duty or to shirk important service.

(a) That the accused quit his or her unit, organization, or other place of duty;

(b) That the accused did so with the intent to avoid a certain duty or shirk a certain service;

(c) That the duty to be performed was hazardous or the service important;

(d) That the accused knew that he or she would be required for such duty or service; and

(e) That the accused remained absent until the date alleged.

(3) Desertion before notice of acceptance of resignation.

(a) That the accused was a commissioned officer of an armed force of the United States, and had tendered his or her resignation;

(b) That before he or she received notice of the acceptance of the resignation, the accused quit his or her post or proper duties;

(c) That the accused did so with the intent to remain away permanently from his or her post or proper duties; and

(d) That the accused remained absent until the date alleged.

[Note: If the absence was terminated by apprehension, add the following element]

(e) That the accused’s absence was terminated by apprehension.

(4) Attempted desertion.

(a) That the accused did a certain overt act;

(b) That the act was done with the specific intent to desert;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to effect the commission of the offense of desertion.

c. Explanation.

(1) Desertion with intent to remain away permanently.

(a) In general. Desertion with intent to remain away permanently is complete when the person absents himself or herself from his or her unit, organization, or place of duty, with the intent to remain away therefrom permanently. A prompt repentance and return, while material in extenuation, is no defense. It is not necessary that the person be absent entirely from military jurisdiction and control.

(b) Absence without authority—inception, duration, termination. See paragraph 10c.

(c) Intent to remain away permanently.

(i) The intent to remain away permanently from the unit, organization, or place of duty may be formed any time during the unauthorized absence. The intent need not exist throughout the absence, or for any particular period of time, as long as it exists at some time during the absence.

(ii) The accused must have intended to remain away permanently from the unit, organization, or place of duty. When the accused had such an intent, it is no defense that the accused also intended to
The intent to remain away permanently may be established by circumstantial evidence. Among the circumstances from which an inference may be drawn that an accused intended to remain absent permanently or; that the period of absence was lengthy; that the accused attempted to, or did, dispose of uniforms or other military property; that the accused purchased a ticket for a distant point or was arrested, apprehended, or surrendered a considerable distance from the accused’s station; that the accused could have conveniently surrendered to military control but did not; that the accused was dissatisfied with the accused’s unit, ship, or with military service; that the accused made remarks indicating an intention to desert; that the accused was under charges or had escaped from confinement at the time of the absence; that the accused made preparations indicative of an intent not to return (for example, financial arrangements); or that the accused enlisted or accepted an appointment in the same or another armed force without disclosing the fact that the accused had not been regularly separated, or entered any foreign armed service without being authorized by the United States. On the other hand, the following are included in the circumstances which may tend to negate an inference that the accused intended to remain away permanently: previous long and excellent service; that the accused left valuable personal property in the unit or on the ship; or that the accused was under the influence of alcohol or drugs during the absence. These lists are illustrative only.

Entries on documents, such as personnel accountability records, which administratively refer to an accused as a “deserter” are not evidence of intent to desert.

Proof of, or a plea of guilty to, an unauthorized absence, even of extended duration, does not, without more, prove guilt of desertion.

Effect of enlistment or appointment in the same or a different armed force. Article 85a(3) does not state a separate offense. Rather, it is a rule of evidence by which the prosecution may prove intent to remain away permanently. Proof of an enlistment or acceptance of an appointment in a service without disclosing a preexisting duty status in the same or a different service provides the basis from which an inference of intent to permanently remain away from the earlier unit, organization, or place of duty may be drawn. Furthermore, if a person, without being regularly separated from one of the armed forces, enlists or accepts an appointment in the same or another armed force, the person’s presence in the military service under such an enlistment or appointment is not a return to military control and does not terminate any desertion or absence without authority from the earlier unit or organization, unless the facts of the earlier period of service are known to military authorities. If a person, while in desertion, enlists or accepts an appointment in the same or another armed force, and deserts while serving the enlistment or appointment, the person may be tried and convicted for each desertion.

Quitting unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service.

(a) Hazardous duty or important service. “Hazardous duty” or “important service” may include service such as duty in a combat or other dangerous area; embarkation for certain foreign or sea duty; movement to a port of embarkation for that purpose; entrainment for duty on the border or coast in time of war or threatened invasion or other disturbances; strike or riot duty; or employment in aid of the civil power in, for example, protecting property, or quelling or preventing disorder in times of great public disaster. Such services as drill, target practice, maneuvers, and practice marches are not ordinarily “hazardous duty or important service.” Whether a duty is hazardous or a service is important depends upon the circumstances of the particular case, and is a question of fact for the court-martial to decide.

(b) Quits. “Quits” in Article 85 means “goes absent without authority.”

(c) Actual knowledge. Article 85a(2) requires proof that the accused actually knew of the hazardous duty or important service. Actual knowledge may be proved by circumstantial evidence.

(3) Attempting to desert. Once the attempt is made, the fact that the person desists, voluntarily or otherwise, does not cancel the offense. The offense is complete, for example, if the person, intending to desert, hides in an empty freight car on a military reservation, intending to escape by being taken away in the car. Entering the car with the intent to desert is the overt act. For a more detailed discussion of at-
tempts, see paragraph 4. For an explanation concerning intent to remain away permanently, see subparagraph 9c(1)(c).

(4) **Prisoner with executed punitive discharge.** A prisoner whose dismissal or dishonorable or bad-conduct discharge has been executed is not a "member of the armed forces" within the meaning of Articles 85 or 86, although the prisoner may still be subject to military law under Article 2(a)(7). If the facts warrant, such a prisoner could be charged with escape from confinement under Article 95 or an offense under Article 134.

**d. Lesser included offense.** Article 86—absence without leave

e. **Maximum punishment.**

1. **Completed or attempted desertion with intent to avoid hazardous duty or to shirk important service.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

2. **Other cases of completed or attempted desertion.**

   (a) **Terminated by apprehension.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

   (b) **Terminated otherwise.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

3. **In time of war.** Death or such other punishment as a court-martial may direct.

f. **Sample specifications.**

1. **Desertion with intent to remain away permanently.**

   In that (personal jurisdiction data), did, on or about 19_____, (a time of war) without authority and with intent to remain away therefrom permanently, absent himself/herself from his/her (unit) (organization) (place of duty), to wit: __________, located at (___________), and did remain so absent in desertion until on or about __________ 19___________.

2. **Desertion prior to acceptance of resignation.**

   In that (personal jurisdiction data) having tendered his/her resignation and prior to due notice of the acceptance of the same, did, on or about __________ 19_______, (a time of war) without leave and with intent to remain away therefrom permanently, quit his/her (post) (proper duties), to wit: __________, and did remain so absent in desertion until (he/she was apprehended) on or about __________ 19___________.

4. **Attempted desertion.**

   In that (personal jurisdiction data), did (at/on board-location), on or about __________ 19_______, (a time of war) attempt to (absent himself/herself from his/her (unit) (organization) (place of duty) to wit: __________, without authority and with intent to remain away therefrom permanently) (quit his/her (unit) (organization) (place of duty), to wit: __________, located at __________, with intent to (avoid hazardous duty) (shirk important service) namely __________ (______).

10. **Article 86—Absence without leave**

   a. **Text.**

   "Any member of the armed forces who, without authority—

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

   (2) goes from that place; or

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

   b. **Elements.**

   (1) Failure to go to appointed place of duty.

   (a) That a certain authority appointed a certain time and place of duty for the accused;

   (b) That the accused knew of that time and place; and

   (c) That the accused, without authority, failed to go to the appointed place of duty at the time prescribed.
(2) Going from appointed place of duty.
   (a) That a certain authority appointed a certain time and place of duty for the accused;
   (b) That the accused knew of that time and place; and
   (c) That the accused, without authority, went from the appointed place of duty after having reported at such place.

(3) Absence from unit, organization, or place of duty.
   (a) That the accused absented himself or herself from his or her unit, organization, or place of duty at which he or she was required to be;
   (b) That the absence was without authority from anyone competent to give him or her leave; and
   (c) That the absence was for a certain period of time.
   [Note: if the absence was terminated by apprehension, add the following element]
   (d) That the absence was terminated by apprehension.

(4) Abandoning watch or guard.
   (a) That the accused was a member of a guard, watch, or duty;
   (b) That the accused absented himself or herself from his or her guard, watch, or duty section;
   (c) That absence of the accused was without authority; and
   [Note: If the absence was with intent to abandon the accused’s guard, watch, or duty section, add the following element]
   (d) That the accused intended to abandon his or her guard, watch, or duty section.

(5) Absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises.
   (a) That the accused absented himself or herself from his or her unit, organization, or place of duty at which he or she was required to be;
   (b) That the absence of the accused was without authority;
   (c) That the absence was for a certain period of time;
   (d) That the accused knew that the absence would occur during a part of a period of maneuvers or field exercises; and
   (e) That the accused intended to avoid all or part of a period of maneuvers or field exercises.

c. Explanation.

(1) In general. This article is designed to cover every case not elsewhere provided for in which any member of the armed forces is through the member’s own fault not at the place where the member is required to be at a prescribed time. It is not necessary that the person be absent entirely from military jurisdiction and control. The first part of this article—relating to the appointed place of duty—applies whether the place is appointed as a rendezvous for several or for one only.

(2) Actual knowledge. The offenses of failure to go to and going from appointed place of duty require proof that the accused actually knew of the appointed time and place of duty. The offense of absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises requires proof that the accused actually knew that the absence would occur during a part of a period of maneuvers or field exercises. Actual knowledge may be proved by circumstantial evidence.

(3) Intent. Specific intent is not an element of unauthorized absence. Specific intent is an element for certain aggravated unauthorized absences.

(4) Aggravated forms of unauthorized absence. There are variations of unauthorized absence under Article 86(3) which are more serious because of aggravating circumstances such as duration of the absence, a special type of duty from which the accused absents himself or herself, and a particular specific intent which accompanies the absence. These circumstances are not essential elements of a violation of Article 86. They simply constitute special matters in aggravation. The following are aggravated unauthorized absences:
   (a) Unauthorized absence for more than 3 days (duration).
   (b) Unauthorized absence for more than 30 days (duration).
   (c) Unauthorized absence from a guard, watch, or duty (special type of duty).
   (d) Unauthorized absence from guard, watch, or duty section with the intent to abandon it (special type of duty and specific intent).
   (e) Unauthorized absence with the intent to avoid maneuvers or field exercises (special type of duty and specific intent).

(5) Control by civilian authorities. A member of the armed forces turned over to the civilian authorities upon request under Article 14 (see R.C.M. 106)
is not absent without leave while held by them under that delivery. When a member of the armed forces, being absent with leave, or absent without leave, is held, tried, and acquitted by civilian authorities, the member’s status as absent with leave, or absent without leave, is not thereby changed, regardless how long held. The fact that a member of the armed forces is convicted by the civilian authorities, or adjudicated to be a juvenile offender, or the case is “diverted” out of the regular criminal process for a probationary period does not excuse any unauthorized absence, because the member’s inability to return was the result of willful misconduct. If a member is released by the civilian authorities without trial, and was on authorized leave at the time of arrest or detention, the member may be found guilty of unauthorized absence only if it is proved that the member actually committed the offense for which detained, thus establishing that the absence was the result of the member’s own misconduct.

(6) Inability to return. The status of absence without leave is not changed by an inability to return through sickness, lack of transportation facilities, or other disabilities. But the fact that all or part of a period of unauthorized absence was in a sense enforced or involuntary is a factor in extenuation and should be given due weight when considering the initial disposition of the offense. When, however, a person on authorized leave, without fault, is unable to return at the expiration thereof, that person has not committed the offense of absence without leave.

(7) Determining the unit or organization of an accused. A person undergoing transfer between activities is ordinarily considered to be attached to the activity to which ordered to report. A person on temporary additional duty continues as a member of the regularly assigned unit and if the person is absent from the temporary duty assignment, the person becomes absent without leave from both units, and may be charged with being absent without leave from either unit.

(8) Duration. Unauthorized absence under Article 86(3) is an instantaneous offense. It is complete at the instant an accused absents himself or herself without authority. Duration of the absence is a matter in aggravation for the purpose of increasing the maximum punishment authorized for the offense. Even if the duration of the absence is not over 3 days, it is ordinarily alleged in an Article 86(3) specific-
sences under one specification, provided that each absence is included within the period alleged in the specification and provided that the accused was not misled. If an accused is found guilty of two or more unauthorized absences under a single specification, the maximum authorized punishment shall not exceed that authorized if the accused had been found guilty as charged in the specification.

d. Lesser included offense. Article 80—

e. Maximum punishment.

(1) Failing to go to, or going from, the appointed place of duty. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(2) Absence from unit, organization, or other place of duty.

(a) For not more than 3 days. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(b) For more than 3 days but not more than 30 days. Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

(c) For more than 30 days. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(d) For more than 30 days and terminated by apprehension. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(3) From guard or watch. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(4) From guard or watch with intent to abandon. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(5) With intent to avoid maneuvers of field exercises. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. Sample specifications.

(1) Failing to go or leaving place of duty.

In that _______ (personal jurisdiction data), did (at/on board-location), on or about _______ 19______, without authority, absente himself/herself from his/her (unit) (organization) (place of duty at which he/she was required to be), to wit: ___________, located at ____________, and did remain so absent until (he/she was apprehended) on or about ____________ 19______.

(3) Absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises.

In that _______ (personal jurisdiction data), did, on or about _______ 19______, without authority and with intent to avoid (maneuvers) (field exercises), absent himself/herself from his/her (unit) (organization) (place of duty at which he/she was required to be), to wit: ___________ located at (___________), and did remain so absent until on or about _______ 19______

(4) Abandoning watch or guard.

In that _______ (personal jurisdiction data), being a member of the _______ (guard) (watch) (duty section), did, (at/on board-location), on or about _______ 19______, without authority, go from his/her (guard) (watch) (duty section) (with intent to abandon the same).

11. Article 87—Missing movement

a. Text.

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

b. Elements.

(1) That the accused was required in the course of duty to move with a ship, aircraft or unit;

(2) That the accused knew of the prospective movement of the ship, aircraft or unit;

(3) That the accused missed the movement of the ship, aircraft or unit; and

(4) That the accused missed the movement through design or neglect.

c. Explanation.

(1) Movement. "Movement" as used in Article 87 includes a move, transfer, or shift of a ship, aircraft, or unit involving a substantial distance and period of time. Whether a particular movement is substantial is a question to be determined by the court-
martial considering all the circumstances. Changes which do not constitute a “movement” include practice marches of a short duration with a return to the point of departure, and minor changes in location of ships, aircraft, or units, as when a ship is shifted from one berth to another in the same shipyard or harbor or when a unit is moved from one barrack to another on the same post.

(2) Mode of movement.

(a) Unit. If a person is required in the course of duty to move with a unit, the mode of travel is not important, whether it be military or commercial, and includes travel by ship, train, aircraft, truck, bus, or walking. The word “unit” is not limited to any specific technical category such as those listed in a table of organization and equipment, but also includes units which are created before the movement with the intention that they have organizational continuity upon arrival at their destination regardless of their technical designation, and units intended to be disbanded upon arrival at their destination.

(b) Ship, aircraft. If a person is assigned as a crew member or is ordered to move as a passenger aboard a particular ship or aircraft, military or chartered, then missing the particular sailing or flight is essential to establish the offense of missing movement.

(3) Design. “Design” means on purpose, intentionally, or according to plan and requires specific intent to miss the movement.

(4) Neglect. “Neglect” means the omission to take such measures as are appropriate under the circumstances to assure presence with a ship, aircraft, or unit at the time of a scheduled movement, or doing some act without giving attention to its probable consequences in connection with the prospective movement, such as a departure from the vicinity of the prospective movement to such a distance as would make it likely that one could not return in time for the movement.

(5) Actual knowledge. In order to be guilty of the offense, the accused must have actually known of the prospective movement that was missed. Knowledge of the exact hour or even of the exact date of the scheduled movement is not required. It is sufficient if the approximate date was known by the accused as long as there is a causal connection between the conduct of the accused and the missing of the scheduled movement. Knowledge may be proved by circumstantial evidence.

(6) Proof of absence. That the accused actually missed the movement may be proved by documentary evidence, as by a proper entry in a log or a morning report. This fact may also be proved by the testimony of personnel of the ship, aircraft, or unit (or by other evidence) that the movement occurred at a certain time, together with evidence that the accused was physically elsewhere at that time.

d. Lesser included offenses.

(1) Design.

(a) Article 87—missing movement through neglect

(b) Article 86—absence without authority

(c) Article 80—attempts

(2) Neglect. Article 86—absence without authority

e. Maximum punishment.

(1) Design. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) Neglect. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

In that ______________ (personal jurisdiction data), did, (at/on board—location), on or about ___________ 19 ___________ through (neglect) (design) miss the movement of (Aircraft No. ______________) (Flight ______________) (the USS ______________) (Company A, 1st Battalion, 7th Infantry) ______________) with which he/she was required in the course of duty to move.

12. Article 88—Contempt toward officials

a. Text.

“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 Transportation, or the Governor or legislature of any State, Territory, 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, Territory, 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. Lesser included offense. Article 80—attempts
e. Maximum punishment. Dismissal, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

In that ______________ (personal jurisdiction data), did, (at/on board—location), on or about ______________ 19 ____________, [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 ______________) (Territory of ______________), a (State) (Territory) ______________ in which he/she, the said ______________, was then (on duty), (present)], to wit: “_____________,” or words to that effect.

13. Article 89—Disrespect toward a superior commissioned officer

a. Text.

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

b. Elements.

(1) That the accused did or omitted certain acts or used certain language to or concerning a certain commissioned officer;

(2) That such behavior or language was directed toward that officer;

(3) That the officer toward whom the acts, omissions, or words were directed was the superior commissioned officer of the accused;

(4) That the accused then knew that the commissioned officer toward whom the acts, omissions, or words were directed was the accused’s superior commissioned officer; and

(5) That, under the circumstances, the behavior or language was disrespectful to that commissioned officer.

c. Explanation.

(1) Superior commissioned officer.

(a) Accused and victim in same armed force. If the accused and the victim are in the same armed force, the victim is a “superior commissioned officer” of the accused when either superior in rank or command to the accused; however, the victim is not a “superior commissioned officer” of the accused if the victim is inferior in command, even though superior in rank.

(b) Accused and victim in different armed forces. If the accused and the victim are in different armed forces, the victim is a “superior commissioned officer” of the accused when the victim is a commissioned officer and superior in the chain of command over the accused or when the victim, not a medical officer or a chaplain, is senior in grade to the accused and both are detained by a hostile entity so that recourse to the normal chain of command is prevented. The victim is not a “superior commissioned officer” of the accused merely because the victim is superior in grade to the accused.

IV-17
(c) Execution of office. It is not necessary that the “superior commissioned officer” be in the execution of office at the time of the disrespectful behavior.

(2) Knowledge. If the accused did not know that the person against whom the acts or words were directed was the accused’s superior commissioned officer, the accused may not be convicted of a violation of this article. Knowledge may be proved by circumstantial evidence.

(3) Disrespect. Disrespectful behavior is that which detracts from the respect due the authority and person of a superior commissioned officer. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual. Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language. Truth is no defense. Disrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer.

(4) Presence. It is not essential that the disrespectful behavior be in the presence of the superior, but ordinarily one should not be held accountable under this article for what was said or done in a purely private conversation.

(5) Special defense—unprotected victim. A superior commissioned officer whose conduct in relation to the accused under all the circumstances departs substantially from the required standards appropriate to that officer’s rank or position under similar circumstances loses the protection of this article. That accused may not be convicted of being disrespectful to the officer who has so lost the entitlement to respect protected by Article 89.

d. Lesser included offenses.

(1) Article 117—provoking speeches or gestures
(2) Article 80—attempts

e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

In that _______ (personal jurisdiction data), did, (at/on board—location), on or about ___________ 19__________, behave himself/herself with disrespect toward __________, his/her superior commissioned officer, then known by the said __________ to be his/her superior commissioned officer, by (saying to him/her “__________,” or words to that effect) (contemptuously turning from and leaving him/her while he/she, the said __________, was talking to him/her, the said __________) (__________).

14. Article 90—Assaulting or willfully disobeying superior commissioned officer

a. Text.

“All person subject to this chapter who—

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

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

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.”

b. Elements.

(1) Striking or assaulting superior commissioned officer.

(a) That the accused struck, drew, or lifted up a weapon against, or offered violence against, a certain commissioned officer;

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

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

(d) That the superior commissioned officer was then in the execution of office.

(2) Disobeying superior commissioned officer.

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

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

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

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

c. Explanation.

(1) Striking or assaulting superior commissioned officer.
(a) **Definitions.**

(i) Superior commissioned officer. The definitions in paragraph 13c(1)(a) and (b) apply here and in subparagraph c(2).

(ii) "Strikes" means an intentional blow, and includes any offensive touching of the person of an officer, however slight.

(iii) The phrase "draws or lifts up any weapon against" covers any simple assault committed in the manner stated. The drawing of any weapon in an aggressive manner or the raising or brandishing of the same in a threatening manner in the presence of and at the superior is the sort of act proscribed. The raising in a threatening manner of a firearm, whether or not loaded, of a club, or of anything by which a serious blow or injury could be given is included in "lifts up."

(iv) The phrase "offers any violence against" includes any form of battery or of mere assault not embraced in the preceding more specific terms "strikes" and "draws or lifts up." If not executed, the violence must be physically attempted or menaced. A mere threatening in words is not an offering of violence in the sense of this article.

(b) **Execution of office.** An officer is in the execution of office when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage. In general, any striking or use of violence against any superior officer by a person over whom it is the duty of that officer to maintain discipline at the time, would be striking or using violence against the officer in the execution of office. The commanding officer on board a ship or the commanding officer of a unit in the field is generally considered to be on duty at all times.

(c) **Knowledge.** If the accused did not know the officer was the accused's superior commissioned officer, the accused may not be convicted of this offense. Knowledge may be proved by circumstantial evidence.

(d) **Defenses.** In a prosecution for striking or assaulting a superior commissioned officer in violation of this article, it is a defense that the accused acted in the proper discharge of some duty, or that the victim behaved in a manner toward the accused such as to lose the protection of this article (see paragraph 13c(5)). For example, if the victim initiated an unlawful attack on the accused, this would deprive the victim of the protection of this article, and, in addition, could excuse any lesser included offense of assault as done in self-defense, depending on the circumstances (see paragraph 54c; R.C.M. 916(e)).

(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 peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime.

(ii) The commissioned officer issuing the order must have authority to give such an order. Authorization may be based on law, regulation, or custom of the service.

(iii) 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.

(iv) 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. If an order does not indicate the time within which it is to be complied with, either expressly or by implication, then a reasonable delay in compliance does not violate this article. 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. Lesser included offenses.

(1) Striking superior commissioned officer in execution of office.

(a) Article 90—drawing or lifting up a weapon or offering violence to superior commissioned officer in execution of office

(b) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon

(c) Article 128—assault or assault consummated by a battery upon commissioned officer not in the execution of office

(d) Article 80—attempts

(2) Drawing or lifting up a weapon or offering violence to superior commissioned officer in execution of office.

(a) Article 128—assault, assault with dangerous weapon

(b) Article 128—assault upon a commissioned officer not in the execution of office

(c) Article 80—attempts

(3) Willfully disobeying lawful order of superior commissioned officer.

(a) Article 92—failure to obey lawful order

(b) Article 89—disrespect to superior commissioned officer

(c) Article 80—attempts

e. Maximum punishment.

(1) Striking, drawing, or lifting up any weapon or offering any violence to superior commissioned officer in the execution of office. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) Willfully disobeying a lawful order of superior commissioned officer. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) In time of war. Death or such other punishment as a court-martial may direct.

f. Sample specifications.

(1) Striking superior commissioned officer.

In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19_______, (a time of war) strike __________, his/her superior commissioned officer, then known by the said __________ to be his/her superior commissioned officer, who was then in the execution of his/her office, (in) (on) the __________ with (a) (his/her) __________.

(2) Drawing or lifting up a weapon against superior commissioned officer.

In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19_______, (a time of war) (draw) lift up) a weapon, to wit: a __________, against __________, his/her superior commissioned officer, then known by the said __________ to be his/her superior commissioned officer, who was then in the execution of his/her office.

(3) Offering violence to superior commissioned officer.

In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19_______, (a time of war) offer violence against __________, his/
her superior commissioned officer, then known by
the said __________ to be his/her superior
commissioned officer, who was then in the execution
of his/her office, by ____________.

(4) Willful disobedience of superior commissioned
officer.

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 ____________
19____________, willfully disobey the same.

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

a. Text.

"Any warrant officer or enlisted member who—
(1) strikes or assaults a warrant officer, non-
commissioned officer, or petty officer, while that
officer is in the execution of his office;
(2) willfully disobeys the lawful order of a war-
rant officer, noncommissioned officer, or petty of-
licer; or
(3) treats with contempt or is disrespectful in
language or deportment toward a warrant, non-
commissioned officer, or petty officer while that
officer is in the execution of his office; shall be pun-
ished as a court-martial may direct."

b. Elements.

(1) Striking or assaulting warrant, noncom-
missioned, or petty officer.
(a) That the accused was a warrant officer or
enlisted member;
(b) That the accused struck or assaulted a cer-
tain 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, noncom-
missioned, or petty officer.
[Note: If the victim was the superior noncom-
missioned, or petty officer of the accused, add the fol-
lowing elements]
(e) That the victim was the superior noncom-
missioned, or petty officer of the accused; and
(f) That the accused then knew that the person
struck or assaulted was the accused's superior non-
commissioned, 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 or-
der; and
(e) That the accused willfully disobeyed the or-
der.

(3) Treating with contempt or being disrespectful
in language or deportment toward a warrant, non-
commissioned, 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 war-
rant, 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, noncom-
missioned, or petty officer.
[Note: If the victim was the superior noncom-
missioned, or petty officer of the accused, add the fol-
lowing elements]
(g) That the victim was the superior noncom-
missioned, 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 re-
spect 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 paragraph 14c. For a discussion of “assault,” see paragraph 54c. 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 paragraph 14c(2) 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 paragraph 14c. For a discussion of disrespect, see paragraph 13c.

d. Lesser included offenses.

(1) Striking or assaulting warrant, noncommissioned, or petty officer in the execution of office.

(a) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon

(b) Article 128—assault upon warrant, noncommissioned, or petty officer not in the execution of office

(c) Article 80—attempts

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

(a) Article 92—failure to obey a lawful order

(b) Article 80—attempts

(3) Treating with contempt or being disrespectful in language or deportment toward warrant, noncommissioned, or petty officer in the execution of office.

(a) Article 117—using provoking or reproachful speech

(b) Article 80—attempts

e. Maximum punishment.

(1) Striking or assaulted 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.

f. 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 _________ 19_______, (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), on or about ____________ 19____________, willfully disobey the same.

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

In that ____________ (personal jurisdiction data) (at/on board—location), on or about ____________ ______________, (did treat with disrespectful in (language) (deportment) 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) (__________)

16. Article 92—Failure to obey order or regulation

a. Text.

"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.

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 Transportation, 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 paragraph 14c(2)(a).

(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 conducting 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) above 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 a 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 paragraph 13c(1).

(ii) 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 paragraph 15b(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 willfullness, 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.

(4) Lesser included offense. Article 80—attempt.

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

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

[Note: For (1) and (2), above, 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.]

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

[Note: (A) and (B) above, 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.]
jurisdiction data, if required), on or about 19, (violate) (fail to obey) a lawful general (order) (regulation), to wit: (paragraph , (Army) (Air Force) Regulation dated 19, (Article No. , U.S. Navy Regulations, dated 19, (General Order No. , U.S. Navy, dated 19, (paragraph 9, 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 Instruction ), 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 19, 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, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about 19, 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 19, (from about 19, to about 19, 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.

17. Article 93—Cruelty and maltreatment

a. Text.

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

b. Elements.

(1) That a certain person was subject to the orders of the accused; and

(2) That the accused was cruel toward, or oppressed, or maltreated that person.

c. Explanation.

(1) Nature of victim. “Any person subject to his orders” means not only those persons under the direct or immediate command of the accused but extends to all persons, subject to the code or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the person.

(2) Nature of act. The cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature. The imposition of necessary or proper duties and the exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

In that , (personal jurisdiction data), (at/on board—location) (subject-matter jurisdiction data, if required), on or about 19, (was cruel toward) (did (oppress) (maltreat)) , a person subject to his/her orders, by (kicking him/her in the stomach) (confining him/her for twenty-four hours without water) .

IV-25
18. Article 94—Mutiny and sedition

a. Text.

"Any person subject to this chapter who—

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

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

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

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

b. Elements.

(1) Mutiny by creating violence or disturbance.

(a) That the accused created violence or a disturbance; and

(b) That the accused created this violence or disturbance with intent to usurp or override lawful military authority.

(2) Mutiny by refusing to obey orders or perform duty.

(a) That the accused refused to obey orders or otherwise do the accused's duty;

(b) That the accused in refusing to obey orders or perform duty acted in concert with another person or persons; and

(c) That the accused did so with intent to usurp or override lawful military authority.

(3) Sedition.

(a) That the accused created revolt, violence, or disturbance against lawful civil authority;

(b) That the accused acted in concert with another person or persons; and

(c) That the accused did so with the intent to cause the overthrow or destruction of that authority.

(4) Failure to prevent and suppress a mutiny or sedition.

(a) That an offense of mutiny or sedition was committed in the presence of the accused; and

(b) That the accused failed to do the accused's utmost to prevent and suppress the mutiny or sedition.

(5) Failure to report a mutiny or sedition.

(a) That an offense of mutiny or sedition occurred;

(b) That the accused knew or had reason to believe that the offense was taking place; and

(c) That the accused failed to take all reasonable means to inform the accused's superior commissioned officer or commander of the offense.

(6) Attempted mutiny.

(a) That the accused committed a certain overt act;

(b) That the act was done with specific intent to commit the offense of mutiny;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to effect the commission of the offense of mutiny.

c. Explanation.

(1) Mutiny. Article 94(a)(1) defines two types of mutiny, both requiring an intent to usurp or override military authority.

(a) Mutiny by creating violence or disturbance. Mutiny by creating violence or disturbance may be committed by one person acting alone or by more than one acting together.

(b) Mutiny by refusing to obey orders or perform duties. Mutiny by refusing to obey orders or perform duties requires collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. This concert of insubordination need not be preconceived, nor is it necessary that the insubordination be active or violent. It may consist simply of a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent, that is, with an intent to usurp or override lawful military authority. The intent may be declared in words or inferred from acts, omissions, or surrounding circumstances.

(2) Sedition. Sedition requires a concert of action in resistance to civil authority. This differs from mutiny by creating violence or disturbance. See subparagraph c(1)(a) above.
Failure to prevent and suppress a mutiny or sedition. “Utmost” means taking those measures to prevent and suppress a mutiny or sedition which may properly be called for by the circumstances, including the rank, responsibilities, or employment of the person concerned. “Utmost” includes the use of such force, including deadly force, as may be reasonably necessary under the circumstances to prevent and suppress a mutiny or sedition.

Failure to report a mutiny or sedition. Failure to “take all reasonable means to inform” includes failure to take the most expeditious means available. When the circumstances known to the accused would have caused a reasonable person in similar circumstances to believe that a mutiny or sedition was occurring, this may establish that the accused had such “reason to believe” that mutiny or sedition was occurring. Failure to report an impending mutiny or sedition is not an offense in violation of Article 94. But see paragraph 16c(3) (dereliction of duty).

Attempted mutiny. For a discussion of attempts, see paragraph 4.

d. Lesser included offenses.

(1) Mutiny by creating violence or disturbance.
   (a) Article 90—assault on commissioned officer
   (b) Article 91—assault on warrant, noncommissioned, or petty officer
   (c) Article 94—attempted mutiny
   (d) Article 116—riot; breach of peace
   (e) Article 128—assault
   (f) Article 134—disorderly conduct

(2) Mutiny by refusing to obey orders or perform duties.
   (a) Article 90—willful disobedience of commissioned officer
   (b) Article 91—willful disobedience of warrant, noncommissioned, or petty officer
   (c) Article 92—failure to obey lawful order
   (d) Article 94—attempted mutiny

(3) Sedition.
   (a) Article 116—riot; breach of peace
   (b) Article 128—assault
   (c) Article 134—disorderly conduct
   (d) Article 80—attempts

e. Maximum punishment. For all offenses under Article 94, death or such other punishment as a court-martial may direct.

f. Sample specifications.

(1) Mutiny by creating violence or disturbance.
   In that ___________ (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___________ 19_________, create (violence) (a disturbance) by (attacking the officers of the said ship) (barricading himself/herself in Barracks T7, firing his/her rifle at ___________, and exhorting other persons to join him/her in defiance of ___________).

(2) Mutiny by refusing to obey orders or perform duties.
   In that ___________ (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board—location) on or about ___________ 19_________, refuse, in concert with ___________ (and ___________) (others whose names are unknown), to (obey the orders of ___________ to ___________) (perform his/her duty as ___________).

(3) Sedition.
   In that ___________ (personal jurisdiction data), with intent to cause the (overthrow) (destruction) (overthrow and destruction) of lawful civil authority, to wit: ___________, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___________ 19__________, in concert with ___________ (and ___________) (others whose names are unknown), create (revolt) (violence) (a disturbance) against such authority by (entering the Town Hall of ___________ and destroying property and records therein) (marching upon and compelling the surrender of the police of ___________).

(4) Failure to prevent and suppress a mutiny or sedition.
   In that ___________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___________ 19_________, fail to do his/her utmost to prevent and suppress a (mutiny) (sedition) among the (soldiers) (sailors) (airmen) (marines) (___________) of ___________, which (mutiny) (sedition) was being committed in
his/her presence, in that (he/she took no means to compel the dispersal of the assembly) (he/she made no effort to assist who was attempting to quell the mutiny) ( ).

5. Failure to report a mutiny or sedition.

In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about 19, fail to take all reasonable means to inform his/her superior commissioned officer or his/her commander of a (mutiny) (sedition) among the (soldiers) (sailors) (airmen) (marines) ( ), which (mutiny) (sedition) he/she, the said (knew) (had reason to believe) was taking place.

6. Attempted mutiny.

In that (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about 19, attempt to (create (violence) (a disturbance) by ) ( ).

19. Article 95—Resistance, breach of arrest, and escape

a. Text.

"Any person subject to this chapter who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct."

b. Elements.

(1) Resisting apprehension.

(a) That a certain person apprehended the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused actively resisted the apprehension.

(2) Breaking arrest.

(a) That a certain person ordered the accused into arrest;

(b) That said person was authorized to order the accused into arrest; and

(c) That the accused went beyond the limits of arrest before being released from that arrest by proper authority.

(3) Escape from custody.

(a) That a certain person apprehended the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused freed himself or herself from custody before being released by proper authority.

(4) Escape from confinement.

(a) That a certain person ordered the accused into confinement;

(b) That said person was authorized to order the accused into confinement; and

(c) That the accused freed himself or herself from confinement before being released by proper authority.

[Note: If the escape was post-trial confinement, add the following element]

(d) That the confinement was the result of a court-martial conviction.

c. Explanation.

(1) Resisting apprehension.

(a) Apprehension. Apprehension is the taking of a person into custody. See R.C.M. 302.

(b) Authority to apprehend. See R.C.M. 302(b) concerning who may apprehend. Whether the status of a person authorized to apprehend the accused is a question of law to be decided by the military judge. Whether the person who attempted to make an apprehension had such a status is a question of fact to be decided by the factfinder.

(c) Nature of the resistance. The resistance must be active, such as assaulting the person attempting to apprehend or flight. Mere words of opposition, argument, or abuse, and attempts to escape from custody after the apprehension is complete, do not constitute the offense of resisting apprehension although they may constitute other offenses.

(d) Mistake. It is a defense that the accused held a reasonable belief that the person attempting to apprehend did not have authority to do so. However, the accused's belief at the time that no basis exists for the apprehension is not a defense.

(e) Illegal apprehension. A person may not be convicted of resisting apprehension if the attempted apprehension is illegal, but may be convicted of other offenses, such as assault, depending on all the circumstances. An attempted apprehension by a person authorized to apprehend is presumed to be
legal in the absence of evidence to the contrary. Ordinarily the legality of an apprehension is a question of law to be decided by the military judge.

2) Breaking arrest.

(a) Arrest. There are two type of arrest: pretrial arrest under Article 9 (see R.C.M. 304) and arrest under Article 15 (see paragraph 5c(3), Part V). This article prohibits breaking any arrest.

(b) Authority to order arrest. See R.C.M. 304(b) and paragraphs 2 and 5b, Part V concerning authority to order arrest.

(c) Nature of restraint imposed by arrest. In arrest, the restraint is moral restraint imposed by orders fixing the limits of arrest.

(d) Breaking. Breaking arrest is committed when the person in arrest infringes the limits set by orders. The reason for the infringement is immaterial. For example, innocence of the offense with respect to which an arrest may have been imposed is not a defense.

(e) Illegal arrest. A person may not be convicted of breaking arrest if the arrest is illegal. An arrest ordered by one authorized to do so is presumed to be legal in the absence of some evidence to the contrary. Ordinarily, the legality of an arrest is a question of law to be decided by the military judge.

3) Escape from custody.

(a) Custody. “Custody” is restraint of free locomotion imposed by lawful apprehension. The restraint may be physical or, once there has been a submission to apprehension or a forcible taking into custody, it may consist of control exercised in the presence of the prisoner by official acts or orders. Custody is temporary restraint intended to continue until other restraint (arrest, restriction, confinement) is imposed or the person is released.

(b) Authority to apprehend. See subparagraph (1)(b) above.

(c) Escape. For a discussion of escape, see subparagraph c(4)(c), below.

(d) Illegal custody. A person may not be convicted of this offense if the custody was illegal. An apprehension effected by one authorized to apprehend is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of an apprehension is a question of law to be decided by the military judge.

(e) Correctional custody. See paragraph 70.

4) Escape from confinement.

(a) Confine ment. Confine ment is physical restraint imposed under R.C.M. 305; 1101; or paragraph 5b, Part V. For purposes of the element of post-trial confinement (subparagraph b(4)(d), above) and increased punishment therefore (subparagraph e(4), below), the confinement must have been imposed pursuant to an adjudged sentence of a court-martial and not as a result of pretrial restraint or nonjudicial punishment.

(b) Authority to order confinement. See R.C.M. 304(b); 1101; and paragraphs 2 and 5b, Part V concerning who may order confinement.

(c) Escape. An escape may be either with or without force or artifice, and either with or without the consent of the custodian. However, where a prisoner is released by one with apparent authority to do so, the prisoner may not be convicted of escape from confinement. See also paragraph 20c(1)(b). Any completed casting off of the restraint of confinement, before release by proper authority, is an escape, and lack of effectiveness of the restraint imposed is immaterial. An escape is not complete until the prisoner is momentarily free from the restraint. If the movement toward escape is opposed, or before it is completed, an immediate pursuit follows, there is no escape until opposition is overcome or pursuit is shaken off.

(d) Status when temporarily outside confinement facility. A prisoner who is temporarily escorted outside a confinement facility for a work detail or other reason by a guard, who has both the duty and means to prevent that prisoner from escaping, remains in confinement.

(e) Legality of confinement. A person may not be convicted of escape from confinement if the confinement is illegal. Confinement ordered by one authorized to do so is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of confinement is a question of law to be decided by the military judge.

d. Lesser included offenses.

1) Resisting apprehension. Article 128—assault; assault consummated by a battery

2) Breaking arrest.

(a) Article 134—breaking restriction

(b) Article 80—attempts

3) Escape from custody. Article 80—attempts

4) Escape from confinement. Article 80—attempts
e. **Maximum punishment.**

(1) **Resisting apprehension.** Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) **Breaking arrest.** Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(3) **Escape from custody, pretrial confinement, or confinement on bread and water or diminished rations imposed pursuant to Article 15.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(4) **Escape from post-trial confinement.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. **Sample specifications.**

(1) **Resisting apprehension.**

In that ____________, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________, 19__________, resist being apprehended by ____________, (an armed force policeman) ____________, a person authorized to apprehend the accused.

(2) **Breaking arrest.**

In that ____________, (personal jurisdiction data), having been placed in arrest (in quarters) (in his/her company area) ____________, by a person authorized to order the accused into arrest, did, (at/on board—location) on or about ____________, 19__________, break said arrest.

(3) **Escape from custody.**

In that ____________, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________, 19__________, escape from the custody of ____________, a person authorized to apprehend the accused.

(4) **Escape from confinement.**

In that ____________, (personal jurisdiction data), having been placed in (post-trial) confinement in (place of confinement), by a person authorized to order accused into confinement did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________, 19__________, escape from confinement.

---

20. **Article 96—Releasing prisoner without proper authority**

a. **Text.**

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

b. **Elements.**

(1) **Releasing a prisoner without proper authority.**

(a) That a certain prisoner was committed to the charge of the accused; and

(b) That the accused released the prisoner without proper authority.

(2) **Suffering a prisoner to escape through neglect.**

(a) That a certain prisoner was committed to the charge of the accused;

(b) That the prisoner escaped;

(c) That the accused did not take such care to prevent the escape as a reasonably careful person, acting in the capacity in which the accused was acting, would have taken in the same or similar circumstances; and

(d) That the escape was the proximate result of the neglect.

(3) **Suffering a prisoner to escape through design.**

(a) That a certain prisoner was committed to the charge of the accused;

(b) That the design of the accused was to suffer the escape of that prisoner; and

(c) That the prisoner escaped as a result of the carrying out of the design of the accused.

c. **Explanation.**

(1) **Releasing a prisoner without proper authority.**

(a) **Prisoner.** "Prisoner" includes a civilian or military person who has been confined.

(b) **Release.** The release of a prisoner is removal of restraint by the custodian rather than by the prisoner.

(c) **Authority to release.** See R.C.M. 305(g) as to who may release pretrial prisoners. Normally, the lowest authority competent to order release of a post-trial prisoner is the commander who convened the court-martial which sentenced the prisoner or the officer exercising general court-martial jurisdiction over the prisoner. See also R.C.M. 1101.

(d) **Committed.** Once a prisoner has been confined, the prisoner has been "committed" in the
cial pay under 37 U.S.C. § 310) (during a time of war).

(4) **Wrongful importation or exportation of controlled substance.**

In that ________ (personal jurisdiction data) did, (at/on board—location) on or about ________, 19_____, wrongfully (import) (export) ________ (grams) (ounces) (pounds) (_______) of ________ (a Schedule (_______) controlled substance) (into the customs territory of) (from) the United States (while on board a vessel/aircraft used by the armed forces or under the control of the armed forces, to wit: __________) (during time of war).

38. **Article 113—Misbehavior of sentinel or lookout**

a. **Text.**

“Any sentinel or look-out who is found drunk or sleeping upon his post, or leaves it before he is regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as a court-martial may direct.”

b. **Elements.**

(1) That the accused was posted or on post as a sentinel or lookout;

(2) That the accused was found drunk while on post, was found sleeping while on post, or left post before being regularly relieved.

[Note: If the offense was committed in time of war or while the accused was receiving special pay under 37 U.S.C. § 310, add the following element]

(3) That the offense was committed (in time of war) (while the accused was receiving special pay under 37 U.S.C. § 310).

c. **Explanation.**

(1) **In general.** This article defines three kinds of misbehavior committed by sentinels or lookouts: being drunk or sleeping upon post, or leaving it before being regularly relieved. This article does not include an officer or enlisted person of the guard, or of a ship’s watch, not posted or performing the duties of a sentinel or lookout, nor does it include a person whose duties as a watchman or attendant do not require constant alertness.

(2) **Post.** “Post” is the area where the sentinel or lookout is required to be for the performance of duties. It is not limited by an imaginary line, but includes, according to orders or circumstances, such surrounding area as may be necessary for the proper performance of the duties for which the sentinel or lookout was posted. The offense of leaving post is not committed when a sentinel or lookout goes an immaterial distance from the post, unless it is such a distance that the ability to fully perform the duty for which posted is impaired.

(3) **On post.** A sentinel or lookout becomes “on post” after having been given a lawful order to go “on post” as a sentinel or lookout and being formally or informally posted. The fact that a sentinel or lookout is not posted in the regular way is not a defense. It is sufficient, for example, if the sentinel or lookout has taken the post in accordance with proper instruction, whether or not formally given. A sentinel or lookout is on post within the meaning of the article not only when at a post physically defined, as is ordinarily the case in garrison or aboard ship, but also, for example, when stationed in observation against the approach of an enemy, or detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.

(4) **Sentinel or lookout.** A sentinel or a lookout is a person whose duties include the requirement to maintain constant alertness, be vigilant, and remain awake, in order to observe for the possible approach of the enemy, or to guard persons, property, or a place and to sound the alert, if necessary.

(5) **Drunk.** For an explanation of “drunk,” see paragraph 35c(3).

(6) **Sleeping.** As used in this article, “sleeping” is that condition of insentience which is sufficient sensibly to impair the full exercise of the mental and physical faculties of a sentinel or lookout. It is not necessary to show that the accused was in a wholly comatose condition. The fact that the accused’s sleeping resulted from a physical incapacity caused by disease or accident is an affirmative defense. See R.C.M. 916(i).

d. **Lesser included offenses.**

(1) **Drunk on post.**

(a) Article 112—drunk on duty

(b) Article 92—dereliction of duty
(a) Article 112a—wrongful possession of controlled substance
(b) Article 80—attempts
(5) Wrongful introduction of controlled substance.
   (a) Article 112a—wrongful possession of controlled substance
   (b) Article 80—attempts
(6) Wrongful possession, manufacture, or introduction of a controlled substance with intent to distribute.
   (a) Article 112a—wrongful possession, manufacture, or introduction of controlled substance
   (b) Article 80—attempts
(7) Wrongful importation or exportation of a controlled substance. Article 80—attempts
e. Maximum punishments.
   (1) Wrongful use, possession, manufacture, or introduction of controlled substance.
   (a) Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use of marijuana), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, III controlled substances. Dishonorable discharge, forfeiture of all pay and allowances, and confinement 5 years.
   (b) Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.
   (2) Wrongful distribution, possession, manufacture, or introduction of controlled substance with intent to distribute, or wrongful importation or exportation of a controlled substance.
   (a) Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use of marijuana), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.
   (b) Phenobarbital and Schedule IV and V controlled substances. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

When any offense under paragraph 37 is committed; while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under the control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; while receiving special pay under 37 U.S.C. § 310; in time of war; or in a confinement facility used by or under the control of the armed forces, the maximum period of confinement authorized for such offense shall be increased by 5 years.

f. Sample specifications.
   (1) Wrongful possession, manufacture, or distribution of controlled substance.
   
   In that (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________, 19__________, wrongfully (possess) (distribute) (manufacture) ____________ (grams) (ounces) (pounds) (__________ of __________ (a schedule (__________) controlled substance), (with the intent to distribute the said controlled substance) (while on duty as a sentinel or lookout) (while (on board a vessel/aircraft) (in or at a missile launch facility) used by the armed forces or under the control of the armed forces, to wit: ____________) (while receiving special pay under 37 U.S.C. § 310) (during time of war).

   (2) Wrongful use of controlled substance.
   
   In that ____________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________, 19__________, wrongfully use ____________ (a Schedule __________ controlled substance) (while on duty as a sentinel or lookout) (while (on board a vessel/aircraft) (in or at a missile launch facility) used by the armed forces or under the control of the armed forces, to wit: ____________) (while receiving special pay under 37 U.S.C. § 310) (during time of war).

   (3) Wrongful introduction of controlled substance.
   
   In that ____________ (personal jurisdiction data) did, (at/on board—location) on or about ____________, 19__________, wrongfully introduce ____________ (grams) (ounces) (pounds) (__________ of __________ (a Schedule (__________) controlled substance) onto a vessel, aircraft, vehicle, or installation used by the armed forces or under control of the armed forces, to wit: ____________ (with the intent to distribute the said controlled substance) (while on duty as a sentinel or lookout) (while receiving spe-
item in a locker or car to which that person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible, however, for more than one person to possess an item simultaneously, as when several people share control of an item. An accused may not be convicted of possession of a controlled substance if the accused did not know that the substance was present under the accused’s control. Awareness of the presence of a controlled substance may be inferred from circumstantial evidence.

(3) Distribute. “Distribute” means to deliver to the possession of another. “Deliver” means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship.

(4) Manufacture. “Manufacture” means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container. “Production,” as used in this subparagraph, includes the planting, cultivating, growing, or harvesting of a drug or other substance.

(5) Wrongfulness. To be punishable under Article 112a, possession, use, distribution, introduction, or manufacture of a controlled substance must be wrongful. Possession, use, distribution, introduction, or manufacture of a controlled substance is wrongful if it is without legal justification or authorization. Possession, distribution, introduction, or manufacture of a controlled substance is not wrongful if such act or acts are: (A) done pursuant to legitimate law enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession); (B) done by authorized personnel in the performance of medical duties; or (C) without knowledge of the contraband nature of the substance (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine). Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use, possession, distribution, manufacture, or introduction was wrongful.

(6) Intent to distribute. Intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference of intent to distribute are: possession of a quantity of substance in excess of that which one would be likely to have for personal use; market value of the substance; the manner in which the substance is packaged; and that the accused is not a user of the substance. On the other hand, evidence that the accused is addicted to or is a heavy user of the substance may tend to negate an inference of intent to distribute.

(7) Certain amount. When a specific amount of a controlled substance is believed to have been possessed, distributed, introduced, or manufactured by an accused, the specific amount should ordinarily be alleged in the specification. It is not necessary to allege a specific amount, however, and a specification is sufficient if it alleges that an accused possessed, distributed, introduced, or manufactured “some,” “traces of,” or “an unknown quantity of” a controlled substance.

(8) Missile launch facility. A “missile launch facility” includes the place from which missiles are fired and launch control facilities from which the launch of a missile is initiated or controlled after launch.

(9) Customs territory of the United States. “Customs territory of the United States” includes only the States, the District of Columbia, and Puerto Rico.

d. Lesser included offenses.

(1) Wrongful possession of controlled substance. Article 80—attempts

(2) Wrongful use of controlled substance.

(a) Article 112a—wrongful possession of controlled substance

(b) Article 80—attempts

(3) Wrongful distribution of controlled substance. Article 80—attempts

(4) Wrongful manufacture of controlled substance.
d. *Lesser included offense.* Article 134—drunk on station

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months.

f. *Sample specification.*

In that __________ (personal jurisdiction data), was, (at/on board—location), on or about __________ 19__________, found drunk while on duty as __________.

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

a. *Text.*

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

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

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

(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.

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

b. *Elements.*

(1) *Wrongful possession of controlled substance.*

(a) That the accused possessed a certain amount of a controlled substance; and

(b) That the possession by the accused was wrongful.

(2) *Wrongful use of controlled substance.*

(a) That the accused used a controlled substance; and

(b) That the use by the accused was wrongful.

(3) *Wrongful distribution of controlled substance.*

(a) That the accused distributed a certain amount of a controlled substance; and

(b) That the distribution by the accused was wrongful.

(4) *Wrongful introduction of a controlled substance.*

(a) That the accused introduced onto a vessel, aircraft, vehicle, or installation used by the armed forces or under the control of the armed forces a certain amount of a controlled substance; and

(b) That the introduction was wrongful.

(5) *Wrongful manufacture of a controlled substance.*

(a) That the accused manufactured a certain amount of a controlled substance; and

(b) That the manufacture was wrongful.

(6) *Wrongful possession, manufacture, or introduction of a controlled substance with intent to distribute.*

(a) That the accused (possessed) (manufactured) (introduced) a certain amount of a controlled substance;

(b) That the (possession) (manufacture) (introduction) was wrongful; and

(c) That the (possession) (manufacture) (introduction) was with the intent to distribute.

(7) *Wrongful importation or exportation of a controlled substance.*

(a) That the accused (imported into the customs territory of) (exported from) the United States a certain amount of a controlled substance; and

(b) That the (importation) (exportation) was wrongful.

[Note: When any of the aggravating circumstances listed in subparagraph e is alleged, it must be listed as an element.]

c. *Explanation.*

(1) *Controlled substance.* “Controlled substance” means amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, and barbituric acid, including phenobarbital and secobarbital. “Controlled substance” also means any substance which is included in Schedules I through V established by the Controlled Substances Act of 1970 (21 U.S.C. 812).

(2) *Possess.* “Possess” means to exercise control of something. Possession may be direct physical custody like holding an item is one’s hand, or it may be constructive, as in the case of a person who hides an
(6) Separate offenses. While the same course of conduct may constitute both drunken and reckless driving, this article proscribes these as separate offenses, and both offenses may be charged. However, as recklessness is a relative matter, evidence of all the surrounding circumstances which made the operation dangerous, whether alleged or not, may be admissible. Thus, on a charge of reckless driving, evidence of drunkenness might be admissible as establishing one of recklessness, and evidence that the vehicle exceeded a safe speed, at a relevant prior point and time, might be admissible as corroborating other evidence of the specific recklessness charged. Similarly, on a charge of drunken driving, relevant evidence of recklessness might have probative value as corroborating other proof of drunkenness.

d. Lesser included offenses. Drunken driving.

(1) Article 112—drunk on duty
(2) Article 134—drunk on station

e. Maximum punishment.

(1) Resulting in personal injury. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.
(2) No personal injury involved. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. Sample specification.

In that ______________________ (personal jurisdiction data), did (at/onboard—location) (subject-matter jurisdiction data, if required), on or about ____________ 19____ (in the motor pool area) (near the Officer's Club) (on ______________________ Street between ______________________ and _______________ Avenues) (______________), operate a vehicle, to wit: (a truck) (a passenger car) (______________), (while drunk) (while impaired by ________________) (in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (driving at a speed in excess of 50 miles per hour on the sidewalk and wrong side of said street) (______________) (and did thereby cause said vehicle to (strike and) injure ________________).

36. Article 112—Drunk on duty

a. Text.

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

b. Elements.

(1) That the accused was on a certain duty; and
(2) That the accused was found drunk while on this duty.

c. Explanation.

(1) Drunk. See paragraph 35c(3).
(2) Duty. "Duty" as used in this article means military duty. Every duty which an officer or enlisted person may legally be required by superior authority to execute is necessarily a military duty. Within the meaning of this article, when in the actual exercise of command, the commander of a post, or of a command, or of a detachment in the field is constantly on duty, as is the commanding officer on board a ship. In the case of other officers or enlisted persons, "on duty" relates to duties or routine or detail, in garrison, at a station, or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and enlisted persons occupy the status of leisure known as "off duty" or "on liberty." In a region of active hostilities, the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article. So also, an officer of the day and members of the guard, or of the watch, are on duty during their entire tour within the meaning of this article.

(3) Nature of offense. It is necessary that the accused be found drunk while actually on the duty alleged, and the fact the accused became drunk before going on duty, although material in extenuation, does not affect the question of guilt. If, however, the accused does not undertake the responsibility or enter upon the duty at all, the accused's conduct does not fall within the terms of this article, nor does that of a person who absents himself or herself from duty and is found drunk while so absent. Included within the article is drunkenness while on duty of an anticipatory nature such as that of an aircraft crew ordered to stand by for flight duty, or of an enlisted person ordered to stand by for guard duty.

(4) Defenses. If the accused is known by superior authorities to be drunk at the time a duty is assigned, and the accused is thereafter allowed to assume that duty anyway, or if the drunkenness results from an accidental overdose administered for medicinal purposes, the accused will have a defense to this offense. But see paragraph 76 (incapacitation for duty).
the ______________ position, obtained and plotted by him/her, to the position of ______________, and well knowing the difficulty of sighting ______________, from a safe distance after sunset, did then and there negligently hazard the said vessel by failing and neglecting to advise his/her commanding officer to lay a safe course for said ship to the northward before continuing on a westerly course, as it was the duty of said ______________ to do; in consequence of which the said ship was, at about ______________ hours on the day above mentioned, run upon ______________ bank in the ______________ Sea, about latitude ______________ degrees, ______________ minutes, north, and longitude ______________ degrees, ______________ minutes, west, and seriously injured.

(3) Suffering a vessel to be hazarded, negligently.

In that ______________ (personal jurisdiction data), while serving as combat intelligence center officer on board the ______________, making passage from Boston to Philadelphia, and having, between ______________ and ______________ hours on ______________, 19 ______________, been duly informed of decreasing radar ranges and constant radar bearing indicating that the said ______________ was upon a collision course approaching a radar target, did then and there negligently suffer the said vessel to be hazarded by failing and neglecting to report said collision course with said radar target to the officer of the deck, as it was his/her duty to do, and he/she, the said ______________, through negligence, did cause the said ______________ to collide with the ______________ at or about ______________ hours on said date, with resultant damage to both vessels.

35. Article 111—Drunken or reckless driving

a. Text.

"Any person subject to this chapter who operates any vehicle while drunk, or in a reckless or wanton manner, or while impaired by a substance described in section 912a(b) of this title (article 112a(b)), shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused was operating a vehicle; and

That the accused was drunk while operating the vehicle, that the accused operated the vehicle in a reckless or wanton manner, or that the accused was impaired by a substance described in article 112a(b) while operating the vehicle.

[Note: If injury resulted add the following element]

(2) That the accused thereby caused the vehicle to injure a person.

c. Explanation.

(1) Vehicle. See 1 U.S.C. § 4. Drunken or reckless operation of water and air transportation may be alleged under other articles of the code, as appropriate.

(2) Operating. Operating a vehicle includes not only driving or guiding it while in motion, either in person or through the agency of another, but also the manipulation of its controls so as to cause the particular vehicle to move, or the setting of its motive power in action.

(3) Drunk or impaired. "Drunk" and "impaired" mean any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties. Whether the drunkenness or impairment was caused by liquor or drugs is immaterial.

(4) Reckless. The operation of a vehicle is "reckless" when it exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, but all these factors may be admissible and relevant as bearing upon the ultimate question; whether, under all the circumstances, the accused's manner of operation of the vehicle was of that heedless nature which made it actually or imminently dangerous to occupants, or to the rights or safety of others. It is driving with such a high degree of negligence that if death were caused, the accused would have committed involuntary manslaughter, at least. The condition of the surface on which the vehicle is operated, the time of day or night, the traffic, and the condition of the vehicle are often matters of importance in the proof of an offense charged under this article, and, where they are of importance, may properly be alleged.

(5) Wanton. "Wanton" includes "reckless," but in describing the operation of a vehicle, it may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.
doing of something which such a person would not have done under the circumstances. No person is relieved of culpability who fails to perform such duties as are imposed by the general responsibilities of that person's grade or rank, or by the customs of the service for the safety and protection of vessels of the armed forces, simply because these duties are not specifically enumerated in a regulation or order. However, a mere error in judgment that a reasonably able person might have committed under the same circumstances does not constitute an offense under this article.

(4) **Suffer.** "To suffer" means to allow or permit. A ship is willfully suffered to be hazarded by one who, although not in direct control of the vessel, knows a danger to be imminent but takes no steps to prevent it, as by a plotting officer of a ship under way who fails to report to the officer of the deck a radar target which is observed to be on a collision course with, and dangerously close to, the ship. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a foreseeable danger.

d. **Lesser included offenses.**

(1) **Willfully and wrongfully hazarding a vessel.**

(a) Article 110—negligently hazarding a vessel

(b) Article 80—attempts

(2) **Willfully and wrongfully suffering a vessel to be hazarded.**

(a) Article 110—negligently suffering a vessel to be hazarded

(b) Article 80—attempts

e. **Maximum punishment.** Hazarding or suffering to be hazarded any vessel of the armed forces:

(1) **Willfully and wrongfully.** Death or such other punishment as a court-martial may direct.

(2) **Negligently.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. **Sample specifications.**

(1) **Hazarding or suffering to be hazarded any vessel, willfully and wrongfully.**

In that __________ (personal jurisdiction data), did, on ______________ 19 ____________, while serving as ________ aboard the ______________ in the vicinity of ______________, willfully and wrongfully (hazard the said vessel) (suffer the said vessel to be hazarded) by (causing the said vessel to collide with ____________) (allowing the said vessel to run aground) ____________.

(2) **Hazarding of vessel, negligently.**

(a) **Example 1.**

In that __________ (personal jurisdiction data), on ______________ 19 ____________, while serving in command of the ______________, making entrance to (Boston Harbor), did negligently hazard the said vessel by failing and neglecting to maintain or cause to be maintained an accurate running plot of the true position of said vessel while making said approach, as a result of which neglect the said ______________, at or about ______________ hours on the day aforesaid, became stranded in the vicinity of (Channel Buoy Number Three).

(b) **Example 2.**

In that __________ (personal jurisdiction data), on ______________ 19 ____________, while serving as navigator of the ______________, cruising on special service in the ______________ Ocean off the coast of ______________, notwithstanding the fact that at about midnight, ______________ 19 ____________, the northeast point of ______________ Island bore abeam and was about six miles distant, the said ship being then under way and making a speed of about ten knots, and well knowing the position of the said ship at the time stated, and that the charts of the locality were unreliable and the currents thereabouts uncertain, did then and there negligently hazard the said vessel by failing and neglecting to exercise proper care and attention in navigating said ship while approaching ______________ Island, in that he/she neglected and failed to lay a course that would carry said ship clear of the last aforesaid island, and to change the course in due time to avoid disaster; and the said ship, as a result of said negligence on the part of ______________, ran upon a rock off the southwest coast of ______________ Island, at about ______________ hours, ______________ 19 ____________, in consequence of which the said ______________ was lost.

(c) **Example 3.**

In that __________ (personal jurisdiction data), on ______________ 19 ____________, while serving as navigator of the ______________ and well knowing that at about sunset of said day the said ship had nearly run her estimated distance from ____________.
another. The terms “wastes” and “spoils” as used in this article refer to such wrongful acts of voluntary destruction of or permanent damage to real property as burning down buildings, burning piers, tearing down fences, or cutting down trees. This destruction in punishable whether done willfully, that is intentionally, or recklessly, that is through a culpable disregard of the foreseeable consequences of some voluntary act.

2. Destroying or damaging non-military property. This portion of Article 109 proscribes the willful and wrongful destruction or damage of the personal property of another. To be destroyed, the property need not be completely demolished or annihilated, but must be sufficiently injured to be useless for its intended purpose. Damage consists of any physical injury to the property. To constitute an offense under this section, the destruction or damage of the property must have been willful and wrongful. As used in this section “willfully” means intentionally and “wrongfully” means contrary to law, regulation, lawful order, or custom. Willfulness may be proved by circumstantial evidence, such as the manner in which the acts were done.

3. Value and damage. In the case of destruction, the value of the property destroyed controls the maximum punishment which may be adjudged. In the case of damage, the amount of the damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by artisans employed in this work who are available to the community wherein the owner resides, or the replacement cost, whichever is less. See also paragraph 46c(1)(g).

d. Lesser included offense. Article 80—Attempts

e. Maximum punishment. Wasting, spoiling, destroying, or damaging any property other than military property of the United States of a value or damage.

1. Of $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

2. Of more than $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___________ 19___________, (willfully) (recklessly) waste) ((willfully) (recklessly) spoil) (willfully and wrongfully (destroy) (damage) by ___________) ___________, (of a value of (about) $___________) (the amount of said damage being in the sum of (about $___________), the property of ___________.

34. Article 110—Improper hazarding of vessel

a. Text.

“(a) Any person subject to this chapter who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such other punishment as a court-martial may direct.

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

b. Elements.

1. That a vessel of the armed forces was hazarded in a certain manner; and

2. That the accused by certain acts or omissions, willfully and wrongfully, or negligently, caused or suffered the vessel to be hazarded.

c. Explanation.

1. Hazard. “Hazard” means to put in danger of loss or injury. Actual damage to, or loss of, a vessel of the armed forces by collision, stranding, running upon a shoal or a rock, or by any other cause, is conclusive evidence that the vessel was hazarded but not of the fact of culpability on the part of any particular person. “Stranded” means run aground so that the vessel is fast for a time. If the vessel “touches and goes,” she is not stranded; if she “touches and sticks,” she is. A shoal is a sand, mud, or gravel bank or bar that makes the water shallow.

2. Willfully and wrongfully. As used in this article, “willfully” means intentionally and “wrongfully” means contrary to law, regulation, lawful order, or custom.

3. Negligence. “Negligence” as used in this article means the failure to exercise the care, prudence, or attention to duties, which the interests of the government require a prudent and reasonable person to exercise under the circumstances. This negligence may consist of the omission to do something the prudent and reasonable person would have done, or the
(b) Article 80—Attempts
e. Maximum punishment.
   (1) Selling or otherwise disposing of military property.
      (a) Of a value of $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.
      (b) Of a value of more than $100.00 or any firearm or explosive. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.
   (2) Through neglect damaging, destroying, or losing, or through neglect suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property.
      (a) Of a value or damage of $100.00 or less. Confinement for 6 months, and forfeiture of two-thirds pay per month for 6 months.
      (b) Of a value or damage of more than $100.00. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.
   (3) Willfully damaging, destroying, or losing, or willfully suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property.
      (a) Of a value or damage of $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.
      (b) Of a value or damage of more than $100.00, or of any firearm or explosive. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.
   f. Sample specifications.
   (1) Selling or disposing of military property.
      In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about (date), without proper authority, (sell to (dispose of by)) (a firearm) (an explosive) of a value of (about) $ (military property of the United States).
   (2) Damaging, destroying, or losing military property.
      In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about (date), without proper authority, (through neglect) ((damage by (destroy by (lose))) (of a value of (about) $ (military property of the United States (the amount of said damage being in the sum of (about) $)).
   (3) Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.
      In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about (date), without proper authority, (willfully) (through neglect) suffer (damage by (destroy by (lose))) (of a value of (about) $ (military property of the United States (the amount of said damage being in the sum of (about) $)).

33. Article 109—Property other than military property of the United States—waste, spoilage, or destruction
a. Text.
   “Any person subject to this chapter who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct.”

b. Elements.
   (1) Wasting or spoiling non-military property.
      (a) That the accused willfully or recklessly wasted or spoiled certain real property in a certain manner;
      (b) That the property was that of another person; and
      (c) That the property was of a certain value.
   (2) Destroying or damaging non-military property.
      (a) That the accused willfully and wrongfully destroyed or damaged certain personal property in a certain manner;
      (b) That the property was that of another person; and
      (c) That the property was of a certain value or the damage was of a certain amount.

c. Explanation.
   (1) Wasting or spoiling non-military property.
      This portion of Article 109 proscribes willful or reckless waste or spoilation of the real property of
That the loss, damage, destruction, sale, or wrongful disposition was suffered by the accused, without proper authority, through a certain omission of duty by the accused;

(d) That the omission was willful or negligent; and

(e) That the property was of a certain value or the damage was of a certain amount.

c. Explanation.

(1) **Military property.** Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States. It is immaterial whether the property sold, disposed, destroyed, lost, or damaged had been issued to the accused, to someone else, or even issued at all. If it is proved by either direct or circumstantial evidence that items of individual issue were issued to the accused, it may be inferred, depending on all the evidence, that the damage, destruction, or loss proved was due to the neglect of the accused. Retail merchandise of service exchange stores is not military property under this article.

(2) **Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.** "To suffer" means to allow or permit. The willful or negligent sufferance specified by this article includes: deliberate violation or intentional disregard of some specific law, regulation, or order; reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; or loaning it to a person, known to be irresponsible, by whom it is damaged.

(3) **Value and damage.** In the case of loss, destruction, sale, or wrongful disposition, the value of the property controls the maximum punishment which may be adjudged. In the case of damage, the amount of damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by the government agency normally employed in such work, or the cost of replacement, as shown by government price lists or otherwise, whichever is less.

d. **Lesser included offenses.**

(1) **Sale or disposition of military property.**

(a) Article 80—attempts

(b) Article 134—sale or disposition of non-military government property

(2) **Willfully damaging military property.**

(a) Article 108—damaging military property through neglect

(b) Article 109—willfully damaging non-military property

(c) Article 80—attempts

(3) **Willfully suffering military property to be damaged.**

(a) Article 108—through neglect suffering military property to be damaged

(b) Article 80—attempts

(4) **Willfully destroying military property.**

(a) Article 108—through neglect destroying military property

(b) Article 109—willfully destroying non-military property

(c) Article 108—willfully damaging military property

(d) Article 109—willfully damaging non-military property

(e) Article 108—through neglect damaging military property

(f) Article 80—attempts

(5) **Willfully suffering military property to be destroyed.**

(a) Article 108—through neglect suffering military property to be destroyed

(b) Article 108—willfully suffering military property to be damaged

(c) Article 108—through neglect suffering military property to be damaged

(d) Article 80—attempts

(6) **Willfully losing military property.**

(a) Article 108—through neglect, losing military property

(b) Article 80—attempts

(7) **Willfully suffering military property to be lost.**

(a) Article 108—through neglect, suffering military property to be lost

(b) Article 80—attempts

(8) **Willfully suffering military property to be sold.**

(a) Article 108—through neglect, suffering military property to be sold

(b) Article 80—attempts

(9) **Willfully suffering military property to be wrongfully disposed of.**

(a) Article 108—through neglect, suffering military property to be wrongfully disposed of in the manner alleged
The rank of any person intended to be deceived is immaterial if that person was authorized in the execution of a particular duty to require or receive the statement or document from the accused. The government may be the victim of this offense.

(3) Intent to deceive. The false representation must be made with the intent to deceive. It is not necessary that the false statement be material to the issue inquiry. If, however, the falsity is in respect to a material matter, it may be considered as some evidence of the intent to deceive, while immateriality may tend to show an absence of this intent.

(4) Material gain. The expectation of material gain is not an element of this offense. Such expectation or lack of it, however, is circumstantial evidence bearing on the element of intent to deceive.

(5) Knowledge that the document or statement was false. The false representation must be one which the accused actually knew was false. Actual knowledge may be proved by circumstantial evidence. An honest, although erroneous, belief that a statement made is true, is a defense.

(6) Statements made during an interrogation.

(a) Person without an independent duty or obligation to speak. A statement made by an accused or suspect during an interrogation is not an official statement within the meaning of the article if that person did not have an independent duty or obligation to speak. But see paragraph 79 (false swearing).

(b) Person with an independent duty or obligation to speak. If a suspect or accused does have an independent duty or obligation to speak, as in the case of a custodian who is required to account for property, a statement made by that person during an interrogation into the matter is official. While the person could remain silent (Article 31(b)), if the person chooses to speak, the person must do so truthfully.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.

In that _____________ (personal jurisdiction data), did, (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____________ 19___________, with intent to deceive, (sign an official (record) (return) (statement) _____________), which (record) (return) (statement) _____________ was (totally false) (false in that _____________), and was then known by the said _____________ to be so false.

32. Article 108—Military property of the United States—sale, loss, damage, destruction, or wrongful disposition

a. Text.

“Any person subject to this chapter who, without proper authority—

(1) sells or otherwise disposes of;

(2) willfully or through neglect damages, destroys, or loses; or

(3) willfully or through neglect suffers to be lost, damaged, destroyed, sold, or wrongfully disposed of, any military property of the United States, shall be punished as a court-martial may direct.”

b. Elements.

(1) Selling or otherwise disposing of military property.

(a) That the accused sold or otherwise disposed of certain property (which was a firearm or explosive);

(b) That the sale or disposition was without proper authority;

(c) That the property was military property of the United States; and

(d) That the property was of a certain value.

(2) Damaging, destroying, or losing military property.

(a) That the accused, without proper authority, damaged or destroyed certain property in a certain way, or lost certain property;

(b) That the property was military property of the United States;

(c) That the damage, destruction, or loss was willfully caused by the accused or was the result of neglect by the accused; and

(d) That the property was of a certain value or the damage was of a certain amount.

(3) Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.

(a) That certain property (which was a firearm or explosive) was lost, damaged, destroyed, sold, or wrongfully disposed of;

(b) That the property was military property of the United States;
That the act apparently tended to bring about the offense of espionage.

(3) Espionage as a capital offense.

(a) That the accused committed espionage or attempted espionage; and

(b) That the offense directly concerned (1) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (2) war plans, (3) communications intelligence or crypticographic information, or (4) any other major weapons system or major element of defense strategy.

c. Explanation.

(1) Intent. "Intent or reason to believe" that the information "is to be used to the injury of the United States or to the advantage of a foreign nation" means that the accused acted in bad faith or otherwise without authority with respect to information that is not lawfully accessible to the public.

(2) National defense information. "Instrument, appliance, or information relating to the national defense" includes the full range of modern technology and matter that may be developed in the future, including chemical or biological agents, computer technology, and other matter related to the national defense.

(3) Espionage as a capital offense. Capital punishment is authorized if the government alleges and proves that the offense directly concerned (1) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (2) war plans, (3) communications intelligence or crypticographic information, or (4) any other major weapons system or major element of defense strategy. See R.C.M. 1004 concerning sentencing proceedings in capital cases.

d. Lesser included offense. Although no lesser included offenses are set forth in the Code, federal civilian offenses on this matter may be incorporated through the third clause of Article 134.

e. Maximum punishment.

(1) Espionage as a capital offense. Death or such other punishment as a court-martial may direct. See R.C.M. 1003.

(2) Espionage or attempted espionage. Any punishment, other than death, that a court-martial may direct. See R.C.M. 1003.

f. Sample specification.

In that ____________ (personal jurisdiction data), did, (at/on board—location), on or about ____________ 19__________, with intent or reason to believe it would be used to the injury of the United States or to the damage of ____________, a foreign nation, (attempt to) (communicate) (deliver) (transmit) ____________ (description of item), (a document) (a writing) (a code book) (a sketch) (a photographic negative) (a blueprint) (a plan) (a map) (a model) (a note) (an instrument) (an appliance) (information) relating to the national defense, ((which directly concerned (nuclear weaponry) (military spacecraft) (military satellites) (early warning systems) (___________, a means of defense or retaliation against a large scale attack) (war plans) (communications intelligence) (crypticographic information) ____________, a major weapons system) ____________, a major element of defense strategy)) to ____________ ((a representative of) (an officer of) (an agent of) (an employee of) (a subject of) (a citizen of)) ((a foreign government) (a faction within a foreign country) (a party within a foreign country) (a military force within a foreign country) (a naval force within a foreign country)) (indirectly by ____________).
30a. Article 106a—Espionage

a. Text.

"(a)(1) Any person subject to this chapter who, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any entity described in paragraph (2), either directly or indirectly, anything described in paragraph (3) shall be punished as a court-martial may direct, except that if the accused is found guilty of an offense that directly concerns (A) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (B) war plans, (C) communications intelligence or cryptographic information, or (D) any other major weapons system or major element of defense strategy, the accused shall be punished by death or such other punishment as a court-martial may direct.

(2) An entity referred to in paragraph (1) is—

(A) a foreign government;

(B) a faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States; or

(C) a representative, officer, agent, employee, subject, or citizen of such a government, faction, party, or force.

(3) A thing referred to in paragraph (1) is a document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense.

(b)(1) No person may be sentenced by court-martial to suffer death for an offense under this section (article) unless—

(A) the members of the court-martial unanimously find at least one of the aggravating factors set out in subsection (c); and

(B) the members unanimously determine that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including the aggravating factors set out under subsection (c).

(2) Findings under this subsection may be based on—

(A) evidence introduced on the issue of guilt or innocence;

(B) evidence introduced during the sentencing proceeding; or

(C) all such evidence.

(3) The accused shall be given broad latitude to present matters in extenuation and mitigation.

(c) A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.

(2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.

(3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.

(4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36)."

b. Elements.

(1) Espionage.

(a) That the accused communicated, delivered, or transmitted any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense;

(b) That this matter was communicated, delivered, or transmitted to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject or citizen thereof, either directly or indirectly; and

(c) That the accused did so with intent or reason to believe that such matter would be used to the injury of the United States or to the advantage of a foreign nation.

(2) Attempted espionage.

(a) That the accused did a certain overt act;

(b) That the act was done with the intent to commit the offense of espionage;

(c) That the act amounted to more than mere preparation; and
ers at _____________ (___________), maltreat the said _____________ by (depriving him/her of _____________ (___________), without justifiable cause.

30. Article 106—Spies

a. "Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death."

b. Elements.
   (1) That the accused was found in, about, or in and about a certain place, vessel, or aircraft within the control or jurisdiction of an armed force of the United States, or a shipyard, manufacturing or industrial plant, or other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere;
   (2) That the accused was lurking, acting clandestinely or under false pretenses;
   (3) That the accused was collecting or attempting to collect certain information;
   (4) That the accused did so with the intent to convey this information to the enemy; and
   (5) That this was done in time of war.

c. Explanation.
   (1) In time of war. See R.C.M. 103(19).
   (2) Enemy. For a discussion of "enemy," see paragraph 23c(1)(b).
   (3) Scope of offense. The words "any person" bring within the jurisdiction of general courts-martial and military commissions all persons of whatever nationality or status who commit spying.
   (4) Nature of offense. A person can be a spy only when, acting clandestinely or under false pretenses, that person obtains or seeks to obtain information with the intent to convey it to a hostile party. It is not essential that the accused obtain the information sought or that it be communicated. The offense is complete with lurking or acting clandestinely or under false pretenses with intent to accomplish these objects.
   (5) Intent. It is necessary to prove an intent to convey information to the enemy. This intent may be inferred from evidence of a deceptive insinuation of the accused among our forces, but evidence that the person had come within the lines for a comparatively innocent purpose, as to visit family or to reach friendly lines by assuming a disguise, is admissible to rebut this inference.

   (6) Persons not included under "spying".
      (a) Members of a military organization not wearing a disguise, dispatch drivers, whether members of a military organization or civilians, and persons in ships or aircraft who carry out their missions openly and who have penetrated enemy lines are not spies because, while they may have resorted to concealment, they have not acted under false pretenses.
      (b) A spy who, after rejoining the armed forces to which the spy belongs, is later captured by the enemy incurs no responsibility for previous acts of espionage.
      (c) A person living in occupied territory who, without lurking, or acting clandestinely or under false pretenses, merely reports what is seen or heard through agents to the enemy may be charged under Article 104 with giving intelligence to or communicating with the enemy, but may not be charged under this article as being a spy.

d. Lesser included offenses. None.

e. Mandatory punishment. Death

f. Sample specification.
   In that _____________ (personal jurisdiction data), was, (at/on board—location), on or about _____________ 19 _____________, a time of war, found (lurking) (acting) as a spy (in) (about) (in and about) _____________ (a (fortification) (port) (base) (vessel) (aircraft) ( _____________ ) within the (control)(jurisdiction) (control and jurisdiction) of an armed force of the United States, to wit: _____________ (a (shipyard) (manufacturing plant) (industrial plant) ( _____________ ) engaged in work in aid of the prosecution of the war by the United States ( _____________ ), for the purpose of (collecting) (attempting to collect) information in regard to the ((numbers) (resources) (operations) ( _____________ ) of the armed forces of the United States) ((military production) ( _____________ ) of the United States) ( _____________ ), with intent to impart the same to the enemy.
29. Article 105—Misconduct as a prisoner

a. Text.
   “Any person subject to this chapter who, while in the hands of the enemy in time of war—
   (1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or
   (2) while in a position of authority over such persons maltreats them without justifiable cause; shall be punished as a court-martial may direct.”

b. Elements.
   (1) Acting without authority to the detriment of another for the purpose of securing favorable treatment.
       (a) That without proper authority the accused acted in a manner contrary to law, custom, or regulation;
       (b) That the act was committed while the accused was in the hands of the enemy in time of war;
       (c) That the act was done for the purpose of securing favorable treatment of the accused by the captors; and
       (d) That other prisoners held by the enemy, either military or civilian, suffered some detriment because of the accused’s act.
   (2) Maltreating prisoners while in a position of authority.
       (a) That the accused maltreated a prisoner held by the enemy;
       (b) That the act occurred while the accused was in the hands of the enemy in time of war;
       (c) That the accused held a position of authority over the person maltreated; and
       (d) That the act was without justifiable cause.

c. Explanation.
   (1) Enemy. For a discussion of “enemy,” see paragraph 23c(1)(b).
   (2) In time of war. See R.C.M. 103(19).
   (3) Acting without authority to the detriment of another for the purpose of securing favorable treatment.
       (a) Nature of offense. Unauthorized conduct by a prisoner of war must be intended to result in improvement by the enemy of the accused’s condition and must operate to the detriment of other prisoners either by way of closer confinement, reduced rations, physical punishment, or other harm. Examples of this conduct include reporting plans of escape being prepared by others or reporting secret food caches, equipment, or arms. The conduct of the prisoner must be contrary to law, custom, or regulation.
       (b) Escape. Escape from the enemy is authorized by custom. An escape or escape attempt which results in closer confinement or other measures against fellow prisoners still in the hands of the enemy is not an offense under this article.
   (4) Maltreating prisoners while in a position of authority.
       (a) Authority. The source of authority is not material. It may arise from the military rank of the accused or—despite service regulations or customs to the contrary—designation by the captor authorities, or voluntary election or selection by other prisoners for their self-government.
       (b) Maltreatment. The maltreatment must be real, although not necessarily physical, and it must be without justifiable cause. Abuse of an inferior by inflammatory and derogatory words may, through mental anguish, constitute this offense.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Any punishment other than death that a court-martial may direct. See R.C.M. 1003.

f. Sample specifications.
   (1) Acting without authority to the detriment of another for the purpose of securing favorable treatment.
       In that ______________ (personal jurisdiction data), while in the hands of the enemy, did, (at/on board—location) on or about __________19______________, a time of war, without proper authority and for the purpose of securing favorable treatment by his/her captors, (report to the commander of Camp ______________ the preparations by ______________, a prisoner at said camp, to escape, as a result of which report the said ______________ was placed in solitary confinement) ______________.
   (2) Maltreating prisoner while in a position of authority.
       In that ______________ (personal jurisdiction data), did, (at/on board—location), on or about ______________ 19______________, a time of ward, while in the hands, of the enemy and in a position of authority over ______________, a prisoner at ______________, as (officer in charge of prison-
subsistence, quarters, and other comforts or aid to which they are lawfully entitled.

(4) **Harboring or protecting the enemy.**

(a) **Nature of offense.** An enemy is harbored or protected when, without proper authority, that enemy is shielded, either physically or by use of any artifice, aid, or representation from any injury or misfortune which in the chance of war may occur.

(b) **Knowledge.** Actual knowledge is required, but may be proved by circumstantial evidence.

(5) **Giving intelligence to the enemy.**

(a) **Nature of offense.** Giving intelligence to the enemy is a particular case of corresponding with the enemy made more serious by the fact that the communication contains intelligence that may be useful to the enemy for any of the many reasons that make information valuable to belligerents. This intelligence may be conveyed by direct or indirect means.

(b) **Intelligence.** “Intelligence” imports that the information conveyed is true or implies the truth, at least in part.

(c) **Knowledge.** Actual knowledge is required but may be proved by circumstantial evidence.

(6) **Communicating with the enemy.**

(a) **Nature of the offense.** No unauthorized communication, correspondence, or intercourse with the enemy is permissible. The intent, content, and method of the communication, correspondence, or intercourse are immaterial. No response or receipt by the enemy is required. The offense is complete the moment the communication, correspondence, or intercourse issues from the accused. The communication, correspondence, or intercourse may be conveyed directly or indirectly. A prisoner of war may violate this Article by engaging in unauthorized communications with the enemy. See also paragraph 29c(3).

(b) **Knowledge.** Actual knowledge is required but may be proved by circumstantial evidence.

(c) **Citizens of neutral powers.** Citizens of neutral powers resident in or visiting invaded or occupied territory can claim no immunity from the customary laws of war relating to communication with the enemy.

d. **Lesser included offense.** For harboring or protecting the enemy, giving intelligence to the enemy, or communicating with the enemy. Article 80—
e. **Maximum punishment.** Death or such other punishment as a court-martial or military commission may direct.

f. **Sample specifications.**

1. **Aiding or attempting to aid the enemy.**

In that ____________ (personal jurisdiction data), did, (at/on board—location), on or about ____________, (attempt to) aid the enemy with (arms) (ammunition) (supplies) (money) (__________), by (furnishing and delivering to ____________, members of the enemy’s armed forces) (__________).

2. **Harboring or protecting the enemy.**

In that ____________ (personal jurisdiction data), did, (at/on board—location), on or about ____________, without proper authority, knowingly (harbor) (protect) ____________, an enemy, by (concealing the said ____________ in his/her house) (__________).

3. **Giving intelligence to the enemy.**

In that ____________ (personal jurisdiction data), did, (at/on board—location), on or about ____________, without proper authority, knowingly give intelligence to the enemy, by (informing a patrol of the enemy’s forces of the whereabouts of a military patrol of the United States forces) (__________).

4. **Communicating with the enemy.**

In that ____________ (personal jurisdiction data), did, (at/on board—location), on or about ____________, without proper authority, knowingly (communicate with) (correspond with) (hold intercourse with) the enemy (by writing and transmitting secretly through the lines to one ____________, whom he/she, the said ____________, knew to be (an officer of the enemy’s armed forces) (__________) a communication in words and figures substantially as follows, to wit: ____________) (indirectly by publishing in ____________, a newspaper published at ____________, a communication in words and figures as follows, to wit: ____________, which communication was intended to reach the enemy) (__________).
1. Failing to secure public property taken from the enemy.

In that (personal jurisdiction data), did, (at/on board—location), on or about ____________ 19__________, fail to secure for the service of the United States certain public property taken from the enemy, to wit: ____________, of a value of (about) ____________.

2. Failing to report and turn over captured or abandoned property.

In that (personal jurisdiction data), did, (at/on board—location), on or about ____________ 19__________, fail to give notice and turn over to proper authority without delay certain (captured) (abandoned) property which had come into his/her (possession) (custody) (control), to wit: ____________, of a value of (about) ____________.

3. Dealing in captured or abandoned property.

In that (personal jurisdiction data), did, (at/on board—location), on or about ____________ 19__________, (buy) (sell) (trade) (deal in) (dispose of) (__________) certain (captured) (abandoned) property, to wit: ____________, of a value of (about) ____________, thereby (receiving) (expecting) a (profit) (benefit) (advantage) to (himself/herself) (__________, his/her accomplice) (__________, his/her brother) (__________).

4. Looting or pillaging.

In that (personal jurisdiction data), did, (at/on board—location), on or about ____________ 19__________, engage in (looting) (pillage) (looting and pillaging) by unlawfully (seizing) (appropriating) ____________, (property which had been left behind) (the property of ____________), (an inhabitant of ____________) (__________).

28. Article 104—Aiding the enemy

a. Text.

"Any person who—

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

(2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct."

b. Elements.

1. Aiding the enemy.

(a) That the accused aided the enemy; and

(b) That the accused did so with certain arms, ammunition, supplies, money, or other things.

2. Attempting to aid the enemy.

(a) That the accused did a certain overt act;

(b) That the act was done with the intent to aid the enemy with certain arms, ammunition, supplies, money, or other things;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to bring about the offense of aiding the enemy with certain arms, ammunition, supplies, money, or other things.

3. Harboring or protecting the enemy.

(a) That the accused, without proper authority, harbored or protected a person;

(b) That the person so harbored or protected was the enemy; and

(c) That the accused knew that the person so harbored or protected was an enemy.

4. Giving intelligence to the enemy.

(a) That the accused, without proper authority, knowingly gave intelligence information to the enemy; and

(b) That the intelligence information was true, or implied the truth, at least in part.

5. Communicating with the enemy.

(a) That the accused, without proper authority, communicated, corresponded, or held intercourse with the enemy, and;

(b) That the accused knew that the accused was communicating, corresponding, or holding intercourse with the enemy.

c. Explanation.

1. Scope of Article 104. This article denounces offenses by all persons whether or not otherwise subject to military law. Offenders may be tried by court-martial or by military commission.

2. Enemy. For a discussion of "enemy," see paragraph 23c(1)(b).

3. Aiding or attempting to aid the enemy. It is not a violation of this article to furnish prisoners of war
(a) That certain public property was taken from the enemy;
(b) That this property was of a certain value; and
(c) That the accused failed to do what was reasonable under the circumstances to secure this property for the service of the United States.

(2) Failing to report and turn over captured or abandoned property.
(a) That certain captured or abandoned public or private property came into the possession, custody, or control of the accused;
(b) That this property was of a certain value; and
(c) That the accused failed to give notice of its receipt and failed to turn over to proper authority, without delay, the captured or abandoned public or private property.

(3) Dealing in captured or abandoned property.
(a) That the accused bought, sold, traded, or otherwise dealt in or disposed of certain public or private captured or abandoned property;
(b) That this property was of certain value; and
(c) That by so doing the accused received or expected some profit, benefit, or advantage to the accused or to a certain person or persons connected directly or indirectly with the accused.

(4) Looting or pillaging.
(a) That the accused engaged in looting, pillaging, or looting and pillaging by unlawfully seizing or appropriating certain public or private property;
(b) That this property was located in enemy or occupied territory, or that it was on board a seized or captured vessel; and
(c) That this property was:
   (i) left behind, owned by, or in the custody of the enemy, an occupied state, an inhabitant of an occupied state, or a person under the protection of the enemy or occupied state, or who, immediately prior to the occupation of the place where the act occurred, was under the protection of the enemy or occupied state; or
   (ii) part of the equipment of a seized or captured vessel; or
   (iii) owned by, or in the custody of the officers, crew, or passengers on board a seized or captured vessel.

c. Explanation.

(1) Failing to secure public property taken from the enemy.
(a) Nature of property. Unlike the remaining offenses under this article, failing to secure public property taken from the enemy involves only public property. Immediately upon its capture from the enemy public property becomes the property of the United States. Neither the person who takes it nor any other person has any private right in this property.

(b) Nature of duty. Every person subject to military law has an immediate duty to take such steps as are reasonably within that person’s power to secure public property for the service of the United States and to protect it from destruction or loss.

(2) Failing to report and turn over captured or abandoned property.
(a) Reports. Reports of receipt of captured or abandoned property are to be made directly or through such channels as are required by current regulations, orders, or the customs of the service.

(b) Proper authority. “Proper authority” is any authority competent to order disposition of the property in question.

(3) Dealing in captured or abandoned property. “Disposed of” includes destruction or abandonment.

(4) Looting or pillaging. “Looting or pillaging” means unlawfully seizing or appropriating property which is located in enemy or occupied territory.

(5) Enemy. For a discussion of “enemy,” see paragraph 23c(1)(b).

d. Lesser included offense. Article 80—attempts e. Maximum punishment.

(1) Failing to secure public property taken from the enemy; failing to secure, give notice and turn over, selling, or otherwise wrongfully dealing in or disposing of captured or abandoned property:
(a) of a value of $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) of a value of more than $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) Looting or pillaging. Any punishment, other than death, that a court-martial may direct. See R.C.M. 1003.

e. Sample specifications.
In that (personal jurisdiction data), did, (at/on board—location), on or about 19, a time of war, disclose the (parole) (countersign), to wit: , to , a person who was not entitled to receive it.

(2) Giving a parole or countersign different from that authorized.

In that (personal jurisdiction data), did, (at/on board—location), on or about 19, a time of war, give to , a person entitled to receive and use the (parole) (countersign), namely: ' which was different from that which, to his/her knowledge, he/she was authorized and required to give, to wit: 

26. Article 102—Forcing a safeguard

a. Text.

"Any person subject to this chapter who forces a safeguard shall suffer death or such other punishment as a court-martial may direct."

b. Elements.

(1) that a safeguard had been issued or posted for the protection of a certain person or persons, place, or property;

(2) That the accused knew or should have known of the safeguard; and

(3) That the accused forced the safeguard.

c. Explanation.

(1) Safeguard. A safeguard is a detachment, guard, or detail posted by a commander for the protection of persons, places, or property of the enemy, or of a neutral affected by the relationship of belligerent forces in their prosecution of war or during circumstances amounting to a state of belligerency. The term also includes a written order left by a commander with an enemy subject or posted upon enemy property for the protection of that person or property. A safeguard is not a device adopted by a belligerent to protect its own property or nationals or to ensure order within its own forces, even if those forces are in a theater of combat operations, and the posting of guards or of off-limits signs does not establish a safeguard unless a commander takes those actions to protect enemy or neutral persons or property. The effect of a safeguard is to pledge the honor of the nation that the person or property shall be respected by the national armed forces.

(2) Forcing a safeguard. "Forcing a safeguard" means to perform an act or acts in violation of the protection of the safeguard.

(3) Nature of offense. Any trespass on the protection of the safeguard will constitute an offense under this article, whether the safeguard was imposed in time of war or in circumstances amounting to a state of belligerency short of a formal state of war.

(4) Knowledge. Actual knowledge of the safeguard is not required. It is sufficient if an accused should have known of the existence of the safeguard.

d. Lesser included offense.

e. Maximum punishment. Article 80—attempts

27. Article 103—Captured or abandoned property

a. Text.

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

(b) Any person subject to this chapter who—

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

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

(3) engages in looting or pillaging; shall be punished as a court-martial may direct."

b. Elements.

(1) Failing to secure public property taken from the enemy.
not necessary that an engagement with the enemy be in progress. It is unnecessary to prove that the offer was received by the enemy or that it was rejected or accepted. The sending of an emissary charged with making the offer or surrender is an act sufficient to prove the offer, even though the emissary does not reach the enemy.

(4) **Enemy.** For a discussion of "enemy," see paragraph 23c(1)(b).

d. **Lesser included offense.** Striking the colors or flag. Article 80—_attempts
e. **Maximum punishment.** All offenses under Article 100. Death or such other punishment as a court-martial may direct.
f. **Sample specifications.**
   (1) **Compelling surrender or attempting to compel surrender.**
   
   In that ________ (personal jurisdiction data), did, (at/on-board location), on or about ________ 19_______, (attempt to) compel ________ , the commander of ________ , (to give up to the enemy) (to abandon) said ________ , by ________ .

(2) **Striking the colors or flag.**
   
   In that ________ (personal jurisdiction data), did, (at/on board—location), on or about ________ 19_______, without proper authority, offer to surrender to the enemy by (striking the (colors)(flag)) ________ .

**25. Article 101—Improper use of countersign**

a. **Text.**

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

b. **Elements.**
   (1) **Disclosing the parole or countersign to one not entitled to receive it.**
      
      (a) That, in time of war, the accused disclosed the parole or countersign to a person, identified or unidentified; and
      (b) That this person was not entitled to receive it.

(2) **Giving a parole or countersign different from that authorized.**
   
   (a) That, in time of war, the accused knew that the accused was authorized and required to give a certain parole or countersign; and
   (b) That the accused gave to a person entitled to receive and use this parole or countersign a different parole or countersign from that which the accused was authorized and required to give.

c. **Explanation.**

(1) **Countersign.** A countersign is a word, signal, or procedure given from the principal headquarters of a command to aid guards and sentinels in their scrutiny of persons who apply to pass the lines. It consists of a secret challenge and a password, signal, or procedure.
   (2) **Parole.** A parole is a word used as a check on the countersign; it is given only to those who are entitled to inspect guards and to commanders of guards.
   (3) **Who may receive countersign.** The class of persons entitled to receive the countersign or parole will expand and contract under the varying circumstances of war. Who these persons are will be determined largely, in any particular case, by the general or special orders under which the accused was acting. Before disclosing such a word, a person subject to military law must determine at that person's peril that the recipient is a person authorized to receive it.
   (4) **Intent, motive, negligence, mistake, ignorance not defense.** The accused's intent or motive in disclosing the countersign or parole is immaterial to the issue of guilt, as is the fact that the disclosure was negligent or inadvertent. It is no defense that the accused did not know that the person to whom the countersign or parole was given was not entitled to receive it.
   (5) **How accused received countersign or parole.** It is immaterial whether the accused had received the countersign or parole in the regular course of duty or whether it was obtained in some other way.
   (6) **In time of war.** See R.C.M. 103(19).

d. **Lesser included offense.** Article 80—_attempts
e. **Maximum punishment.** Death or such other punishment as a court-martial may direct.
f. **Sample specifications.**
   (1) **Disclosing the parole or countersign to one not entitled to receive it.**
it was his/her duty to do, (certain enemy troops
which were in retreat) (__________). (9) Failing to afford relief and assistance.
In that (personal jurisdiction
data), did, (at/on board—location), on or about
___________ 19___________ (before) (in
the presence of) the enemy, fail to afford all practica-
ble relief and assistance to (the USS
___________, which was engaged in battle and
had run aground, in that he/she failed to take her in
tow) (certain troops of the ground forces of
___________, which were engaged in battle and
were pinned down by enemy fire, in that he/she
failed to furnish air cover) (___________) as he/
she properly should have done.

24. Article 100—Subordinate compelling
surrender
a. Text.
"Any person subject to this chapter who compels
or attempts to compel the commander of any place,
vessel, aircraft, or other military property, or of any
body of members of the armed forces, to give it up to
an enemy or to abandon it, or who strikes the colors
or flag to an enemy without proper authority, shall
be punished by death or such other punishment as a
court-martial may direct."
b. Elements.
(1) Compelling surrender.
(a) That a certain person was in command of a
certain place, vessel, aircraft, or other military prop-
erty or of a body of members of the armed forces;
(b) That the accused did an overt act which
was intended to and did compel that commander
to give it up to the enemy or abandon it; and
(c) That the place, vessel, aircraft, or other mil-
itary property or body of members of the armed
forces was actually given up to the enemy or aban-
donned.
(2) Attempting to compel surrender.
(a) That a certain person was in command of a
certain place, vessel, aircraft, or other military prop-
erty or of a body of members of the armed forces;
(b) That the accused did a certain overt act;
(c) That the act was done with the intent to
compel that commander to give up to the enemy or
abandon the place, vessel, aircraft, or other military
property or body of members of the armed forces;
d) That the act amounted to more than mere
preparation; and
e) That the act apparently tended to bring
about the compelling of surrender or abandonment.
(3) Striking the colors or flag.
(a) That there was an offer of surrender to an
enemy;
(b) That this offer was made by striking the
colors or flag to the enemy or in some other manner;
(c) That the accused made or was responsible
for the offer; and
(d) That the accused did not have proper au-
thority to make the offer.
c. Explanation.
(1) Compelling surrender.
(a) Nature of offense. The offenses under this
article are similar to mutiny or attempted mutiny
designed to bring about surrender or abandonment.
Unlike some cases of mutiny, however, concert of
action is not an essential element of the offenses
under this article. The offense is not complete until
the place, military property, or command is actually
abandoned or given up to the enemy.
(b) Surrender. "Surrender" and "to give it up
to an enemy" are synonymous.
(c) Acts required. The surrender or abandon-
ment must be compelled or attempted to be com-
pelled by acts rather than words.
(2) Attempting to compel surrender. The offense
of attempting to compel a surrender or abandon-
ment does not require actual abandonment or sur-
render, but there must be some act done with this
purpose in view, even if it does not accomplish the
purpose.
(3) Striking the colors or flag.
(a) In general. To "strike the colors or flag" is
to haul down the colors or flag in the face of the en-
emy or to make any other offer of surrender. It is
traditional wording for an act of surrender.
(b) Nature of offense. The offense is committed
when one assumes the authority to surrender a mili-
tary force or position when not authorized to do so
either by competent authority or by the necessities of
battle. If continued battle has become fruitless and it
is impossible to communicate with higher authority,
those facts will constitute proper authority to sur-
render. The offense may be committed whenever
there is sufficient contact with the enemy to give the
opportunity of making an offer of surrender and it is
(2) **Shamefully abandoning, surrendering, or delivering up command.** Article 80—attempts

(3) **Endangering safety of a command, unit, place, ship, or military property.**
   (a) Through disobedience of order. Article 92—failure to obey lawful order
   (b) Article 80—attempts

(4) **Casting away arms or ammunition.**
   (a) Article 108—military property of the United States—loss, damage, destruction, or wrongful disposition.
   (b) Article 80—attempts

(5) **Cowardly conduct.**
   (a) Article 85—desertion with intent to avoid hazardous duty or important service
   (b) Article 86—absence without authority
   (c) Article 99—running away
   (d) Article 80—attempts

(6) **Quitting place of duty to plunder or pillage.**
   (a) Article 86(2)—going from appointed place of duty
   (b) Article 80—attempts

(7) **Causing false alarms.** Article 80—attempts

(8) **Willfully failing to do utmost to encounter enemy.** Article 80—attempts

(9) **Failing to afford relief and assistance.** Article 80—attempts

e. **Maximum punishment.** All offenses under Article 99. Death or such other punishment as a court-martial may direct.

f. **Sample specifications.**

(1) **Running away.**

   In that 19, did, (at/on board—location), on or about 19, (before) (in the presence of) the enemy, run away (from his/her company) (and hide) ( ), which it was his/her duty to defend.

(2) **Shamefully abandoning, surrendering, or delivering up command.**

   In that 19, did, (at/on board—location), on or about 19, (before) (in the presence of) the enemy, shamefully (abandon) (surrender) (deliver up) ( ), which it was his/her duty to defend.

(3) **Endangering safety of a command, unit, place, ship, or military property.**

   In that (personal jurisdiction data), (at/on board—location), on or about 19, (before) (in the presence of) the enemy, endanger the safety of ( ), which it was his/her duty to defend, by (disobeying an order from ( ) to engage the enemy) (neglecting his/her duty as a sentinel by engaging in a card game while on his/her post) (intentional misconduct in that he/she became drunk and fired flares, thus revealing the location of his/her unit) ( ).

(4) **Casting away arms or ammunition.**

   In that (personal jurisdiction data), did, (at/on board—location), on or about 19, (before) (in the presence of) the enemy, cast away his/her (rifle) (ammunition) ( ).

(5) **Cowardly conduct.**

   In that (personal jurisdiction data), (at/on board—location), on or about 19, (before) (in the presence of) the enemy, was guilty of cowardly conduct as a result of fear, in that ( ).

(6) **Quitting place of duty to plunder or pillage.**

   In that (personal jurisdiction data), did, (at/on board—location), on or about 19, (before) (in the presence of) the enemy, quit his/her place of duty for the purpose of (plunder) (pillar) (plundering and pillaging).

(7) **Causing false alarms.**

   In that (personal jurisdiction data), did, (at/on board—location), on or about 19, (before) (in the presence of) the enemy, cause a false alarm in (Fort (the said ship) (the camp) ( )) by (needlessly and without authority (causing the call to arms to be sounded) (sounding the general alarm) ( )).

(8) **Willfully failing to do utmost to encounter enemy.**

   In that (personal jurisdiction data), being (before) (in the presence of) the enemy, did, (at/on board—location), on or about 19, (before) by, (ordering his/her troops to halt their advance) ( ), willfully fail to do his/her utmost to (encounter) (engage) (capture) (destroy), as
§23c.1

(1) Running away. “Running away” means an unauthorized departure to avoid actual or impending combat. It need not, however, be the result of fear, and there is no requirement that the accused literally run.

(b) Enemy. “Enemy” includes organized forces of the enemy in time of war, any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades, and includes civilians as well as members of military organizations. “Enemy” is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and all the citizens of the other.

(c) Before the enemy. Whether a person is “before the enemy” is a question of tactical relation, not distance. For example, a member of an antiaircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat may be before the enemy although miles from the enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not a part of a tactical operation then going on or in immediate prospect is not “before or in the presence of the enemy” within the meaning of this article.

(2) Shamefully abandoning, surrendering, or delivering up of command.

(a) Scope. This provision concerns primarily commanders chargeable with responsibility for defending a command, unit, place, ship or military property. Abandonment by a subordinate would ordinarily be charged as running away.

(b) Shameful. Surrender or abandonment without justification is shameful within the meaning of this article.

(c) Surrender; deliver up. “Surrender” and “deliver up” are synonymous for the purposes of this article.

(d) Justification. Surrender or abandonment of a command, unit, place, ship, or military property by a person charged with its can be justified only by the utmost necessity or extremity.

(3) Endangering safety of a command, unit, place, ship, or military property.

(a) Neglect. “Neglect” is the absence of conduct which would have been taken by a reasonably careful person in the same or similar circumstances.

(b) Intentional misconduct. “Intentional misconduct” does not include a mere error in judgment.

(4) Casting away arms or ammunition. Self-explanatory.

(5) Cowardly conduct.

(a) Cowardice. “Cowardice” is misbehavior motivated by fear.

(b) Fear. Fear is a natural feeling of apprehension when going into battle. The mere display of apprehension does not constitute this offense.

(c) Nature of offense. Refusal or abandonment of a performance of duty before or in the presence of the enemy as a result of fear constitutes this offense.

(d) Defense. Genuine and extreme illness, not generated by cowardice, is a defense.

(6) Quitting place of duty to plunder or pillage.

(a) Place of duty. “Place of duty” includes any place of duty, whether permanent or temporary, fixed or mobile.

(b) Plunder or pillage. “Plunder or pillage” means to seize or appropriate public or private property unlawfully.

(c) Nature of offense. The essence of this offense is quitting the place of duty with intent to plunder or pillage. Merely quitting with that purpose is sufficient, even if the intended misconduct is not done.

(7) Causing false alarms. This provision covers spreading of false or disturbing rumors or reports, as well as the false giving of established alarm signals.

(8) Willfully failing to do utmost to encounter enemy. Willfully refusing a lawful order to go on a combat patrol may violate this provision.

(9) Failing to afford relief and assistance.

(a) All practicable relief and assistance. “All practicable relief and assistance” means all relief and assistance which should be afforded within the limitations imposed upon a person by reason of that person’s own specific tasks or mission.

(b) Nature of offense. This offense is limited to a failure to afford relief and assistance to forces “engaged in battle.”

d. Lesser included offenses.

(1) Running away.

(a) Article 85—desertion with intent to avoid hazardous or important service

(b) Article 86—absence without authority; going from appointed place of duty

(c) Article 80—attempts
(7) causes false alarms in any command, unit, or place under control of the armed forces;
(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or
(9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle; shall be punished by death or such other punishment as a court-martial may direct."

b. Elements.
(1) Running away.
   (a) That the accused was before or in the presence of the enemy;
   (b) That the accused misbehaved by running away; and
   (c) That the accused intended to avoid actual or impending combat with the enemy by running away.
(2) Shamefully abandoning, surrendering, or delivering up command.
   (a) That the accused was charged by orders or circumstances with the duty to defend a certain command, unit, place, ship, or military property;
   (b) That, without justification, the accused shamefully abandoned, surrendered, or delivered up that command, unit, place, ship, or military property; and
   (c) That this act occurred while the accused was before or in the presence of the enemy.
(3) Endangering safety of a command, unit, place, ship, or military property.
   (a) That it was the duty of the accused to defend a certain command, unit, place, ship, or certain military property;
   (b) That the accused committed certain disobedience, neglect, or intentional misconduct;
   (c) That the accused thereby endangered the safety of the command, unit, place, ship, or military property; and
   (d) That this act occurred while the accused was before or in the presence of the enemy.
(4) Casting away arms or ammunition.
   (a) That the accused was before or in the presence of the enemy; and
(b) That the accused cast away certain arms or ammunition.
(5) Cowardly conduct.
   (a) That the accused committed an act of cowardice;
   (b) That this conduct occurred while the accused was before or in the presence of the enemy; and
   (c) That this conduct was the result of fear.
(6) Quitting place of duty to plunder or pillage.
   (a) That the accused was before or in the presence of the enemy;
   (b) That the accused quit the accused's place of duty; and
   (c) That the accused's intention in quitting was to plunder or pillage public or private property.
(7) Causing false alarms.
   (a) That an alarm was caused in a certain command, unit, or place under control of the armed forces of the United States;
   (b) That the accused caused the alarm;
   (c) That the alarm was caused without any reasonable or sufficient justification or excuse; and
   (d) That this act occurred while the accused was before or in the presence of the enemy.
(8) Willfully failing to do utmost to encounter enemy.
   (a) That the accused was serving before or in the presence of the enemy;
   (b) That the accused had a duty to encounter, engage, capture, or destroy certain enemy troops, combatants, vessels, aircraft, or a certain other thing; and
   (c) That the accused willfully failed to do the utmost to perform that duty.
(9) Failing to afford relief and assistance.
   (a) That certain troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or an ally of the United States were engaged in battle and required relief and assistance;
   (b) That the accused was in a position and able to render relief and assistance to these troops, combatants, vessels, or aircraft, without jeopardy to the accused's mission;
   (c) That the accused failed to afford all practicable relief and assistance; and
   (d) That, at the time, the accused was before or in the presence of the enemy.
c. Explanation.
§22a.

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

(2) Knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct.”

b. Elements.

(1) Unnecessary delay in disposing of case.

(a) That the accused was charged with a certain duty in connection with the disposition of a case of a person accused of an offense under the code;
(b) That the accused knew that the accused was charged with this duty;
(c) That delay occurred in the disposition of the case;
(d) That the accused was responsible for the delay; and
(e) That, under the circumstances, the delay was unnecessary.

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code.

(a) That the accused failed to enforce or comply with a certain provision of the code regulating a proceeding before, during, or after a trial;
(b) That the accused had the duty of enforcing or complying with that provision of the code;
(c) That the accused knew that the accused was charged with this duty; and
(d) That the accused’s failure to enforce or comply with that provision was intentional.

(1) Unnecessary delay in disposing of case. The purpose of section (1) of Article 98 is to ensure expeditious disposition of cases of persons accused of offenses under the code. A person may be responsible for delay in the disposition of a case only when that person’s duties require action with respect to the disposition of that case.

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code. Section (2) of Article 98 does not apply to errors made in good faith before, during, or after trial. It is designed to punish intentional failure to enforce or comply with the provisions of the code regulating the proceedings before, during, and after trial. Unlawful command influence under Article 37 may be prosecuted under this Article. See also Article 31 and R.C.M. 104.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment.

(1) Unnecessary delay in disposing of case. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) Unnecessary delay in disposing of case.

In that ____________ (personal jurisdiction data), being charged with the duty of (investigating) (taking immediate steps to determine the proper disposition of) charges preferred against ____________, a person accused of an offense under the Uniform Code of Military Justice (__________), was, (at/on board—location), on or about ____________ 19__________, responsible for unnecessary delay in (investigating said charges) (determining the proper disposition of said charges (__________), in that he/she (did ____________) (failed to ____________) (__________).

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code.

In that ____________ (personal jurisdiction data), being charged with the duty of ____________, did, (at/on board—location), on or about ____________ 19__________, knowingly and intentionally fail to (enforce) (comply with) Article ____________, Uniform Code of Military Justice, in that he/she ____________.

23. Article 99—Misbehavior before the enemy

a. Text.

“Any member of the armed forces who before or in the presence of the enemy—

(1) runs away;

(2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;

(3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;

(4) casts away his arms or ammunition;

(5) is guilty of cowardly conduct;

(6) quits his place of duty to plunder or pillage;
sense of Article 96, and only a competent authority (see subparagraph (c)) may order release, regardless of failure to follow procedures prescribed by the code, this Manual, or other law.

(2) Suffering a prisoner to escape through neglect.
   (a) Suffer. “Suffer” means to allow or permit; not to forbid or hinder.
   (b) Neglect. “Neglect” is a relative term. It is the absence of conduct which would have been taken by a reasonably careful person in the same or similar circumstances.
   (c) Escape. Escape is defined in paragraph 19c(4)(c).
   (d) Status of prisoner after escape not a defense. After escape, the fact that a prisoner returns, is captured, killed, or otherwise dies is not a defense.

(3) Suffering a prisoner to escape through design. An escape is suffered through design when it is intended. Such intent may be inferred from conduct so wantonly devoid of care that the only reasonable inference which may be drawn is that the escape was contemplated as a probable result.

d. Lesser included offenses.
   (1) Releasing a prisoner without proper authority. Article 80—attempts
   (2) Suffering a prisoner to escape through neglect. None
   (3) Suffering a prisoner to escape through design.
      (a) Article 96—suffering a prisoner to escape through neglect
      (b) Article 80—attempts

e. Maximum punishment.
   (1) Releasing a prisoner without proper authority. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.
   (2) Suffering a prisoner to escape through neglect. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.
   (3) Suffering a prisoner to escape through design. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. Sample specifications.
   (1) Releasing a prisoner without proper authority.
      In that ______________ (personal jurisdiction data), did, (at/on board—location), on or about ___________ 19 ____________, without proper authority, release ____________, a prisoner committed to his/her charge.
   (2) Suffering a prisoner to escape through neglect or design.
      In that ______________ (personal jurisdiction data), did, (at/on board—location), on or about ___________ 19 ____________, through (neglect) (design), suffer ____________, a prisoner committed to his/her charge, to escape.

21. Article 97—Unlawful detention
a. Text.
   “Any person subject to this chapter who, except as provided by law, apprehends, arrests, or confines any person shall be punished as a court-martial may direct.”

b. Elements.
   (1) That the accused apprehended, arrested, or confined a certain person; and
   (2) That the accused unlawfully exercised the accused’s authority to do so.

c. Explanation.
   (1) Scope. This article prohibits improper acts by those empowered by the code to arrest, apprehend, or confine. See Articles 7 and 9; R.C.M. 302, 304, 305, and 1101, and paragraphs 2 and 5b, Part V. It does not apply to private acts of false imprisonment or unlawful restraint of another’s freedom of movement by one not acting under such a delegation of authority under the code.

   (2) No force required. The apprehension, arrest, or confinement must be against the will of the person restrained, but force is not required.

   (3) Defense. A reasonable belief held by the person imposing restraint that it is lawful is a defense.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. Sample specification.
   In that ______________ (personal jurisdiction data), did, (at/on board—location), on or about ___________ 19 ____________, unlawfully (apprehend ____________) (place ____________ in arrest) (confine ____________ in ____________).

22. Article 98—Noncompliance with procedural rules
a. Text.
   “Any person subject to this chapter who—
(c) Article 134—drunk on station
(d) Article 134—drunk in uniform in a public
place
(2) Sleeping on post.
(a) Article 92—dereliction of duty
(b) Article 134—loitering or wrongfully sitting
down on post
(3) Leaving post.
(a) Article 92—dereliction of duty
(b) Article 86—going from appointed place of
duty
e. Maximum punishment.
(1) In time of war. Death or such other punish-
ment as a court-martial may direct.
(2) While receiving special pay under 37 U.S.C. §
310. Dishonorable discharge, forfeiture of all pay
and allowances, and confinement for 10 years.
(3) In all other places. Dishonorable discharge,
forfeiture of all pay and allowances, and confine-
ment for 1 year.
f. Sample specification.
In that (personal jurisdiction
data), on or about (a time of war)
(at/on board—location), (while receiving special
pay under 37 U.S.C. §
ce. 310), (being (posted) (on
post) as a (sentinel) (lookout) at (warehouse no. 7)
(post no. 11) (for radar observation)
(_______) (was found (drunk) (sleeping)
upon his/her post) (did leave his/her post before he/
she was regularly relieved).

39. Article 114—Dueling

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

b. Elements.
(1) Dueling.
(a) That the accused fought another person
with deadly weapons;
(b) That the combat was for private reasons;
and
(c) That the combat was by prior agreement.
(2) Promoting a duel.
(a) That the accused promoted a duel between
certain persons; and
(b) That the accused did so in a certain man-
ner.
(3) Conniving at fighting a duel.
(a) That certain persons intended to and were
about to engage in a duel;
(b) That the accused had knowledge of the
planned duel; and
(c) That the accused connived at the fighting of
the duel in a certain manner.
(4) Failure to report a duel.
(a) That a challenge to fight a duel had been
sent or was about to be sent;
(b) That the accused had knowledge of this
challenge; and
(c) That the accused failed to report this fact
promptly to proper authority.
c. Explanation.
(1) Duel. A duel is combat between two persons
for private reasons fought with deadly weapons by
prior agreement.
(2) Promoting a duel. Urging or taunting another
to challenge or to accept a challenge to duel, acting
as a second or as carrier of a challenge or accept-
ance, or otherwise furthering or contributing to the
fighting of a duel are examples of promoting a duel.
(3) Conniving at fighting a duel. Anyone who has
knowledge that steps are being taken or have been
taken toward arranging or fighting a duel and who
fails to take reasonable preventive action thereby
connives at the fighting of a duel.

d. Lesser included offense. Article 80—
e. Maximum punishment. For all Article 114 of-
fenses: dishonorable discharge, forfeiture of all pay
and allowances, and confinement for 1 year.
f. Sample specifications.
(1) Dueling.
In that (personal jurisdiction
data) (and ___________), did, (at/on
board—location) (subject-matter jurisdiction data,
if required), on or about __________,
fight a duel (with ___________), using as
weapons therefor (pistols) (swords) (__________).
(2) Promoting a duel.
In that (personal jurisdiction
data), did, (at/on board—location) (subject-matter
jurisdiction data, if required), on or about
__________ 19__________, promote a
duel between ____________ and
40. Article 115—Malingering

a. Text.
"Any person subject to this chapter who for the purpose of avoiding work, duty, or service"—
(1) feigns illness, physical disablement, mental lapse, or derangement; or
(2) intentionally inflicts self-injury; shall be punished as a court-martial may direct.

b. Elements.
(1) That the accused was assigned to, or was aware of prospective assignment to, or availability for, the performance of work, duty, or service;
(2) That the accused feigned illness, physical disablement, mental lapse, or derangement, or intentionally inflicted injury upon himself or herself; and
(3) That the accused's purpose or intent in doing so was to avoid the work, duty, or service.

[Note: If the offense was committed in time of war or in a hostile fire pay zone, add the following element]

(4) That the offense was committed (in time of war) (in a hostile fire pay zone).

c. Explanation.
(1) Nature of offense. The essence of this offense is the design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. Whether to avoid all duty, or only a particular job, is the purpose to shirk which characterizes the offense. Hence, the nature or permanency of a self-inflicted injury is not material on the question of guilt, nor is the seriousness of a physical or mental disability which is a sham. Evidence of the extent of the self-inflicted injury or feigned disability may, however, be relevant as a factor indicating the presence or absence of the purpose.

(2) How injury inflicted. The injury may be inflicted by nonviolent as well as by violent means and may be accomplished by any act or omission which produces, prolongs, or aggravates any sickness or disability. Thus, voluntary starvation which results in debility is a self-inflicted injury and when done for the purpose of avoiding work, duty, or service constitutes a violation of this article.

d. Lesser included offenses.
(1) Article 134—self-injury without intent to avoid service
(2) Article 80—attempts

e. Maximum punishment.
(1) Feigning illness, physical disablement, mental lapse, or derangement. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) Feigning illness, physical disablement, mental lapse, or derangement in a hostile fire pay zone or in time of war. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(3) Intentional self-inflicted injury. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(4) Intentional self-inflicted injury in a hostile fire pay zone or in time of war. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. Sample specification.
In that (personal jurisdiction data), did, (at/on board—location) (in a hostile fire pay zone) (subject-matter jurisdiction data, if required) (on or about ____________ from about ____________ to about ____________, (a time of war) for the purpose of avoiding (his/her duty as officer of the day) (his/her duty as aircraft mechanic) (work in the mess hall) (service as an enlisted person)
(feign (a headache) (a sore back) (illness) (mental lapse) (mental derangement) (intentionally injure himself/herself by ))

41. Article 116—Riot or breach of peace

a. Text.

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

b. Elements.

(1) Riot.

(a) That the accused was a member of an assembly of three or more persons;

(b) That the accused and at least two other members of this group mutually intended to assist one another against anyone who might oppose them in doing an act for some private purpose;

(c) That the group or some of its members, in furtherance of such purpose, unlawfully committed a tumultuous disturbance of the peace in a violent or turbulent manner; and

(d) That these acts terrorized the public in general in that they caused or were intended to cause public alarm or terror.

(2) Breach of the peace.

(a) That the accused caused or participated in a certain act of a violent or turbulent nature; and

(b) That the peace was thereby unlawfully disturbed.

c. Explanation.

(1) Riot. “Riot” is a tumultuous disturbance of the peace by three or more persons assembled together in furtherance of a common purpose to execute some enterprise of a private nature by concerted action against anyone who might oppose them, committed in such a violent and turbulent manner as to cause or be calculated to cause public terror. The gravamen of the offense of riot is terrorization of the public. It is immaterial whether the act intended was lawful. Furthermore, it is not necessary that the common purpose be determined before the assembly. It is sufficient if the assembly begins to execute in a tumultuous manner a common purpose formed after it assembled.

(2) Breach of the peace. A “breach of the peace” is an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. The acts or conduct contemplated by this article are those which disturb the public tranquility or impinge upon the peace and good order to which the community is entitled. Engaging in an affray and unlawful discharge of firearms in a public street are examples of conduct which may constitute a breach of the peace. Loud speech and unruly conduct may also constitute a breach of the peace by the speaker. A speaker may also by guilty of causing a breach of the peace if the speaker uses language which can reasonably be expected to produce a violent or turbulent response and a breach of the peace results. The fact that the words are true or used under provocation is not a defense, nor is tumultuous conduct excusable because incited by others.

(3) Community and public. “Community” and “public” include a military organization, post, camp, ship, aircraft, or station.

d. Lesser included offenses.

(1) Riot.

(a) Article 116—breach of the peace

(b) Article 134—disorderly conduct

(c) Article 80—attempts

(2) Breach of the peace.

(a) Article 134—disorderly conduct

(b) Article 80—attempts

e. Maximum punishment.

(1) Riot. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) Breach of the peace. Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

f. Sample specifications.

(1) Riot.

In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about (cause) (participate in) a riot by unlawfully assembling with (others to the number of about whose names are unknown) for the purpose of (resisting the police of) (assaulting passers-by) (and ), and in furtherance of said purpose did (fight with said police) (assault certain persons, to wit: ) ( ), to the terror and disturbance of .

(2) Breach of the peace.
§111(2)

In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about 19, wrongfully use (provoking) (reproachful) (words, to wit; "__________:" or words to that effect) (and) (gestures, to wit: __________) towards (Sergeant __________, U.S. Air Force) __________.

42. Article 117—Provoking speeches or gestures
a. Text.

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

b. Elements.

(1) That the accused wrongfully used words or gestures toward a certain person;
(2) That the words or gestures used were provoking or reproachful; and
(3) That the person toward whom the words or gestures were used was a person subject to the code.

c. Explanation.

(1) In general. As used in this article, “provoking” and“reproachful” describe those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances. These words and gestures do not include reprimands, censures, reproofs and the like which may properly be administered in the interests of training, efficiency, or discipline in the armed forces.

(2) Knowledge. It is not necessary that the accused have knowledge that the person toward whom the words or gestures are directed is a person subject to the code.

d. Lesser included offenses. Article 80—attempts

e. Maximum punishment. Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

f. Sample specification.

In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about 19, wrongfully use (provoking) (reproachful) (words, to wit; "__________:" or words to that effect) (and) (gestures, to wit: __________) towards (Sergeant __________, U.S. Air Force) __________.

43. Article 118—Murder
a. Text.

"Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—"

(1) has a premeditated design to kill;
(2) intends to kill or inflict great bodily harm;
(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

b. Elements.

(1) Premeditated murder.

(a) That a certain named or described person is dead;
(b) That the death resulted from the act or omission of the accused;
(c) That the killing was unlawful; and
(d) That, at the time of the killing, the accused had a premeditated design to kill.

(2) Intent to kill or inflict great bodily harm.

(a) That a certain named or described person is dead;
(b) That the death resulted from the act or omission of the accused;
(c) That the killing was unlawful; and
(d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person.

(3) Act inherently dangerous to others.

(a) That a certain named or described person is dead;
(b) That the death resulted from the intentional act of the accused;
(c) That this act was inherently dangerous to others and showed a wanton disregard for human life;

(d) That the accused knew that death or great bodily harm was a probable consequence of the act; and

(e) That the killing was unlawful.

(4) During certain offenses.

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused was engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson.

C. Explanation.

(1) In general. Killing a human being is unlawful when done without justification or excuse. See R.C.M. 916. Whether an unlawful killing constitutes murder or a lesser offense depends upon the circumstances. The offense is committed at the place of the act or omission although the victim may have died elsewhere. Whether death occurs at the time of the accused’s act or omission, or at some time thereafter, it must have followed from an injury received by the victim which resulted from the act or omission.

(2) Premeditated murder.

(a) Premeditation. A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. It is not necessary that the intention to kill have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution. The existence of premeditation may be inferred from the circumstances.

(b) Transferred premeditation. When an accused with a premeditated design attempted to unlawfully kill a certain person, but, by mistake or inadvertence, killed another person, the accused is still criminally responsible for a premeditated murder, because the premeditated design to kill is transferred from the intended victim to the actual victim.

(c) Intoxication. Voluntary intoxication (see R.C.M. 916(1)(2)) not amounting to legal insanity may reduce premeditated murder (Article 118(1)) to unpremeditated murder (Article 118(2) or (3)) but it does not reduce either premeditated murder or unpremeditated murder to manslaughter (Article 119) or any other lesser offense.

(3) Intent to kill or inflict great bodily harm.

(a) Intent. An unlawful killing without premeditation is also murder when the accused had either an intent to kill or inflict great bodily harm. It may be inferred that a person intends the natural and probable consequences of an act purposely done. Hence, if a person does an intentional act likely to result in death or great bodily injury, it may be inferred that death or great bodily injury was intended. The intent need not be directed toward the person killed, or exist for any particular time before commission of the act, or have previously existed at all. It is sufficient that it existed at the time of the act or omission (except if death is inflicted in the heat of a sudden passion caused by adequate provocation—see paragraph 44). For example, a person committing housebreaking who strikes and kills the householder attempting to prevent flight can be guilty of murder even if the householder was not seen until the moment before striking the fatal blow.

(b) Great bodily harm. “Great bodily harm” means serious injury; it does not include minor injuries such as a black eye or a bloody nose, but it does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries. It is synonymous with the term “grievous bodily harm.”

(c) Intoxication. Voluntary intoxication not amounting to legal insanity does not reduce unpremeditated murder to manslaughter (Article 119) or any other lesser offense.

(4) Act inherently dangerous to others.

(a) Wanton disregard of human life. Intentionally engaging in an act inherently dangerous to others—although without an intent to cause the death of or great bodily harm to any particular person, or even with a wish that death will not be caused—may also constitute murder if the act shows wanton disregard of human life. Such disregard is characterized by heedlessness of the probable conse-
quences of the act or omission, or indifference to the likelihood of death or great bodily harm. Examples include throwing a live grenade toward others in jest or flying an aircraft very low over a crowd to make it scatter.

(b) Knowledge. The accused must know that death or great bodily harm was a probable consequence of the inherently dangerous act. Such knowledge may be proved by circumstantial evidence.

(5) During certain offenses.

(a) In general. The commission or attempted commission of any of the offenses listed in Article 118(4) is likely to result in homicide, and when an unlawful killing occurs as a consequence of the perpetration or attempted perpetration of one of these offenses, the killing is murder. Under these circumstances it is not a defense that the killing was unintended or accidental.

(b) Separate offenses. The perpetration or attempted perpetration of the burglary, sodomy, rape, robbery, or aggravated arson may be charged separately from the homicide.

d. Lesser included offenses.

(1) Premeditated murder and murder during certain offenses. Article 118(2) and (3)—murder

(2) All murders under Article 118.

(a) Article 119—involuntary manslaughter

(b) Article 128—assault; assault consummated by a battery; aggravated assault

(c) Article 134—negligent homicide

(3) Murder as defined in Article 118(1), (2), and (4).

(a) Article 80—_attempts

(b) Article 119—voluntary manslaughter

(c) Article 134—assault with intent to commit murder

(d) Article 134—assault with intent to commit voluntary manslaughter
e. Maximum punishment.

(1) Article 118(1) or (4)—death. Mandatory minimum—imprisonment for life.

(2) Article 118(2) or (3)—such punishment other than death as a court-martial may direct.

f. Sample specification.

In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19___________, (with premeditation) (while perpetrating) (attempting to perpetrate) __________ murder __________ by means of (shooting him/her with a rifle) __________.

44. Article 119—Manslaughter

a. Text.

“(a) Any person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter and shall be punished as a court-martial may direct.”

(b) Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—

(1) by culpable negligence; or

(2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (article 118), directly affecting the person; is guilty of involuntary manslaughter and shall be punished as a court-martial may direct.

b. Elements.

(1) Voluntary manslaughter.

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon the person killed.

(2) Involuntary manslaughter.

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That this act or omission of the accused constituted culpable negligence, or occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person other than burglary, sodomy, rape, robbery, or aggravated arson.

c. Explanation.

(1) Voluntary manslaughter.

(a) Nature of offense. An unlawful killing, although done with an intent to kill or inflict great bodily harm, is not murder but voluntary man-
slaughter if committed in the heat of sudden passion caused by adequate provocation. Heat of passion may result from fear or rage. A person may be provoked to such an extent that in the heat of sudden passion caused by the provocation, although not in necessary defense of life or to prevent bodily harm, a fatal blow may be struck before self-control has returned. Although adequate provocation does not excuse the homicide, it does preclude conviction of murder.

(b) Nature of provocation. The provocation must be adequate to excite uncontrollable passion in a reasonable person, and the act of killing must be committed under and because of the passion. However, the provocation must be sought or induced as an excuse for killing or doing harm. If, judged by the standard of a reasonable person, sufficient cooling time elapses between the provocation and the killing, the offense is murder, even if the accused's passion persists. Examples of acts which may, depending on the circumstances, constitute adequate provocation are the unlawful infliction of great bodily harm, unlawful imprisonment, and the sight by one spouse of an act of adultery committed by the other spouse. Insulting or abusive words or gestures, a slight blow with the hand or fist, and trespass or other injury to property are not, standing alone, adequate provocation.

(2) Involuntary manslaughter.

(a) Culpable negligence.

(i) Nature of culpable negligence. Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. Thus, the basis of a charge of involuntary manslaughter may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not necessarily be a natural and probable consequence of the act or omission. Acts which may amount to culpable negligence include negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous; and carelessly leaving poisons or dangerous drugs where they may endanger life.

(ii) Legal duty required. When there is no legal duty to act there can be no neglect. Thus, when a stranger makes no effort to save a drowning person, or a person allows a beggar to freeze or starve to death, no crime is committed.

(b) Offense directly affecting the person. An "offense directly affecting the person" means one affecting some particular person as distinguished from an offense affecting society in general. Among offenses directly affecting the person are the various types of assault, battery, false imprisonment, involuntary engagement in an affray, and maiming.

d. Lesser included offenses.

(1) Voluntary manslaughter.

(a) Article 119—involuntary manslaughter

(b) Article 128—assault; assault consummated by a battery; aggravated assault

(c) Article 134—assault with intent to commit voluntary manslaughter

(d) Article 134—negligent homicide

(e) Article 80—attempts

(2) Involuntary manslaughter.

(a) Article 128—assault consummated by a battery

(b) Article 134—negligent homicide

e. Maximum punishment.

(1) Voluntary manslaughter. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) Involuntary manslaughter. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. Sample specifications.

(1) Voluntary manslaughter.

In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19 __________, willfully and unlawfully kill __________ by __________ him/her (in) (on) the __________ with a __________.

(2) Involuntary manslaughter.

In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19 __________, (by culpable negligence) (while (perpetrating) (attempting to perpetrate) an offense directly affecting the person of __________, to wit: (maiming) (a battery)
unlawfully kill
by him/her (in) on the with a 45.

45. Article 120—Rape and carnal knowledge

a. Text.

“(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.”

(b) “Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.”

(c) “Penetration, however slight, is sufficient to complete either of these offenses.”

b. Elements.

(1) Rape.

(a) That the accused committed an act of sexual intercourse with a certain female;

(b) That the female was not the accused’s wife; and

(c) That the act of sexual intercourse was done by force and without her consent.

(2) Carnal knowledge.

(a) That the accused committed an act of sexual intercourse with a certain female;

(b) That the female was not the accused’s wife; and

(c) That at the time of the sexual intercourse the female was under 16 years of age.

c. Explanation.

(1) Rape.

(a) Nature of offense. Rape is sexual intercourse by a person with a female not his wife, by force and without her consent. It may be committed on a female of any age. Any penetration, however slight, is sufficient to complete the offense.

(b) Force and lack of consent. Force and lack of consent are necessary to the offense. Thus, if the female consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a woman in possession of her mental and physical faculties fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the female is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused’s knowledge the woman is of unsound mind or unconscious to an extent rendering her incapable of giving consent, the act is rape. Likewise, the acquiescence of a child of such tender years that she is incapable of understanding the nature of the act is not consent.

(c) Character of victim. See Mil.R.Evid. 412 concerning rules of evidence relating to an alleged rape victim’s character.

(2) Carnal knowledge. “Carnal knowledge” is sexual intercourse under circumstances not amounting to rape, with a female who is not the accused’s wife and who has not attained the age of 16 years. Any penetration, however slight, is sufficient to complete the offense. It is no defense that the accused is ignorant or misinformed as to the true age of the female, or that she was of prior unchaste character; it is the fact of the girl’s age and not his knowledge or belief which fixes his criminal responsibility. Evidence of these matters should, however, be considered in determining an appropriate sentence.

d. Lesser included offenses.

(1) Rape.

(a) Article 128—assault; assault consummated by a battery

(b) Article 134—assault with intent to commit rape

(c) Article 134—indecent assault

(d) Article 80—attempts

(e) Article 120(6)—carnal knowledge

(2) Carnal knowledge.

(a) Article 134—indecent acts or liberties with a person under 16

(b) Article 80—attempts

e. Maximum punishment.
(1) **Rape.** Death or such other punishment as a court-martial may direct.

(2) **Carnal knowledge.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

f. **Sample specifications.**

(1) **Rape.**

In that ____________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________ 19__________, rape ____________, (a person who had not attained the age of 16 years).

(2) **Carnal knowledge.**

In that ____________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________ 19__________, commit the offense of carnal knowledge with ____________.

46. **Article 121—Larceny and wrongful appropriation**

a. **Text.**

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

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

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

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

b. **Elements.**

(1) **Larceny.**

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.

[Note: If the property is alleged to be military property, as defined in paragraph 32c(1), add the following element]

(e) That the property was military property.

(2) **Wrongful appropriation.**

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent temporarily to deprive or defraud another person of the use and benefit of the property or temporarily to appropriate the property for the use of the accused or for any person other than the owner.

c. **Explanation.**

(1) **Larceny.**

(a) **In general.** A wrongful taking with intent permanently to deprive includes the common law offense of larceny; a wrongful obtaining with intent permanently to defraud includes the offense formerly known as obtaining by false pretense; and a wrongful withholding with intent permanently to appropriate includes the offense formerly known as embezzlement. Any of the various types of larceny under Article 121 may be charged and proved under a specification alleging that the accused “did steal” the property in question.

(b) **Taking, obtaining, or withholding.** There must be a taking, obtaining, or withholding of the property by the thief. For instance, there is no taking if the property is connected to a building by a chain and the property has not been disconnected from the building; property is not “obtained” by merely acquiring title thereto without exercising some possessory control over it. As a general rule, however, any movement of the property or any exercise of dominion over it is sufficient if accompanied by the requi-
site intent. Thus, if an accused enticed another's horse into the accused's stable without touching the animal, or procured a railroad company to deliver another's trunk by changing the check on it, or obtained the delivery of another's goods to a person or place designated by the accused, or had the funds of another transferred to the accused's bank account, the accused is guilty of larceny if the other elements of the offense have been proved. A person may "obtain" the property of another by acquiring possession without title, and one who already has possession of the property of another may "obtain" it by later acquiring title to it. A "withholding" may arise as a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property, or it may arise as a result of devoting property to a use not authorized by its owner. Generally, this is so whether the person withholding the property acquired it lawfully or unlawfully. See subparagraph c(1)(f) below. However, acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property or of being an accessory after the fact are not included within the meaning of "withholds." Therefore, neither a receiver of stolen property nor an accessory after the fact can be convicted of larceny on that basis alone.

The taking, obtaining, or withholding must be of specific property. A debtor does not withhold specific property from the possession of a creditor by failing or refusing to pay a debt, for the relationship of debtor and creditor does not give the creditor a possessory right in any specific money or other property of the debtor.

(c) Ownership of the property.

(i) In general. Article 121 requires that the taking, obtaining, or withholding be from the possession of the owner or of any other person. Care, custody, management, and control are among the definitions of possession.

(ii) Owner. "Owner" refers to the person who, at the time of the taking, obtaining, or withholding, had the superior right to possession of the property in the light of all conflicting interests therein which may be involved in the particular case. For instance, an organization is the true owner of its funds as against the custodian of the funds charged with the larceny thereof.

(d) Wrongfulness of the taking, obtaining, or withholding. The taking, obtaining, or withholding of the property must be wrongful. As a general rule, a taking or withholding of property from the possession of another is wrongful if done without the consent of the other, and an obtaining of property from the possession of another is wrongful if the obtaining is by false pretense. However, such an act is not wrongful if it is authorized by law or apparently lawful superior orders, or, generally, if done by a person who has a right to the possession of the property either equal to or greater than the right of one from whose possession the property is taken, obtained, or withheld. An owner of property who takes or withholds it from the possession of another, without the consent of the other, or who obtains it therewith from false pretense, does so wrongfully if the other has a superior right—such as a lien—to possession of the property. A person who takes, obtains, or withholds property as the agent of another has the same rights and liabilities as does the principal, but may not be charged with a guilty knowledge or intent of the principal which that person does not share.

(e) False pretense. With respect to obtaining property by false pretense, the false pretense may be made by means of any act, word, symbol, or token. The pretense must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief
in its truth. A false pretense is a false representation of past or existing fact. In addition to other kinds of facts, the fact falsely represented by a person may be that person's or another's power, authority, or intention. Thus, a false representation by a person that that person presently intends to perform a certain act in the future is a false representation of an existing fact—the intention—and thus a false pretense. Although the pretense need not be the sole cause inducing the owner to part with the property, it must be an effective and intentional cause of the obtaining. A false representation made after the property was obtained will not result in a violation of Article 121. A larceny is committed when a person obtains the property of another by false pretense and with intent to steal, even though the owner neither intended nor was requested to part with title to the property. Thus, a person who gets another's watch by pretending that it will be borrowed briefly and then returned, but who really intends to sell it, is guilty of larceny.

(f) Intent.

(i) In general. The offense of larceny requires that the taking, obtaining, or withholding by the thief be accompanied by an intent permanently to deprive or defraud another of the use and benefit of property or permanently to appropriate the property to the thief's own use or the use of any person other than the owner. These intents are collectively called an intent to steal. Although a person gets property by a taking or obtaining which was not wrongful or which was without a concurrent intent to steal, a larceny is nevertheless committed if an intent to steal is formed after the taking or obtaining and the property is wrongfully withheld with that intent. For example, if a person rents another's vehicle, later decides to keep it permanently, and then either fails to return it at the appointed time or uses it for a purpose not authorized by the terms of the rental, larceny has been committed, even though at the time the vehicle was rented, the person intended to return it after using it according to the agreement.

(ii) Inference of intent. An intent to steal may be proved by circumstantial evidence. Thus, if a person secretly takes property, hides it, and denies knowing anything about it, an intent to steal may be inferred; if the property was taken openly and returned, this would tend to negate such an intent. Proof of sale of the property may show an intent to steal, and therefore, evidence of such a sale may be introduced to support a charge of larceny. An intent to steal may be inferred from a wrongful and intentional dealing with the property of another in a manner likely to cause that person to suffer a permanent loss thereof.

(iii) Special situations.

(A) Motive does not negate intent. The accused's purpose in taking an item ordinarily is irrelevant to the accused's guilt as long as the accused had the intent required under subparagraph c(1)(f)(i) above. For example, if the accused wrongfully took property as a "joke" or "to teach the owner a lesson" this would not be a defense, although if the accused intended to return the property, the accused would be guilty of wrongful appropriation, not larceny. When a person takes property intending only to return it to its lawful owner, as when stolen property is taken from a thief in order to return it to its owner, larceny or wrongful appropriation is not committed.

(B) Intent to pay for or replace property not a defense. An intent to pay for or replace the stolen property is not a defense, even if that intent existed at the time of the theft. If, however, the accused takes money or a negotiable instrument having no special value above its face value, with the intent to return an equivalent amount of money, the offense of larceny is not committed although wrongful appropriation may be.

(C) Return of property not a defense. Once a larceny is committed, a return of the property or payment for it is no defense. See subparagraph c(2) below when the taking, obtaining, or withholding is with the intent to return.

(g) Value.

(i) In general. Value is a question of fact to be determined on the basis of all of the evidence admitted.

(ii) Government property. When the stolen property is an item issued or procured from Government sources, the price listed in an official publication for that property at the time of the theft is admissible as evidence of its value. See Mil.R.Evid. 803(17). However, the stolen item must be shown to have been, at the time of the theft, in the condition upon which the value indicated in the official price list is based. The price listed in the official publication is not conclusive as to the value of the item, and
other evidence may be admitted on the question of its condition and value.

(iii) Other property. As a general rule, the value of other stolen property is its legitimate market value at the time and place of the theft. If this property, because of its character or the place where it was stolen, had no legitimate market value at the time and place of the theft or if that value cannot readily be ascertained, its value may be determined by its legitimate market value in the United States at the time of the theft, or by its replacement cost at that time, whichever is less. Market value may be established by proof of the recent purchase price paid for the article in the legitimate market involved or by testimony or other admissible evidence from any person who is familiar through training or experience with the market value in question. The owner of the property may testify as to its market value if familiar with its quality and condition. The fact that the owner is not an expert of the market value of the property goes only to the weight to be given that testimony, and not to its admissibility. See Mil.R.Evid. 701. When the character of the property clearly appears in evidence—for instance, when it is exhibited to the court-martial—the court-martial, from its own experience, may infer that it has some value. If as a matter of common knowledge the property is obviously of a value substantially in excess of $100.00, the court-martial may find a value of more than $100.00. Writings representing value may be considered to have the value—even though contingent—which they represented at the time of the theft.

(iv) Limited interest in property. If an owner of property or someone acting in the owner's behalf steals it from a person who has a superior, but limited, interest in the property, such as a lien, the value for punishment purposes shall be that of the limited interest.

(h) Miscellaneous considerations.

(i) Lost property. A taking or withholding of lost property by the finder is larceny if accompanied by an intent to steal and if a clue to the identity of the general or special owner, or through which such identity may be traced, is furnished by the character, location, or marketing of the property, or by other circumstances.

(ii) Multiple article larceny. When a larceny of several articles is committed at substantially the same time and place, it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several persons or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification.

(iii) Special kinds of property which may also be the subject of larceny. Included in property which may be the subject of larceny is property which is taken, obtained, or withheld by severing it from real estate and writings which represent value such as commercial paper.

(iv) Services. Theft of services may not be charged under this paragraph, but see paragraph 78.

(v) Mail. As to larceny of mail, see also paragraph 93.

(2) Wrongful appropriation.

(a) In general. Wrongful appropriation requires an intent to temporarily—as opposed to permanently—deprive the owner of the use and benefit of, or appropriate to the use of another, the property wrongfully taken, withheld, or obtained. In all other respects wrongful appropriation and larceny are identical.

(b) Examples. Wrongful appropriation includes: taking another's automobile without permission or lawful authority with intent to drive it a short distance and then return it or cause it to be returned to the owner; obtaining a service weapon by falsely pretending to be about to go on guard duty with intent to use it on a hunting trip and later return it; and while driving a government vehicle on a mission to deliver supplies, withholding the vehicle from government service by deviating from the assigned route without authority, to visit a friend in a nearby town and later restore the vehicle to its lawful use. An inadvertent exercise of control over the property of another will not result in wrongful appropriation. For example, a person who fails to return a borrowed boat at the time agreed upon because the boat inadvertently went aground is not guilty of this offense.

d. Lesser included offenses.

(1) Larceny.

(a) Article 121—wrongful appropriation

(b) Article 80—attempts

(2) Larceny of military property.

(a) Article 121—wrongful appropriation
Article 121—larceny of property other than military property

(c) Article 80—attempts

(3) Wrongful appropriation. Article 80—attempts
e. Maximum punishment.

(1) Larceny.

(a) Military property of a value of $100 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) Property other than military property of a value of $100 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(c) Military property of a value of more than $100 or of any military motor vehicle, aircraft, vessel, firearm, or explosive. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(d) Property other than military property of a value of more than $100 or any motor vehicle, aircraft, vessel, firearm, or explosive not included in subparagraph e(1)(c). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

(2) Wrongful appropriation.

(a) Of a value of $100.00 or less. Confinement for 3 months, and forfeiture of two-thirds pay per month for 3 months.

(b) Of a value of more than $100.00. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(c) Of any motor vehicle, aircraft, vessel, firearm, or explosive. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. Sample specifications.

(1) Larceny.

In that _________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _________ 19_______, steal ____________ (military property), of a value of (about) $ ____________, the property of ____________.

(2) Wrongful appropriation.

In that _________ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about _________ 19_______, wrongfully appropriate ____________, of a value of (about) $ ____________, the property of ____________.

47. Article 122—Robbery

a. Text.

"Any person subject to this chapter who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused wrongfully took certain property from the person or from the possession and in the presence of a person named or described;

(2) That the taking was against the will of that person;

(3) That the taking was by means of force, violence, or force and violence, or putting the person in fear of immediate or future injury to that person, a relative, a member of the person's family, anyone accompanying the person at the time of the robbery, the person's property, or the property of a relative, family member, or anyone accompanying the person at the time of the robbery;

(4) That the property belonged to a person named or described;

(5) That the property was of a certain or of some value;

(6) That the taking of the property by the accused was with the intent permanently to deprive the person robbed of the use and benefit of the property.

[Note: If the robbery was committed with a firearm, add the following element]

(7) That the means of force or violence or of putting the person in fear was a firearm.

c. Explanation.

(1) Taking in the presence of the victim. It is not necessary that the property taken be located within any certain distance of the victim. If persons enter a house and force the owner by threats to disclose the hiding place of valuables in an adjoining room, and, leaving the owner tied, go into that room and steal the valuables, they have committed robbery.

(2) Force or violence. For a robbery to be committed by force or violence, there must be actual force
or violence to the person, preceding or accompanying the taking against the person's will, and it is immaterial that there is no fear engendered in the victim. Any amount of force is enough to constitute robbery if the force overcomes the actual resistance of the person robbed, puts the person in such a position that no resistance is made, or suffices to overcome the resistance offered by a chain or other fastening by which the article is attached to the person. The offense is not robbery if an article is merely snatched from the hand of another or a pocket is picked by stealth, no other force is used, and the owner is not put in fear. But if resistance is overcome in snatching the article, there is sufficient violence, as when an earring is torn from a person's ear. There is sufficient violence when a person's attention is diverted by being jostled by a confederate of a pickpocket, who is thus enabled to steal the person's watch, even though the person had no knowledge of the act; or when a person is knocked insensible and that person's pockets rifled; or when a guard steals property from the person of a prisoner in the guard's charge after handcuffing the prisoner on the pretext of preventing escape.

(3) Fear. For a robbery to be committed by putting the victim in fear, there need be no actual force or violence, but there must be a demonstration of force or menace by which the victim is placed in such fear that the victim is warranted in making no resistance. The fear must be a reasonable apprehension of present or future injury, and the taking must occur while the apprehension exists. The injury apprehended may be death or bodily injury to the person or to a relative or family member, or to anyone in the person's company at the time, or it may be the destruction of the person's habitation or other property or that of a relative or family member or anyone in the person's company at the time of sufficient gravity to warrant giving up the property demanded by the assailant.

(4) Larceny by taking. Robbery includes "taking with intent to steal"; hence, a larceny by taking is an integral part of a charge of robbery and must be proved at the trial. See paragraph 46c(1).

(5) Multiple-victim robberies. Robberies of different persons at the same time and place are separate offenses and each such robbery should be alleged in a separate specification.

d. Lesser included offenses.

1. Article 121—larceny
2. Article 121—wrongful appropriation
3. Article 128—assault; assault consummated by a battery
4. Article 128—assault with a dangerous weapon
5. Article 128—assault intentionally inflicting grievous bodily harm
6. Article 134—assault with intent to rob
7. Article 80—attempts

[Note: More than one lesser included offense may be found in an appropriate case because robbery is a compound offense. For example, a person may be found not guilty of robbery but guilty of wrongful appropriation and assault.]

e. Maximum punishment.

1. When committed with a firearm. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

2. Other cases. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. Sample specifications.

In that __________________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___________ 19 __________ by means of (force) (violence) (force and violence) (and) (putting him/her in fear) (with a firearm) steal from the (person) (presence) of ____________, against his/her will, (a watch) (__________) of value of (about) $ __________, the property of ____________.

48. Article 123—Forgery

a. Text.

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

"(1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or"

"(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered; is guilty of forgery and shall be punished as a court-martial may direct."

b. Elements.

1. Forgery—making or altering.
(a) That the accused falsely made or altered a certain signature or writing;
(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another’s legal rights or liabilities to that person’s prejudice; and
(c) That the false making or altering was with the intent to defraud.

(2) Forgery—uttering.
(a) That a certain signature or writing was falsely made or altered;
(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another’s legal rights or liabilities to that person’s prejudice;
(c) That the accused uttered, offered, issued, or transferred the signature or writing;
(d) That at such time the accused knew that the signature or writing had been falsely made or altered; and
(e) That the uttering, offering, issuing or transferring was with the intent to defraud.

c. Explanation.
(1) In general. Forgery may be committed either by falsely making a writing or by knowingly uttering a falsely made writing. There are three elements common to both aspects of forgery: a writing falsely made or altered; and apparent capability of the writing as falsely made or altered to impose a legal liability on another or to change another’s legal rights or liabilities to that person’s prejudice; and an intent to defraud.
(2) False. “False” refers not to the contents of the writing or to the facts stated therein but to the making or altering of it. Hence, forgery is not committed by the genuine making of a false instrument even when made with intent to defraud. A person who, with intent to defraud, signs that person’s own signature as the maker of a check drawn on a bank in which that person does not have money or credit does not commit forgery. Although the check falsely represents the existence of the account, it is what it purports to be, a check drawn by the actual maker, and therefore it is not falsely made. See, however, paragraph 49. Likewise, if a person makes a false signature of another to an instrument, but adds the word “by” with that person’s own signature thus indicating authority to sign, the offense is not forgery even if no such authority exists. False recitals of fact in a genuine document, as an aircraft flight report which is “padded” by the one preparing it, do not make the writing a forgery. But see paragraph 31 concerning false official statements.
(3) Signatures. Signing the name of another to an instrument having apparent legal efficacy without authority and with intent to defraud is forgery as the signature is falsely made. The distinction is that in this case the falsely made signature purports to be the act of one other than the actual signer. Likewise, a forgery may be committed by a person signing that person’s own name to an instrument. For example, when a check payable to the order of a certain person comes into the hands of another of the same name, forgery is committed if, knowing the check to be another’s, that person indorses it with that person’s own name intending to defraud. Forgery may also be committed by signing a fictitious name, as when Roe makes a check payable to Roe and signs it with a fictitious name—Doe—as drawer.
(4) Nature of writing. The writing must be one which would, if genuine, apparently impose a legal liability on another, as a check or promissory note, or change that person’s legal rights or liabilities to that person’s prejudice, as a receipt. Some other instruments which may be the subject of forgery are orders for the delivery of money or goods, railroad tickets, and military orders directing travel. A writing falsely “made” includes an instrument that may be partially or entirely printed, engraved, written with a pencil, or made by photography or other device. A writing may be falsely “made” by materially altering an existing writing, by filling in a paper signed in blank, or by signing an instrument already written. With respect to the apparent legal efficacy of the writing falsely made or altered, the writing must appear either on its face or from extrinsic facts to impose a legal liability on another, or to change a legal right or liability the prejudice of another. If under all the circumstances the instrument has neither real nor apparent legal efficacy, there is no forgery. Thus, the false making with intent to defraud of an instrument affirmatively invalid on its face is not forgery nor is the false making or altering, with intent to defraud, of a writing which could not impose a legal liability, as a mere letter of introduction. However, the false making of another’s signature on an instrument with intent to defraud is for-
gery, even if there is no resemblance to the genuine signature and the name is misspelled.

(5) **Intent to defraud.** See paragraph 49c(14). The intent to defraud need not be directed toward any one in particular nor be for the advantage of the offender. If it is immaterial that nobody was actually defrauded, or that no further step was made toward carrying out the intent to defraud other than the false making or altering of a writing.

(6) **Alteration.** The alteration must effect a material change in the legal tenor of the writing. Thus, an alteration which apparently increases, diminishes, or discharges any obligation is material. Examples of material alterations in the case of a promissory note are changing the date, amount, or place of payment. If a genuine writing has been delivered to the accused and while in the accused’s possession is later found to be altered, it may be inferred that the writing was altered by the accused.

(7) **Uttering.** See paragraph 49c(4).

d. **Lesser included offense.** Article 80—Attempts.

e. **Maximum punishment.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. **Sample specifications.**

(1) **Forgery—making or altering.**

In that ___________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___________ 19__________, with intent to defraud, falsely (make (in its entirety) (the signature of as an indorsement to) (the signature of to) ___________ a certain (check) (writing) ___________ in the following words and figures, to wit: ___________ by (adding thereto ___________) ___________ in the following words and figures, to wit: ___________ would, if genuine, apparently operate to the legal harm of another (*and which (could be) (was) used to the legal harm of ___________, in that ___________).

[Note: This allegation should be used when the document specified is not one which by its nature would clearly operate to the legal prejudice of another—for example, an insurance application. The manner in which the document could be or was used to prejudice the legal rights of another should be alleged in the last blank.]

(2) **Forgery—uttering.**

In that ___________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___________ 19__________, with intent to defraud, (utter) (offer) (issue) (transfer) a certain (check) (writing) ___________ in the following words and figures, to wit: ___________, a writing which would, if genuine, apparently operate to the legal harm of another, (which said (check) (writing) ___________) (the signature to which said (check) (writing) ___________) ___________ was, as he/she, the said ___________, then well knew, falsely (made) (altered) (*and which ___________ (could be) (was) used to the legal harm of ___________, in that ___________).

[Note: See the note following (1), above]
ment. In this section, the word 'credit' means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft, or order."

b. Elements.
(1) For the procurement of any article or thing of value, with intent to defraud.
(a) That the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money payable to a named person or organization;
(b) That the accused did so for the purpose of procuring an article or thing of value;
(c) That the act was committed with intent to defraud; and
(d) That at the time of making, drawing, uttering, or delivery of the instrument the accused knew that the accused or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.
(2) For the payment of any past due obligation, or for any other purpose, with intent to deceive.
(a) That the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money payable to a named person or organization;
(b) That the accused did so for the purpose or purported purpose of effecting the payment of a past due obligation or for some other purpose;
(c) That the act was committed with intent to deceive; and
(d) That at the time of making, drawing, uttering, or delivering of the instrument, the accused knew that the accused or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

c. Explanation.
(1) Written instruments. The written instruments covered by this article include any check, draft (including share drafts), or order for the payment of money drawn upon any bank or other depository, whether or not the drawer bank or depository is actually in existence. It may be inferred that every check, draft, or order carries with it a representation that the instrument will be paid in full by the bank or other depository upon presentment by a holder when due.
(2) Bank or other depository. "Bank or other depository" includes any business regularly but not necessarily exclusively engaged in public banking activities.

(3) Making or drawing. "Making" and "drawing" are synonymous and refer to the act of writing and signing the instrument.

(4) Uttering or delivering. "Uttering" and "delivering" have similar meanings. Both mean transferring the instrument to another, but "uttering" has the additional meaning of offering to transfer. A person need not personally be the maker or drawer of an instrument in order to violate this article if that person utters or delivers it. For example, if a person holds a check which that person knows is worthless, and utters or delivers the check to another, that person may be guilty of an offense under this article despite the fact that the person did not personally draw the check.

(5) For the procurement. "For the procurement" means for the purpose of obtaining any article or thing of value. It is not necessary that an article or thing of value actually be obtained, and the purpose of the obtaining may be for the accused's own use or benefit or for the use or benefit of another.

(6) For the payment. "For the payment" means for the purpose or purported purpose of satisfying in whole or in part any past due obligation. Payment need not be legally effected.

(7) For any other purpose. "For any other purpose" includes all purposes other than the payment of a past due obligation or the procurement of any article or thing of value. For example, it includes paying or purporting to pay an obligation which is not yet past due. The check, draft, or order, whether made or negotiated for the procurement of an article or thing of value or for the payment of a past due obligation or for some other purpose, need not be intended or represented as payable immediately. For example, the making of a postdated check, delivered at the time of entering into an installment purchase contract and intended as payment for a future installment, would, if made with the requisite intent and knowledge, be a violation of this article.

(8) Article or thing of value. "Article or thing of value" extends to every kind of right or interest in property, or derived from contract, including interests and rights which are intangible or contingent or which mature in the future.

(9) Past due obligation. A "past due obligation" is an obligation to pay money, which obligation has le-
gally matured before making, drawing, uttering, or delivering the instrument.

(10) **Knowledge.** The accused must have knowledge, at the time the accused makes, draws, utters, or delivers the instrument, that the maker or drawer, whether the accused or another, has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of the instrument in full upon its presentment. Such knowledge may be proved by circumstantial evidence.

(11) **Sufficient funds.** “Sufficient funds” refers to a condition in which the account balance of the maker or drawer in the bank or other depository at the time of the presentment of the instrument for payment is not less than the face amount of the instrument and has not been rendered unavailable for payment by garnishment, attachment, or other legal procedures.

(12) **Credit.** “Credit” means an arrangement or understanding, express or implied, with the bank or other depository for the payment of the check, draft, or order. An absence of credit includes those situations in which an accused writes a check on a nonexistent bank or on a bank in which the accused has no account.

(13) **Upon its presentment.** “Upon its presentment” refers to the time the demand for payment is made upon presentation of the instrument to the bank or other depository on which it was drawn.

(14) **Intent to defraud.** “Intent to defraud” means an intent to obtain, through a misrepresentation, an article or thing of value and to apply it to one’s own use and benefit or to the use and benefit of another, either permanently or temporarily.

(15) **Intent to deceive.** “Intent to deceive” means an intent to mislead, cheat, or trick another by means of a misrepresentation made for the purpose of gaining an advantage for oneself or for a third person, or of bringing about a disadvantage to the interests of the person to whom the representation was made or to interests represented by that person.

(16) **The relationship of time and intent.** Under this article, two times are involved: (a) when the accused makes, draws, utters, or delivers the instrument; and (b) when the instrument is presented to the bank or other depository for payment. With respect to (a), the accused must possess the requisite intent and must know that the maker or drawer does not have or will not have sufficient funds in, or credit with, the bank or the depository for payment of the instrument in full upon its presentment when due. With respect to (b), if it can otherwise be shown that the accused possessed the requisite intent and knowledge at the time the accused made, drew, uttered, or delivered the instrument, neither proof of presentment nor refusal of payment is necessary, as when the instrument is one drawn on a nonexistent bank.

(17) **Statutory rule of evidence.** The provision of this article with respect to establishing prima facie evidence of knowledge and intent by proof of notice and nonpayment within 5 days is a statutory rule of evidence. The failure of an accused who is a maker or drawer to pay the holder the amount due within 5 days after receiving either oral or written notice from the holder of a check, draft, or order, or from any other person having knowledge that such check, draft, or order was returned unpaid because of insufficient funds, is prima facie evidence (a) that the accused had the intent to defraud or deceive as alleged; and (b) that the accused knew at the time the accused made, drew, uttered, or delivered the check, draft, or order that the accused did not have or would not have sufficient funds in, or credit with, the bank or other depository for the payment of such check, draft, or order upon its presentment for payment. Prima facie evidence is that evidence from which the accused’s intent to defraud or deceive and the accused’s knowledge of insufficient funds in or credit with the bank or other depository may be inferred, depending on all the circumstances. The failure to give notice referred to in the article, or payment by the accused, maker, or drawer to the holder of the amount due within 5 days after such notice has been given, precludes the prosecution from using the statutory rule of evidence but does not preclude conviction of this offense if all the elements are otherwise proved.

(18) **Affirmative defense.** Honest mistake is an affirmative defense to offenses under this article. See R.C.M. 916(j).

d. **Lesser included offenses.**

(1) Article 134—making, drawing, uttering or delivering a check, draft, or order, and thereafter wrongfully and dishonorably failing to maintain sufficient funds

(2) Article 80—attempts

e. **Maximum punishment.**
(1) For the procurement of any article or thing of value, with intent to defraud, in the face amount of:
   (a) $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.
   (b) More than $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.
(2) For the payment of any past due obligation, or for any other purpose, with intent to deceive. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.
f. Sample specifications.
   (1) For the procurement of any article or thing of value, with intent to defraud.
      In that ________________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ________________ 19__, with intent to defraud and for the procurement of (lawful currency) (and) ________________ (an article) (a thing) of value, wrongfully and unlawfully (make (draw)) (utter) (deliver) to ________________, a certain (check) (draft) (money order) upon the ________________ (bank) (depository) in words and figures as follows, to wit: ________________, then knowing that (he/she) ________________, the (maker) (drawer) thereof, did not or would not have sufficient funds in or credit with such (bank) (depository) for the payment of the said (check) (draft) (order) in full upon its presentation.
   (2) For the payment of any past due obligation, or for any other purpose, with intent to deceive.
      In that ________________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ________________ 19__, with intent to deceive and for the payment of a past due obligation, to wit: ________________ (for the purpose of ________________) wrongfully and unlawfully (make (draw)) (utter) (deliver) to ________________, a certain (check) (draft) (money order) for the payment of money upon ________________ (bank) (depository), in words and figures as follows, to wit: ________________, then knowing that (he/she) ________________, the (maker) (drawer) thereof, did not or would not have sufficient funds in or credit with such (bank) (depository) for the payment of the said (check) (draft) (order) in full upon its presentation.
   
50. Article 124—Maiming
a. Text.
   "Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which—"
      (1) "seriously disfigures his person by any mutilation thereof;"
      (2) "destroys or disables any member or organ of his body; or"
      (3) "seriously diminishes his physical vigor by the injury of any member or organ; is guilty of maiming and shall be punished as a court-martial may direct."
b. Elements.
   (1) That the accused inflicted a certain injury upon a certain person;
   (2) That this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor by the injury to an organ or member; and
   (3) That the accused inflicted this injury with an intent to cause some injury to a person.
c. Explanation
   (1) Nature of offense. It is maiming to put out a person's eye, to cut off a hand, foot, or finger, or to knock out a tooth, as these injuries destroy or disable those members or organs. It is also maiming to injure an internal organ so as to seriously diminish the physical vigor of a person. Likewise, it is maiming to cut off an ear or to scar a face with acid, as these injuries seriously disfigure a person. A disfigurement need not mutilate any entire member to come within the article, or be of any particular type, but must be such as to impair perceptibly and materially the victim's comeliness. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature. However, the offense is complete if such an injury is inflicted even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery.
   (2) Means of inflicting injury. To prove the offense it is not necessary to prove the specific means
by which the injury was inflicted. However, such evidence may be considered on the question of intent.

(3) Intent. Maiming requires a specific intent to injure generally but not a specific intent to maim. Thus, one commits the offense who intends only a slight injury, if in fact there is infliction of an injury of the type specified in this article. Infliction of the type of injuries specified in this article upon the person of another may support an inference of the intent to injure, disfigure, or disable.

(4) Defenses. If the injury is done under circumstances which would justify or excuse homicide, the offense of maiming is not committed. See R.C.M. 916.

d. Lesser included offenses.

(1) Article 128—assault; assault consummated by a battery
(2) Article 128—assault with a dangerous weapon
(3) Article 128—assault intentionally inflicting grievous bodily harm
(4) Article 80—attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

f. Sample specification.

In that __________________________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about ____________________ 19 ________ ___, maim ___________________ by (crushing his/her foot with a sledge hammer) (______________).

51. Article 125—Sodomy

a. Text.

“(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall by punished as a court-martial may direct.”

b. Elements.

(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

(Note: Add either or both of the following elements, if applicable)

(2) That the act was done with a child under the age of 16.

(3) That the act was done by force and without the consent of the other person.

c. Explanation. It is unnatural carnal copulation for a person to take into that person’s mouth or anus the sexual organ of another person or of an animal; or to place that person’s sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.

d. Lesser included offenses.

(1) With a child under the age of 16.

(a) Article 125—forcible sodomy (and offenses included therein; see subparagraph (2) below)

(b) Article 134—indecent acts with a child under 16

(c) Article 80—attempts

(2) Forcible sodomy.

(a) Article 125—sodomy (and offenses included therein; see subparagraph (3) below)

(b) Article 134—assault with intent to commit sodomy

(c) Article 134—indecent assault

(d) Article 80—attempts

(3) Sodomy.

(a) Article 134—indecent acts with another

(b) Article 80—attempts

e. Maximum punishment.

(1) By force and without consent. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(2) With a child under the age of 16 years. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) Other cases. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.

In that __________________________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________________ 19__________ , commit sodomy with ______________ (a child under the age of 16 years) (by force and without the consent of the said __________________).
52. Article 126—Arson

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

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

b. Elements.

(1) Aggravated arson.
   (a) Inhabited dwelling.
      (i) That the accused burned or set fire on fire an inhabited dwelling;
      (ii) That this dwelling belonged to a certain person and was of a certain value; and
      (iii) That the act was willful and malicious.
   (b) Structure.
      (i) That the accused burned or set fire on fire a certain structure;
      (ii) That the act was willful and malicious;
      (iii) That there was a human being in the structure at the time;
      (iv) That the accused knew that there was a human being in the structure at the time; and
      (v) That this structure belonged to a certain person and was of a certain value.

(2) Simple arson.
   (a) That the accused burned or set fire to certain property of another;
   (b) That the property was of a certain value; and
   (c) That the act was willful and malicious.

c. Explanation.

(1) In general. In aggravated arson, danger to human life is the essential element; in simple arson, it is injury to the property of another. In either case, it is immaterial that no one is, in fact, injured. It must be shown that the accused set the fire willfully and maliciously, that is, not merely by negligence or accident.

(2) Aggravated arson.
   (a) Inhabited dwelling. An inhabited dwelling includes the outbuildings that form part of the cluster of buildings used as a residence. A shop or store is not an inhabited dwelling unless occupied as such, nor is a house that has never been occupied or which has been temporarily abandoned. A person may be guilty of aggravated arson of the person's dwelling, whether as owner or tenant.

   (b) Structure. Aggravated arson may also be committed by burning or setting on fire any other structure, movable or immovable, such as a theater, church, boat, trailer, tent, auditorium, or any other sort of shelter or edifice, whether public or private, when the offender knows that there is a human being inside at the time. It may be that the offender had this knowledge when the nature of the structure—as a department store or theater during hours of business, or other circumstances—are shown to have been such that a reasonable person would have known that a human being was inside at the time.

   (c) Damage to property. It is not necessary that the dwelling or structure be consumed or materially injured; it is enough if fire is actually communicated to any part thereof. Any actual burning or charring is sufficient, but a mere scorching or discoloration by heat is not.

   (d) Value and ownership of property. For the offense of aggravated arson, the value and ownership of the dwelling or other structure are immaterial, but should ordinarily be alleged and proved to permit the finding in an appropriate case of the included offense of simple arson.

(3) Simple arson. “Simple arson” is the willful and malicious burning or setting fire to the property of another under circumstances not amounting to aggravated arson. The offense includes burning or setting fire to real or personal property of someone other than the offender. See also paragraph 67 (Burning with intent to defraud).

d. Lesser included offenses.

(1) Aggravated arson.
   (a) Article 126—simple arson
   (b) Article 80—attempts

(2) Simple arson. Article 80—attempts

e. Maximum punishment.

(1) Aggravated arson. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(2) Simple arson, where the property is—
(a) Of a value of $100.00 or less. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) Of a value of more than $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) Aggravated arson.

(a) Inhabited dwelling.

In that ____________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________ 19 ____________, willfully and maliciously (burn) (set on fire) an inhabited dwelling, to wit: (the residence of ____________, (the property of ____________), of a value of (about) ____________.

(b) Structure.

In that ____________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________ 19 ____________, willfully and maliciously (burn) (set on fire), knowing that a human being was therein at the time, (the Post Theater) ____________, the property of ____________, of a value of (about) ____________.

(2) Simple arson.

In that ____________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________ 19 ____________, willfully and maliciously (burn) (set fire to) (an automobile) ____________, the property of ____________, of a value of (about) ____________.

53. Article 127—Extortion

a. Text.

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

b. Elements.

(1) That the accused communicated a certain threat to another; and

(2) That the accused intended to unlawfully obtain something of value, or any acquittance, advantage, or immunity.

c. Explanation.

(1) In general. Extortion is complete upon communication of the threat with the requisite intent. The actual or probable success of the extortion need not be proved.

(2) Threat. A threat may be communicated by any means but must be received by the intended victim. The threat may be: a threat to do any unlawful injury to the person or property of the person threatened or to any member of that person's family or any other person held dear to that person; a threat to accuse the person threatened, or any member of that person's family or any other person held dear to that person, of any crime; a threat to expose or impeach any deformity or disgrace to the person threatened or to any member of that person's family or any other person held dear to that person; a threat to expose any secret affecting the person threatened or any member of that person's family or any other person held dear to that person; or a threat to do any other harm.

(3) Acquittance. An "acquittance" is a release or discharge from an obligation.

(4) Advantage or immunity. Unless it is clear from the circumstances, the advantage or immunity sought should be described in the specification. An intent to make a person do an act against that person's will is not, by itself, sufficient to constitute extortion.

d. Lesser included offenses.

(1) Article 134—communicating a threat

(2) Article 80—attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. Sample specification.

In that ____________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________ 19 ____________, with intent unlawfully to obtain (something of value) (an acquittance) (an advantage, to wit ____________) (an immunity, to wit ____________), communicate to ____________ a threat to (here describe the threat).
54. Article 128—Assault
a. Text.
“(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who—
(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or
(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon; is guilty of aggravated assault and shall be punished as a court-martial may direct.”

b. Elements.
(1) Simple assault.
(a) That the accused attempted or offered to do bodily harm to a certain person; and
(b) That the attempt or offer was done with unlawful force or violence.

(2) Assault consummated by a battery.
(a) That the accused did bodily harm to a certain person; and
(b) That the bodily harm was done with unlawful force or violence.

(3) Assaults permitting increased punishment based on status of victim.
(a) Assault upon a commissioned, warrant, noncommissioned; or petty officer.
(i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;
(ii) That the attempt, offer, or bodily harm was done with unlawful force or violence;
(iii) That the person was a commissioned, warrant, noncommissioned, or petty officer; and
(iv) That the accused then knew that the person was a commissioned, warrant, noncommissioned, or petty officer.

(b) Assault upon a sentinel or lookout in the execution of duty, or upon a person in the execution of law enforcement duties.
(i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;
(ii) That the attempt, offer, or bodily harm was done with unlawful force or violence;
(iii) That the person was a sentinel or lookout in the execution of duty or was a person who then had and was in the execution of security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties; and
(iv) That the accused then knew that the person was a sentinel or lookout in the execution of duty or was a person who then had and was in the execution of security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties.

(c) Assault consummated by a battery upon a child under 16 years.
(i) That the accused did bodily harm to a certain person;
(ii) That the bodily harm was done with unlawful force or violence; and
(iii) That the person was then a child under the age of 16 years.

(4) Aggravated assault.
(a) Assault with a dangerous weapon or other means of force likely to produce death or grievous bodily harm.
(i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;
(ii) That the accused did so with a certain weapon, means, or force;
(iii) That the attempt, offer, or bodily harm was done with unlawful force or violence; and
(iv) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.
(Note: When a loaded firearm was used, add the following element)
(v) That the weapon was a loaded firearm.

(b) Assault in which grievous bodily harm is intentionally inflicted.
(i) That the accused assaulted a certain person;
(ii) That grievous bodily harm was thereby inflicted upon such person;
(iii) That the grievous bodily harm was done with unlawful force or violence; and
(iv) That the accused, at the time, had the specific intent to inflict grievous bodily harm.
(Note: When a loaded firearm was used, add the following element)
(v) That the injury was inflicted with a loaded firearm.

c. Explanation.
§54c.(1)

(1) Simple assault.

(a) Definition of assault. An “assault” is an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. It must be done without legal justification or excuse and without the lawful consent of the person affected. “Bodily harm” means any offensive touching of another, however slight.

(b) Difference between “attempt” and “offer” type assaults.

(i) Attempt type assault. An “attempt” type assault requires a specific intent to inflict bodily harm, and an overt act—that is, an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. An attempt type assault may be committed even though the victim had no knowledge of the incident at the time.

(ii) Offer type assault. An “offer” type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required.

(iii) Examples.

(A) If Doe swings a fist at Roe’s head intending to hit Roe but misses, Doe has committed an attempt type assault, whether or not Roe is aware of the attempt.

(B) If Doe swings a fist in the direct of Roe’s head either intentionally or as a result of culpable negligence, and Roe sees the blow coming and is thereby put in apprehension of being struck, Doe has committed an offer type assault whether or not Doe intended to hit Roe.

(C) If Doe swings at Roe’s head, intending to hit it, and Roe sees the blow coming and is thereby put in apprehension of being struck, Doe has committed both on offer and an attempt type assault.

(D) If Doe swings at Roe’s head simply to frighten Roe, not intending to hit Roe, and Roe does not see the blow and is not placed in fear, then no assault of any type has been committed.

(c) Situations not amounting to assault.

(i) Mere preparation. Preparation not amounting to an overt act, such as picking up a stone without any attempt or offer to throw it, does not constitute an assault.

(ii) Threatening words. The use of threatening words alone does not constitute an assault. However, if the threatening words are accompanied by a menacing act or gesture, there may be an assault, since the combination constitutes a demonstration of violence.

(iii) Circumstances negating intent to harm. If the circumstances known to the person menaced clearly negate an intent to do bodily harm there is no assault. Thus, if a person accompanies an apparent attempt to strike another by an unequivocal announcement in some form of an intention not to strike, there is no assault. For example, if Doe raises a stick and shakes it at Roe within striking distance saying, “If you weren’t an old man, I would knock you down,” Doe has committed no assault. However, an offer to inflict bodily injury upon another instantly if that person does not comply with a demand which the assailant has no lawful right to make is an assault. Thus, if Doe points a pistol at Roe and says, “If you don’t hand over your watch, I will shoot you,” Doe has committed an assault upon Roe. See also paragraph 47 (robbery) of this part.

(d) Situations not constituting defenses to assault.

(i) Assault attempts fails. It is not a defense to a charge of assault that for some reason unknown to the assailant, an assault attempt was bound to fail. Thus, if a person loads a rifle with what is believed to be a good cartridge and, pointing it at another, pulls the trigger, that person may be guilty of assault although the cartridge was defective and did not fire. Likewise, if a person in a house shoots through the roof at a place where a policeman is believed to be, that person may be guilty of assault even though the policeman is at another place on the roof.

(ii) Retreating victim. An assault is complete if there is a demonstration of violence and an apparent ability to inflict bodily injury causing the person at whom it was directed to reasonably apprehend that unless the person retreats bodily harm will be inflicted. This is true even though the victim retreated and was never within actual striking distance of the assailant. There must, however, be an apparent present ability to inflict the injury. Thus, to aim a pistol at a person at such a distance that it clearly could not injure would not be an assault.

(2) Battery.
(a) In general. A “battery” is an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm.

(b) Application of force. The force applied in a battery may have been directly or indirectly applied. Thus, a battery can be committed by inflicting bodily injury on a person through striking the horse on which the person is mounted causing the horse to throw the person, as well as by striking the person directly.

(c) Examples of battery. It may be a battery to spit on another, push a third person against another, set a dog at another which bites the person, cut another’s cloths while the person is wearing them though without touching or intending to touch the person, shoot a person, cause a person to take poison, or drive an automobile into a person. A person who, although excused in using force, uses more force than is required, commits a battery. Throwing an object into a crowd may be a battery on anyone whom the object hits.

(d) Situations not constituting battery. If bodily harm is inflicted unintentionally and without culpable negligence, there is no battery. It is also not a battery to touch another to attract the other’s attention or to prevent injury.

(3) Assaults permitting increased punishment based on status of victims.

(a) Assault upon a commissioned, warrant, noncommissioned, or petty officer. The maximum punishment is increased when assault is committed upon a commissioned officer of the armed forces of the United States, or of a friendly foreign power, or upon a warrant, noncommissioned, or petty officer of the armed forces of the United States. Knowledge of the status of the victim is an essential element of the offense and may be proved by circumstantial evidence. See paragraph 38c(4) for the definition of “sentinel or lookout.”

(c) Assault consummated by a battery upon a child under 16 years of age. The maximum punishment is increased when assault consummated by a battery is committed upon a child under 16 years of age. Knowledge that the person assaulted was under 16 years of age is not an element of this offense.

(4) Aggravated assault.

(a) Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm.

(i) Dangerous weapon. A weapon is dangerous when used in a manner likely to produce death or grievous bodily harm.

(ii) Other means or force. The phrase “other means or force” may include any means or instrumentality not normally considered a weapon. When the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be inferred that the means or force is “likely” to produce that result. The use to which a certain kind of instrument is ordinarily put is irrelevant to the question of its method of employment in a particular case. Thus, a bottle, beer glass, a rock, a bunk adapter, a piece of pipe, a piece of wood, boiling water, drugs, or a rifle butt may be used in a manner likely to inflict death or grievous bodily harm. On the other hand, an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means of force likely to produce grievous bodily harm, whether or not the assailant knew it was unloaded.

(iii) Grievous bodily harm. “Grievous bodily harm” means serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

(iv) Death or injury not required. It is not necessary that death or grievous bodily harm be actually inflicted to prove assault with a dangerous weapon or means likely to produce grievous bodily harm.

(b) Assault in which grievous bodily harm is intentionally inflicted.
(i) **In general.** It must be proved that the accused specifically intended to and did inflict grievous bodily harm. Culpable negligence will not suffice.

(ii) **Proving intent.** Specific intent may be proved by circumstantial evidence. When grievous bodily harm has been inflicted by means of intentionally using force in a manner likely to achieve that result, it may be inferred that grievous bodily harm was intended. On the other hand, that inference might not be drawn if a person struck another with a fist in a sidewalk fight even if the victim fell so that the victim's head hit the curbstone and a skull fracture resulted. It is possible, however, to commit this kind of aggravated assault with the fists, as when the victim is held by one of several assailants while the others beat the victim with their fists and break a nose, jaw, or rib.

(iii) **Grievous bodily harm.** See subparagraph (4)(a)(iii).

d. **Lesser included offenses.**

(1) **Simple assault.** None

(2) **Assault consummated by a battery.** Article 128—simple assault

(3) **Assault upon a commissioned, warrant, noncommissioned, or petty officer.** Article 128—simple assault; assault consummated by a battery

(4) **Assault upon a sentinel or lookout in the execution of duty, or upon any person who, in the execution of office, is performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(5) **Assault consummated by a battery upon a child under 16 years.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(6) **Assault with a dangerous weapon or other means of force to produce death or grievous bodily harm.**

(a) **When committed with a loaded firearm.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years.

(b) **Other cases.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(7) **Assault in which grievous bodily harm is intentionally inflicted.**

(a) **When the injury is inflicted with a loaded firearm.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(b) **Other cases.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. **Maximum punishment.**

(1) **Simple assault.** Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(2) **Assault consummated by a battery.** Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(3) **Assault upon a commissioned officer of the armed forces of the United States or of a friendly foreign power, not in the execution of office.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(4) **Assault upon a warrant officer, not in the execution of office.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(5) **Assault upon a noncommissioned or petty officer, not in the execution of office.** Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(6) **Assault upon a sentinel or lookout in the execution of duty, or upon any person who, in the execution of office, is performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(7) **Assault consummated by a battery upon a child under 16 years.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(8) **Assault upon a commissioned or warrant officer, not in the execution of office.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(9) **Assault upon a noncommissioned or petty officer, not in the execution of office.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. **Sample specifications.**

(1) **Simple assault.**

In that ___________ (personal jurisdiction data), did, (at/on board—location), (subject-matter jurisdiction data, if required), on or about ___________ 19__________, assault ___________ by (striking him/her with a ___________). (__________).
In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, unlawfully (strike) (__________) (on) (in) the __________ with __________.

(3) Assault upon a commissioned officer.
In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, assault __________, who then was and was then known by the accused to be a commissioned officer of (__________), a friendly foreign power (the United States (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)) by __________.

(4) Assault upon a warrant, noncommissioned, or petty officer.
In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, assault __________, who then was and was then known by the accused to be a (warrant) (noncommissioned) (petty) officer of the United States (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard), by __________.

(5) Assault upon a sentinel or lookout.
In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, assault __________, who then was and was then known by the accused to be a (sentinel) (lookout) in the execution of his/her duty, ((in) (on) the __________) by __________.

(6) Assault upon a person in the execution of law enforcement duties.
In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, assault __________, who then was and was then known by the accused to be a person then having and in the execution of (Air Force security police) (military police) (shore patrol) (master at arms) (military) (civilian) law enforcement) duties, by __________.

(7) Assault consummated by a battery upon a child under 16 years.
In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, unlawfully (strike) (__________) (on) (in) the __________ with __________.

(8) Assault, aggravated—with a dangerous weapon, means, or force.
In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, commit an assault upon __________ by (shooting) (pointing) (striking) (cutting) (__________) (at him/ her) (him/her) (in) (on) (the __________) with (a dangerous weapon) (a (means) (force) likely to produce death or grievous bodily harm), to wit: a (loaded firearm) (pickax) (bayonet) (club) (__________).

(9) Assault, aggravated—inflicting grievous bodily harm.
In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, commit an assault upon __________ by (shooting) (striking) (cutting) (__________) (him/her) (on) (the __________) with (a loaded firearm) (rock) (brick) (and did thereby intentionally inflict grievous bodily harm upon him/her, to wit: a (broken leg) (deep cut) (fractured skull) (__________)).

55. Article 129—Burglary

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

b. Elements.
(1) That the accused unlawfully broke and entered the dwelling house of another;
(2) That both the breaking and entering were done in the nighttime; and
That the breaking and entering were done with the intent to commit an offense punishable under Article 118 through 128, except Article 123a.

c. **Explanation.**

(1) **In general.** "Burglary" is the breaking and entering in the nighttime of the dwelling house of another, with intent to commit an offense punishable under Articles 118 through 128, except 123a. In addition, an intent to commit an offense which, although not covered by Article 118 through 128, necessarily includes an offense within one of these articles, satisfies the intent element of this article. This includes, for example, assaults punishable under Article 134 which necessarily include simple assault under Article 128.

(2) **Breaking.** There must be a breaking, actual or constructive. Merely to enter through a hole left in the wall or roof or through an open window or door will not constitute a breaking; but if a person moves any obstruction to entry of the house without which movement the person could not have entered, the person has committed a "breaking." Opening a closed door or window or other similar fixture, opening wider a door or window already partly open but insufficient for the entry, or cutting out the glass of a window or the netting of a screen is a sufficient breaking. The breaking of an inner door by one who has entered the house without breaking, or by a person lawfully within the house who has no authority to enter the particular room, is a sufficient breaking, but unless such a breaking is followed by an entry into the particular room with the requisite intent, burglary is not committed. There is a constructive breaking when the entry is gained by a trick, such as concealing oneself in a box; under false pretense, such as impersonating a gas or telephone inspector; by intimidating the occupants through violence or threats into opening the door; through collusion with a confederate, an occupant of the house; or by descending a chimney, even if only a partial descent is made and no room is entered.

(3) **Entry.** An entry must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient. Insertion into the house of a tool or other instrument is also a sufficient entry, unless the insertion is solely to facilitate the breaking or entry.

(4) **Nighttime.** Both the breaking and entry must be in the nighttime. "Nighttime" is the period between sunset and sunrise when there is not sufficient daylight to discern a person's face.

(5) **Dwelling house of another.** To constitute burglary the house must be the dwelling house of another. "Dwelling house" includes outbuildings within the common inclosure, farmyard, or cluster of buildings used as a residence. Such an area is the "curtilage." A store is not a dwelling house unless part of, or also used as, a dwelling house, as when the occupant uses another part of the same building as a dwelling, or when the store in habitually slept in by family members or employees. The house must be used as a dwelling at the time of the breaking and entering. It is not necessary that anyone actually be in it at the time of the breaking and entering, but if the house has never been occupied at all or has been left without any intention of returning, it is not a dwelling house. Separate dwellings within the same building, such as a barracks room, apartment, or a room in a hotel, are subjects of burglary by other residents or guests, and in general by the owner of the building. A tent is not a subject of burglary.

(6) **Intent to commit offense.** Both the breaking and entry must be done with the intent to commit in the house an offense punishable under Articles 118 through 128, except 123a. If, after the breaking and entering, the accused commits one or more of these offenses, it may be inferred that the accused intended to commit the offense or offenses at the time of the breaking and entering. If the evidence warrants, the intended offense may be separately charged. It is immaterial whether the offense intended is committed or even attempted. If the offense is intended, it is no defense that its commission was impossible.

(7) **Separate offense.** If the evidence warrants, the intended offense in the burglary specification may be separately charged.

d. **Lesser included offenses.**

(1) Article 130—housebreaking
(2) Article 134—unlawful entry
(3) Article 80—attempts

e. **Maximum punishment.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. **Sample specification.**

In that __________ (personal jurisdiction data), did, at __________, (subject-matter jurisdiction data, if required), on or about __________, 19__________, in the night-
time, unlawfully break and enter the (dwelling house) (__________ within the curtilage) of ____________, with intent to commit (murder) (larceny) (__________) therein.

56. Article 130—Housebreaking

a. Text.
“Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.”
b. Elements.
(1) That the accused unlawfully entered a certain building or structure of a certain other person; and
(2) That the unlawful entry was made with the intent to commit a criminal offense therein.
c. Explanation.
(1) Scope of offense. The offense of housebreaking is broader than burglary in that the place entered is not required to be a dwelling house; it is not necessary that the place be occupied; it is not essential that there be a breaking; the entry may be either in the night or in the daytime; and the intent need not be to commit one of the offenses made punishable under Articles 118 through 128.
(2) Intent. The intent to commit some criminal offense is an essential element of housebreaking and must be alleged and proved to support a conviction of this offense. If, after the entry the accused committed a criminal offense inside the building or structure, it may be inferred that the accused intended to commit that offense at the time of the entry.
(3) Criminal offense. Any act or omission which is punishable by courts-martial, except an act or omission constituting a purely military offense, is a “criminal offense.”
(4) Building, structure. “Building” includes a room, shop, store, office, or apartment in a building. “Structure” refers only to those structures which are in the nature of a building or dwelling. Examples of these structures are a stateroom, hold, or other compartment of a vessel, an inhabitable trailer, an enclosed truck or freight car, a tent, and a houseboat. It is not necessary that the building or structure be in use at the time of the entry.
(5) Entry. See paragraph 55c(3).

(6) Separate offense. If the evidence warrants, the intended offense in the housebreaking specification may be separately charged.
d. Lesser included offenses.
(1) Article 134—unlawful entry
(2) Article 80—attempts
e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.
f. Sample specification.
In that ____________, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________ 19__________, unlawfully enter a (dwelling) (room) (bank) (store) (warehouse) (shop) (tent) (stateroom) (__________), the property of ____________, with intent to commit a criminal offense, to wit: ____________, therein.

57. Article 131—Perjury

a. Text.
“Any person subject to this chapter who in a judicial proceeding or in a course of justice willfully and corruptly—
(1) upon a lawful oath or in any form allowed by law to be substituted for an oath, gives any false testimony material to the issue or matter of inquiry; or
(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, subscribes any false statement material to the issue or matter of inquiry; is guilty of perjury and shall be punished as a court-martial may direct.”
b. Elements.
(1) Giving false testimony.
(a) That the accused took an oath or affirmation in a certain judicial proceeding or course of justice;
(b) That the oath or affirmation was administered to the accused in a matter in which an oath or affirmation was required or authorized by law;
(c) That the oath or affirmation was administered by a person having authority to do so;
(d) That upon the oath or affirmation that accused willfully gave certain testimony;
(e) That the testimony was material;
(f) That the testimony was false; and
(g) That the accused did not then believe the testimony to be true.


(2) **Subscribing false statement.**

(a) That the accused subscribed a certain statement in a judicial proceeding or course of justice;

(b) That in the declaration, certification, verification, or statement under penalty of perjury, the accused declared, certified, verified, or stated the truth of that certain statement;

(c) That the accused willfully subscribed the statement;

(d) That the statement was material;

(e) That the statement was false; and

(f) That the accused did not then believe the statement to be true.

c. **Explanation.**

(1) **In general.** "Judicial proceeding" includes a trial by court-martial and "course of justice" includes an investigation conducted under Article 32. If the accused is charged with having committed perjury before a court-martial, it must be shown that the court-martial was duly constituted.

(2) **Giving false testimony.**

(a) **Nature.** The testimony must be false and must be willfully and corruptly given; that is, it must be proved that the accused gave the false testimony willfully and did not believe it to be true. A witness may commit perjury by testifying to the truth of a matter when in fact the witness knows nothing about it at all or is not sure about it, whether the thing is true or false in fact. A witness may also commit perjury in testifying falsely as to a belief, remembrance, or impression, or as to a judgment or opinion. It is no defense that the witness voluntarily appeared, that the witness was incompetent as a witness, or that the testimony was given in response to questions that the witness could have declined to answer.

(b) **Material matter.** The false testimony must be with respect to a material matter, but that matter need not be the main issue in the case. Thus, perjury may be committed by giving false testimony with respect to the credibility of a material witness or in an affidavit in support of a request for a continuance, as well as by giving false testimony with respect to a fact from which a legitimate inference may be drawn as to the existence or nonexistence of a fact in issue. Whether the allegedly false testimony was with respect to a material matter is a question of law to be determined as an interlocutory question.

(c) **Proof.** The falsity of the allegedly perjured statement cannot be proved by circumstantial evidence alone, except with respect to matters which by their nature are not susceptible of direct proof. The falsity of the statement cannot be proved by the testimony of a single witness unless that testimony directly contradicts the statement and is corroborated by other guidance either direct or circumstantial, tending to prove the falsity of the statement. However, documentary evidence directly disproving the truth of the statement charged to have been perjured need not be corroborated if: the document is an official record shown to have been well known to the accused at the time the oath was taken; or the documentary evidence originated from the accused—or had in any manner been recognized by the accused as containing the truth—before the allegedly perjured statement was made.

(d) **Oath.** The oath must be one recognized or authorized by law and must be duly administered by one authorized to administer it. When a form of oath has been prescribed, a literal following of that form is not essential; it is sufficient if the oath administered conforms in substance to the prescribed form. "Oath" includes an affirmation when the latter is authorized in lieu of an oath.

(e) **Belief of accused.** The fact that the accused did not believe the statement to be true may be proved by testimony of one witness without corroboration or by circumstantial evidence.

(3) **Subscribing false statement.** See subparagraphs (1) and (2), above, as applicable. Section 1746 of title 28, United States Code, provides for subscribing to the truth of a document by signing it expressly subject to the penalty for perjury. The signing must take place in a judicial proceeding or course of justice—for example, if a witness signs under penalty of perjury summarized testimony given at an Article 32 investigation. It is not required that the document be sworn before a third party. Section 1746 does not change the requirement that a deposition be given under oath or alter the situation where an oath is required to be taken before a specific person.

d. **Lesser included offense.** Article 80—_attempts.

e. **Maximum punishment.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. **Sample specifications.**
(1) *Giving false testimony.*
In that ____________ (personal jurisdiction data), having taken a lawful (oath) (affirmation) in a (trial by ____________ court-martial of ____________) (trial by a court of competent jurisdiction, to wit: ____________ of ____________) (deposition for use in a trial by ____________ of ____________) (__________) that he/she would (testify) (depose) truly, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________ 19__________, willfully, corruptly, and contrary to such (oath) (affirmation), (testify) (depose) falsely in substance that ____________, which (testimony) (deposition) was upon a material matter and which he/she did not then believe to be true.

(2) *Subscribing false statement.*
In that ____________ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________ 19__________, in a (judicial proceeding) (course of justice), and in a (declaration) (certification) (verification) (statement) under penalty of perjury pursuant to section 1746 of title 28, United States Code, willfully and corruptly subscribed a false statement material to the (issue) (matter of inquiry), to wit: ____________, which statement was false in that ____________, and which statement he/she did not then believe to be true.

58. Article 132—Frauds against the United States

a. Text.
"Any person subject to this chapter—"

(1) "who, knowing it to be false of fraudulent—"
   (a) "makes any claim against the United States or any officer thereof; or"

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

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

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

   (b) "makes any oath to any fact or to any writing or other paper knowing the oath to be false; or"

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

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

(4) "who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; shall, upon conviction, be punished as a court-martial may direct."

b. Elements.

(1) *Making a false or fraudulent claim.*
   (a) That the accused made a certain claim against the United States or an officer thereof;

   (b) That the claim was false or fraudulent in certain particulars; and

   (c) That the accused then knew that the claim was false or fraudulent in these particulars.

(2) *Presenting for approval or payment a false or fraudulent claim.*
   (a) That the accused presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States or an officer thereof;

   (b) That the claim was false or fraudulent in certain particulars; and

   (c) That the accused then knew that the claim was false or fraudulent in these particulars.

(3) *Making or using a false writing or other paper in connection with claims.*
   (a) That the accused made or used a certain writing or other paper;

   (b) That certain material statements in the writing or other paper were false or fraudulent;

   (c) That the accused then knew the statements were false or fraudulent; and
(d) That the act of the accused was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

(4) False oath in connection with claims.
(a) That the accused made an oath to a certain fact or to a certain writing or other paper;
(b) That the oath was false in certain particulars;
(c) That the accused then knew it was false; and
(d) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

(5) Forgery of signature in connection with claims.
(a) That the accused forged or counterfeited the signature of a certain person on a certain writing or other paper; and
(b) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof.

(6) Using forged signature in connection with claims.
(a) That the accused used the forged or counterfeited signature of a certain person;
(b) That the accused then knew that the signature was forged or counterfeited; and
(c) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof.

(7) Delivering less than amount called for by receipt.
(a) That the accused had charge, possession, custody, or control of certain money or property of the United States furnished or intended for the armed forces thereof;
(b) That the accused obtained a certificate or receipt for a certain amount or quantity of that money or property;
(c) That for the certificate or receipt the accused knowingly delivered to a certain person having authority to receive it an amount or quantity of money or property less than the amount or quantity thereof specified in the certificate or receipt; and
(d) That the undelivered money or property was of a certain value.

(8) Making or delivering receipt without having full knowledge that it is true.
(a) That the accused was authorized to make or deliver a paper certifying the receipt from a certain person of certain property of the United States furnished or intended for the armed forces thereof;
(b) That the accused made or delivered to that person a certificate or receipt;
(c) That the accused made or delivered the certificate without having full knowledge of the truth of a certain material statement or statements therein;
(d) That the act was done with intent to defraud the United States; and
(e) That the property certified as being received was of a certain value.

(c) Explanation.

(1) Making a false or fraudulent claim.
(a) Claim. A “claim” is a demand for a transfer of ownership of money or property and does not include requisitions for the mere use of property. This article applies only to claims against the United States or any officer thereof as such, and not to claims against an officer of the United States in that officer’s private capacity.

(b) Making a claim. Making a claim is a distinct act from presenting it. A claim may be made in one place and presented in another. The mere writing of a paper in the form of a claim, without any further act to cause the paper to become a demand against the United States or an officer thereof, does not constitute making a claim. However, any act placing the claim in official channels constitutes making a claim, even if that act does not amount to presenting a claim. It is not necessary that the claim be allowed or paid or that it be made by the person to be benefited by the allowance or payment. See also subparagraph (2), below.

(c) Knowledge. The claim must be made with knowledge of its fictitious or dishonest character. This article does not proscribe claims, however groundless they may be, that the maker believes to be valid, or claims that are merely made negligently or without ordinary prudence.

(2) Presenting for approval or payment a false or fraudulent claim.
(a) False and fraudulent. False and fraudulent claims include not only those containing some material false statement, but also claims which the claimant knows to have been paid or for some other rea-
son the claimant knows the claimant is not authorized to present or upon which the claimant knows the claimant has no right to collect.

(b) Presenting a claim. The claim must be presented, directly or indirectly, to some person having authority to pay it. The person to whom the claim is presented may be identified by position or authority to approve the claim, and need not be identified by name in the specification. A false claim may be tacitly presented, as when a person who knows that there is no entitlement to certain pay accepts it nevertheless without disclosing a disqualification, even though the person may not have made any representation of entitlement to the pay. For example, a person cashing a pay check which includes an amount for a dependency allowance, knowing at the time that the entitlement no longer exists because of a change in that dependency status, has tacitly presented a false claim. See also subparagraph (1), above.

(3) Making or using a false writing or other paper in connection with claims. The false or fraudulent statement must be material, that is, it must have a tendency to mislead governmental officials in their consideration or investigation of the claim. The offense of making a writing or other paper known to contain a false or fraudulent statement for the purpose of obtaining the approval, allowance, or payment of a claim is complete when the writing or paper is made for that purpose, whether or not any use of the paper has been attempted and whether or not the claim has been presented. See also the explanation in subparagraph (1) and (2), above.

(4) False oath in connection with claims. See subparagraphs (1) and (2), above.

(5) Forgery of signature in connection with claims. Any fraudulent making of the signature of another is forging or counterfeiting, whether or not an attempt is made to imitate the handwriting. See paragraph 48(c) and subparagraph (1) and (2), above.

(6) Delivering less than amount called for by receipt. It is immaterial by what means—whether deceit, collusion, or otherwise—the accused effected the transaction, or what was the accused's purpose.

(7) Making or delivering receipt without having full knowledge that it is true. When an officer or other person subject to military law is authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, and a receipt or other paper is presented for signature stating that a certain amount of supplies has been furnished by a certain contractor, it is that person's duty before signing the paper to know that the full amount of supplies therein stated to have been furnished has in fact been furnished, and that the statements contained in the paper are true. If the person signs the paper with intent to defraud the United States and without that knowledge, that person is guilty of a violation of this section of the article. If the person signs the paper with knowledge that the full amount was not received, it may be inferred that the person intended to defraud the United States.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment.

(1) Article 132(1) and (2). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) Article 132(3) and (4).

(a) When amount is $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) When amount is over $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) Making false claim.

In that _____________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____________ 19___________, (by preparing (a voucher) _____________ for presentation for approval or payment _____________), make a claim against the (United States) (finance officer at _____________) _____________ in the amount of $________________ for (private property alleged to have been (lost) (destroyed) in the military service) _____________, which claim was (false) (fraudulent) (false and fraudulent) in the amount of $________________ in that _____________ and was then known by the said _____________ to be (false) (fraudulent) (false and fraudulent).

(2) Presenting false claim.

In that _____________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____________ 19___________, by presenting (a voucher) _____________ to _____________,
an officer of the United States duly authorized to (approve) (pay) (approve and pay) such claim, present for (approval) (payment) (approval and payment) a claim against the (United States) (finance officer) in the amount of $__________, for (services alleged to have been rendered to the United States by __________), which claim was (false) (fraudulent) (false and fraudulent) in the amount of $__________, and was then known by the said __________ to be (false) (fraudulent) (false and fraudulent).

(3) Making or using false writing.

In that __________ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment), of a claim against the United States in the amount of $__________, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, (make) (use) (make and use) a certain (writing) (paper), to wit: __________, which said (writing) (paper), as he/she, the said __________, then knew, contained a statement that __________, which statement was (false) (fraudulent) (false and fraudulent) in that __________, and was then known by the said __________ to be (false) (fraudulent) (false and fraudulent).

(4) Making false oath.

In that __________ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, make an oath (to the fact that __________) (to a certain (writing) (paper), to wit: __________, to the effect that __________), which said oath was false in that __________, and was then known by the said __________ to be false.

(5) Forging or counterfeiting signature.

In that __________ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, (forge) (counterfeit) (forge and counterfeit) the signature of __________ upon a __________ in words and figures as follows: __________.

(6) Using forged signature.

In that __________, for the purpose of obtaining the (approval)(allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, use the signature of __________ on a certain (writing) (paper), to wit: __________, then knowing such signature to be (forged) (counterfeited) (forged and counterfeited).

(7) Paying amount less than called for by receipt.

In that __________ (personal jurisdiction data), having (charge)(possession) (custody) (control) of (money) (__________) of the United States, (furnished) (intended) (furnished and intended) for the armed forces thereof, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, knowingly deliver to __________, the said having authority to receive the same, (an amount) (__________), which, as he/she, __________, then knew, was ($__________) (__________) less than the (amount) (__________), for which he/she received a (certificate) (receipt) from the said __________.

(8) Making receipt without knowledge of the facts.

In that __________ (personal jurisdiction data), being authorized to (make) (deliver) (make and deliver) a paper certifying the receipt of property of the United States (furnished) (intended) (furnished and intended) for the armed forces thereof, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, without having full knowledge of the statement therein contained and with intent to defraud the United States, (make) (deliver) (make and deliver) to __________, such a writing, in words and figures as follows: __________, the property therein certified as received being of a value of about $__________.
59. Article 133—Conduct unbecoming an officer and gentleman

a. Text.

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

b. Elements.

(1) That the accused did or omitted to do certain acts; and

(2) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

c. Explanation.

(1) Gentleman. As used in this article, “gentleman” includes both male and female commissioned officers, cadets, and midshipmen.

(2) Nature of offense. Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer’s character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person’s standing as an officer. There are certain moral attributes common to the ideal of officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person’s standing as an officer. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising. This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121. Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman.

(3) Examples of offenses. Instances of violation of this article include knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer’s presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer’s family.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Dismissal, forfeiture of all pay and allowances, and confinement for a period not in excess of that authorized for the most analogous offense for which a punishment is prescribed in this Manual, or, if none is prescribed, for 1 year.

f. Sample specifications.

(1) Copying or using examination paper.

In that __________________ (personal jurisdiction data), did, (at/on board—location), on or about 19________________, while undergoing a written examination on the subject of __________________, wrongfully and dishonorably (receive) (request) unauthorized aid by (using) (copying) the examination paper of __________________(________________).

(2) Drunk or disorderly.

In that __________________ (personal jurisdiction data), was, (at/on board—location), on or about 19________________, in a public place, to wit: __________________, (drunk) (disorderly) (drunk and disorderly) while in uniform, to the disgrace of the armed forces.

60. Article 134—General article

a. Text.

“Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and de-
gree of the offense, and shall be punished at the discretion of that court."

b. Elements. The proof required for conviction of an offense under Article 134 depends upon the nature of the misconduct charged. If the conduct is punished as a crime or offense not capital, the proof must establish every element of the crime or offense as required by the applicable law. If the conduct is punished as a disorder or neglect to the prejudice of good order and discipline in the armed forces, or of a nature to bring discredit upon the armed forces, then the following proof is required:

(1) That the accused did or failed to do certain acts; and

(2) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) In general. Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the code. These are referred to as "clauses 1, 2, and 3" of Article 134. Clause 1 offenses involved disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate Federal law including law made applicable through the Federal Assimilative Crimes Act, see subsection (4) below. If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article. See subparagraph (5)(a) below. However, see paragraph 59c for offenses committed by commissioned officers, cadets, and midshipmen.

(2) Disorders and neglects to the prejudice of good order and discipline in the armed forces (clause 1).

(a) To the prejudice of good and discipline. "To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable. An act in violation of a local civil law or of a foreign law may be punished if it constitutes a disorder or neglect to the prejudice of good order and discipline in the armed forces. However, see R.C.M. 203 concerning subject-matter jurisdiction.

(b) Breach of custom of the service. A breach of a custom of the service may result in a violation of clause 1 of Article 134. In its legal sense, "custom" means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been generally abandoned. Many customs of the service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violations of the regulations in which they appear if the regulation is punitive. See paragraph 16c.

(3) Conduct of a nature to bring discredit upon the armed forces (clause 2). "Discredit" means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Acts in violation of a local civil law or a foreign law may be punished if they are of a nature to bring discredit upon the armed forces. However, see R.C.M. 203 concerning subject-matter jurisdiction.

(4) Crimes and offenses not capital (clause 3).

(a) In general. State and foreign laws are not included within the crimes and offenses not capital referred to in this clause of Article 134 and violations thereof may not be prosecuted as such except when State law becomes Federal law of local application under section 13 of title 18 of the United States Code (Federal Assimilative Crimes Act—see subparagraph (4)(c) below). For the purpose of court-martial jurisdiction, the laws which may be applied under clause 3 of Article 134 are divided into two groups: crimes and offenses of unlimited application (crimes which are punishable regardless where they may be committed), and crimes and offenses of local application (crimes which are punishable only if committed in areas of federal jurisdiction).
(b) Crimes and offenses of unlimited application. Certain noncapital crimes and offenses prohibited by the United States Code are made applicable under clause 3 of Article 134 to all persons subject to the code regardless where the wrongful act or omission occurred. Examples include: counterfeiting (18 U.S.C. § 471), and various frauds against the Government not covered by Article 132.

c) Crimes and offenses of local application.

(i) In general. A person subject to the code may not be punished under clause 3 of Article 134 for an offense that occurred in a place where the law in question did not apply. For example, a person may not be punished under clause 3 of Article 134 when the act occurred in a foreign country merely because that act would have been an offense under the United States Code had the act occurred in the United States. Regardless where committed, such an act might be punishable under clauses 1 or 2 of Article 134. There are two types of congressional enactments of local application: specific federal statutes (defining particular crimes), and a general federal statute, the Federal Assimilative Crimes Act (which adopts certain state criminal laws).

(ii) Federal Assimilative Crimes Act (18 U.S.C. § 13). The Federal Assimilative Crimes Act is an adoption by Congress of state criminal laws for areas of exclusive or concurrent federal jurisdiction, provided federal criminal law, including the UCMJ, has not defined an applicable offense for the misconduct committed. The Act applies to state laws validly existing at the time of the offense without regard to when these laws were enacted, whether before or after passage of the Act, and whether before or after the acquisition of the land where the offense was committed. For example, if a person committed an act on a military installation in the United States at a certain location over which the United States had either exclusive or concurrent jurisdiction, and it was not an offense specifically defined by federal law (including the UCMJ), that person could be punished for that act by a court-martial if it was a violation of a noncapital offense under the law of the State where the military installation was located. This is possible because the Act adopts the criminal law of the state wherein the military installation is located and applies it as though it were federal law. The text of the Act is as follows: Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(5) Limitations on Article 134.

(a) Preemption doctrine. The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent—there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121.

(b) Capital offense. A capital offense may not be tried under Article 134.

(6) Drafting specifications for Article 134 offenses.

(a) In general. A specification alleging a violation of Article 134 need not expressly allege that the conduct was “a disorder or neglect,” that it was “of a nature to bring discredit upon the armed forces,” or that it constituted “a crime or offense not capital.” The same conduct may constitute a disorder or neglect to the prejudice of good order and discipline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces.

(b) Specifications under clause 3. When alleging a clause 3 violation, each element of the federal or assimilated statute must be alleged expressly or by necessary implication. In addition, the federal or assimilated statute should be identified.

(c) Specifications for clause 1 or 2 offenses not listed. If conduct by an accused does not fall under any of the listed offenses for violations of Article 134 in this Manual (paragraphs 61 through 113 of this Part) a specification not listed in this Manual may be used to allege the offense.

61. Article 134—(Abusing public animal)

a. Text. See paragraph 60.

b. Elements.
(1) That the accused wrongfully abused a certain public animal; and
(2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. A public animal is any animal owned or used by the United States; and animal owned or used by a local or State government in the United States, its territories or possessions; or any wild animal located on any public lands in the United States, its territories or possessions. This would include, for example, drug detector dogs used by the government.

d. Lesser included offenses. Article 80—attempts

e. Maximum punishment. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. Sample specification.
In that ________ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ________, 19_______, wrongfully (kick a public drug detector dog in the nose) _________.

62. Article 134—(Adultery)
a. Text. See paragraph 60.
b. Elements.
(1) That the accused wrongfully had sexual intercourse with a certain person;
(2) That, at the time, the accused or the other person was married to someone else; and
(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. Adultery is not a lesser included offense of rape.
d. Lesser included offense. Article 80—attempts
e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.
In that ________ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about ________, 19_______, commit an indecent assault upon ________, a person not his/her wife/husband by ________, with intent to gratify his/her (lust) (sexual desires).

63. Article 134—(Assault—indecent)
a. Text. See paragraph 60.
b. Elements.
(1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;
(2) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and
(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. See paragraph 54c for a discussion of assault. Specific intent is an element of this offense. For a definition of “indecent”, see paragraph 90c.
d. Lesser included offenses.
(1) Article 128—assault consummated by a battery; assault
(2) Article 134—indecency
(3) Article 80—attempts
e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.
In that ________ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about ________, 19_______, wrongfully have sexual intercourse with ________, a (married) (woman/man) not (his wife) (her husband).

64. Article 134—(Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking)
a. Text. See paragraph 60.
b. Elements.
(1) That the accused assaulted a certain person;
(2) That, at the time of the assault, the accused intended to kill (as required for murder or voluntary manslaughter) or intended to commit rape, robbery, sodomy, arson, burglary, or housebreaking; and
(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and
discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) In general. An assault with intent to commit any of the offenses mentioned above is not necessarily the equivalent of an attempt to commit the intended offense, for an assault can be committed with intent to commit an offense without achieving that proximity to consummation of an intended offense which is essential to an attempt. See paragraph 4.

(2) Assault with intent to murder. Assault with intent to commit murder is assault with specific intent to kill. Actual infliction of injury is not necessary. To constitute an assault with intent to murder with a firearm, it is not necessary that the weapon be discharged. When the intent to kill exists, the fact that for some unknown reason the actual consummation of the murder by the means employed is impossible is not a defense if the means are apparently adapted to the end in view. The intent to kill need not be directed against the person assaulted if the assault is committed with intent to kill some person. For example, if a person, intending to kill Jones, shoots Smith, mistaking Smith for Jones, that person is guilty of assaulting Smith with intent to murder. If a person fires into a group with intent to kill anyone in the group, that person is guilty of and assault with intent to murder each member of the group.

(3) Assault with intent to commit voluntary manslaughter. Assault with intent to commit voluntary manslaughter is an assault committed with a specific intent to kill under such circumstances that, if death resulted therefrom, the offense of voluntary manslaughter would have been committed. There can be no assault with intent to commit involuntary manslaughter, for it is not a crime capable of being intentionally committed.

(4) Assault with intent to commit rape. In assault with intent to commit rape, the accused must have intended to overcome any resistance by force, and to complete the offense. Any lesser intent will not suffice. No actual touching is necessary, but indecent advances and importunities, however earnest, not accompanied by such an intent, do not constitute this offense, nor do mere preparations to rape not amounting to an assault. Once an assault with intent to commit rape is made, it is no defense that the accused voluntarily desisted.

(5) Assault with intent to rob. For assault with intent to rob, the fact that the accused intended to take money and that the person the accused intended to rob had none is not a defense.

(6) Assault with intent to commit sodomy. Assault with intent to commit sodomy is an assault against a human being and must be committed with a specific intent to commit sodomy. Any lesser intent, or different intent, will not suffice.

d. Lesser included offenses.

(1) Assault with intent to murder.

(a) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon; assault intentionally inflicting grievous bodily harm

(b) Article 134—assault with intent to commit voluntary manslaughter; willful or careless discharge of a firearm

(2) Assault with intent to commit voluntary manslaughter.

(a) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon; assault intentionally inflicting grievous bodily harm

(b) Article 134—willful or careless discharge of a firearm

(3) Assault with intent to commit rape or sodomy.

(a) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon

(b) Article 134—indecent assault

(4) Assault with intent to commit burglary.

(a) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon

(b) Article 134—assault with intent to commit housebreaking

(5) Assault with intent to commit robbery, arson, or housebreaking. Article 128—assault; assault consummated by a battery; assault with a dangerous weapon

e. Maximum punishment.

(1) Assault with intent to commit murder or rape. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(2) Assault with intent to commit voluntary manslaughter, robbery, sodomy, arson, or burglary. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) Assault with intent to commit housebreaking. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.
In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, with intent to commit (murder) (voluntary manslaughter) (rape) (robbery) (sodomy) (arson) (burglary) (housebreaking), commit an assault upon __________ by __________.

65. Article 134—(Bigamy)
a. Text. See paragraph 60.
b. Elements.
   (1) That the accused had a living lawful spouse;
   (2) That while having such spouse the accused wrongfully married another person; and
   (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. Bigamy is contracting another marriage by one who already has a living lawful spouse. If a prior marriage was void, it will have created no status of “lawful spouse.” However, if it was only voidable and has not been voided by a competent court, this is no defense. A belief that a prior marriage has been terminated by divorce, death of the other spouse, or otherwise, constitutes a defense only if the belief was reasonable. See R.C.M. 915(I)(1).
d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. Sample specification.
   In that __________ (personal jurisdiction data), did, at __________, (subject-matter jurisdiction data, if required), on or about __________ 19__________, wrongfully marry __________, having at the time of his/her said marriage to __________ a lawful wife/husband then living, to wit: __________.

(b) That the accused then occupied a certain official position or had certain official duties;

(c) That the accused asked, accepted, or received this thing of value (with the intent to have the accused’s decision or action influenced with respect to a certain matter)* (as compensation for or in recognition of services rendered, to be rendered, or both, by the accused in relation to a certain matter)**;

(d) That this certain matter was an official matter in which the United States was and is interested; and

(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(*Note: This element is required for bribery.)

(**Note: This element is required for graft.)

(2) Promising, offering, or giving.
   (a) That the accused wrongfully promised, offered, or gave a thing of value to a certain person;
   (b) That this person then occupied a certain official position or had certain official duties;
   (c) That this thing of value was promised, offered, or given (with the intent to influence the decision or action of this person)* (as compensation for or in recognition of services rendered, to be rendered, or both, by this person in relation to a certain matter)*

(*Note: This element is required for bribery.)

(**Note: This element is required for graft.)

c. Explanation. Bribery requires an intent to influence or be influenced in an official matter; graft does not. Graft involves compensation for services performed in an official matter when no compensation is due.

d. Lesser included offenses.
   (1) Bribery. Article 134—graft
   (2) Bribery and graft. Article 80—attempts

e. Maximum punishment.
   (1) Bribery. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.
(2) Graft. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. Sample specifications.

(1) Asking, accepting, or receiving.

In that ____________ (personal jurisdiction data), being at the time (a contracting officer for ____________, (the personnel officer of ____________,), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________, wrongfully (ask) (accept) (receive) from ____________, (a contracting company) engaged in ____________, (the sum of $__________) (__________, of a value of (about) $__________) (__________), (with intent to have his/her (decision) (action) influenced with respect to*) ((as compensation for) (in recognition of)) service (rendered) (to be rendered) (rendered and to be rendered) by him/her the said ____________ in relation to**) an official matter in which the United States was and is interested, to wit: (the purchasing of military supplies from ____________) (the transfer of ____________) to duty with ____________. (*Note: This language should be used to allege bribery.)

(2) Promising, offering, or giving.

In that ____________ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________, willfully and maliciously (burn) (set fire to) (a dwelling) (a barn) (an automobile), the property of ____________, with intent to defraud (the insurer thereof, to wit: ____________) (__________) (__________), with intent to influence the (decision) (action) of the said ____________ in relation to**) an official matter in which the United States was and is interested, to wit: (the granting of leave to ____________) (the processing of a claim against the United States in favor of ____________) (__________). (**Note: This language should be used to allege graft.)

67. Article 134—(Burning with intent to defraud)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused willfully and maliciously burned or set fire to certain property owned by a certain person or organization;

(2) That such burning or setting on fire was with the intent to defraud a certain person or organization; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. See paragraph 49c(14) for a discussion of "intent to defraud."

d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. Sample specification.

In that ____________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________, 19__________, willfully and maliciously (burn) (set fire to) (a dwelling) (a barn) (an automobile), the property of ____________, with intent to defraud (the insurer thereof, to wit: ____________) (__________).

68. Article 134—(Check, worthless, making and uttering—by dishonorably failing to maintain funds)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused made and uttered a certain check;

(2) That the check was made and uttered for the purchase of a certain thing, in payment of a debt, or for a certain purpose;

(3) That the accused subsequently failed to place or maintain sufficient funds in or credit with the drawee bank for payment of the check in full upon its presentment for payment;
(4) That this failure was dishonorable; and
(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. This offense differs from an Article 123a offense (paragraph 49) in that there need be no intent to defraud or deceive at the time of making, drawing, uttering, or delivery, and that the accused need not know at that time that the accused did not or would not have sufficient funds for payment. The gist of the offense lies in the conduct of the accused after uttering the instrument. Mere negligence in maintaining one’s bank balance is insufficient for this offense, for the accused’s conduct must reflect bad faith or gross indifference in this regard. As in the offense of dishonorable failure to pay debts (see paragraph 71), dishonorable conduct of the accused is necessary, and the other principles discussed in paragraph 71 also apply here.

d. Lesser included offenses. None.

e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. Sample specification.
In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19 __________, make and utter to __________ a certain check, in words and figures as follows, to wit: ____________, (for the purchase of ____________) (in payment of a debt) (for the purpose of ____________), and did thereafter dishonorably fail to (place) (maintain) sufficient funds in the __________ Bank for payment of such check in full upon its presentment for payment.

69. Article 134—(Cohabitation, wrongful)

a. Text. See paragraph 60.

b. Elements.
(1) That, during a certain period of time, the accused and another person openly and publicly lived together as husband and wife, holding themselves out as such;
(2) That the other person was not the spouse of the accused;
(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. This offense differs from adultery (see paragraph 62) in that it is not necessary to prove that one of the partners was married or that sexual intercourse took place. Public knowledge of the wrongfulness of the relationship is not required, but the partners must behave in a manner, as exhibited by conduct or language, that leads others to believe that a martial relationship exists.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Confinement for 4 months and forfeiture of two-thirds pay per month for 4 months.

f. Sample specification.
In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), from about __________ 19 __________, to about __________, wrongfully cohabit with __________, (a woman not his wife) (a man not her husband).

70. Article 134—(Correctional custody—offenses against)

a. Text. See paragraph 60.

b. Elements.
(1) Escape from correctional custody.
(a) That the accused was placed in correctional custody by a person authorized to do so;
(b) That, while in such correctional custody, the accused was under physical restraint;
(c) That the accused freed himself or herself from the physical restraint of this correctional custody before being released therefrom by proper authority; and
(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) Breach of correctional custody.
(a) That the accused was placed in correctional custody by a person authorized to do so;
(b) That, while in correctional custody, a certain restraint was imposed upon the accused;
(c) That the accused went beyond the limits of the restraint imposed before having been released from the correctional custody or relieved of the restraint by proper authority; and
(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. **Explanation.**

(1) **Escape from correctional custody.** Escape from correctional custody is the act of a person undergoing the punishment of correctional custody pursuant to Article 15, who, before being set at liberty by proper authority, casts off any physical restraint imposed by the custodian or by the place or conditions of custody.

(2) **Breach of correctional custody.** Breach of restraint during correctional custody is the act of a person undergoing the punishment who, in the absence of physical restraint imposed by a custodian or by the place or conditions of custody, breaches any form of restraint imposed during this period.

(3) **Authority to impose correctional custody.** See Part V concerning who may impose correctional custody. Whether the status of a person authorized that person to impose correctional custody is a question of law to be decided by the military judge. Whether the person who imposed correctional custody had such a status is a question of fact to be decided by the factfinder.

d. **Lesser included offense.** Article 80—attempts

e. **Maximum punishment.**

(1) **Escape from correctional custody.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) **Breach of correctional custody.** Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. **Sample specifications.**

(1) **Escape from correctional custody.**

In that _____________ (personal jurisdiction data), while undergoing the punishment of correctional custody imposed by a person authorized to do so, did, (at/on board—location), on or about _____________ 19___________, escape from correctional custody.

(2) **Breach of correctional custody.**

In that _____________ (personal jurisdiction data), while duly undergoing the punishment of correctional custody imposed by a person authorized to do so, did, (at/on board—location), on or about _____________ 19___________, breach the restraint imposed thereunder by _____________.

71. **Article 134—(Debt, dishonorably failing to pay)**

a. **Text.** See paragraph 60.

b. **Elements.**

(1) That the accused was indebted to a certain person or entity in a certain sum;

(2) That this debt became due and payable on or about a certain date;

(3) That while the debt was still due and payable the accused dishonorably failed to pay this debt; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. **Explanation.** More than negligence in nonpayment is necessary. The failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations. For a debt to form the basis of this offense, the accused must not have had a defense, or an equivalent offset or counterclaim, either in fact or according to the accused's belief, at the time alleged. The offense should not be charged if there was a genuine dispute between the parties as to the facts or law relating to the debt which would affect the obligation of the accused to pay. The offense is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment. The length of the period of nonpayment and any denial of indebtedness which the accused may have made may tend to prove that the accused's conduct was dishonorable, but the court-martial may convict only if it finds from all of the evidence that the conduct was in fact dishonorable.

d. **Lesser included offenses.** None.

e. **Maximum punishment.** Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. **Sample specification.**

In that _____________ (personal jurisdiction data), being indebted to _____________ in the sum of $___________ for _____________, which amount became due and payable (on) (about) (on or about) _____________ 19___________, did (at/on board—location)(subject-matter jurisdiction data, if required), from _____________ 19___________, to _____________.


72. Article 134—(Disloyal statements)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused made a certain statement;
(2) That the statement was communicated to another person;
(3) That the statement was disloyal to the United States;
(4) That the statement was made with the intent to promote disloyalty or disaffection toward the United States by any member of the armed forces or to interfere with or impair the loyalty to the United States or good order and discipline of any member of the armed forces; and
(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. Certain disloyal statements by military personnel may not constitute an offense under 18 U.S.C. §§ 2385, 2387, and 2388, but may, under the circumstances, be punishable under this article. Examples include praising the enemy, attacking the war aims of the United States, or denouncing our form of government with the intent to promote disloyalty or disaffection among members of the armed services. A declaration of personal belief can amount to a disloyal statement if it disavows allegiance owed to the United States by the declarant. The disloyalty involved for this offense must be to the United States as a political entity and not merely to a department or other agency that is a part of its administration.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment.

Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. Sample specification.

In that ____________, (personal jurisdiction data), did, (at/on board—location), on or about ____________, 19____________, with intent to (promote (disloyalty) (disaffection) (disloyalty and disaffection)) ((interfere with) (impair) the (loyalty) (good order and discipline)) of any member of the armed forces of the United States communicate to ______________, the following statement, to wit: ____________, or words to that effect, which statement was disloyal to the United States.

73. Article 134—(Disorderly conduct, drunkenness)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused was drunk, disorderly, or drunk and disorderly on board ship or in some other place; and
(2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) Drunkenness. See paragraph 35c(3) for a discussion of intoxication.

(2) Disorderly. Disorderly conduct is conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character.

(3) Service discrediting. Unlike most offenses under Article 134, “conduct of a nature to bring discredit upon the armed forces” must be included in the specification and proved in order to authorize the higher maximum punishment when the offense is service discrediting.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment.

(1) Disorderly conduct.

(a) Under such circumstances as to bring discredit upon the military service. Confinement for 4 months and forfeiture of two-thirds pay per month for 4 months.

(b) Other cases. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(2) Drunkenness.

(a) Aboard ship or under such circumstances as to bring discredit upon the military service. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(b) Other cases. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(3) Drunk and disorderly.
(a) *Aboard ship.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *Under such circumstances as to bring discredit upon the military service.* Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

(c) *Other cases.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. *Sample specification.*

In that ____________ (personal jurisdiction data), was, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____________ 19____________, (drunk) (disorderly) (drunk and disorderly) (which conduct was of a nature to bring discredit upon the armed forces).

74. Article 134—(Drinking liquor with prisoner)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused was a sentinel or in another assignment in charge of a prisoner;

(2) That, while in such capacity, the accused unlawfully drank intoxicating liquor with a prisoner;

(3) That the prisoner was under the charge of the accused;

(4) That the accused knew that the prisoner was a prisoner under the accused’s charge; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *Prisoner.* A “prisoner” is a person who is in confinement or custody imposed under R.C.M. 302, 304, or 305, or under sentence of a court-martial who has not been set free by proper authority.

(2) *Liquor.* For the purposes of this offense, “liquor” includes any alcoholic beverage.

d. *Lesser included offense.* None.

e. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. *Sample specification.*

In that ____________ (personal jurisdiction data), a (sentinel) _____________ in charge of prisoners, did, (at/on board—location), on or about _____________ 19____________, unlawfully drink intoxicating liquor with _____________, a prisoner under his/her charge.

75. Article 134—(Drunken prisoner)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused was a prisoner;

(2) That while in such status the accused was found drunk; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *Prisoner.* See paragraph 74c(1).

(2) *Drunk.* See paragraph 35c(3) for a discussion of intoxication.

d. *Lesser included offenses.* None.

e. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. *Sample specification.*

In that ____________ (personal jurisdiction data), a prisoner, was (at/on board—location), on or about _____________ 19____________, found drunk.

76. Article 134—(Drunkenness—incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused had certain duties to perform;

(2) That the accused was incapacitated for the proper performance of such duties;

(3) That such incapacitation was the result of previous wrongful indulgence in intoxicating liquor or any drug; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *Liquor.* See paragraph 74c(2).

(2) *Incapacitated.* Incapacitated means unfit or unable to perform properly. A person is "unfit" to
perform duties if at the time the duties are to commence, the person is drunk, even though physically able to perform the duties. Illness resulting from previous overindulgence is an example of being "unable" to perform duties. For a discussion of "drunk" see paragraph 35c(3).

(3) Affirmative defense. The accused's lack of knowledge of the duties assigned is an affirmative defense to this offense.

d. Lesser included offense. Article 80—attempts.

e. Maximum punishment. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. Sample specification.

In that ____________ (personal jurisdiction data), was, (at/on board—location), on or about ____________ 19__________, as a result of wrongful previous overindulgence in intoxicating liquor or drugs incapacitated for the proper performance of his/her duties.

77. Article 134—(False or unauthorized pass offenses)

a. Text. See paragraph 60.

b. Elements.

(1) Wrongful making, altering, counterfeiting, or tampering with a military or official pass, permit, discharge certificate, or identification card.

(a) That the accused wrongfully and falsely made, altered, counterfeited, or tampered with a certain military or official pass, permit, discharge certificate, or identification card; and

(b) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) Wrongful sale, gift, loan, or disposition of a military or official pass, permit, discharge certificate, or identification card.

(a) That the accused wrongfully sold, gave, loaned, or disposed of a certain military or official pass, permit, discharge certificate, or identification card; and

(b) That the pass, permit, discharge certificate, or identification card was false or unauthorized;

(c) That the accused then knew that the pass, permit, discharge certificate, or identification card was false or unauthorized; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(3) Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card.

(a) That the accused wrongfully used or possessed a certain military or official pass, permit, discharge certificate, or identification card;

(b) That the pass, permit, discharge certificate, or identification card was false or unauthorized;

(c) That the accused then knew that the pass, permit, discharge certificate, or identification card was false or unauthorized; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[Note: When there is intent to defraud or deceive, add the following element after (c) above: That the accused used or possessed the pass, permit, discharge certificate, or identification card with an intent to defraud or deceive.]

c. Explanation.

(1) In general. "Military or official pass, permit, discharge certificate, or identification card" includes, as well as the more usual forms of these documents, all documents issued by any governmental agency for the purpose of identification and copies thereof.

(2) Intent to defraud or deceive. See paragraph 49c(14) and (15).

d. Lesser included offenses.

(1) Wrongful use or possession of false or unauthorized military or official pass, permit, discharge certificate, or identification card, with the intent to defraud or deceive. Article 134—same offenses, except without the intent to defraud or deceive.

(2) All false or unauthorized pass offenses. Article 80—attempts.

e. Maximum punishment.

(1) Possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.
(2) All other cases. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.
f. Sample specifications.

(1) Wrongful making, altering, counterfeiting, or tampering with military or official pass, permit, discharge certificate, or identification card. In that ________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ________ 19________, wrongfully and falsely (make) (forge) (alter by ________) (counterfeit) (tamper with by ________) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) ________ in words and figures as follows: ________.

(2) Wrongful sale, gift, loan, or disposition of a military or official pass, permit, discharge certificate, or identification card.

In that ________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ________ 19________, wrongfully (sell to ________) (give to ________) (loan to ________) (dispose of by ________) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) ________ in words and figures as follows: ________, he/she, the said ________, then well knowing the same to be (false) (unauthorized).

(3) Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card.

In that ________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ________ 19________, wrongfully (use) (possess) (with intent to (defraud)(deceive)) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) ________, he/she, the said ________, then well knowing the same to be (false) (unauthorized).

78. Article 134—(False pretenses, obtaining services under)
a. Text. See paragraph 60.
b. Elements.

(1) That the accused wrongfully obtained certain services;
(2) That the obtaining was done by using false pretenses;
(3) That the accused then knew of the falsity of the pretenses;
(4) That the obtaining was with intent to defraud;
(5) That the services were of a certain value; and
(6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
c. Explanation. This offense is similar to the offenses of larceny and wrongful appropriation by false pretenses, except that the object of the obtaining is services (for example, telephone service) rather than money, personal property, or articles of value of any kind as under Article 121. See paragraph 46c. See paragraph 49c(14) for a definition of "intent to defraud."
d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Obtaining services under false pretenses.

(1) Of a value of $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) Of a value of more than $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.
f. Sample specification.

In that ________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ________ 19________, with intent to defraud, falsely pretend to ________ that ________, then knowing that the pretenses were false, and by means thereof did wrongfully obtain from ________ services, of a value of (about) ________, to wit: ________.

79. Article 134—(False swearing)
a. Text. See paragraph 60.
b. Elements.

(1) That the accused took an oath or equivalent;
(2) That the oath or equivalent was administered to the accused in a matter in which such oath or equivalent was required or authorized by law;

(3) That the oath or equivalent was administered by a person having authority to do so;

(4) That upon this oath or equivalent the accused made or subscribed a certain statement;

(5) That the statement was false;

(6) That the accused did not then believe the statement to be true; and

(7) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) Nature of offense. False swearing is the making under a lawful oath or equivalent of any false statement, oral or written, not believing the statement to be true. It does not include such statements made in a judicial proceeding or course of justice, as these are under Article 131, perjury (see paragraph 57). Unlike a false official statement under Article 107 (see paragraph 31) there is no requirement that the statement be made with an intent to deceive or that the statement be official. See paragraphs 57c(1), c(2)(c) and c(2)(e) concerning “judicial proceeding or course of justice,” proof of the falsity, and the belief of the accused, respectively.

(2) Oath. See Article 136 and R.C.M. 807 as to the authority to administer oaths, and see Section IX of Part III (Military Rules of Evidence) concerning proof of the signatures of persons authorized to administer oaths. An oath includes an affirmation when authorized in lieu of an oath.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. Sample specification.

In that ______________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________ 19____________, through negligence, discharge a (service rifle) ________ in the (squadron) (tent) (barracks) ________ of ____________ .

80. Article 134—(Firearm, discharging—through negligence)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused discharged a firearm;

(2) That such discharge was caused by the negligence of the accused; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. For a discussion of negligence, see paragraph 85c(2).

d. Lesser included offenses. None

e. Maximum punishment. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. Sample specification.

In that ______________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________ 19____________, through negligence, discharge a (service rifle) ________ in the (squadron) (tent) (barracks) ________ of ____________ .

81. Article 134—(Firearm, discharging—willfully, under such circumstances as to endanger human life)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused discharged a firearm;

(2) That the discharge was willful and wrongful;

(3) That the discharge was under circumstances such as to endanger human life; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. “Under circumstances such as to endanger human life” refers to a reasonable potentiality for harm to human beings in general. The test is not whether the life was in fact endangered but whether, considering the circumstances surrounding the wrongful discharge of the weapon, the act was unsafe to human life in general.

d. Lesser included offenses.

(1) Article 134—firearm, discharging—through negligence
(2) Article 80—attempts
e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.
f. Sample specification.

   In that ___________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___________ 19__________, wrongfully and willfully discharge a firearm, to wit: ___________ (in the mess hall of ___________), under circumstances such as to endanger human life.

82. Article 134—(Fleeing scene of accident)
a. Text. See paragraph 60.
b. Elements.

   (1) Driver.

      (a) That the accused was the driver of a vehicle;
      (b) That while the accused was driving the vehicle was involved in an accident;
      (c) That the accused knew that the vehicle had been in an accident;
      (d) That the accused left the scene of the accident without (providing assistance to the victim who had been struck (and injured) by the said vehicle) or (providing identification);
      (e) That such leaving was wrongful; and
      (f) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

   (2) Senior passenger.

      (a) That the accused was a passenger in a vehicle which was involved in an accident;
      (b) That the accused knew that said vehicle had been in an accident;
      (c) That the accused was the superior commissioned or noncommissioned officer of the driver, or commander of the vehicle, and wrongfully and unlawfully ordered, caused, or permitted the driver to leave the scene of the accident without (providing assistance to the victim who had been struck (and injured) by the said vehicle) (or) (providing identification); and
      (d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
c. Explanation.

   (1) Nature of offense. This offense covers “hit and run” situations where there is damage to property other than the driver’s vehicle or injury to someone other than the driver or a passenger in the driver’s vehicle. It also covers accidents caused by the accused, even if the accused’s vehicle does not contact other people, vehicles, or property.

   (2) Knowledge. Actual knowledge that an accident has occurred is an essential element of this offense. Actual knowledge may be proved by circumstantial evidence.

   (3) Passenger. A passenger other than a senior passenger may also be liable under this paragraph. See paragraph 1 of this Part.
d. Lesser included offense. Article 80—attempts
e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.
f. Sample specification.

   In that ___________ (personal jurisdiction data), (the driver of) (a passenger in*) (the senior officer/noncommissioned officer in) (___________ in) a vehicle at the time of an accident in which said vehicle was involved, and having knowledge of said accident, did, at ___________ (subject-matter jurisdiction data, if required), on or about ___________ 19__________ (wrongfully leave) (by ___________, assist the driver of the said vehicle in wrongfully leaving*) (wrongfully order, cause, or permit the driver to leave) the scene of the accident without (providing assistance to ____________, who had been struck (and injured) by the said vehicle) (making his/her (the driver’s) identity known).

[Note: This language should be used when the accused was a passenger and is charged as a principal. See paragraph 1 of this part.]

83. Article 134—(Fraternization)
a. Text. See paragraph 60.
b. Elements.

   (1) That the accused was a commissioned or warrant officer;
   (2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;
That the accused then knew the person(s) to be (an) enlisted member(s);

That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

In general. The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

Regulations. Regulations, directives, and orders may also govern conduct between officer and enlisted personnel on both a service-wide and a local basis. Relationships between enlisted persons of different ranks, or between officers of different ranks may be similarly covered. Violations of such regulations, directives, or orders may be punishable under Article 92. See paragraph 16.

d. Lesser included offense. Article 80—_attempts e. Maximum punishment. Dismissal, forfeiture of all pay and allowances, and confinement for 2 years.

f. Sample specification.

In that _______________ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _______________, knowingly fraternize with _______________, an enlisted person, on terms of military equality, to wit: _______________, in violation of the custom of (the Naval Service of the United States) (the United States Army) (the United States Air Force) (the United States Coast Guard) that officers shall not fraternize with enlisted persons on terms of military equality.

84. Article 134—(Gambling with subordinate)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused gambled with a certain servicemember;

(2) That the accused was then a noncommissioned or petty officer;

(3) That the servicemember was not then a noncommissioned or petty officer and was subordinate to the accused;

(4) That the accused knew that the servicemember was not then a noncommissioned or petty officer and was subordinate to the accused; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. This offense can only be committed by a noncommissioned or petty officer gambling with an enlisted person of less than noncommissioned or petty officer rank. Gambling by an officer with an enlisted person may be a violation of Article 133. See also paragraph 83.

d. Lesser included offense. Article 80—_attempts e. Maximum punishment. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. Sample specification.

In that _______________ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _______________, gamble with _______________, then knowing that the said _______________ was not a noncommissioned or petty officer and was subordinate to the said _______________.

85. Article 134—(Homicide, negligent)

a. Text. See paragraph 60.

b. Elements.

(1) That a certain person is dead;

(2) That this death resulted from the act or failure to act of the accused;

(3) That the killing by the accused was unlawful;
(4) That the act or failure to act of the accused which caused the death amounted to simple negligence; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) Nature of offense. Negligent homicide is any unlawful homicide which is the result of simple negligence. An intent to kill or injure is not required.

(2) Simple negligence. Simple negligence is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care of the safety of others which a reasonably careful person would have exercised under the same or similar circumstances. Simple negligence is a lesser degree of carelessness than culpable negligence. See paragraph 44c(2)(a).

d. Lesser included offenses. None

e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, unlawfully kill __________, (by negligently __________) the said __________ (in) (on) the __________ with a __________ (by driving a (motor vehicle) __________) against the said __________ in a negligent manner) __________.

86. Article 134—(Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused impersonated a commissioned, warrant, noncommissioned, or petty officer, or an agent of superior authority of one of the armed forces of the United States, or an official of a certain government, in a certain manner;

(2) That the impersonation was wrongful and willful; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[Note 1: If intent to defraud is in issue, add the following additional element after (2), above: That the accused did so with the intent to defraud a certain person or organization in a certain manner.]

[Note 2: If the accused is charged with impersonating an official of a certain government without an intent to defraud, use the following additional element after (2) above: That the accused committed one or more acts which exercised or asserted the authority of the office the accused claimed to have.]

c. Explanation.

(1) Nature of offense. Impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, although this is an aggravating factor.

(2) Willfulness. “Willful” means with the knowledge that one is falsely holding oneself out as such.

(3) Intent to defraud. See paragraph 49c(14).

d. Lesser included offense. Article 80—_attempts
e. Maximum punishment. Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official.

(1) With intent to defraud. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) All other cases. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. Sample specification.

In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, wrongfully and willfully impersonate (a commissioned officer) (warrant officer) (noncommissioned officer) (petty officer) (agent of superior authority) of the (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)) (an official of the Government of __________) by (publicly wearing the uniform and insignia of rank of a (lieutenant of the __________) __________) (showing the credentials of __________) __________) (with intent to defraud __________ by __________ *) (and (exercised) (asserted) the authority of __________ by __________ **).
87. Article 134—(Indecent acts or liberties with a child)
a. Text. See paragraph 60.
b. Elements.
   (1) Physical contact.
      (a) That the accused committed a certain act upon or with the body of a certain person;
      (b) That the person was under 16 years of age and not the spouse of the accused;
      (c) That the act of the accused was indecent;
      (d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and
      (e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
   
   (2) No physical contact.
      (a) That the accused committed a certain act;
      (b) That the act amounted to the taking of indecent liberties with a certain person;
      (c) That the accused committed the act in the presence of this person;
      (d) That this person was under 16 years of age and not the spouse of the accused;
      (e) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and
      (f) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.
   (1) Consent. Lack of consent by the child to the act or conduct is not essential to this offense; consent is not a defense.
   (2) Indecent liberties. When a person is charged with taking indecent liberties, the liberties must be taken in the physical presence of the child, but physical contact is not required. Thus, one who with the requisite intent exposes one’s private parts to a child under 16 years of age may be found guilty of this offense. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child.
   
   (3) Indecent. See paragraph 89c and 90c.
d. Lesser included offense.
   (1) Article 134—indecent acts with another
   (2) Article 128—assault; assault consummated by a battery
   (3) Article 80—attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.
f. Sample specification.
   In that ____________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____________ 19__________, (take (indecent) liberties with) (commit an indecent act (upon) (with) the body of ____________, a (female) (male) under 16 years of age, not the (wife) (husband) of the said ____________, by (fondling (her) (him) and placing his/her hands upon (her) (his) leg and private parts) (__________), with intent to (arouse) (appeal to) (gratify) the (lust) (passion) (sexual desires) of the said ____________(and ____________).

88. Article 134—(Indecent exposure)
a. Text. See paragraph 60.
b. Elements.
   (1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;
   (2) That the exposure was willful and wrongful; and
   (3) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
c. Explanation. "Willful" means an intentional exposure to public view. Negligent indecent exposure is not punishable as a violation of the code. See paragraph 90c concerning "indecent."
d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.
f. Sample specification.
   In that ____________ (personal jurisdiction data), did (at/on board—location) (subject-matter
jurisdiction data, if required), on or about __________ 19 __________, while (at a barracks window) __________) willfully and wrongfully expose in an indecent matter to public view his or her ____________.

89. Article 134—(Indecent language)
a. Text. See paragraph 60.
b. Elements.
   (1) That the accused orally or in writing communicated to another person certain language;
   (2) That such language was indecent; and
   (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
   [Note: In appropriate cases add the following element after element (1): That the person to whom the language was communicated was a child under the age of 16.]
c. Explanation. “Indecent” language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. The language must violate community standards. See paragraph 87 if the communication was made in the physical presence of a child.
d. Lesser included offenses.
   (1) Article 117—provoking speeches
   (2) Article 80—attempts
e. Maximum punishment. Indecent or insulting language.
   (1) Communicated to any child under the age of 16 years. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.
   (2) Other cases. Bad-conduct discharge; forfeiture of all pay and allowances, and confinement for 6 months.
f. Sample specification.
   In that __________ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19 __________, (orally) (in writing) communicate to ____________ (a child under the age of 16 years), certain indecent language, to wit: ____________.

90. Article 134—(Indecent acts with another)
a. Text. See paragraph 60.
b. Elements.
   (1) That the accused committed a certain wrongful act with a certain person;
   (2) That the act was indecent; and
   (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
c. Explanation. “Indecent” signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.
d. Lesser included offense. Article 80—attempts
e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.
f. Sample specification.
   In that __________ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19 __________, wrongfully commit an indecent act with ____________ by ____________.

91. Article 134—(Jumping from vessel into the water)
a. Text. See paragraph 60.
b. Elements.
   (1) That the accused jumped from a vessel in use by the armed forces into the water;
   (2) That such act by the accused was wrongful and intentional; and
   (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
c. Explanation. “In use by” means any vessel operated by or under the control of the armed forces. This offense may be committed at sea, at anchor, or in port.
d. Lesser included offense. Article 80—attempts
e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.
f. Sample specification.
   In that __________ (personal jurisdiction data), did, on board ____________, at (location), on or about __________ 19 __________,
wrongfully and intentionally jump from a vessel in use by the armed forces, into the (sea) (lake) (river).

92. Article 134—(Kidnapping)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused seized, confined, inveigled, decoyed, or carried away a certain person;

(2) That the accused then held such person against that person’s will;

(3) That the accused did so willfully and wrongfully; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) **Inveigle, decoy.** “Inveigle” means to lure, lead astray, or entice by false representations or other deceitful means. For example, a person who entices another to ride in a car with a false promise to take the person to a certain destination has inveigled the passenger into the car. “Decoy” means to entice or lure by means of some fraud, trick, or temptation. For example, one who lures a child into a trap with candy has decoyed the child.

(2) **Held.** “Held” means detained. The holding must be more than a momentary or incidental detention. For example, a robber who holds the victim at gunpoint while the victim hands over a wallet, or a rapist who throws his victim to the ground, does not, by such acts, commit kidnapping. On the other hand, if, before or after such robbery or rape, the victim is involuntarily transported some substantial distance, as from a housing area to a remote area of the base or post, this may be kidnapping, in addition to robbery or rape.

(3) **Against the will.** “Against that person’s will” means that the victim was held involuntarily. The involuntary nature of the detention may result from force, mental or physical coercion, or from other means, including false representations. If the victim is incapable of having a recognizable will, as in the case of a very young child or a mentally incompetent person, the holding must be against the will of the victim’s parents or legal guardian. Evidence of the availability or nonavailability to the victim of means of exit or escape is relevant to the voluntariness of the detention, as is evidence of threats or force, or lack thereof, by the accused to detain the victim.

(4) **Willfully.** The accused must have specifically intended to hold the victim against the victim’s will to be guilty of kidnapping. An accidental detention will not suffice. The holding need not have been for financial or personal gain or for any other particular purpose. It may be an aggravating circumstance that the kidnapping was for ransom, however. See R.C.M. 1001(b)(4).

(5) **Wrongfully.** “Wrongfully” means without justification or excuse. For example, a law enforcement official may justifiably apprehend and detain, by force if necessary (see R.C.M. 302(d)(3)), a person reasonably believed to have committed an offense. An official who unlawfully uses the official’s authority to apprehend someone is not guilty of kidnapping, but may be guilty of unlawful detention. See paragraph 21. It is not wrongful under this paragraph and therefore not kidnapping for a parent or legal guardian to seize and hold that parent’s or legal guardian’s minor child.

d. Lesser included offense. Article 80—_attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

f. Sample specification.

In that , (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about 19 , willfully and wrongfully (seize) (confine) (inveigle)(decoy) (carry away) and hold (a minor whose parent or legal guardian the accused was not) (a person not a minor) against his/her will.

93. Article 134—(Mail: taking, opening, secreting, destroying, or stealing)

a. Text. See paragraph 60.

b. Elements.

(1) **Taking.**

(a) That the accused took certain mail matter;

(b) That such taking was wrongful;

(c) That the mail matter was taken by the accused before it was delivered to or received by the addressee;

(d) That such taking was with the intent to obstruct the correspondence or pry into the business or secrets of any person or organization; and
(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) **Opening, secreting, destroying, or stealing.**

(a) That the accused opened, secreted, destroyed, or stole certain mail matter;

(b) That such opening, secreting, destroying, or stealing was wrongful;

(c) That the mail matter was opened, secreted, destroyed, or stolen by the accused before it was delivered to or received by the addressee; and

(d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. **Explanation.** These offenses are intended to protect the mail and mail system. "Mail matter" means any matter deposited in a postal system of any government or any authorized depository thereof or in official mail channels of the United States or an agency thereof including the armed forces. The value of the mail matter is not an element. See paragraph 46c(1) concerning "steal."

d. **Lesser included offenses.**

(1) Article 121—larceny; wrongful appropriation

(2) Article 80—attempts

e. **Maximum punishment.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. **Sample specifications.**

(1) **Taking.**

In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about 19__________, wrongfully take certain mail matter, to wit: (a) (letter(s)) (postal card(s)) (package(s)), addressed to ____________, (out of the (Post Office ____________) (orderly room of ____________) (unit mail box of ____________) (custody of ____________) (__________)), had previously been committed to ____________, (a representative of ____________, (an official agency for the transmission of communications)) before said (letter(s)) (__________) (was) (were) (delivered) (actually received) (to) (by) the (addressee).

94. **Article 134—(Mails: depositing or causing to be deposited obscene matters in)**

a. **Text.** See paragraph 60.

b. **Elements.**

(1) That the accused deposited or caused to be deposited in the mails certain matter for mailing and delivery;

(2) That the act was done wrongfully and knowingly;

(3) That the matter was obscene; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. **Explanation.** Whether something is obscene is a question of fact. "Obscene" is synonymous with "indecent" as the latter is defined in paragraph 89c. The matter must violate community standards of decency or obscenity and must go beyond customary limits of expression. "Knowingly" means the accused deposited the material with knowledge of its nature.

d. **Lesser included offense.** Article 80—attempts

e. **Maximum punishment.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. **Sample specification.**

In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about 19__________, wrongfully
and knowingly (deposit) (cause to be deposited) in the (United States) ( ) mails, for mailing and delivery a (letter) (picture) ( ) (containing) (portraying) (suggesting) ( ) certain obscene matters, to wit: _________.

95. Article 134-(Misprision of serious offense)

a. Text. See paragraph 60.
b. Elements.
   (1) That a certain serious offense was committed by a certain person;
   (2) That the accused knew that the said person had committed the serious offense;
   (3) That, thereafter, the accused concealed the serious offense and failed to make it known to civilian or military authorities as soon as possible;
   (4) That the concealing was wrongful; and
   (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
c. Explanation.
   (1) In general. Misprision of a serious offense is the offense of concealing a serious offense committed by another but without such previous concert with or subsequent assistance to the principal as would make the accused an accessory. See paragraph 3. An intent to benefit the principal is not necessary to this offense.
   (2) Serious offense. For purposes of this paragraph, a “serious offense” is any offense punishable under the authority of the code by death or by confinement for a term exceeding 1 year.
   (3) Positive act of concealment. A mere failure or refusal to disclose the serious offense without some positive act of concealment does not make one guilty of this offense. Making a false entry in an account book for the purpose of concealing a theft committed by another is an example of a positive act of concealment.
d. Lesser included offense. Article 80—attempts
e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.
f. Sample specification.

In that ________ (personal jurisdiction data), having knowledge that ________ had actually committed a serious offense to wit: (the murder of ________ ) (_______), did, (at/on board—location) (subject-matter jurisdiction data, if required from about _______________ 19__________ , to about _______________ 19__________ , wrongfully conceal such serious offense by ________ and fail to make the same known to the civil or military authorities as soon as possible.

96. Article 134—(Obstructing justice)

a. Text. See paragraph 60.
b. Elements.
   (1) That the accused wrongfully did a certain act;
   (2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;
   (3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and
   (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
c. Explanation. This offense may be based on conduct that occurred before preferral of charges. Actual obstruction of justice is not an element of this offense. For purposes of this paragraph “criminal proceedings” includes nonjudicial punishment proceedings under Part V of this Manual. Examples of obstruction of justice include wrongfully influencing, intimidating, impeding, or injuring a witness, a person acting on charges under this chapter, an investigating officer under R.C.M. 406, or a party; and by means of bribery, intimidation, misrepresentation, or force or threat of force delaying or preventing communication of information relating to a violation of any criminal statute of the United States to a person authorized by a department, agency, or armed force of the United States to conduct or engage in investigations or prosecutions of such offenses; or endeavoring to do so. See also paragraph 22 and Article 37.
d. Lesser included offenses. None.
e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.
f. Sample specification.
In that (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, wrongfully (endeavor to) (impede (a trial by court-martial) (an investigation) (__________)) [(influence) (alter) the testimony of __________ as a witness before a (court-martial) (an investigating officer) (__________) in the case of __________ by [(promising) (offering) (giving) to the said __________, (the sum of $__________) (__________, of a value of about $__________) [communicating to the said __________ a threat to __________ [__________], (if) (unless) he/she, the said __________ would [recommend dismissal of the charges against said __________] [(wrongfully refuse to testify) (testify falsely concerning __________) (__________)] [(at such trial) (before such investigating officer)] [__________].

96a. Art 134 (Wrongful interference with an adverse administrative proceeding)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused wrongfully did a certain act;
(2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be an adverse administrative proceeding pending;
(3) That the act was done with the intent to influence, impede, or obstruct the conduct of such administrative proceeding, or otherwise obstruct the due administration of justice;
(4) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. For purposes of this paragraph “adverse administrative proceeding” includes any administrative proceeding or action, initiated against a servicemember, that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification. Examples of wrongful interference include wrongfully influencing, intimidating, impeding, or injuring a witness, an investigator, or other person acting on an adverse administrative action; by means of bribery, intimidation, misrepresentation, or force or threat of force delaying or preventing communication of information relating to such administrative proceeding; and, the wrongful destruction or concealment of information relevant to such adverse administrative proceeding.

d. Lesser included offenses. None.

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.

In that __________ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19__________, (wrongfully endeavor to) [impede (an adverse administrative proceeding) (an investigation) (__________)] [(influence) (alter) the testimony of __________ as a witness before (a board established to consider an administrative proceeding or elimination) (an investigating officer) (__________) in the case of __________, by [(promising) (offering) (giving) to the said __________, (the sum of $__________) (__________, of a value of about $__________) [communicating to the said __________ a threat to __________ [__________], (if) (unless) the said __________ would [recommend dismissal of the charges against said __________] [(wrongfully refuse to testify) (testify falsely concerning __________) (__________)] [(at such trial) (before such investigating officer)] [__________].

97. Article 134—(Pandering and prostitution)

a. Text. See paragraph 60.
b. Elements.
(1) Prostitution.
   (a) That the accused had sexual intercourse with another person not the accused's spouse;
   (b) That the accused did so for the purpose of receiving money or other compensation;
   (c) That this act was wrongful; and
   (d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
(2) Pandering by compelling, inducing, enticing, or procuring act of prostitution.
   (a) That the accused compelled, induced, enticed, or procured a certain person to engage in an act of sexual intercourse for hire and reward with a person to be directed to said person by the accused;
   (b) That this compelling, inducing, enticing, or procuring was wrongful; and
   (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
(3) Pandering by arranging or receiving consideration for arranging for sexual intercourse or sodomy.
   (a) That the accused arranged for, or received valuable consideration for arranging for, a certain person to engage in sexual intercourse or sodomy with another person;
   (b) That the arranging (and receipt of consideration) was wrongful; and
   (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. Prostitution may be committed by males or females. Sodomy for money or compensation is not included in subparagraph b(1). Sodomy may be charged under paragraph 5 1. Evidence that sodomy was for money or compensation may be a matter in aggravation. See R.C.M. 1001(b)(4).
d. Lesser included offense. Article 80—attempts
e. Maximum punishment.
   (1) Prostitution. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.
   (2) Pandering. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.
(1) Prostitution.
   In that _______________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _______________ 19______________, wrongfully engage in (an act) (acts) of sexual intercourse with _______________, a person not his/her spouse, for the purpose of receiving (money) ________________.
(2) Compelling, inducing, enticing, or procuring act of prostitution.
   In that _______________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _______________ 19______________, wrongfully (compel) (induce) (entice) (procure) ________________ to engage in (an act) (acts) of (sexual intercourse for hire and reward) with persons to be directed to him/her by the said ________________.
(3) Arranging, or receiving consideration for arranging for sexual intercourse or sodomy.
   In that _______________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _______________ 19______________, wrongfully (arrange for) (receive valuable consideration, to wit: ________________ on account of arranging for) ________________ to engage in (an act) (acts) of (sexual intercourse) (sodomy) with ________________.

98. Article 134—(Perjury: subornation of)
a. Text. See paragraph 60.
b. Elements.
   (1) That the accused induced and procured a certain person to take an oath or its equivalent and to falsely testify, depose, or state upon such oath or its equivalent concerning a certain matter;
   (2) That the oath or its equivalent was administered to said person in a matter in which an oath or its equivalent was required or authorized by law;
   (3) That the oath or its equivalent was administered by a person having authority to do so;
   (4) That upon the oath or its equivalent said person willfully made or subscribed a certain statement;
   (5) That the statement was material;
   (6) That the statement was false;
   (7) That the accused and the said person did not then believe that the statement was true; and
(8) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. **Explanation.** See paragraph 57c for applicable intercourse "Induce and procure" means to influence, persuade, or cause.

d. **Lesser included offense.** Article 80—attempts

e. **Maximum punishment.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. **Sample specification.**

   In that ___________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___________ 19__________, to procure ___________ to commit perjury by inducing him/her, the said ___________, to take a lawful (oath) (affirmation) in a (trial by court-martial of ___________) (trial by a court of competent jurisdiction, to wit: ___________) of ___________ (deposition for use in a trial by ___________ of ___________) (___________) that he/she, the said ___________, would (testify) (depose) ___________ truly, and to (testify) (depose) ___________ willfully, corruptly, and contrary to such (oath) (affirmation) in substance that ___________, which (testimony) (deposition) ___________ was upon a material matter and which the accused and the said ___________ did not then believe to be true.

99. **Article 134—(Public record: altering, concealing, removing, mutilating, obliterating, or destroying)**

a. **Text.** See paragraph 60.

b. **Elements.**
   
   (1) That the accused altered, concealed, removed, mutilated, obliterated, destroyed, or took with the intent to alter, conceal, remove, mutilate, obliterate, or destroy, a certain public record;
   
   (2) That the act of the accused was willful and unlawful; and
   
   (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. **Explanation.** "Public records" include records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to which matters there was a duty to report. "Public records" includes classified matters.

d. **Lesser included offense.** Article 80—attempts

e. **Maximum punishment.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. **Sample specification.**

   In that ___________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___________ 19__________, willfully and unlawfully (alter) (conceal) (remove) (mutilate) (obliterate) (destroy) (take with intent to alter) (conceal) (remove) (mutilate) (obliterate) (destroy) a public record, to wit: ___________.

100. **Article 134—(Quarantine: medical, breaking)**

a. **Text.** See paragraph 60.

b. **Elements.**
   
   (1) That a certain person ordered the accused into medical quarantine;
   
   (2) That the person was authorized to order the accused into medical quarantine;
   
   (3) That the accused knew of this medical quarantine and the limit thereof;
   
   (4) That the accused went beyond the limits of the medical quarantine before being released therefrom by proper authority; and
   
   (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. **Explanation.** None.

d. **Lesser included offenses.**
   
   (1) Article 134—breaking restriction
   
   (2) Article 80—attempts

e. **Maximum punishment.** Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

f. **Sample specification.**

   In that ___________ (personal jurisdiction data) having been placed in medical quarantine by a person authorized to order the accused into medical isol
quarantine, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about 19, break said medical quarantine.

101. Article 134—(Requesting commission of an offense)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused communicated certain language;
(2) That the language advised, directed, requested, or suggested to certain person(s) to commit an offense under the code;
(3) That the communication was wrongful; and
(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. This offense differs from solicitation to commit an offense (see paragraphs 6 and 105) in that for this offense the accused need not have specifically intended that the offense advised, directed, requested, or suggested by the accused be committed. Advice or a direction, request, or suggestion is wrongful if it is made in a manner or under circumstances which the accused could reasonably expect the persons to whom it was made to take seriously and act upon.

d. Lesser included offenses. None.

e. Maximum punishment. Confinement for 4 months and forfeiture of two-thirds pay per month for 4 months.

f. Sample specification.

In that (personal jurisdiction data), (at/on board—location) (subject-matter jurisdiction data, if required), on or about 19, wrongfully communicate certain language, to wit: ________________________, which language (advised) (directed) (requested) (suggested to) the said _______________________, to commit ______________________________________________________, an offense under the code.

102. Article 134—(Restriction, breaking)

a. Text. See paragraph 60.

b. Elements.

(1) That a certain person ordered the accused to be restricted to certain limits;
(2) That said person was authorized to order said restriction;
(3) That the accused knew of the restriction and the limits thereof;
(4) That the accused went beyond the limits of the restriction before being released therefrom by proper authority; and
(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. Restriction is the moral restraint of a person imposed by an order directing a person to remain within certain specified limits. "Restriction" includes restriction under R.C.M. 304(a)(2), restriction resulting from imposition of either nonjudicial punishment (see Part V) or the sentence of a court-martial (see R.C.M. 1003(b)(6)), and administrative restriction in the interest of training, operations, security, or safety.

d. Lesser included offenses. Article 80—attempts

e. Maximum punishment. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

f. Sample specification.

In that (personal jurisdiction data), having been restricted to the limits of ________________________, by a person authorized to do so, did, (at/on board—location), on or about 19, break said restriction.

103. Article 134—(Seizure: destruction, removal, or disposal of property to prevent)

a. Text. See paragraph 60.

b. Elements.

(1) That one or more persons authorized to make searches and seizures were seizing, about to seize, or endeavoring to seize certain property;
(2) That the accused destroyed, removed, or otherwise disposed of that property with intent to prevent the seizure thereof;
(3) That the accused then knew that person(s) authorized to make searches were seizing, about to seize, or endeavoring to seize the property; and
(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

IV-116
c. Explanation. See Mil. R. Evid. 316(a) concerning military personnel who may make seizures. It is not a defense that a search or seizure was technically defective.

d. Lesser included offense. Article 80—attempt.

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

   In that ______________ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about ______________ 19______________, with intent to prevent its seizure, (destroy) (remove) (dispose of) ______________, property which, as ______________ then knew, (a) person(s) authorized to make searches and seizures were (seizing) (about to seize) (endeavoring to seize).

104. Article 134—(Sentinel or lookout: offenses against or by)

a. Text. See paragraph 60.

b. Elements.

   (1) Disrespect to a sentinel or lookout.

   (a) That a certain person was a sentinel or lookout;

   (b) That the accused knew that said person was a sentinel or lookout;

   (c) That the accused used certain disrespectful language or behaved in a certain disrespectful manner;

   (d) That such language or behavior was wrongful;

   (e) That such language or behavior was directed toward and within the sight or hearing of the sentinel or lookout;

   (f) That said person was at the time in the execution of duties as a sentinel or lookout; and

   (g) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

   (2) Loitering or wrongfully sitting on post by a sentinel or lookout.

   (a) In general. The discussion set forth in paragraph 38c applies to loitering or sitting down while posted as a sentinel or lookout as well.

   (b) Loiter. “Loiter” means to stand around, to move about slowly, to linger, or to lay behind when that conduct is in violation of known instructions or accompanied by a failure to give complete attention to duty.

   (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[c. Explanation.]

(1) Disrespect. For a discussion of “disrespect,” see paragraph 13c(3).

(2) Loitering or wrongfully sitting on post.

   (a) In general. The discussion set forth in paragraph 38c applies to loitering or sitting down while posted as a sentinel or lookout as well.

   (b) Loiter. “Loiter” means to stand around, to move about slowly, to linger, or to lay behind when that conduct is in violation of known instructions or accompanied by a failure to give complete attention to duty.

   (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(d) Lesser included offenses.

(1) Disrespect to a sentinel or lookout. Article 80—attempt.

(2) Loitering or wrongfully sitting on post by a sentinel or lookout. Article 80—attempt.

(e) Maximum punishment.

   (1) Disrespect to a sentinel or lookout. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

   (2) Loitering or wrongfully sitting on post by a sentinel or lookout.

      (a) In time of war or while receiving special pay under 37 U.S.C. § 310. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

      (b) Other cases. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. Sample specifications.

   (1) Disrespect to a sentinel or lookout.

      In that ______________ (personal jurisdiction data), did, (at/on board—location), on or about ______________ 19______________, then knowing that ______________ was a sentinel or lookout, (wrongfully use the following disrespectful language “_______________,” or words to that effect, to ______________) (wrongfully behave in a disre-
spectful manner toward ______________, by ______________) a (sentinel) (lookout) in the execution of his/her duty.

(2) Loitering or wrongfully sitting down on post by a sentinel or lookout.

In that ______________ (personal jurisdiction data), while posted as a (sentinel) (lookout), did, (at/on board—location) (while receiving special pay under 37 U.S.C. § 310) on or about ______________ 19__________, (a time of war) (loiter) (wrongfully sit down) on his/her post.

105. Article 134—(Soliciting another to commit an offense)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused solicited or advised a certain person or persons to commit a certain offense named in the code other than one of the four offenses named in Article 82;

(2) That the accused did so with the intent that the offense actually be committed; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was a nature to bring discredit upon the armed forces.

c. Explanation. See paragraph 6c. If the offense solicited actually committed, see also paragraph 1.

d. Lesser included offenses. Article 80—attempts.

(1) Article 134—Requesting another to commit an offense, wrongful communication of language

(2) Article 80—attempts

e. Maximum punishment. Any person subject to the code who is found guilty of soliciting or advising another person to commit an offense which, if committed by one subject to the code, would be punishable under the code, shall be subject to the maximum punishment authorized for the offense solicited or advised, except that in no case shall the death penalty be imposed nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 5 years. However, any person subject to the code who is found guilty of soliciting or advising another person to commit the offense of espionage (Article 106a) shall be subject to any punishment, other than death, that a court-martial may direct.

f. Sample specification.

106. Article 134—(Stolen property: knowingly receiving, buying, concealing)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused wrongfully received, bought, or concealed certain property of some value;

(2) That the property belonged to another person;

(3) That the property had been stolen;

(4) That the accused then knew that the property had been stolen; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) In general. The actual thief is not criminally liable for receiving the property stolen; however a principle to the larceny (see paragraph l), when not the actual thief, may be found guilty of knowingly receiving the stolen property but may not be found guilty of both the larceny and receiving the property.

(2) Knowledge. Actual knowledge that the property was stolen is required. Knowledge may be proved by circumstantial evidence.

(3) Wrongfulness. Receiving stolen property is wrongful if it is without justification or excuse. For example, it would not be wrongful for a person to receive stolen property for the purpose of returning it to its rightful owner, or for a law enforcement officer to seize it as evidence.

d. Lesser included offense. Article 80—attempts

e. Maximum punishment. Stolen property, knowingly receiving, buying, or concealing.

(1) Of a value of $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.
(2) Of a value of more than $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. Sample specification.

In that __________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about __________ 19_________, wrongfully (receive) (buy) (conceal) __________, of a value of (about) __________, the property of __________, which property, as he/she, the said __________, then knew, had been stolen.

107. Article 134—(Straggling)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused, while accompanying the accused’s organization on a march, maneuvers, or similar exercise, straggled;

(2) That the straggling was wrongful; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. “Straggle” means to wander away, to stray, to become separated from, or to lag or linger behind.

d. Lesser included offenses. None.

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.

In that __________ (personal jurisdiction data), did, at __________, on or about __________ 19_________, while accompanying his/her organization on (a march) (maneuvers) (___________), wrongfully straggle.

108. Article 134—(Testify: wrongful refusal)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused was in the presence of a court-martial, board of officer(s), military commission, court of inquiry, an officer conducting an investigation under Article 32, Uniform Code of Military Justice (officer taking a deposition) (___________) (of) (for) the United States, of which __________ was (military judge) (president), (___________), and having been directed by the said __________ to qualify as a witness and having been directed by the said __________ to answer the following question(s) put to him/her as a witness, “___________”), did, (at/on board—location), on or about __________ 19_________, wrongfully refuse (to qualify as a witness) (to answer said question(s)).

109. Article 134—(Threat or hoax: bomb)

a. Text. See paragraph 60.

b. Elements.

(1) Bomb threat.

(a) That the accused communicated certain language;

(b) That the language communicated amounted to a threat;
(c) That the harm threatened was to be done by means of an explosive;
(d) That the communication was wrongful; and
(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) Bomb hoax.
(a) That the accused communicated or conveyed certain information;
(b) That the language or information concerned an attempt being made or to be made by means of an explosive to unlawfully kill, injure, or intimidate a person or to unlawfully damage or destroy property;
(c) That the information communicated by the accused was false and that the accused then knew it was false;
(d) That the communication of the information by the accused was malicious; and
(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.
(1) Threat. A “threat” is an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property presently or in the future. Proof that the accused actually intended to kill, injure, intimidate, damage, or destroy is not required. See also paragraph 110.
(2) Malicious. A communication is “malicious” if the accused believed that the information would probably interfere with the peaceful use of the building, vehicle, aircraft, or other property concerned, or would cause fear or concern to one or more persons.
(3) Explosive. See R.C.M. 103(11).

d. Lesser included offenses.
(1) Bomb threat.
(a) Article 134—communicating a threat
(b) Article 80—attempts
(2) Bomb hoax. Article 80—attempts
e. Maximum punishment. Bomb threat and bomb hoax: Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.
f. Sample specifications.
(1) Bomb threat.
in that ______ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about 19__________, wrongfully communicate certain language, to wit: ____________ , which language constituted a threat to harm a person or property by means of an explosive.

(2) Bomb hoax.
in that ______ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about 19__________, maliciously (communicate) (convey) certain information concerning an attempt being made or to be made to unlawfully (kill) (injure) (intimidate) (damage) (destroy) ________, by means of an explosive, to wit: ____________, which information was false and which ________ then knew to be false.

110. Article 134—(Threat, communicating)
a. Text. See paragraph 60.
b. Elements.
(1) That the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;
(2) That the communication was made known to that person or to a third person;
(3) That the communication was wrongful; and
(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
c. Explanation. To establish the threat it is not necessary that the accused actually intended to do the injury threatened. However, a declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another. See also paragraph 109 concerning bomb threat.
d. Lesser included offenses.
(1) Article 117—provoking speeches or gestures
(2) Article 80—attempts


e. **Maximum punishment.** Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. **Sample specification.**

   In that _________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _________ 19__________, wrongfully communicate to _________ a threat (injure _________ by _________) (accuse _________ of having committed the offense of _________).

111. **Article 134—(Unlawful entry)**

a. **Text.** See paragraph 60.

b. **Elements.**

   (1) That the accused entered the real property of another or certain personal property of another which amounts to a structure usually used for habitation or storage;

   (2) That such entry was unlawful; and

   (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. **Explanation.** See paragraph 55 for a discussion of "entry." An entry is "unlawful" if made without the consent of any person authorized to consent to entry or without other lawful authority. No specific intent or breaking is required for this offense. See paragraph 56 for a discussion of housebreaking. The property protected against unlawful entry includes real property and the sort of personal property which amounts to a structure usually used for habitation or storage. It would usually not include an aircraft, automobile, tracked vehicle, or a person’s locker, even though used for storage purposes. However, depending on the circumstances, an intrusion into such property may be prejudicial to good order and discipline.

d. **Lesser included offense.** Article 80—attempts

e. **Maximum punishment.** Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. **Sample specification.**

   In that _________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _________ 19__________, unlawfully enter the (dwelling house) (garage) (warehouse) (tent) (vegetable garden) (orchard) (stateroom) _________ of _________.

112. **Article 134—(Weapon: concealed, carrying)**

a. **Text.** See paragraph 60.

b. **Elements.**

   (1) That the accused carried a certain weapon concealed on or about the accused’s person;

   (2) That the carrying was unlawful;

   (3) That the weapon was a dangerous weapon; and

   (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. **Explanation.**

   (1) **Concealed weapon.** A weapon is concealed when it is carried by a person and intentionally covered or kept from sight.

   (2) **Dangerous weapon.** For purposes of this paragraph, a weapon is dangerous if it was specifically designed for the purpose of doing grievous bodily harm, or it was used or intended to be used by the accused to do grievous bodily harm.

   (3) **On or about.** "On or about" means the weapon was carried on the accused’s person or was within the immediate reach of the accused.

d. **Lesser included offense.** Article 80—attempts

e. **Maximum punishment.** Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. **Sample specification.**

   In that _________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _________ 19__________, unlawfully carry on or about his/her person a concealed weapon, to wit: a _________.

113. **Article 134—(Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button)**

a. **Text.** See paragraph 60.

b. **Elements.**

   (1) That the accused wore a certain insignia, decoration, badge, ribbon, device, or lapel button upon the accused’s uniform or civilian clothing;
§113b.(2)  

(2) That the accused was not authorized to wear the item;  

(3) That the wearing was wrongful; and  

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.  

c. Explanation. None.  

d. Lesser included offense. Article 80—attempts  

e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.  

f. Sample specification.  

In that ____________ (personal jurisdiction data), did, (at/on board—location), on or about ____________ 19___________, wrongfully and without authority wear upon his/her (uniform) (civilian clothing) (the insignia or grade of a (master sergeant of ____________) (chief gunner's mate of _____________)) (Combat Infantryman Badge) (the Distinguished Service Cross) (the ribbon representing the Silver Star) (the lapel button representing the Legion of Merit) (____________).
PART V

NONJUDICIAL PUNISHMENT PROCEDURE

1. General
a. Authority. Nonjudicial punishment in the United States Armed Forces is authorized by Article 15.
b. Nature. Nonjudicial punishment is a disciplinary measure more serious than the administrative corrective measures discussed in paragraph 1g, but less serious than trial by court-martial.
c. Purpose. Nonjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in servicemembers without the stigma of a court-martial conviction.
d. Policy.
   (1) Commander's responsibility. Commanders are responsible for good order and discipline in their commands. Generally, discipline can be maintained through effective leadership including, when necessary, administrative corrective measures. Nonjudicial punishment is ordinarily appropriate when administrative corrective measures are inadequate due to the nature of the minor offense or the record of the servicemember, unless it is clear that only trial by court-martial will meet the needs of justice and discipline. Nonjudicial punishment shall be considered on an individual basis. Commanders considering nonjudicial punishment should consider the nature of the offense, the record of the servicemember, the needs for good order and discipline, and the effect of nonjudicial punishment on the servicemember and the servicemember's record.
   (2) Commander's discretion. A commander who is considering a case for disposition under Article 15 will exercise personal discretion in evaluating each case, both as to whether nonjudicial punishment is appropriate, and, if so, as to the nature and amount of punishment appropriate. No superior may direct that a subordinate authority impose nonjudicial punishment in a particular case, issue regulations, orders, or “guides” which suggest to subordinate authorities that certain categories of minor offenses be disposed of by nonjudicial punishment instead of by court-martial or administrative corrective measures, or that predetermined kinds or amounts of punishments be imposed for certain classifications of offenses that the subordinate considers appropriate for disposition by nonjudicial punishment.
   (3) Commander's suspension authority. Commanders should consider suspending all or part of any punishment selected under Article 15, particularly in the case of first offenders or when significant extenuating or mitigating matters are present. Suspension provides an incentive to the offender and gives an opportunity to the commander to evaluate the offender during the period of suspension.
e. Minor offenses. Nonjudicial punishment may be imposed for acts or omissions that are minor offenses under the punitive articles (see Part IV). Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence impossible for the offense if tried by general court-martial. Ordinarily, a minor offense is an offense which the maximum sentence impossible would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial. The decision whether an offense is “minor” is a matter of discretion for the commander imposing nonjudicial punishment, but nonjudicial punishment for an offense other than a minor offense (even though thought by the commander to be minor) is not a bar to trial by court-martial for the same offense. See R.C.M. 907(b)(2)(D)(iv). However, the accused may show at trial that nonjudicial punishment was imposed, and if the accused does so, this fact must be considered in determining an appropriate sentence. See Article 15(f); R.C.M. 1001(c)(1)(B).
f. Limitations on nonjudicial punishment.
   (1) Double punishment prohibited. When nonjudicial punishment has been imposed for an offense, punishment may not again be imposed for the same offense under Article 15. But see paragraph 1e concerning trial by court-martial.
   (2) Increase in punishment prohibited. Once nonjudicial punishment has been imposed, it may not be increased, upon appeal or otherwise.
   (3) Multiple punishment prohibited. When a commander determines that nonjudicial punishment is appropriate for a particular servicemember, all known offenses determined to be appropriate for disposition by nonjudicial punishment and ready to be
considered at that time, including all such offenses arising from a single incident or course of conduct, shall ordinarily be considered together, and not made the basis for multiple punishments.

(4) Statute of limitations. Except as provided in Article 43(d), nonjudicial punishment may not be imposed for offenses which were committed more than 2 years before the date of imposition. See Article 43(c).

(5) Civilian courts. Nonjudicial punishment may not be imposed for an offense tried by a court which derives its authority from the United States. Nonjudicial punishment may not be imposed for an offense tried by a State or foreign court unless authorized by regulations of the Secretary concerned.

g. Relationship of nonjudicial punishment to administrative corrective measures. Article 15 and Part V of this Manual do not apply to include, or limit use of administrative corrective measures that promote efficiency and good order and discipline such as counseling, admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, rebukes, extra military instruction, and administrative withholding of privileges. See also R.C.M. 306. Administrative corrective measures are not punishment, and they may be used for acts or omissions which are not offenses under the code and for acts or omissions which are offenses under the code.

h. Effect of errors. Failure to comply with any of the procedural provisions of Part V of this Manual shall not invalidate a punishment imposed under Article 15, unless the error materially prejudiced a substantial right of the servicemember on whom the punishment was imposed.

2. Who may impose nonjudicial punishment

The following persons may serve as a nonjudicial punishment authority for the purposes of administering nonjudicial punishment proceedings under this Part:

a. Commander. Unless otherwise provided by regulations of the Secretary concerned, a commander may impose nonjudicial punishment upon any military personnel of that command. “Commander” means a commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area, which under pertinent official directives is recognized as a “command.” Subject to subparagraph 1d(2) and any regulations of the Secretary concerned, the authority of a commander to impose nonjudicial punishment as to certain types of offenses, certain categories of persons, or in specific cases, or to impose certain types of punishment, may be limited or withheld by a superior commander or by the Secretary concerned.

b. Officer in charge. If authorized by regulations of the Secretary concerned, an officer in charge may impose nonjudicial punishment upon enlisted persons assigned to that unit.

c. Principal assistant. If authorized by regulations of the Secretary concerned, a commander exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate that commander’s powers under Article 15 to a principal assistant. The Secretary concerned may define “principal assistant.”

3. Right to demand trial

Except in the case of a person attached to or embarked in a vessel, punishment may not be imposed under Article 15 upon any member of the armed forces who has, before the imposition of nonjudicial punishment, demanded trial by court-martial in lieu of nonjudicial punishment. This right may also be granted to a person attached to or embarked in a vessel if so authorized by regulations of the Secretary concerned. A person is “attached to” or “embarked in” a vessel if, at the time nonjudicial punishment is imposed, that person is assigned or attached to the vessel, is on board for passage, or is assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body.

4. Procedure

a. Notice. If, after a preliminary inquiry (see R.C.M. 303), the nonjudicial punishment authority determines that disposition by nonjudicial punishment proceedings is appropriate (see R.C.M. 306: paragraph 1 of this Part), the nonjudicial punishment authority shall cause the servicemember to be notified. The notice shall include:

(1) a statement that the nonjudicial punishment authority is considering the imposition of nonjudicial punishment;
(2) a statement describing the alleged offenses—including the article of the code—which the member is alleged to have committed;

(3) a brief summary of the information upon which the allegations are based or a statement that the member may, upon request, examine available statements and evidence;

(4) a statement of the rights that will be accorded to the servicemember under subparagraphs 4c(1) and (2) of this Part;

(5) unless the right to demand trial is not applicable (see paragraph 3 of this Part), a statement that the member may demand trial by court-martial in lieu of nonjudicial punishment, a statement of the maximum punishment which the nonjudicial punishment authority may impose by nonjudicial punishment; a statement that, if trial by court-martial is demanded, charges could be referred for trial by summary, special, or general court-martial; that the member may not be tried by summary court-martial over the member's objection; and that at a special or general court-martial the member has the right to be represented by counsel.

b. Decision by servicemember.

(1) Demand for trial by court-martial. If the servicemember demands trial by court-martial (when this right is applicable), the nonjudicial proceedings shall be terminated. It is within the discretion of the commander whether to forward or refer charges for trial by court-martial (see R.C.M. 306; 307; 401-407) in such a case, but in no event may nonjudicial punishment be imposed for the offenses affected unless the demand is voluntarily withdrawn.

(2) No demand for trial by court-martial. If the servicemember does not demand trial by court-martial within a reasonable time after notice under paragraph 4a of this Part, or if the right to demand trial by court-martial is not applicable, the nonjudicial punishment authority may proceed under paragraph 4c of this Part.

c. Nonjudicial punishment accepted.

(1) Personal appearance requested; procedure. Before nonjudicial punishment may be imposed, the servicemember shall be entitled to appear personally before the nonjudicial punishment authority who offered nonjudicial punishment, except when appearance is prevented by the unavailability of the nonjudicial punishment authority or by extraordinary circumstances, in which case the servicemember shall be entitled to appear before a person designated by the nonjudicial punishment authority who shall prepare a written summary of any proceedings before that person and forward it and any written matter submitted by the servicemember to the nonjudicial punishment authority. If the servicemember requests personal appearance, the servicemember shall be entitled to:

(A) Be informed in accordance with Article 31(b);

(B) Be accompanied by a spokesperson provided or arranged for by the member unless the punishment to be imposed will not exceed extra duty for 14 days, restriction for 14 days, and an oral reprimand. Such a spokesperson need not be qualified under R.C.M. 502(d); such spokesperson is not entitled to travel or similar expenses, and the proceedings need not be delayed to permit the presence of a spokesperson; the spokesperson may speak for the servicemember, but may not question witnesses except as the nonjudicial punishment authority may allow as a matter of discretion;

(C) Be informed orally or in writing of the information against the servicemember and relating to the offenses alleged;

(D) Be allowed to examine documents or physical objects against the member which the nonjudicial punishment authority has examined in connection with the case and on which the nonjudicial punishment authority intends to rely in deciding whether and how much nonjudicial punishment to impose;

(E) Present matters in defense, extenuation, and mitigation orally, or in writing, or both;

(F) Have present witnesses, including those adverse to the servicemember, upon request if their statements will be relevant and they are reasonably available. For purposes of this subparagraph, a witness is not reasonably available if the witness requires reimbursement by the United States for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or, if a military witness, cannot be excused from other important duties;

(G) Have the proceeding open to the public unless the nonjudicial punishment authority determines that the proceeding should be closed for good cause, such as military exigencies or security interests, or unless the punishment to be imposed will not
exceed extra duty for 14 days, restriction for 14 days, and an oral reprimand; however, nothing in this subparagraph requires special arrangements to be made to facilitate access to the proceeding.

(2) Personal appearance waived; procedure. Subject to the approval of the nonjudicial punishment authority, the servicemember may request not to appear personally under subparagraph 4c(1) of this Part. If such request is granted, the servicemember may submit written for consideration by the nonjudicial punishment authority before such authority’s decision under subparagraph 4c(4) of this Part. The servicemember shall be informed of the right to remain silent and that matters submitted may be used against the member in a trial by court-martial.

(3) Evidence. The Military Rules of Evidence (Part III), other than with respect to privileges, do not apply at nonjudicial punishment proceedings. Any relevant matter may be considered, after compliance with subparagraphs 4c(1)(C) and (D) of this Part.

(4) Decision. After considering all relevant matters presented, if the nonjudicial punishment authority—

(A) Does not conclude that the servicemember committed the offenses alleged, the nonjudicial punishment authority shall so inform the member and terminate the proceedings;

(B) Concludes that the servicemember committed one or more of the offenses alleged, the nonjudicial punishment authority shall:

(i) so inform the servicemember;

(ii) inform the servicemember of the punishment imposed; and

(iii) inform the servicemember of the right to appeal (see paragraph 7 of this Part).

d. Nonjudicial punishment based on record of court of inquiry or other investigative body. Nonjudicial punishment may be based on the record of a court of inquiry or other investigative body, in which proceeding the member was accorded the rights of a party. No additional proceeding under subparagraph 4c(1) of this Part is required. The servicemember shall be informed in writing that nonjudicial punishment is being considered based on the record of the proceedings in question, and given the opportunity, if applicable, to refuse nonjudicial punishment. If the servicemember does not demand trial by court-martial or has no option, the servicemember may submit, in writing, any matter in defense, extenuation, or mitigation, to the officer considering imposing nonjudicial punishment, for consideration by that officer to determine whether the member committed the offenses in question, and, if so, to determine an appropriate punishment.

5. Punishments

a. General limitations. The Secretary concerned may limit the power granted by Article 15 with respect to the kind and amount of the punishment authorized. Subject to paragraphs 1 and 4 of this Part and to regulations of the Secretary concerned, the kinds and amounts of punishment authorized by Article 15(b) may be imposed upon servicemembers as provided in this paragraph.

b. Authorized maximum punishments. In addition to or in lieu of admonition or reprimand, the following disciplinary punishments subject to the limitation of paragraph 5d of this Part, be imposed upon servicemembers:

(1) Upon commissioned officers and warrant officers—

(A) By any commanding officer—restriction to specified limits, with or without suspension from duty for not more than 30 consecutive days;

(B) If imposed by an officer exercising general court-martial jurisdiction, an officer of general or flag rank in command, or a principal assistant as defined in paragraph 2c of this Part—

(i) arrest in quarters for not more than 30 consecutive days;

(ii) forfeiture of not more than one-half of one month’s pay per month for 2 months;

(iii) restriction to specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(2) Upon other military personnel of the command—

(A) By any nonjudicial punishment authority—

(i) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than 3 consecutive days;

(ii) correctional custody for not more than 7 consecutive days;

(iii) forfeiture of not more than 7 days’ pay;
(iv) reduction to the next inferior grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

(v) extra duties, including fatigue or other duties, for not more than 14 consecutive days;

(vi) restriction to specified limits, with or without suspension from duty, for not more than 14 consecutive days;

(B) If imposed by a commanding officer of the grade of major or lieutenant commander or above or a principal assistant as defined in paragraph 2c of this Part—

(i) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than 3 consecutive days;

(ii) correctional custody for not more than 30 consecutive days;

(iii) forfeiture of not more than one-half of 1 month’s pay per month for 2 months;

(iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but enlisted members in pay grades above E-4 may not be reduced more than one pay grade, except that during time or war or national emergency this category of persons may be reduced two grades if the Secretary concerned determines that circumstances require the removal of this limitation;

(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

(vi) restriction to specified limits, with or without suspension from duty, for not more than 60 consecutive days.

(c) Nature of punishment.

(1) Admonition and reprimand. Admonition and reprimand are two forms of censure intended to express adverse reflection upon or criticism of a person’s conduct. A reprimand is a more severe form of censure than an admonition. When imposed as nonjudicial punishment, the admonition or reprimand is considered to be punitive, unlike the nonpunitive admonition and reprimand provided for in paragraph 1f of this Part. In the case of commissioned officers and warrant officers, admonitions and reprimands given as nonjudicial punishment must be administered in writing. In other cases, unless otherwise prescribed by the Secretary concerned, they may be administered either orally or in writing.

(2) Restriction. Restriction is the least severe form of deprivation of liberty. Restriction involves moral rather than physical restraint. The severity of this type of restraint depends on its duration and the geographical limits specified when the punishment is imposed. A person undergoing restriction may be required to report to a designated place at specified times if reasonably necessary to ensure that the punishment is being properly executed. Unless otherwise specified by the nonjudicial punishment authority, a person in restriction may be required to perform any military duty.

(3) Arrest in quarters. As in the case of restriction, the restraint involved in arrest in quarters is enforced by a moral obligation rather than by physical means. This punishment may be imposed only on officers. An officer undergoing this punishment may be required to perform those duties prescribed by the Secretary concerned. However, an officer so punished is required to remain within that officer’s quarters during the period of punishment unless the limits of arrest are otherwise extended by appropriate authority. The quarters of an officer may consist of a military residence, whether a tent, stateroom, or other quarters assigned, or a private residence when government quarters have not been provided.

(4) Correctional custody. Correctional custody is the physical restraint of a person during duty or nonduty hours, or both, imposed as a punishment under Article 15, and may include extra duties, fatigue duties, or hard labor as an incident of correctional custody. A person may be required to serve correctional custody in a confinement facility, but if practicable, not in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial. A person undergoing correctional custody may be required to perform those regular military duties, extra duties, fatigue duties, and hard labor which may be assigned by the authority charged with the administration of the punishment. The conditions under which correctional custody is served shall be prescribed by the Secretary concerned. In addition, the Secretary concerned may limit the categories of enlisted members upon whom correctional custody may be imposed. The
authority competent to order the release of a person from correctional custody shall be as designated by the Secretary concerned.

(5) **Confinement on bread and water or diminished rations.** Confinement on bread and water or diminished rations involves confinement in places where the person so confined may communicate only with authorized personnel. The ration to be furnished a person undergoing a punishment of confinement on bread and water or diminished rations is that specified by the authority charged with the administration of the punishment, but the ration may not consist solely of bread and water unless this punishment has been specifically imposed. When punishment of confinement on bread and water or diminished rations is imposed, a signed certificate of a medical officer containing an opinion that no serious injury to the health of the person to be confined will be caused by that punishment, must be obtained before the punishment is executed. The categories of enlisted personnel upon whom this type of punishment may be imposed may be limited by the Secretary concerned.

(6) **Extra duties.** Extra duties involve the performance of duties in addition to those normally assigned to the person undergoing the punishment. Extra duties may include fatigue duties. Military duties of any kind may be assigned as extra duty. However, no extra duty may be imposed which constitutes a known safety or health hazard to the member or which constitutes cruel or unusual punishment or which is not sanctioned by customs of the service concerned. Extra duties assigned as punishment of noncommissioned officers, petty officers, or any other enlisted persons of equivalent grades or positions designated by the Secretary concerned, should not be of a kind which demeans their grades or positions.

(7) **Reduction in grade.** Reduction in grade is one of the most severe forms of nonjudicial punishment and it should be used with discretion. As used in Article 15, the phrase "if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction" does not refer to the authority to promote the person concerned but to the general authority to promote to the grade held by the person to be punished.

(8) **Forfeiture of pay.** Forfeiture means a permanent loss of entitlement to the pay forfeited. "Pay," as used with respect to forfeiture of pay under Article 15, refers to the basic pay of the person or, in the case of reserve component personnel on inactive-duty, compensation for periods of inactive-duty training, plus any sea or foreign duty pay. "Basic pay" includes no element of pay other than the basic pay fixed by statute for the grade and length of service of the person concerned and does not include special pay for a special qualification, incentive pay for the performance of hazardous duties, proficiency pay, subsistence and quarters allowances, and similar types of compensation. If the punishment includes both reduction, whether or not suspended, and forfeiture of pay, the forfeiture must be based on the grade to which reduced. The amount to be forfeited will be expressed in whole dollar amounts only and not in a number of day's pay or fractions of monthly pay. If the forfeiture is to be applied for more than 1 month, the amount to be forfeited per month and the number of months should be stated. Forfeiture of pay may not extend to any pay accrued before the date of its imposition.

d. **Limitations on combination of punishments.**

(1) Arrest in quarters may not be imposed in combination with restriction;

(2) Confinement on bread and water or diminished rations may not be imposed in combination with correctional custody, extra duties, or restriction;

(3) Correctional custody may not be imposed in combination with restriction or extra duties;

(4) Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum impossible for extra duties;

(5) Subject to the limits in subparagraphs d(1) through (4) all authorized punishments may be imposed in a single case in the maximum amounts.

e. **Punishments imposed on reserve component personnel while on inactive-duty training.** When a punishment under Article 15 amounting to a deprivation of liberty (for example, restriction, correctional custody, extra duties, or arrest in quarters) is imposed on a member of a reserve component during a period of inactive-duty training, the punishment may be served during one or both of the following:

(1) a normal period of inactive-duty training; or
(2) a subsequent period of active duty (not including a period of active duty under Article 2(d)(1), unless such active duty was approved by the Secretary concerned).

Unserved punishments may be carried over to subsequent periods of inactive-duty training or active duty. A sentence to forfeiture of pay may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

f. Punishments imposed on reserve component personnel when ordered to active duty for disciplinary purposes. When a punishment under Article 15 is imposed on a member of a reserve component during a period of active duty to which the reservist was ordered pursuant to R.C.M. 204 and which constitutes a deprivation of liberty (for example, restriction, correctional custody, extra duties, or arrest in quarters), the punishment may be served during any or all of the following:

(1) that period of active duty to which the reservist was ordered pursuant to Article 2(d), but only where the order to active duty was approved by the Secretary concerned;

(2) a subsequent normal period of inactive-duty training; or

(3) a subsequent period of active duty (not including a period of active duty pursuant to R.C.M. 204 which was not approved by the Secretary concerned).

Unserved punishments may be carried over to subsequent periods of inactive-duty training or active duty. A sentence to forfeiture of pay may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

g. Effective date and execution of punishments. Reduction and forfeiture of pay, if unsuspended, take effect on the date the commander imposes the punishments. Other punishments, if unsuspended, will take effect and be carried into execution as prescribed by the Secretary concerned.

6. Suspension, mitigation, remission, and setting aside

a. Suspension. The nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment, or a successor in command over the person punished, may, at any time, suspend any part or amount of the unexecuted punishment imposed and may suspend a reduction in grade or a forfeiture, whether or not executed, subject to the following rules:

(1) An executed punishment of reduction or forfeiture of pay may be suspended only within a period of 4 months after the date of execution.

(2) Suspension of a punishment may not be for a period longer than 6 months from the date of the suspension, and the expiration of the current enlistment or term of service of the servicemember involved automatically terminates the period of suspension.

(3) Unless the suspension is sooner vacated, suspended portions of the punishment are remitted, without further action, upon the termination of the period of suspension.

(4) Unless otherwise stated, an action suspending a punishment includes a condition that the servicemember not violate any punitive article of the code. The nonjudicial punishment authority may specify in writing additional conditions of the suspension.

(5) A suspension may be vacated by any nonjudicial punishment authority or commander competent to impose upon the servicemember concerned punishment of the kind and amount involved in the vacation of suspension. Vacation of suspension may be based only on a violation of the conditions of suspension which occurs within the period of suspension. Before a suspension may be vacated, the servicemember ordinarily shall be notified and given an opportunity to respond. Although a hearing is not required to vacate a suspension, if the punishment is of the kind set forth in Article 15(e)(1)-(7), the servicemember should, unless impracticable, be given an opportunity to appear before the officer authorized to vacate suspension of the punishment to present any matters in defense, extenuation, or mitigation of the violation on which the vacation action is to be based. Vacation of a suspended nonjudicial punishment is not itself nonjudicial punishment, and additional action to impose nonjudicial punishment for a violation of a punitive article of the code upon which the vacation action is based is not precluded thereby.

b. Mitigation. Mitigation is a reduction in either the quantity or quality of a punishment, its general nature remaining the same. Mitigation is appropriate when the offender’s later good conduct merits a reduction in the punishment, or when it is determined
that the punishment imposed was disproportionate. The nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment, or a successor in command may, at any time, mitigate any part or amount of the unexecuted portion of the punishment imposed. The nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment, or a successor in command may also mitigate reduction in grade, whether executed or unexecuted, to forfeiture of pay, but the amount of the forfeiture may not be greater than the amount that could have been imposed by the officer who initially imposed the nonjudicial punishment. Reduction in grade may be mitigated to forfeiture of pay only within 4 months after the date of execution.

When mitigating—

(1) Arrest in quarters to restriction;
(2) Confinement on bread and water or diminished rations to correctional custody;
(3) Correctional custody or confinement on bread and water or diminished rations to extra duties or restriction, or both; or
(4) Extra duties to restriction, the mitigated punishment may not be for a greater period than the punishment mitigated. As restriction is the least severe form of deprivation of liberty, it may not be mitigated to a lesser period of another form of deprivation of liberty, as that would mean an increase in the quality of the punishment.

c. Remission. Remission is an action whereby any portion of the unexecuted punishment is cancelled. Remission is appropriate under the same circumstances as mitigation. The nonjudicial punishment authority who imposes punishment, the commander who imposes nonjudicial punishment, or a successor in command may, at any time, remit any part or amount of the unexecuted portion of the punishment imposed. The expiration of the current enlistment or term of service of the servicemember automatically remits any unexecuted punishment imposed under Article 15.

d. Setting aside. Setting aside is an action whereby the punishment or any part or amount thereof, whether executed or unexecuted, is set aside and any property, privileges, or rights affected by the portion of the punishment set aside are restored. The nonjudicial punishment authority who imposed punishment, the commander who imposes nonjudicial punishment, or a successor in command may set aside punishment. The power to set aside punishments and restore rights, privileges, and property affected by the executed portion of a punishment should ordinarily be exercised only when the authority considering the case believes that, under all circumstances of the case, the punishment has resulted in clear injustice. Also, the power to set aside an executed punishment should ordinarily be exercised only within a reasonable time after the punishment has been executed. In this connection, 4 months is a reasonable time in the absence of unusual circumstances.

7. Appeals

a. In general. Any servicemember punished under Article 15 who considers the punishment to be unjust or disproportionate to the offense may appeal through the proper channels to the next superior authority.

b. Who may act on appeal. A “superior authority,” as prescribed by the Secretary concerned, may act on an appeal. When punishment has been imposed under delegation of a commander’s authority to administer nonjudicial punishment (see paragraph 2c of this Part), the appeal may not be directed to the commander who delegated the authority.

c. Format of appeal. Appeals shall be in writing and may include the appellant’s reasons for regarding the punishment as unjust or disproportionate.

d. Time limit. An appeal shall be submitted within 5 days of imposition of punishment, or the right to appeal shall be waived in the absence of good cause shown. A servicemember who has appealed may be required to undergo any punishment imposed while the appeal is pending, except that if action is not taken on the appeal within 5 days after the appeal was submitted, and if the servicemember so requests, any unexecuted punishment involving restraint or extra duty shall be stayed until action on the appeal is taken.

e. Legal review. Before acting on an appeal from any punishment of the kind set forth in Article 15(e)(1)-(7), the authority who is to act on the appeal shall refer the case to a judge advocate or to a lawyer of the Department of Transportation for consideration and advice, and may so refer the case upon appeal from any punishment imposed under Article 15.
When the case is referred, the judge advocate or lawyer is not limited to an examination of any written matter comprising the record of proceedings and may make any inquiries and examine any additional matter deemed necessary.

f. Action by superior authority.

(1) In general. In acting on an appeal, the superior authority may exercise the same power with respect to the punishment imposed as may be exercised under Article 15(d) and paragraph 6 of this Part by the officer who imposed the punishment. The superior authority may take such action even if no appeal has been filed.

(2) Matters considered. When reviewing the action of an officer who imposed nonjudicial punishment, the superior authority may consider the record of the proceedings, any matters submitted by the servicemember, any matters considered during the legal review, if any, and any other appropriate matters.

(3) Additional proceedings. If the superior authority sets aside a nonjudicial punishment due to a procedural error, that authority may authorize additional proceedings under Article 15, to be conducted by the officer who imposed the nonjudicial punishment, the commander, or a successor in command, for the same offenses involved in the original proceedings. Any punishment imposed as a result of these additional proceedings may be no more severe than that originally imposed.

(4) Notification. Upon completion of action by the superior authority, the servicemember upon whom punishment was imposed shall be promptly notified of the result.

(5) Delegation to principal assistant. If authorized by regulation of the Secretary concerned a superior authority who is a commander exercising general court-martial jurisdiction, or is an officer of general or flag rank in command, may delegate the power under Article 15(e) and this paragraph to a principal assistant.

8. Records of nonjudicial punishment

The content, format, use, and disposition of records of nonjudicial punishment may be prescribed by regulations of the Secretary concerned.
APPENDIX 1
CONSTITUTION OF THE UNITED STATES—1787

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution of the United States of America.

ARTICLE I
Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second year by the people of the several states, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representative and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each state shall have at Least one Representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any state, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall choose the Speaker and other officers; and shall have the sole power of Impeachment.

Section 3. 2 The Senate of the United States shall be composed of two Senators from each State chosen by the Legislature thereof, for six Years and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no Vote unless they be equally divided.

The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice-President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.

Judgement in Cases of Impeachment shall not extend further than to removal from Office and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and with the Concurrence of two-thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members either House on any question shall, at the Desire of one fifth of those Present be entered on the Journal.

1 This clause has been affected by the 14th and 16th amendments.
2 This section has been affected by the 17th amendment
3 This clause has been affected by the 20th amendment
Neither House, during the Session of Congress shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he is elected, be appointed to any Civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which is shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law. But in all such Cases the Votes of Both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representative may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be re-passed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

To borrow Money on the credit of the United States; To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the States in which the Same shall be, for the Erection of Forts, Magazines, arsenals, dock-Yards, and other Needful Buildings; And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor
shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imports, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States and, together with the Vice President, chosen for the same Term, be elected as follows.

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

4 The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner choose the President. But in choosing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a choice. In every case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall choose from them by Ballot the Vice President.

The Congress may determine the Time of the choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within a Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. But the Congress may by law vest the Appointment of
such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section 1. The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States, between a State and Citizens of another State, between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens, or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Act, Records, and judicial Proceedings of every other State. And the Congress may, by general Laws, prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall, on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labor may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State, nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both House shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid, to all intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State,
without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI
All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, Anything in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound, by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII
The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Articles in Addition to, and Amendment of, the Constitution of the United States of America. Proposed by Congress, and Ratified by the Legislatures of the Several States Pursuant to the Fifth Article of the Original Constitution

AMENDMENT I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II
A well-regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III
No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner; nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V
No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

AMENDMENT VII
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law.

AMENDMENT VIII
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

AMENDMENT IX
The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT X
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

AMENDMENT XI
The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

AMENDMENT XII
The Electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign, and certify, and transmit, sealed, to the seat of the government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President.
President, if such number be a majority of the whole number of Electors appointed; and if no person have such a majority, then, from the persons having the highest numbers, not exceeding three, on the list of those voted for a President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, the Vice-President shall act as President, as in case of death, or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators; a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that Vice-President of the United States.

**AMENDMENT XIII**

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the number of such male citizens shall bear to the whole number of male citizens twenty one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a Member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**AMENDMENT XV**

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT XVI**

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration.

**AMENDMENT XVII**

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.
AMENDMENT XVIII

Section 1. After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years of the date of the submission hereof to the States by Congress.

AMENDMENT XIX The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice President-elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Vice President-elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President-elect nor a Vice President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by three fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XXII

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which his Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT XXIII

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representative in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in

5 This article was replaced by the 21st amendment
APPENDIX 1

Amdt. XXIII, § 1

the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXIV

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXV

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty eight hours for that purpose if not in session. If the Congress, within twenty one days after Congress is required to assemble, determines by two thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT XXVI

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.
APPENDIX 2
UNIFORM CODE OF MILITARY JUSTICE

CHAPTER 47. UNIFORM CODE OF MILITARY JUSTICE

SUBCHAPTER 1. GENERAL PROVISIONS


In this chapter.

(1) The term “Judge Advocate General” means, severally, the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, the General Counsel of the Department of Transportation.

(2) The Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy, shall be considered as one armed force.

(3) The term “commanding officer” includes only commissioned officers.

(4) The term “officer in charge” means a member of the Navy, the Marine Corps, or the Coast Guard designated to perform legal duties for a command.

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

(6) The term “cadet” means a cadet of the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy.

(7) The term “midshipman” means a midshipman of the United States Naval Academy and any other midshipman on active duty in the naval service.

(8) The term “military” refers to any or all of the armed forces.

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

(10) The term “military judge” means an official of a general or special court-martial detailed in accordance with section 826 of this title (article 26).

(11) The term “law specialist” means a commissioned officer of the Coast Guard designated for special duty (law).

(12) The term “legal officer” means any commissioned officer of the Navy, Marine Corps, or Coast Guard designated to perform legal duties for a command.

(13) The term “judge advocate” means—

(A) an officer of the Judge Advocate General’s Corps of the Army or the Navy;

(B) an officer of the Air Force or the Marine Corps who is designated as a judge advocate; or

(C) an officer of the Coast Guard who is designated as a judge advocate.

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

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

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

§ 802. Art. 2. Persons subject to this chapter

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.
(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

(c) Notwithstanding any other provision of law, a person serving with an armed force who:

(1) submitted voluntarily to military authority;

(2) met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

(d)(1) A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 815 of this title (article 43), subject to trial by court-martial for all offenses under this chapter committed before the fraudulant discharge.

(2) A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was in a status in which the person is subject to this chapter and who

(A) on active duty; or

(B) on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(3) Authority to order a member to active duty under paragraph (1) shall be exercised under regulations prescribed by the President.

(4) A member may be ordered to active duty under paragraph (1) only by a person empowered to convene general courts-martial in a regular component of the armed forces.

(5) A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not

(A) be sentenced to confinement; or

(B) be required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive-duty training or active duty (other than active duty ordered under paragraph (1)).

§ 803. Art. 3. Jurisdiction to try certain personnel

(a) Subject to section 843 of this title (article 43), a person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

(b) Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to section 843 of this title (article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulant discharge.

(c) No person who has deserted from the armed forces may be relieved from amenability to the jurisdiction of this chapter by virtue of a separation from any later period of service.

(d) A member of a reserve component who is subject to this chapter is not, by virtue of the termination of a period of active duty or inactive-duty training, relieved from amenability to the jurisdiction of this chapter for an offense against this chapter committed during such period of active duty or inactive-duty training.

§ 804. Art. 4. Dismissed officer's right to trial by court-martial

(a) If any commissioned officer, dismissed by order of the President, makes a written application for trial by court-martial setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try that officer on the charges on which he was dismissed. A court-martial so convened has jurisdiction to try the dismissed officer on those charges, and he shall be considered to have waived the right to plead any statute of limitations applicable to any offense with which he is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal, but if the court-martial acquits the accused or if the sentence is vacated. A court-martial so convened has jurisdiction to try the dismissed officer on the charges on which he was dismissed.

(b) If the President fails to convene a general court-martial within six months from the preparation of an application for trial under this article, the Secretary concerned shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issue.

(c) If a discharge is substituted for a dismissal under this article, the President alone may reappoint the officer to such commissioned grade and with such rank as, in the opinion of the President, that former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to the existence of a vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and the reappointment...
shall be considered as actual service for all purposes, including the right to pay and allowances.

(d) If an officer is discharged from any armed force by administrative action or is dropped from the rolls by order of the President, he has no right to trial under this article.

§ 805. Art. 5. Territorial applicability of this chapter
This chapter applies in all places.

§ 806. Art. 6. Judge Advocates and legal officers
(a) The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspection in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General.

(c) No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing authority on the same case.

(d)(1) A judge advocate who is assigned or detailed to perform the functions of a civil office in the Government of the United States under section 973(b)(2)(B) of this title may perform such duties as may be requested by the agency concerned, including representation of the United States in civil and criminal cases.

(2) The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations providing that reimbursement may be a condition of assistance by judge advocates assigned or detailed under section 973(b)(2)(B) of this title.

§ 806a. Art. 6a. Investigation and disposition of matters pertaining to the fitness of military judges
(a) The President shall prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of a military judge or military appellate judge to perform the duties of the judge’s position. To the extent practicable, the procedures shall be uniform for all armed forces.

(b) The President shall transmit a copy of the procedures prescribed pursuant to this section to the Committees on Armed Services of the Senate and the House of Representatives.

SUBCHAPTER II. APPREHENSION AND RESTRAINT

§ 810. Art. 10. Restraint of persons charged with offenses
Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordina-
§ 810. Art. 10.

Applicability of Article

When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

§ 811. Art. 11. Reports and receiving of prisoners

(a) No provost marshal, commander or a guard, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after that commitment or as soon as he is relieved from guard, report to the commanding officer the name of the prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

§ 812. Art. 12. Confinement with enemy prisoners prohibited

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

§ 813. Art. 13. Punishment prohibited before trial

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

§ 814. Art. 14. Delivery of offenders to civil authorities

(a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

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

SUBCHAPTER III. NON-JUDICIAL PUNISHMENT

§ 815. Art. 15. Commanding Officer’s non-Judicial punishment

(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authority to exercise those powers, the applicability of this article to an accused who
UNIFORM CODE OF MILITARY JUSTICE

§ 816. Art. 16.3

(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

(vi) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(vii) detention of not more than one-half of one month's pay per month for three months.

(viii) detention of not more than one-half of one month's pay per month for three months.

Detention of pay shall be for a stated period of not more than one year but if the offender's term of service expires earlier, the detention shall terminate upon that expiration. No two or more of the punishments of arrest in quarters, confinement on bread and water or diminished rations, correctional custody, extra duties, and restriction may be combined to run consecutively in the maximum amount imposable for each. Whenever any of those punishments are combined to run consecutively, there must be an apportionment. In addition, forfeiture of pay may not be combined with detention of pay without an apportionment. For the purpose of this subsection, "correctional custody" is the physical restraint of a person during duty or nonduty hours and may include extra duties, fatigue duties, or hard labor. If practicable, correctional custody will not be served in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial.

(c) An officer in charge may impose upon enlisted members assigned to the unit of which he is in charge such of the punishments authorized under subsection (b)(2)(A)-(G) as the Secretary concerned may specifically prescribe by regulation.

(d) The officer who imposes the punishment authorized in subsection (b), or his successor in command, may, at any time, suspend provisionally any part or amount of the unexecuted punishment imposed and may suspend provisionally a reduction in grade or a forfeiture imposed under subsection (b), whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay. When mitigating -

(1) arrest in quarters to restriction;
(2) confinement on bread and water or diminished rations to correctional custody;
(3) correctional custody or confinement on bread and water or diminished rations to extra duties or restriction, or both; or
(4) extra duties to restriction; the mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating forfeiture of pay to detention of pay, the amount of the detention shall not be greater than the amount of the forfeiture. When mitigating reduction in grade to forfeiture or detention of pay, the amount of the forfeiture or detention shall not be greater than the amount that could have been imposed initially under this article by the officer who imposed the punishment mitigated.

(e) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (d) by the officer who imposed the punishment. Before acting on an appeal from a punishment of -

(1) arrest in quarters for more than seven days;
(2) correctional custody for more than seven days;
(3) forfeiture of more than seven days' pay;
(4) reduction of one or more pay grades from the fourth or a higher pay grade;
(5) extra duties for more than 14 days;
(6) restriction for more than 14 days; or
(7) detention of more than 14 days' pay;

the authority who is to act on the appeal shall refer the case to a judge advocate or a lawyer of the Department of Transportation for consideration and advice, and may so refer the case upon appeal from any punishment imposed under subsection (b).

(f) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

(g) The Secretary concerned may, by regulation, prescribe the form of records to be kept of proceedings under this article and may also prescribe that certain categories of those proceedings shall be in writing.

SUBCHAPTER IV. COURT-MARTIAL JURISDICTION

Sec. 816. Art. 16. Courts-martial classified.
817. Jurisdiction of courts-martial in general.
818. Jurisdiction of general courts-martial.
819. Jurisdiction of special courts-martial.
821. Jurisdiction of courts-martial not exclusive.

§ 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and not less than five members.

(2) special courts-martial, consisting of—

(A) not less than three members; or

(B) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.
§ 817. Art. 17. Jurisdiction of courts-martial in general
(a) Each armed force has court-martial jurisdiction over all persons subject to this chapter. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.
(b) In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required under this chapter, shall be carried out by the department that includes the armed force of which the accused is a member.

§ 818. Art. 18. Jurisdiction of general courts-martial
Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

§ 819. Art. 19. Jurisdiction of special courts-martial
Subject to section 817 of this title (article 17), special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title (article 16(b)(B)) was detailed to represent the accused, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed.

§ 820. Art. 20. Jurisdiction of summary courts-martial
Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

§ 821. Art. 21. Jurisdiction of courts-martial not exclusive
The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

§ 822. Art. 22. Who may convene general courts-martial
(a) General courts-martial may be convened by—
(1) the President of the United States;
(2) the Secretary of Defense;
(3) the commanding officer of a unified or specified combatant command;
(4) the Secretary concerned;
(5) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps. a division, a separate brigade. or a corresponding unit of the Army or Marine Corps;
(6) the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States;
(7) the commanding officer of an air command, an air force, an air division. or a separate wing of the Air Force or Marine Corps; or
(8) any other commanding officer designated by the Secretary concerned; or
(9) any other commanding officer in any of the armed forces when empowered by the President.
§ 823. Art. 23. Who may convene special court-martial

(a) Special courts-martial may be convened by—
   (1) any person who may convene a general court-martial;
   (2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary air field, or other place where members of the Army or the Air Force are on duty;
   (3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;
   (4) the commanding officer of a wing, group, or separate squadron of the Air Force;
   (5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; the commanding officer of any Marine brigade, regiment, detached battalion, or corresponding unit; the commanding officer of any Marine barracks, wing, group, separate squadron, station, base, auxiliary air field, or other place where members of the Marine Corps are on duty;
   (6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or
   (7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

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

§ 824. Art. 24. Who may convene summary court-martial

(a) Summary courts-martial may be convened by—
   (1) any person who may convene a general or special court-martial;
   (2) the commanding officer of a detached company or other detachment of the Army;
   (3) the commanding officer of a detached squadron or other detachment of the Air Force; or
   (4) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

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

§ 825. Art. 25. Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c)(1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(2) In this article, "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d)(1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.

§ 826. Art. 26. Military Judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the
§ 826. Art. 26.(c) APPENDIX 2

armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

§ 827. Art. 27. Detail of trial counsel and defense counsel

(a) (1) Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial.

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

(b) Trial counsel or defense counsel detailed for a general court-martial—

(1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

(c) In the case of a special court-martial—

(1) the accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies. If counsel having such qualifications cannot be obtained, the court may be convened and the trial held but the convening authority shall make a detailed writ-ten statement, to be appended to the record, stating why counsel with such qualifications could not be obtained;

(2) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified; and

(3) if the trial counsel is a judge advocate or a member of the bar of a Federal court or the highest court of a State, the defense counsel detailed by the convening authority must be one of the foregoing.

§ 828. Art. 28. Detail or employment of reporters and Interpreters

Under such regulations as the Secretary concerned may prescribe, the convening authority of a court-martial, military commission, or court of inquiry shall detail or employ qualified court reporters, who shall record the proceedings and testimony taken before that court or commission. Under like regulations the convening authority of a court-martial, military commission, or court of inquiry may detail or employ interpreters who shall interpret for the court or commission.

§ 829. Art. 29. Absent and additional members

(a) No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.

(b) Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below five members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.

(c) Whenever a special court-martial, other than a special court-martial composed of a military judge only, is reduced below three members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than three members. The trial shall proceed with the new members present as if no evidence had previously been introduced at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a stipulation thereof is read to the court in the presence of the military judge, if any, the accused and counsel for both sides.

(d) If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 8 16(1)(B) or (2)(C) of this title (article 16(1)(B) or (2)(C)), after the detail of a new military judge as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new military judge, the accused, and counsel for both sides.

SUBCHAPTER VI. PRE-TRIAL PROCEDURE
Chapter 3. Trial

§ 830. Art. 30. Charges and specifications
(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state:

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

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

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

§ 831. Art. 31. Compulsory self-incrimination prohibited
(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

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

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

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

§ 832. Art. 32. Investigation
(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as provided in section 838 of this title (article 38) and in regulations prescribed under that section. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigation officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

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

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

§ 833. Art. 33. Forwarding of charges
When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the Investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

§ 834. Art. 34. Advice of staff Judge advocate and reference for trial
(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice. The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that—

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

(2) the specification is warranted by the evidence indicated in the report of investigation under section 832 of this title (article 32) (if there is such a report); and

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

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

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

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

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

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

§ 835. Art. 35. Service of charges
The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person may, against his objection, be brought to trial or be required to participate by himself or counsel in a session called by the military judge under section 839(a) of this title, in a general court-martial case within a period of five days after the service of charges upon him or in a special court-martial within a period of three days after the service of the charges upon him.

SUBCHAPTER VII. TRIAL PROCEDURE

Sec. 836. 36. President may prescribe rules.
837. 37. Unlawfully influencing action of court.
838. 38. Duties of trial counsel and defense counsel.
840. 40. Continuances.
841. 41. Challenges.
842. 42. Oaths.
843. 43. Statute of limitations.
844. 44. Former jeopardy.
845. 45. Pleas of the accused.
846. 46. Opportunity to obtain witnesses and other evidence.
847. 47. Refusal to appear or testify.
848. 48. Contempts.
849. 49. Deposits.
850. 50. Admissibility of records of courts of inquiry.
850a. 50a. Defense of lack of mental responsibility.
851. 51. Voting and rulings.
852. 52. Number of votes required.
853. 53. Court to announce action.
854. 54. Record of trial.

§ 838. Art. 36. President may prescribe rules
(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
(b) All rules and regulations made under this article shall be uniform insofar as practicable.

§ 837. Art. 37. Unlawfully influencing action of court
(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.
(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

§ 838. Art. 38. Duties of trial counsel and defense counsel
(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.
(b)(1) The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.
(2) The accused may be represented by civilian counsel if provided by him.
(3) The accused may be represented—
(A) by military counsel detailed under section 827 of this title (article 27); or
(B) by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7)).
(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused.
(5) Except as provided under paragraph (6), if the accused is represented by military counsel of his own selection under paragraph (3)(B), any military counsel detailed under paragraph (3)(A) shall be excused.
(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under reg-
matters prescribed under section 827 of this title (article 27) to
detail counsel in his sole discretion—

(A) may detail additional military counsel as assistant de-
fense counsel; and

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

(7) The Secretary concerned shall, by regulation, define "rea-
sonably available" for the purpose of paragraph (3)(B) and establish
procedures for determining whether the military counsel se-
lected by an accused under that paragraph is reasonably
available. Such regulations may not prescribe any limitation
based on the reasonable availability of counsel solely on the
grounds that the counsel selected by the accused is from an armed
force other than the armed force of which the accused is a mem-
ber. To the maximum extent practicable, such regulations shall
establish uniform policies among the armed forces while recog-
nizing the differences in the circumstances and needs of the vari-
ous armed forces. The Secretary concerned shall submit copies of
regulations prescribed under this paragraph to the Committees
on Armed Services of the Senate and House of Representatives.

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

(1) may forward for attachment to the record of proceedings a
brief of such matters as he determines should be considered in be-
half of the accused on review (including any objection to the con-
tents of the record which he considers appropriate);

(2) may assist the accused in the submission of any matter
under section 860 of this title (article 60); and

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

(d) An assistant trial counsel of a general court-martial may,
under the direction of the trial counsel or when he is qualified to
be a trial counsel as required by section 827 of this title (article
27), perform any duty imposed by law, regulation, or the custom
of the service upon the trial counsel of the court. An assistant trial
counsel of a special court-martial may perform any duty of the
trial counsel.

(e) An assistant defense counsel of a general or special court-
martial may, under the direction of the defense counsel or when
he is qualified to be the defense counsel as required by section 827
of this title (article 27), perform any duty imposed by law, regula-
tion, or the custom of the service upon counsel for the accused.

§ 839. Art. 39. Sessions

(a) At any time after the service of charges which have been re-
ferred for trial to a court-martial composed of a military judge
and members, the military judge may, subject to section 835 of
this title (article 35), call the court into session without the pres-
ence of the members for the purpose of—

(1) hearing and determining motions raising defenses or objec-
tions which are capable of determination without trial of the is-
sues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled
upon by the military judge under this chapter, whether or not the
matter is appropriate for later consideration or decision by the
members of the court;

(3) if permitted by regulations of the Secretary concerned,
holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be
performed by the military judge under this chapter or under rules
prescribed pursuant to section 836 of this title (article 36) and
which does not require the presence of the members of the court.
These proceedings shall be conducted in the presence of the ac-
cused, the defense counsel, and the trial counsel and shall be made
a part of the record. These proceedings may be conducted not-
withstanding the number of members of the court and without re-
gard to section 829 of this title (article 29).

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

§ 840. Art. 40. Continuances

The military judge or a court-martial without a military judge
may, for reasonable cause, grant a continuance to any party for
such time, and as often, as may appear to be just.

§ 841. Art. 41. Challenges

(a)(1) The military judge and members of a general or special
court-martial may be challenged by the accused or the trial coun-
sel for cause stated to the court. The military judge, or, if none,
the court, shall determine the relevance and validity of challenges
for cause, and may not receive a challenge to more than one per-
son at a time. Challenges by the trial counsel shall ordinarily be
presented and decided before those by the accused are offered.

(2) If exercise of a challenge for cause reduces the court below
the minimum number of members required by section 816 of this
title (article 16), all parties shall (notwithstanding section 829 of
this title (article 29)) either exercise or waive any remaining
cause against the remaining members of the court
before additional members are detailed to the court. However,
peremptory challenges shall not be exercised at that time.

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

(2) If exercise of a peremptory challenge reduces the court be-
low the minimum number of members required by section 816 of
this title (article 16), all parties shall (notwithstanding section 829
of this title (article 29)) either exercise or waive any challenge for
cause against the remaining members of the court
before additional members are detailed to the court. However,
peremptory challenges shall not be exercised at that time.

(c) Whenever additional members are detailed to the court,
and after any challenges for cause against such additional mem-
bers are presented and decided, each accused and the trial counsel
are entitled to one peremptory challenge against members not
previously subject to peremptory challenge.
§ 541(b)–(d), 104 Stat. 1565.)
§ 842. Art. 42. Oaths
(a) Before performing their respective duties, military judges, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant or associate defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary concerned. These regulations may provide that an oath to perform faithfully duties as a military judge, trial counsel, assistant trial counsel, defense counsel, or assistant or associate defense counsel may be taken at any time by any judge advocate or other person certified to be qualified or competent for the duty, and if such an oath is taken it need not again be taken at the time the judge advocate, or other person is detailed to that duty.
(b) Each witness before a court-martial shall be examined on oath.

§ 843. Art. 43. Statute of limitations
(a) A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation.
(b)(1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.
(2) A person charged with an offense is not liable to be punished under section 815 of this title (article 15) if the offense was committed more than two years before the imposition of punishment.
(c) Periods in which the accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation prescribed in this section (article).
(d) Periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article.
(e) For an offense the trial of which in time of war is certified to the President by the Secretary concerned to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article is extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.
(f) When the United States is at war, the running of any statute of limitations applicable to any offense under this chapter -
   (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not;
   (2) committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States; or
   (3) committed in connection with the negotiation, procurement, award, performance, payment, interim financing, cancellation, or other termination or settlement, of any contract, subcon-tract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency; is suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.
(g)(1) If charges or specifications are dismissed as defective or insufficient for any cause and the period prescribed by the applicable statute of limitations—
   (A) has expired; or
   (B) will expire within 180 days after the date of dismissal of the charges and specifications, trial and punishment under new charges and specifications are not barred by the statute of limitations if the conditions specified in paragraph (2) are met.
(2) The conditions referred to in paragraph (1) are that the new charges and specifications must—
   (A) be received by an officer exercising summary court-martial jurisdiction over the command within 180 days after the dismissal of the charges or specifications; and
   (B) allege the same acts or omissions that were alleged in the dismissed charges or specifications (or allege acts or omissions that were included in the dismissed charges or specifications).

§ 844. Art. 44. Former jeopardy
(a) No person may, without his consent, be tried a second time for the same offense.
(b) No proceeding in which an accused has been found guilty by court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.
(c) A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article.

845. Art. 45. Pleas of the accused
(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.
(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.
§ 846. Art. 46. Opportunity to obtain witnesses and other evidence
The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

§ 647. Art. 47. Refusal to appear or testify
(a) Any person not subject to this chapter who—
(1) has been duly subpoenaed to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board;
(2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States; and
(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce; is guilty of an offense against the United States.
(b) Any person who commits an offense named in subsection (a) shall be tried on information in a United States district court or in a court of original criminal jurisdiction in any of the Territories, Commonwealths, or possessions of the United States, and jurisdiction is conferred upon those courts for that purpose. Upon conviction, such a person shall be punished by a fine of not more than $500, or imprisonment for not more than six months, or both.
(c) The United States attorney or the officer prosecuting for the United States in any such court of original criminal jurisdiction shall, upon the certification of the facts to him by the military court, commission, court of inquiry, or board, file an information against and prosecute any person violating this article.
(d) The fees and mileage of witnesses shall be advanced or paid out of the appropriations for the compensation of witnesses.

§ 848. Art. 48. Contempts
A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both.

§ 849. Art. 49. Depositions
(a) At any time after charges have been signed as provided in section 830 of this title (article 30), any party may take oral or written depositions unless the military judge or court-martial without a military judge hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate commissioned officers to represent the prosecution and the defense and may authorize those officers to take the deposition of any witness.
(b) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.
(c) Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.
(d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be played in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears
(1) that the witness resides or is beyond the State, Territory, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing;
(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or
(3) that the present whereabouts of the witness is unknown.
(e) Subject to subsection (d), testimony by deposition may be presented by the defense in capital cases.
(f) Subject to subsection (d), a deposition may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence in any case in which the death penalty is authorized but is not mandatory, whenever the convening authority directs that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial.

§ 850. Art. 50. Admissibility of records of courts of inquiry
(a) In any case not capital and not extending to the dismissal of a commissioned officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible under the rules of evidence, be read in evidence by any party before a court-martial or military commission if the accused was a party before the court of inquiry and if the same issue was involved or if the accused consents to the introduction of such evidence.
(b) Such testimony may be read in evidence only by the defense in capital cases or cases extending to the dismissal of a commissioned officer.
(c) Such testimony may also be read in evidence before a court of inquiry or a military board.

§ 850a. Art. 50a. Defense of lack of mental responsibility
(a) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the
acts. Mental disease or defect does not otherwise constitute a defense.
(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.
(c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge, or the president of a court-martial without a military judge, shall instruct the members of the court as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—
(1) guilty;
(2) not guilty; or
(3) not guilty only by reason of lack of mental responsibility.
(d) Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall find the accused—
(1) guilty;
(2) not guilty; or
(3) not guilty only by reason of lack of mental responsibility.
(e) Notwithstanding the provisions of section 852 of this title (article 52), the accused shall be found not guilty only by reason of lack of mental responsibility if—
(1) a majority of the members of the court-martial present at the time the vote is taken determines that the defense of lack of mental responsibility has been established; or
(2) in the case of court-martial composed of a military judge only, the military judge determines that the defense of lack of mental responsibility has been established.

§ 851. Art. 51. Voting and rulings
(a) Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.
(b) The military judge and, except for questions of challenge, the president of a court-martial without a military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused, or by the president of a court-martial without a military Judge upon any question of law other than a motion for a finding of not guilty, is final and constitutes the ruling of the court. However, the military judge or the president of a court-martial without a military judge may change his ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title (article 52), beginning with the junior in rank.
(c) Before a vote is taken on the findings, the military judge or the president of a court-martial without a military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them—
(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;
(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;
(3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and
(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.
(d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

§ 852. Art. 52. Number of votes required
(a)(1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.
(2) No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.
(b)(1) No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this chapter expressly made punishable by death.
(2) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.
(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.
(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty or to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member challenged. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

§ 853. Art. 53. Court to announce action
A court-martial shall announce its findings and sentence to the parties as soon as determined.

§ 854. Art. 54. Record of trial
(a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be
§ 855. Art. 55. Cruel and unusual punishments prohibited

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

§ 856. Art. 56. Maximum limits

The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

§ 857. Art. 57. Effective date of sentences

(a) No forfeiture may extend to any pay or allowances accrued before the date on which the sentence is approved by the person acting under section 860(c) of this title (article 60(c)).

(b) Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement.

(c) All other sentences of courts-martial are effective on the date ordered executed.

(d) On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.

§ 858. Art. 58. Execution of confinement

(a) Under such instructions as the Secretary concerned may prescribe, a sentence of confinement adjudged by a court-martial or other military tribunal, whether or not the sentence includes discharge or dismissal, and whether or not the discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated.

(b) The omission of the words "hard labor" from any sentence of a court-martial adjudging confinement does not deprive the authority executing that sentence of the power to require hard labor as a part of the punishment.

§ 858a. Art. 58a. Sentences: reduction in enlisted grade upon approval

(a) Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted person to reduction in grade may be suspended or deferred if the sentence exceeds that which may otherwise be adjudged by a court-martial; and

(b) After the court-martial, is returned to that state or foreign country under the authority of a mutual agreement or treaty, as the case may be.

(3) In this subsection, the term 'state' means a state of the United States, the District of Columbia, a territory, or a possession of the United States.
§ 858a. Art. 58a.(a)  APPENDIX 2
member in a pay grade above E-1, as approved by the convening authority, that includes—
(1) a dishonorable or bad-conduct discharge;
(2) confinement; or
(3) hard labor without confinement;
reduces that member to pay grade E-1, effective on the date of that approval.

(b) If the sentence of a member who is reduced in pay grade under subsection (a) is set aside or disapproved, or, as finally approved, does not include any punishment named in subsection (a)(1), (2), or (3), the rights and privileges of which he was deprived because of that reduction shall be restored to him and he is entitled to the pay and allowances to which he would have been entitled for the period the reduction was in effect, had he not been so reduced.

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

Sec.  Art.
859.  59. Error of law; lesser included offense.
860.  60. Action by the convening authority.
861.  61. Waiver or withdrawal of appeal.
862.  62. Appeal by the United States.
*863.  63. Rehearings.
864.  64. Review by a judge advocate.
865.  65. Disposition of records.
866.  66. Review by Court of Military Review.
867.  67. Review by the Court of Military Appeals.
867a.  67a. Review by the Supreme Court.
868.  68. Branch offices.
869.  69. Review in the office of the Judge Advocate General.
870.  70. Appellate counsel.
871.  71. Execution of sentence; suspension of sentence.
872.  72. Vacation of suspension.
873.  73. Petition for a new trial.
874.  74. Remission and suspension.
875.  75. Restoration.
876.  76. Finality of proceedings, findings, and sentences.
876a.  76a. Leave required to be taken pending review of certain court-martial convictions.

§ 859. Art. 59. Error of law; lesser included offense
(a) A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.
(b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.

§ 860. Art. 60. Action by the Convening authority
(a) The findings and sentence of a court-martial shall be reported promptly to the convening authority after the announcement of the sentence.

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

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

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

(4) The accused may waive his right to make a submission to the convening authority under paragraph (1). Such a waiver must be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which the accused may make a submission under this subsection shall be deemed to have expired upon the submission of such a waiver to the convening authority.
(c)(1) The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority. Under regulations of the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

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

(3) Action on the findings of a court-martial by the convening authority or other person acting on the sentence is not required. However, such person, in his sole discretion, may—
(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or
(B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.
(d) Before acting under this section on any general court-martial case or any special court-martial case that includes a bad-conduct discharge, the convening authority or other person taking action under this section shall obtain and consider the written recommendation of his staff judge advocate or legal officer. The convening authority or other person taking action under this section shall refer the record of trial to his staff judge advocate or legal officer, and the staff judge advocate or legal officer shall use such record in the preparation of his recommendation. The recommendation of the staff judge advocate or legal officer shall include such matters as the President may prescribe by regulation and shall be served on the accused, who may submit any matter in re-
sponse under subsection (b). Failure to object in the response to the recommendation or to any matter attached to the recommendation waives the right to object thereto.

(e)(1) The convening authority or other person taking action under this section, in his sole discretion, may order a proceeding in revision or a rehearing.

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

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

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

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

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

§ 864. Art. 64. Review by a judge advocate

(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

§ 863. Art. 63. Rehearings

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

§ 862. Art. 62. Appeal by the United States

(a)(1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceeding. However, the United States may not appeal an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification.

(b) An appeal under this section shall be forwarded by a means prescribed under regulations of the President directly to the Court of Military Review and shall, whenever practicable, have priority over all other proceedings before that court. In ruling on an appeal under this section, the Court of Military Review may act only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c)).

(c) Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.

§ 861. Art. 61. Waiver or withdrawal of appeal

(a) In each case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)), except a case in which the sentence as approved under section 860(c) of this title (article 60(c)) includes death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review. Such a waiver shall be signed by both the accused and by defense counsel and must be filed within 10 days after the action under section 880(c) of this title (article 60(c)) is served on the accused or on defense counsel. The convening authority or other person taking such action, for good cause, may extend the period for such filing by not more than 30 days.

(b) Except in a case in which the sentence as approved under section 860(c) of this title (article 60(c)) includes death, the accused may withdraw an appeal at any time.

(c) A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 866 or 869(a) of this title (article 66 or 69(a)).

§ 864. Art. 64(a)(2)
§ 864. Art. 64. (a)(3)  

(3) If the case is sent for action under subsection (b), a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

(b) The record of trial and related documents in each case reviewed under subsection (a) shall be sent for action to the person exercising general court-martial jurisdiction over the accused at the time the court was convened (or to that person's successor in command) if—

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

(2) the sentence approved under section 860(c) of this title (article 60(c)) extends to dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six months; or

(3) such action is otherwise required by regulations of the Secretary concerned.

(c)(1) The person to whom the record of trial and related documents are sent under subsection (b) may—

(A) disapprove or approve the findings or sentence, in whole or in part;

(B) remit, commute, or suspend the sentence in whole or in part;

(C) except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

(D) dismiss the charges.

(2) If a rehearing is ordered but the convening authority finds a rehearing impracticable, he shall dismiss the charges.

(3) If the opinion of the judge advocate in the judge advocate’s review under subsection (a) is that corrective action is required as a matter of law and if the person required to take action under subsection (b) does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and action thereon shall be sent to the Judge Advocate General for review under section 869(b) of this title (article 69(b)).

§ 865. Art. 65. Disposition of records

(a) In a case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)) in which the right to such review is not waived, or an appeal is not withdrawn, under section 861 of this title (article 61), the record of trial and action thereon shall be transmitted to the Judge Advocate General for appropriate action.

(b) Except as otherwise required by this chapter, all other records of trial and related documents shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.

§ 866. Art. 66. Review by Court of Military Review

(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Military Review any case in the court of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Military Review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Military Appeals, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Military Review. If the Court of Military Review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Military Review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the office of the Judge Advocates General and by Courts of Military Review.

(g) No member of a Court of Military Review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Military Review, an effectiveness, fitness, or efficiency report, or any other report documents used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces shall be retained on active duty.

(h) No member of a Court of Military Review shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.
§ 867. Art. 67. Review by the Court of Military Appeals
(a) The Court of Military Appeals shall review the record in—
   (1) all cases in which the sentence, as affirmed by a Court of Military Review, extends to death;
   (2) all cases reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and
   (3) all cases reviewed by a Court of Military Review in which, upon petition of the accused and on good cause shown, the Court of Military Appeals has granted a review.
(b) The accused may petition the Court of Military Appeals for review of a decision of a Court of Military Review within 60 days from the earlier of—
   (1) the date on which the accused is notified of the decision of the Court of Military Review; or
   (2) the date on which a copy of the decision of the Court of Military Review, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record. The Court of Military Appeals shall act upon such a petition promptly in accordance with the rules of the court.
(c) In any case reviewed by it, the Court of Military Appeals may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Military Review. In a case which the Judge Advocate General orders sent to the Court of Military Appeals, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Military Appeals shall take action only with respect to matters of law.
(d) If the Court of Military Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.
(e) After it has acted on a case, the Court of Military Appeals may direct the Judge Advocate General to return the record to the Court of Military Review for further review in accordance with the decision of the Court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

§ 867a. Art. 67a. Review by the Supreme Court
(a) Decisions of the United States Court of Military Appeals are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Military Appeals in refusing to grant a petition for review.
(b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

§ 868. Art. 66. Branch offices
The Secretary concerned may direct the Judge Advocate General to establish a branch office with any command. The branch office shall be under an Assistant Judge Advocate General who, with the consent of the Judge Advocate General, may establish a Court of Military Review with one or more panels. That Assistant Judge Advocate General and any Court of Military Review established by him may perform for that command under the general supervision of the Judge Advocate General, the respective duties which the Judge Advocate General and a Court of Military Review established by the Judge Advocate General would otherwise be required to perform as to all cases involving sentences not requiring approval by the President.

§ 869. Art. 69. Review in the office of the Judge Advocate General
(a) The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61).
   If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both.
(b) The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under section 866 of this title (article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. If such a case is considered upon application of the accused, the application must be filed in the office of the Judge Advocate General by the accused on or before the last day of the two-year period beginning on the date the sentence is approved under section 860(c) of this title (article 60(c)), unless the accused establishes good cause for failure to file within that time.
(c) If the Judge Advocate General sets aside the findings or sentence, he may, except when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If he sets aside the findings and sentence and does not order a rehearing, he shall order that the charges be dismissed. If the Judge Advocate General orders a rehearing but the convening authority finds a rehearing impractical, the convening authority shall dismiss the charges.
(d) A Court of Military Review may review, under section 866 of this title (article 66)—
   (1) any court-martial case which (A) is subject to action by the Judge Advocate General under this section, and (B) is sent to the Court of Military Review by order of the Judge Advocate General; and,
   (2) any action taken by the Judge Advocate General under this section in such case.
§ 869. Art. 69.(e)  
(e) Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Military Review under this section, the Court may take action only with respect to matters of law.

§ 870. Art. 70. Appellate counsel  
(a) The Judge Advocate General shall detail in his office one or more commissioned officers as appellate Government counsel, and one or more commissioned officers as appellate defense counsel, who are qualified under section 827(b)(1) of this title (article 27(b)(1)).

(b) Appellate Government counsel shall represent the United States before the Court of Military Review or the Court of Military Appeals when directed to do so by the Judge Advocate General. Appellate Government counsel may represent the United States before the Supreme Court in cases arising under this chapter when requested to do so by the Attorney General.

(c) Appellate defense counsel shall represent the accused before the Court of Military Review, the Court of Military Appeals, or the Supreme Court—

(1) when requested by the accused;
(2) when the United States is represented by counsel; or
(3) when the Judge Advocate General has sent the case to the Court of Military Appeals.

(d) The accused has the right to be represented before the Court of Military Review, the Court of Military Appeals, or the Supreme Court by civilian counsel if provided by him.

(e) Military appellate counsel shall also perform such other functions in connection with the review of court-martial cases as the Judge Advocate General directs.

§ 871. Art. 71. Execution of sentence; suspension of sentence  
(a) If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit. That part of the sentence providing for death may not be suspended.

(b) If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of the sentence, as he sees fit. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(c)(1) If a sentence extends to death, dismissal, or a dishonorable or bad-conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn, under section 861 of this title (article 61), that part of the sentence extending to dismissal or a bad-conduct or dishonorable discharge may not be executed until review of the case by a judge advocate (and any action of that review) under section 864 of this title (article 64) is completed. Any other part of a court-martial sentence may be ordered executed by the convening authority or other person acting on the case under section 860 of this title (article 60) when approved by him under that section.

(d) The convening authority or other person acting on the case under section 860 of this title (article 60) may suspend the execution of any sentence or part thereof, except a death sentence.

§ 872. Art. 72. Vacation of suspension  
(a) Before the vacation of the suspension of a special court-martial sentence which as approved includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation. The probationer shall be represented at the hearing by counsel if he so desires.

(b) The record of the hearing and the recommendation of the officer having special court-martial jurisdiction shall be sent for action to the officer exercising general court-martial jurisdiction over the probationer. If he vacates the suspension, any unexecuted part of the sentence, except a dismissal, shall be executed, subject to applicable restrictions in section 871(c) of this title (article 71(c)). The vacation of the suspension of a dismissal is not effective until approved by the Secretary concerned.

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

§ 873. Art. 73. Petition for a new trial  
At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Military Review or before the Court of Military Appeals, the Judge Advocate General shall refer the pe-
§ 874. Art. 74. Remission and suspension
(a) The Secretary concerned and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the President.
(b) The Secretary concerned may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

§ 875. Art. 75. Restoration
(a) Under such regulations as the President may prescribe, all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed part is included in a sentence imposed upon the new trial or rehearing.
(b) If a previously executed sentence of dishonorable or bad-conduct discharge is not imposed on a new trial, the Secretary concerned shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of this enlistment.
(c) If a previously executed sentence of dismissal is not imposed on a new trial, the Secretary concerned shall substitute therefor a form of discharge authorized for administrative issue, and the commissioned officer dismissed by the sentence may be reappointed by the President alone to such commissioned grade and with such rank as in the opinion of the President that former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to the existence of a vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and the reappointment shall be considered as actual service for all purposes, including the right to pay and allowances.

§ 876. Art. 76. Finality of proceedings, findings, and sentences
The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74), and the authority of the President.

§ 876a. Art. 76a. Leave required to be taken pending review of certain court-martial convictions
Under regulations prescribed by the Secretary concerned, an accused who has been sentenced by a court-martial may be required to take leave pending completion of action under this subchapter if the sentence, as approved under section 860 of this title (article 60), includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge. The accused may be required to begin such leave on the date on which the sentence is approved under section 860 of this title (article 60) or at any time after such date, and such leave may be continued until the date which action under this subchapter is completed or may be terminated at any earlier time.

SUBCHAPTER X. PUNITIVE ARTICLES

<table>
<thead>
<tr>
<th>Sec.</th>
<th>Art.</th>
</tr>
</thead>
<tbody>
<tr>
<td>877</td>
<td>77</td>
</tr>
<tr>
<td>878</td>
<td>78</td>
</tr>
<tr>
<td>879</td>
<td>79</td>
</tr>
<tr>
<td>880</td>
<td>80</td>
</tr>
<tr>
<td>881</td>
<td>81</td>
</tr>
<tr>
<td>882</td>
<td>82</td>
</tr>
<tr>
<td>883</td>
<td>83</td>
</tr>
<tr>
<td>884</td>
<td>84</td>
</tr>
<tr>
<td>885</td>
<td>85</td>
</tr>
<tr>
<td>886</td>
<td>86</td>
</tr>
<tr>
<td>887</td>
<td>87</td>
</tr>
<tr>
<td>888</td>
<td>88</td>
</tr>
<tr>
<td>889</td>
<td>89</td>
</tr>
<tr>
<td>890</td>
<td>90</td>
</tr>
<tr>
<td>891</td>
<td>91</td>
</tr>
<tr>
<td>892</td>
<td>92</td>
</tr>
<tr>
<td>893</td>
<td>93</td>
</tr>
<tr>
<td>894</td>
<td>94</td>
</tr>
<tr>
<td>895</td>
<td>95</td>
</tr>
<tr>
<td>896</td>
<td>96</td>
</tr>
<tr>
<td>897</td>
<td>97</td>
</tr>
<tr>
<td>898</td>
<td>98</td>
</tr>
<tr>
<td>899</td>
<td>99</td>
</tr>
<tr>
<td>900</td>
<td>100</td>
</tr>
<tr>
<td>901</td>
<td>101</td>
</tr>
<tr>
<td>902</td>
<td>102</td>
</tr>
<tr>
<td>903</td>
<td>103</td>
</tr>
<tr>
<td>904</td>
<td>104</td>
</tr>
<tr>
<td>905</td>
<td>105</td>
</tr>
<tr>
<td>906</td>
<td>106</td>
</tr>
<tr>
<td>906a</td>
<td>106a</td>
</tr>
<tr>
<td>907</td>
<td>107</td>
</tr>
<tr>
<td>908</td>
<td>108</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNIFORM CODE OF MILITARY JUSTICE</td>
</tr>
<tr>
<td>SUBCHAPTER X. PUNITIVE ARTICLES</td>
</tr>
<tr>
<td>§ 876a. Art. 76a. Leave required to be taken pending review of certain</td>
</tr>
<tr>
<td>court-martial convictions</td>
</tr>
<tr>
<td>Under regulations prescribed by the Secretary concerned, an accused</td>
</tr>
<tr>
<td>who has been sentenced by a court-martial may be required to take</td>
</tr>
<tr>
<td>leave pending completion of action under this subchapter if the</td>
</tr>
<tr>
<td>sentence, as approved under section 860 of this title (article 60),</td>
</tr>
<tr>
<td>includes an unsuspended dismissal or an unsuspended dishonorable or</td>
</tr>
<tr>
<td>bad-conduct discharge. The accused may be required to begin such leave</td>
</tr>
<tr>
<td>on the date on which the sentence is approved under section 860 of this</td>
</tr>
<tr>
<td>title (article 60) or at any time after such date, and such leave may</td>
</tr>
<tr>
<td>be continued until the date which action under this subchapter is</td>
</tr>
<tr>
<td>completed or may be terminated at any earlier time.</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>SUBCHAPTER X. PUNITIVE ARTICLES</td>
</tr>
<tr>
<td>Sec.</td>
</tr>
<tr>
<td>------</td>
</tr>
<tr>
<td>877</td>
</tr>
<tr>
<td>878</td>
</tr>
<tr>
<td>879</td>
</tr>
<tr>
<td>880</td>
</tr>
<tr>
<td>881</td>
</tr>
<tr>
<td>882</td>
</tr>
<tr>
<td>883</td>
</tr>
<tr>
<td>884</td>
</tr>
<tr>
<td>885</td>
</tr>
<tr>
<td>886</td>
</tr>
<tr>
<td>887</td>
</tr>
<tr>
<td>888</td>
</tr>
<tr>
<td>889</td>
</tr>
<tr>
<td>890</td>
</tr>
<tr>
<td>891</td>
</tr>
<tr>
<td>892</td>
</tr>
<tr>
<td>893</td>
</tr>
<tr>
<td>894</td>
</tr>
<tr>
<td>895</td>
</tr>
<tr>
<td>896</td>
</tr>
<tr>
<td>897</td>
</tr>
<tr>
<td>898</td>
</tr>
<tr>
<td>899</td>
</tr>
<tr>
<td>900</td>
</tr>
<tr>
<td>901</td>
</tr>
<tr>
<td>902</td>
</tr>
<tr>
<td>903</td>
</tr>
<tr>
<td>904</td>
</tr>
<tr>
<td>905</td>
</tr>
<tr>
<td>906</td>
</tr>
<tr>
<td>906a</td>
</tr>
<tr>
<td>907</td>
</tr>
<tr>
<td>908</td>
</tr>
</tbody>
</table>
SUBCHAPTER X. PUNITIVE

%%$
\begin{align*}
\text{Sec.} & \quad \text{Art.} \\
909 & \quad 109. \quad \text{Property other than military property of United States—Waste, spoilage, or destruction.} \\
910 & \quad 110. \quad \text{Improper hazarding of vessel.} \\
*911 & \quad 111. \quad \text{Drunken or reckless operation of a vehicle, aircraft, or vessel} \\
912 & \quad 112. \quad \text{Drunken on duty.} \\
912a & \quad 112a. \quad \text{Wrongful use, possession, etc., of controlled substances.} \\
913 & \quad 113. \quad \text{Misbehavior of sentinel.} \\
914 & \quad 114. \quad \text{Dueling.} \\
915 & \quad 115. \quad \text{Malingering.} \\
916 & \quad 116. \quad \text{Riot or breach of peace.} \\
917 & \quad 117. \quad \text{Provoking speeches or gestures.} \\
*918 & \quad 118. \quad \text{Murder.} \\
919 & \quad 119. \quad \text{Manslaughter.} \\
*920 & \quad 120. \quad \text{Rape and carnal knowledge.} \\
921 & \quad 121. \quad \text{Larceny and wrongful appropriation.} \\
922 & \quad 122. \quad \text{Robbery.} \\
923 & \quad 123. \quad \text{ Forgery.} \\
923a & \quad 123a. \quad \text{Making, drawing, or uttering check, draft, or order without sufficient funds.} \\
924 & \quad 124. \quad \text{Maiming.} \\
925 & \quad 125. \quad \text{Sodomy.} \\
926 & \quad 126. \quad \text{Arson.} \\
927 & \quad 127. \quad \text{Extortion.} \\
928 & \quad 128. \quad \text{Assault.} \\
929 & \quad 129. \quad \text{Burglary.} \\
930 & \quad 130. \quad \text{Housebreaking.} \\
931 & \quad 131. \quad \text{Perjury.} \\
932 & \quad 132. \quad \text{Frauds against the United States.} \\
933 & \quad 133. \quad \text{Conduct unbecoming an officer and a gentleman.} \\
934 & \quad 134. \quad \text{General article.}
\end{align*}$

APPENDIX 2

\section*{§ 880. Art. 80. Attempts}
(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

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

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

\section*{§ 881. Art. 81. Conspiracy}
Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

\section*{§ 882. Art. 82. Solicitation}
(a) Any person subject to this chapter who solicits or advises another or others to desert in violation of section 885 of this title (article 85) or mutiny in violation of section 894 of this title (article 94) shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of section 899 of this title (article 99) or sedition in violation of section 894 of this title (article 94) shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.

\section*{§ 883. Art. 83. Fraudulent enlistment, appointment, or separation}
Any person who
(a) procures his own enlistment or appointment in the armed forces by knowingly false representation or deliberate concealment as to his qualifications for the enlistment or appointment and receives pay or allowances thereunder; or
(b) procures his own separation from the armed forces by knowingly false representation or deliberate concealment as to his eligibility for that separation; shall be punished as a court-martial may direct.

\section*{§ 884. Art. 84. Unlawful enlistment, appointment, or separation}
Any person subject to this chapter who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct.
§ 885. Art. 85. Desertion
(a) Any member of the armed forces who—
   (1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently;
   (2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or
   (3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States, is guilty of desertion.
(b) Any commissioned officer of the armed forces who, after tender of his resignation and before notice of its acceptance, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.
(c) Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

§ 886. Art. 86. Absence without leave
Any member of the armed forces, without authority—
   (1) fails to go to his appointed place of duty at the time prescribed;
   (2) goes from that place; or
   (3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed; shall be punished as a court-martial may direct.

§ 887. Art. 87. Missing movement
Any person subject to this chapter who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct.

§ 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 Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

§ 889. Art. 89 Disrespect toward superior commissioned officer
Any person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct.

§ 890. Art. 90. Assaulting or willfully disobeying superior commissioned officer
Any person subject to this chapter who—
   (1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or
   (2) willfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

§ 891. Art. 91. Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer
Any warrant officer or enlisted member who
   (1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office;
   (2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or
   (3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office; shall be punished as a court-martial may direct.

§ 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; or
   (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.

§ 893. Art. 93. Cruelty and maltreatment
Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

§ 894. Art. 94. Mutiny or sedition
(a) Any person subject to this chapter who—
   (1) with intent to usurp or override lawful military authority, refuses, in concert with any other person, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny;
   (2) with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence, or other disturbance against that authority is guilty of sedition;
   (3) fails to do his utmost to prevent and suppress a mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior commissioned officer or commanding officer of a mutiny or sedition which it knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.
   (b) A person who is found guilty of attempted mutiny, mutiny, sedition, or failure to suppress or report a mutiny or sedition shall be punished by death or such other punishment as a court-martial may direct.
§ 895. Art. 95. Resistance, breach of arrest, and escape
Any person subject to this chapter who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct.

§ 896. Art. 96. Releasing prisoner without proper authority
Any person subject to this chapter who, without proper authority, releases any prisoner committed to his charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with law.

§ 897. Art. 97. Unlawful detention
Any person subject to this chapter who, except as provided by law, apprehends, arrests, or confines any person shall be punished as a court-martial may direct.

§ 898. Art. 98. Noncompliance with procedural rules
Any person subject to this chapter who
(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or
(2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct.

§ 899. Art. 99. Misbehavior before the enemy
Any person subject to this chapter who before or in the presence of the enemy—
(1) runs away;
(2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;
(3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;
(4) casts away his arms or ammunition;
(5) is guilty of cowardly conduct;
(6) quits his place of duty to plunder or pillage;
(7) causes false alarms in any command, unit, or place under control of the armed forces;
(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or
(9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle; shall be punished by death or such other punishment as a court-martial may direct.

§ 900. Art. 100. Subordinate compelling surrender
Any person subject to this chapter who compels or attempts to compel the commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces, to give it up to an enemy or to abandon it, or who strikes the colors or flag to any enemy without proper authority, shall be punished by death or such other punishment as a court-martial may direct.

§ 901. Art. 101. Improper use of countersign
Any person subject to this chapter who in time of war discloses the parole or countersign to any person not entitled to receive it or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to his knowledge, he was authorized and required to give, shall be punished by death or such other punishment as a court-martial may direct.

§ 902. Art. 102. Forcing a safeguard
Any person subject to this chapter who forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

§ 903. Art. 103. Captured or abandoned property
(a) All persons subject to this chapter shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody, or control.
(b) Any person subject to this chapter who—
(1) fails to carry out the duties prescribed in subsection (a);
(2) buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he receives or expects any profit, benefit, or advantage to himself or another directly or indirectly connected with himself; or
(3) engages in looting or pillaging; shall be punished as a court-martial may direct.

§ 904. Art. 104. Aiding the enemy
Any person who—
(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or
(2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct.

§ 905. Art. 105. Misconduct as prisoner
Any person subject to this chapter who, while in the hands of the enemy in time of war—
(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or
(2) while in a position of authority over such persons maltreat them without justifiable cause; shall be punished as a court-martial may direct.
§ 906. Art. 106. Spies
Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.

§ 906a. Art. 106a. Espionage
(a)(1) Any person subject to this chapter who, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any entity described in paragraph (2), either directly or indirectly, any thing described in paragraph (3) shall be punished as a court-martial may direct, except that if the accused is found guilty of an offense that directly concerns (A) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (B) war plans, (C) communications intelligence or cryptographic information, or (D) any other major weapons system or major element of defense strategy, the accused shall be punished by death or such other punishment as a court-martial may direct.

(2) An entity referred to in paragraph (1) is—
(A) a foreign government;
(B) a faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States; or
(C) a representative, officer, agent, employee, subject, or citizen of such a government, faction, party, or force.

(3) A thing referred to in paragraph (1) is a document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense.

(b)(1) No person may be sentenced by court-martial to suffer death for an offense under this section (article) unless—
(A) the members of the court-martial unanimously find at least one of the aggravating factors set out in subsection (c); and
(B) the members unanimously determine that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including the aggravating factors set out under subsection (c).

(2) Findings under this subsection may be based on—
(A) evidence introduced on the issue of guilt or innocence;
(B) evidence introduced during the sentencing proceeding; or
(C) all such evidence.

(3) The accused shall be given broad latitude to present matters in extenuation and mitigation.

(c) A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:
(1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.
(2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.
(3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.
(4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36).

§ 907. Art. 107. False official statements
Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.

§ 908. Art. 108. Military property of United States - Loss, damage, destruction, or wrongful disposition
Any person subject to this chapter who, without proper authority—
(1) sells or otherwise disposes of;
(2) willfully or through neglect damages, destroys, or loses; or
(3) willfully or through neglect suffers to be lost, damaged, sold, or wrongfully disposed of;

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

§ 909. Art. 109. Property other than military property of United States - Waste, spoilage, or destruction
Any person subject to this chapter who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct.

§ 910. Art. 110. Improper hazarding of vessel
(a) Any person subject to this chapter who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such punishment as a court-martial may direct.
(b) Any person subject to this chapter who negligently hazards or suffers to be hazarded any vessel of the armed forces shall be punished as a court-martial may direct.

§ 911. Art. 111. Drunken or reckless operation of a vehicle, aircraft or vessel
Any person subject to this chapter who—
(1) operates or physically controls any vehicle, aircraft, or vessel in a reckless or wanton manner or while impaired by a substance described in section 912a(b) of this title (article 112a(b)), or
(2) operates or is in actual physical control of any vehicle, aircraft, or vessel while drunk or when the alcohol concentration in the person's blood or breath is 0.10 grams of alcohol per 100 milliliters of blood or 0.10 grams of alcohol per 210 liters of breath, as shown by chemical analysis, shall be punished as a court-martial may direct.
§ 912. Art. 112. Drunk on duty
Any person subject to this chapter other than a sentinel or lookout, who is found drunk on duty, shall be punished as a court-martial may direct.

§ 912a. Art 112a. Wrongful use, possession, etc., of controlled substances
(a) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.
(b) The substances referred to in subsection (a) are the following:

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

(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.

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

§ 913. Art. 113. Misbehavior of sentinel
Any sentinel or lookout who is found drunk or sleeping upon his post or leaves it before being regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is at any other time, by such punishment other than death as a court-martial may direct.

§ 914. Art 114. Dueling
Any person subject to this chapter who fights or promotes, or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct.

§ 915. Art. 115. Malingering
Any person subject to this chapter who for the purpose of avoiding work, duty, or service—

(1) feigns illness, physical disablement, mental lapse, or derangement; or

(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.

§ 916. Art 116. Riot or breach of peace
Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.

§ 917. Art. 117. Provoking speeches or gestures
Any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct.

§ 918. Art. 118. Murder
Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

§ 919. Art. 119. Manslaughter
(a) Any person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter and shall be punished as a court-martial may direct.
(b) Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—

(1) by culpable negligence; or

(2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (article 118), directly affecting the person;

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

§ 920. Art. 120. Rape and carnal knowledge
(a) Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.
(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.
(c) Penetration, however slight, is sufficient to complete either of these offenses.

§ 921. Art. 121. Larceny and wrongful appropriation
(a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—

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

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

§ 922. Art. 122. Robbery
Any person subject to this chapter who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.

§ 923. Art. 123. Forgery
Any person subject to this chapter who, with intent to defraud—
(1) falsely makes or alters any signature, to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or
(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered;
is guilty of forgery and shall be punished as a court-martial may direct.

§ 923a. Art. 123a. Making, drawing, or uttering check, draft, or order without sufficient funds
Any person subject to this chapter who—
(1) for the procurement of any article or thing of value, with intent to defraud; or
(2) for the payment of any past due obligation, or for any other purpose, with intent to deceive; makes, draws, utters, or delivers any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment, shall be punished as a court-martial may direct. The making, drawing, uttering, or delivering by a maker or drawer of a check, draft or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in the drawee’s possession or control, is prima facie evidence of his intent to defraud or deceive and of his knowledge of insufficient funds in, or credit with, that bank or other depository, unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft, or order was not paid on presentment. In this section, the word “credit” means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft, or order.

§ 924. Art. 124. Maiming
Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which
(1) seriously disfigures his person by a mutilation thereof;
(2) destroys or disables any member or organ of his body; or
(3) seriously diminishes his physical vigor by the injury of any member or organ;
is guilty of maiming and shall be punished as a court-martial may direct.

§ 925. Art. 125. Sodomy
(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

§ 926. Art. 126. Arson
(a) Any person subject to this chapter who willfully and maliciously burns or sets fire on an inhabited dwelling, or any other structure, movable or immovable, wherein to the knowledge of the offender there is at the time a human being, is guilty of aggravated arson and shall be punished as court-martial may direct.
(b) Any person subject to this chapter who willfully and maliciously burns or sets fire to the property of another, except as provided in subsection (a), is guilty of simple arson and shall be punished as a court-martial may direct.

§ 927. Art. 127. Extortion
Any person subject to this chapter who communicates threats to another person with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and shall be punished as a court-martial may direct.

§ 928. Art. 128. Assault
(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.
(b) Any person subject to this chapter who—
(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or
(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;
is guilty of aggravated assault and shall be punished as a court-martial may direct.

§ 929. Art. 129. Burglary
Any person subject to this chapter who, with intent to commit an offense punishable under section 918-928 of this title (article 118-128), breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct.

§ 930. Art. 130. Housebreaking
Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.
§ 931. Art. 131. Perjury
Any person subject to this chapter who in a judicial proceeding or in a course of justice willfully and corruptly—
(1) upon a lawful oath or in any form allowed by law to be substituted for an oath, gives any false testimony material to the issue or matter of inquiry; or
(2) in any declaration, certificate, verification, or statement under penalty or perjury as permitted under section 1746 of title 28, United States Code, subscribes any false statement material to the issue or matter of inquiry; is guilty of perjury and shall be punished as a court-martial may direct.

§ 932. Art. 132. Frauds against the United States
Any person subject to this chapter—
(1) who, knowing it to be false or fraudulent—
   (A) makes any claim against the United States or any officer thereof; or
   (B) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof;
(2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States or any officer thereof-
   (A) makes or uses any writing or other paper knowing it to contain any false or fraudulent statements;
   (B) makes any oath to any fact or to any writing or other paper knowing the oath to be false; or
   (C) forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing it to be forged or counterfeited;
(3) who, having charge, possession, custody, or control of any money, or other property of the United States, furnished or intended for the armed forces thereof, knowingly delivers to any person having authority to receive it, any amount thereof less than that for which he receives a certificate or receipt; or
(4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; shall, upon conviction, be punished as a court-martial may direct.

§ 933. Art. 133. Conduct unbecoming an officer and a gentleman
Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

§ 934. Art. 134. General article
Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, accord-

§ 935. Art. 135. Courts of inquiry
(a) Courts of inquiry to investigate any matter may be convened by any person authorized to convene a general court-martial or by any other person designated by the Secretary concerned for that purpose, whether or not the persons involved have requested such an inquiry.
(b) A court of inquiry consists of three or more commissioned officers. For each court of inquiry the convening authority shall also appoint counsel for the court.
(c) Any person subject to this chapter whose conduct is subject to inquiry shall be designated as a party. Any person subject to this chapter or employed by the Department of Defense who has a direct interest in the subject of inquiry has the right to be designated as a party upon request to the court. Any person designated as a party shall be given due notice and has the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence.
(d) Members of a court of inquiry may be challenged by a party, but only for cause stated to the court.
(e) The members, counsel, the reporter, and interpreters of courts of inquiry shall take an oath to faithfully perform their duties.
(f) Witnesses may be summoned to appear and testify and be examined before courts of inquiry, as provided for courts-martial.
(g) Courts of inquiry shall make findings of fact but may not express opinions or make recommendations unless required to do so by the convening authority.
(h) Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. If the record cannot be authenticated by the president, it shall be signed by a member in lieu of the president. If the record cannot be authenticated by the counsel for the court, it shall be signed by a member in lieu of the counsel.

§ 936. Art. 136. Authority to administer oaths and to act as notary
(a) The following persons on active duty or performing inactive-duty training may administer oaths for the purposes of military administration, including military justice:
(1) All judge advocates.
(2) All summary courts-martial.
(3) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants.

(4) All commanding officers of the Navy, Marine Corps, and Coast Guard.

(5) All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers.

(6) All other persons designated by regulations of the armed forces or by statute.

(b) The following persons on active duty or performing inactive-duty training may administer oaths necessary in the performance of their duties:

(1) The president, military judge, trial counsel, and assistant trial counsel for all general and special courts-martial.

(2) The president and the counsel for the court of any court of inquiry.

(3) All officers designated to take a deposition.

(4) All persons detailed to conduct an investigation.

(5) All recruiting officers.

(6) All other persons designated by regulations of the armed forces or by statute.

§ 937. Art. 137. Articles to be explained

(a)(1) The sections of this title (articles of the Uniform Code of Military Justice) specified in paragraph (3) shall be carefully explained to each enlisted member at the time of (or within six days after)—

(A) the member's initial entrance on active duty; or

(B) the member's initial entrance into a duty status with a reserve component.

(2) Such sections (articles) shall be explained again —

(A) after the member has completed six months of active duty or, in the case of a member of a reserve component, after the member has completed basic or recruit training; and

(B) at the time when the member reenlists.

(3) This subsection applies with respect to sections 802, 803, 807-815, 825, 827, 831, 837, 838, 855, 877-934, and 937-939 of this title (articles 2, 3, 7-15, 25, 27, 31, 38, 55, 77-134, and 137-139).

(b) The text of the Uniform Code of Military Justice and of the regulations prescribed by the President under such Code shall be made available to a member on active duty or to a member of a reserve component, upon request by the member, for the member's personal examination.

§ 938. Art. 138. Complaints of wrongs

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

§ 939. Art. 139. Redress of injuries to property

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

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

§ 940. Art. 140. Delegation by the President

The President may delegate any authority vested in him under this chapter, and provide for the subdelegation of any such authority.

SUBCHAPTER XII - COURT OF MILITARY APPEALS

§ 941. Art. 141. Status

There is a court of record known as the United States Court of Military Appeals. The court is established under article I of the Constitution. The court is located for administrative purposes only in the Department of Defense.

§ 942. Art. 142. Judges

(a) Number. The United States Court of Military Appeals consists of five judges.

(b) Appointment; qualification.

(1) Each judge of the court shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, for a specified term determined under paragraph (2). A judge may serve as a senior judge as provided in subsection (e).

(2) The term of a judge shall expire as follows:
APPENDIX 2

§ 942. Art. 142.(b)(2)(A)

(A) In the case of a judge who is appointed after March 31 and before October 1 of any year, the term shall expire on September 30 of the year in which the fifteenth anniversary of the appointment occurs.

(B) In the case of a judge who is appointed after September 30 of any year and before April 1 of the following year, the term shall expire fifteen years after such September 30.

(3) Not more than three of the judges of the court may be appointed from the same political party, and no person may be appointed to be a judge of the court unless the person is a member of the bar of a Federal court or the highest court of a State.

(4) For purposes of appointment of judges to the court, a person retired from the armed forces after 20 or more years of active service (whether or not such person is on the retired list) shall not be considered to be in civilian life.

c) Removal. Judges of the court may be removed from office by the President, upon notice and hearing, for—
   (1) neglect of duty;
   (2) misconduct; or
   (3) mental or physical disability.

A judge may not be removed by the President for any other cause.

d) Pay and allowances. Each judge of the court is entitled to the same salary and travel allowances as are, and from time to time may be, provided for judges of the United States Courts of Appeals.

e) Senior judges.

(1)(A) A former judge of the court who is receiving retired pay or an annuity under section 945 of this title (Article 145) or under subchapter III of chapter 83 or chapter 84 of title 5 shall be a senior judge. The chief judge of the court may call upon an individual who is a senior judge of the court under this subparagraph, with the consent of the senior judge, to perform judicial duties with the court—
   (i) during a period a judge of the court is unable to perform his duties because of illness or other disability;
   (ii) during a period in which a position of judge of the court is vacant; or
   (iii) in any case in which a judge of the court recuses himself. (B) If, at the time the term of a judge expires, no successor to that judge has been appointed, the chief judge of the court may call upon that judge (with the judge's consent) to continue to perform judicial duties with the court until the vacancy is filled. A judge who, upon the expiration of the judge's term, continues to perform judicial duties with the court without a break in service under this subparagraph shall be a senior judge while such service continues.

(2) A senior judge shall be paid for each day on which he performs judicial duties with the court an amount equal to the daily equivalent of the annual rate of pay provided for a judge of the court. Such pay shall be in lieu of retired pay and in lieu of an annuity under section 945 of this title (Article 145), subchapter III of chapter 83 or subchapter II of chapter 84 of title 5, or any other retirement system for employees of the Federal Government.

(3) A senior judge, while performing duties referred to in paragraph (2), shall be provided with such office space and staff assistance as the chief judge considers appropriate and shall be entitled to the per diem, travel allowances, and other allowances provided for judges of the court.

(4) A senior judge shall be considered to be an officer or employee of the United States with respect to his status as a senior judge, but only during periods the senior judge is performing duties referred to in paragraph (2). For the purposes of section 205 of title 18, a senior judge shall be considered to be a special Government employee during such periods. Any provision of law that prohibits or limits the political or business activities of an employee of the United States shall apply to a senior judge only during such periods.

(5) The court shall prescribe rules for the use and conduct of senior judges of the court. The chief judge of the court shall transmit such rules, and any amendments to such rules, to the Committees on Armed Services of the Senate and the House of Representatives not later than 15 days after the issuance of such rules or amendments, as the case may be.

(6) For purposes of subchapter III of chapter 83 of title 5 (relating to the Civil Service Retirement and Disability System) and chapter 84 of such title (relating to the Federal Employees' Retirement System) and for purposes of any other Federal Government retirement system for employees of the Federal Government—

   (A) a period during which a senior judge performs duties referred to in paragraph (1) shall not be considered creditable service;
   (B) no amount shall be withheld from the pay of a senior judge as a retirement contribution under section 8334, 8343, 8422, or 8432 of title 5 or under other such retirement system for any period during which the senior judge performs duties referred to in paragraph (1);
   (C) no contribution shall be made by the Federal Government to any retirement system with respect to a senior judge for any period during which the senior judge performs duties referred to in paragraph (1); and
   (D) a senior judge shall not be considered to be a reemployed annuitant for any period during which the senior judge performs duties referred to in paragraph (1).

(f) Service of article III judges.

(1) The Chief Justice of the United States, upon the request of the chief judge of the court, may designate a judge of a United States court of appeals or of a United States district court to perform the duties of judge of the United States Court of Military Appeals—

   (A) during a period a judge of the court is unable to perform his duties because of illness or other disability; or
   (B) in any case in which a judge of the court recuses himself; or
   (C) during a period when there is a vacancy on the court and in the opinion of the chief judge of the court such a designation is necessary for the proper dispatch of the business of the court.

(2) The chief judge of the court may not request that a designation be made under paragraph (1) unless the chief judge has determined that no person is available to perform judicial duties with the court as a senior judge under subsection (e).

(3) A designation under paragraph (1) may be made only with the consent of the designated judge and the concurrence of the chief judge of the court of appeals or district court concerned.

(4) Per diem, travel allowances, and other allowances paid to the designated judge in connection with the performance of duties
§ 943. Art. 143. Organization and employees
(a) Chief judge.—(1) The chief judge of the United States Court of Military Appeals shall be the judge of the court in regular active service who is senior in commission among the judges of the court who—

(A) have served for one or more years as judges of the court; and

(B) have not previously served as chief judge.

(2) In any case in which there is no judge of the court in regular active service who has served as a judge of the court for at least one year, the judge of the court in regular active service who is senior in commission and has not served previously as chief judge shall act as the chief judge.

(3) Except as provided in paragraph (4), a judge of the court shall serve as the chief judge under paragraph (1) for a term of five years. If no other judge is eligible under paragraph (1) to serve as chief judge upon the expiration of that term, the chief judge shall continue to serve as chief judge until another judge becomes eligible under that paragraph to serve as chief judge.

(4)(A) The term of a chief judge shall be terminated before the end of five years if—

(i) The chief judge leaves regular active service as a judge of the court; or

(ii) The chief judge notifies the other judges of the court in writing that such judge desires to be relieved of his duties as chief judge.

(B) The effective date of a termination of the term under subparagraph (A) shall be the date on which the chief judge leaves regular active service or the date of the notification under subparagraph (A)(ii), as the case may be.

(5) If a chief judge is temporarily unable to perform his duties as a chief judge, the duties shall be performed by the judge of the court in active service who is present, able and qualified to act, and is next in precedence.

(b) Precedence of judges. The chief judge of the court shall have precedence and preside at any session that he attends. The other judges shall have precedence and preside according to the seniority of their original commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

(c) Status of attorney positions.

(1) Attorney positions of employment under the Court of Military Appeals are excepted from the competitive service. Appointments to such positions shall be made by the court, without the concurrence of any other officer or employee of the executive branch, in the same manner as appointments are made to other executive branch positions of a confidential or policy-determining character for which it is not practicable to examine or to hold a competitive examination. Such positions shall not be counted as positions of that character for purposes of any limitation on the number of positions of that character provided in law.

(2) In making appointments to the positions described in paragraph (1), preference shall be given, among equally qualified persons, to those who are preference eligibles (as defined in section 2108(3) of title 5).

§ 944. Art. 144. Procedure
The United States Court of Military Appeals may prescribe its rules of procedure and may determine the number of judges required to constitute a quorum.

§ 945. Art. 145. Annuities for judges and survivors
(a) Retirement annuities for judges.

(1) A person who has completed a term of service for which he was appointed as a judge of the United States Court of Military Appeals is eligible for an annuity under this section upon separation from civilian service in the Federal Government. A person who continues service with the court as a senior judge under section 943(e)(1)(B) of this title (art. 143(e)(1)(B)) upon the expiration of the judge's term shall be considered to have been separated from civilian service in the Federal Government only upon the termination of that continuous service.

(2) A person who is eligible for any annuity under this section shall be paid that annuity if, at the time he becomes eligible to receive that annuity, he elects to receive that annuity in lieu of any other annuity for which he may be eligible at the time of such election (whether an immediate or a deferred annuity) under subchapter III of chapter 83 or subchapter II of chapter 84 of title 5 or any other retirement system for civilian employees of the Federal Government. Such an election may not be revoked.

(3)(A) The Secretary of Defense shall notify the Director of the Office of Personnel Management whenever an election under paragraph (2) is made affecting any right or interest under subchapter III of chapter 83 or subchapter 11 of chapter 85 of title 5 based on service as a judge of the United States Court of Military Appeals.

(B) Upon receiving any notification under subparagraph (A) in the case of a person making an election under (2), the Director shall determine the amount of the person's lump-sum credit under subchapter 111 of chapter 83 or subchapter II of chapter 84 of title 5, as applicable, and shall request the Secretary of the Treasury to transfer such amount from the Civil Service Retirement and Disability Fund to the Department of Defense Military Retirement Fund. The Secretary of the Treasury shall make any transfer so requested.

(C) In determining the amount of a lump-sum credit under section 8331(8) of title 5 for purposes of this paragraph—

(i) interest shall be computed using the rates under section 8334(e)(3) of such title; and

(ii) the completion of 5 years of civilian service (or longer) shall not be a basis for excluding interest.

(b) Amount of annuity. The annuity payable under this section to a person who makes an election under subsection (a)(2) is 80 percent of the rate of pay for a judge in active service on the United States Court of Military Appeals as of the date on which the person is separated from civilian service.

(c) Relation to thrift savings plan. Nothing in this section affects any right of any person to participate in the thrift savings plan under section 8351 of title 5 of subchapter III of chapter 84 of such title.
(d) **Survivor annuities.** The Secretary of Defense shall prescribe by regulation a program to provide annuities for survivors and former spouses of persons receiving annuities under this section by reason of elections made by such persons under subsection (a)(2). That program shall, to the maximum extent practicable, provide benefits and establish terms and conditions that are similar to those provided under survivor and former spouse annuity programs under other retirement systems for civilian employees of the Federal Government. The program may include provisions for the reduction in the annuity paid the person as a condition for the survivor annuity. An election by a judge (including a senior judge) or former judge to receive an annuity under this section terminates any right or interest which any other individual may have to a survivor annuity under any other retirement system for civilian employees of the Federal Government based on the service of that judge or former judge as a civilian officer or employee of the Federal Government (except with respect to an election under subsection (g)(1)(B)).

(e) **Cost-of-living increases.** The Secretary of Defense shall periodically increase annuities and survivor annuities paid under this section in order to take account of changes in the cost of living. The Secretary shall prescribe by regulation procedures for increases in annuities under this section. Such system shall, to the maximum extent appropriate, provide cost-of-living adjustments that are similar to those that are provided under other retirement systems for civilian employees of the Federal Government.

(f) **Dual compensation.** A person who is receiving an annuity under this section by reason of service as a judge of the court and who is appointed to a position in the Federal Government shall, during the period of such person's service in such position, be entitled to receive only the annuity under this section or the pay for that position, whichever is higher.

(g) **Election of judicial retirement benefits.**

1. A person who is receiving an annuity under this section by reason of service as a judge of the court and who later is appointed as a justice or judge of the United States to hold office during good behavior and who retires from that office, or from regular active service in that office, shall be paid either —

   (A) the annuity under this section, or

   (B) the annuity or salary to which he is entitled by reason of his service as such a justice or judge of the United States, as determined by an election by that person at the time of his retirement from the office, or from regular active service in the office, of justice or judge of the United States. Such an election may not be revoked.

2. An election by a person to be paid an annuity or salary pursuant to paragraph (1)(B) terminates (A) any election previously made by such person to provide a survivor annuity pursuant to subsection (d), and (B) any right of any other individual to receive a survivor annuity pursuant to subsection (d) on the basis of the service of that person.

(h) **Source of payment of annuities.** Annuities and survivor annuities paid under this section shall be paid out of the Department of Defense Military Retirement Fund.

(i) **Eligibility to elect between retirement systems.** —(1) This subsection applies with respect to any person who—

   (A) prior to being appointed as a judge of the United States Court of Military Appeals, performed civilian service of a type making such person subject to the Civil Service Retirement System; and

   (B) would be eligible to make an election under section 301(a)(2) of the Federal Employees' Retirement System Act of 1986, by virtue of being appointed as such a judge, but for the fact that such person has not had a break in service of a sufficient duration to be considered someone who is being reemployed by the Federal Government.

2. Any person with respect to whom this subsection applies shall be eligible to make an election under section 301(a)(2) of the Federal Employees' Retirement System Act of 1986 to the same extent and in the same manner (including subject to the condition set forth in section 301(d) of such Act) as if such person's appointment constituted reemployment with the Federal Government.


### § 946. Art. 146. Code committee

(a) **Annual survey.** A committee shall meet at least annually and shall make an annual comprehensive survey of the operation of this chapter.

(b) **Composition of committee.** The committee shall consist of—

1. the judges of the United States Court of Military Appeals;

2. the Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel of the Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps; and

3. two members of the public appointed by the Secretary of Defense.

(c) **Reports.**

1. After each such survey, the committee shall submit a report—

   (A) to the Committees on Armed Services of the Senate and House of Representatives; and

   (B) to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Transportation.

2. Each report under paragraph (1) shall include the following:

   (A) Information on the number and status of pending cases.

   (B) Any recommendation of the committee relating to—

      (i) uniformity of policies as to sentences;

      (ii) amendments to this chapter; and

      (iii) any other matter the committee considers appropriate.

(d) **Qualifications and terms of appointed members.** Each member of the committee appointed by the Secretary of Defense under subsection (b)(3) shall be a recognized authority in military justice or criminal law. Each such member shall be appointed for a term of three years.

(e) **Applicability of Federal Advisory Committee Act.** The Federal Advisory Committee Act (5 U.S.C.App. 1) shall not apply to the committee.
APPENDIX 3

Department of Defense
DIRECTIVE
January 22, 1985
NUMBER 5525.7

GC/IG, DoD

SUBJECT:
Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes

References:
(b) Memorandum of Understanding Between the Department Relating to the Investigation and Prosecution of Certain Crimes, August 1984
(c) Title 18, United States Code
(d) Title 10, United States Code, Sections 801-940 (Articles 1-140), "Uniform Code of Military Justice (UCMJ)"

A. REISSUANCE AND PURPOSE
This Directive reissues reference (a), updates policy and procedures, assigns responsibilities, and implements the 1984 Memorandum of Understanding (MOU) between the Department of Justice (DoJ) and the Department of Defense (DoD).

B. APPLICABILITY
This Directive applies to the Office of the Secretary of Defense, the Military Departments, the Office of Inspector General, DoD, the Organization of the Joint Chiefs of Staff, the Defense Agencies, and Unified and Specified Commands (hereafter referred to collectively as "DoD Components"). The term "DoD criminal investigative organizations," as used herein, refers collectively to the United States Army Criminal Investigation Command (USACIDC); Naval Investigative Service (NIS); U.S. Air Force Office of Special Investigations (AFOSI), and Defense Criminal Investigative Service (DCIS), Office of the Inspector General, DoD.

C. POLICY
It is DoD policy to maintain effective working relationships with the DoJ in the investigation and prosecution of crimes involving the programs, operations, or personnel of the Department of Defense.

D. PROCEDURES
With respect to inquiries for which the DoJ has assumed investigative responsibility based on the MOU, DoD investigative agencies should seek to participate jointly with DoJ investigative agencies whenever the inquiries relate to the programs, operations, or personnel of the Department of Defense. This applies to cases referred to the Federal Bureau of Investigation (FBI) under paragraph C. I.a. of the attached MOU (see enclosure 1) as well as to those cases for which a DoJ investigative agency is assigned primary investigative responsibility by a DoJ prosecutor. DoD components shall comply with the terms of the MOU and DoD Supplemental Guidance (see enclosure 1).

E. RESPONSIBILITIES
1. The Inspector General, Department of Defense (IG, DoD), shall:
   a. Establish procedures to implement the investigative policies set forth in this Directive.
   b. Monitor compliance by DoD criminal investigative organizations to the terms of the MOU.
   c. Provide specific guidance regarding investigative matters, as appropriate.
2. The General Counsel, Department of Defense, shall:
   a. Establish procedures to implement the prosecutive policies set forth in this Directive.
   b. Monitor compliance by the DoD Components regarding the prosecutive aspects of the MOU.
   c. Provide specific guidance, as appropriate.
   d. Modify the DoD Supplemental Guidance at enclosure 1, with the concurrence of the IG, DoD, after requesting comments from affected DoD Components.
APPENDIX 3

3. The Secretarys of the Military Departments shall establish procedures to implement the policies set forth in this Directive.

F. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. The Military Departments shall forward two copies of implementing documents to the Inspector General, Department of Defense, within 90 days. Other DoD Components shall disseminate this Directive to appropriate personnel.

Signed by William H. Taft, IV
Deputy Secretary of Defense

Enclosure—1
Memorandum of Understanding Between the Departments of Justice And Defense Relating to the Investigation and Prosecution of Certain Crimes

MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE

This enclosure contains the verbatim text of the 1984 Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes (reference (b)). Matter that is identified as "DoD Supplemental Guidance" has been added by the Department of Defense. DoD Components shall comply with the MOU and the DoD Supplemental Guidance.

MEMORANDUM OR UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES

A. PURPOSE, SCOPE AND AUTHORITY

This Memorandum of Understanding (MOU) establishes policy for the Department of Justice and the Department of Defense with regard to the investigation and prosecution of criminal matters over which the two Departments have jurisdiction. This memorandum is not intended to confer any rights, benefits, privileges or form of due process procedure upon individuals, associations, corporations or other persons or entities.

This Memorandum applies to all components and personnel of the Department of Justice and the Department of Defense. The statutory bases for the Department of Defense and the Department of Justice investigation and prosecution responsibilities include, but are not limited to:

1. Department of Justice: Titles 18, 21 and 28 of the United States Code; and
2. Department of Defense: The Uniform Code of Military Justice, Title 10, United States Code, Sections 801-940; the Inspector General Act of 1978, Title 5 United States Code, Appendix 3; and Title 5 United States Code, Section 301.

B. POLICY

The Department of Justice has primary responsibility for enforcement of federal laws in the United States District Courts. The Department of Defense has responsibility for the integrity of its programs, operations and installations and for the discipline of the Armed Forces. Prompt administrative actions and completion of investigations within the two (2) year statute of limitations under the Uniform Code of Military Justice require the Department of Defense to assume an important role in federal criminal investigations. To encourage joint and coordinated investigative efforts, in appropriate cases where the Department of Justice assumes investigative responsibility for a matter relating to the Department of Defense, it should share information and conduct the inquiry jointly with the interested Department of Defense investigative agency.

It is neither feasible nor desirable to establish inflexible rules regarding the responsibilities of the Department of Defense and the Department of Justice as to each matter over which they may have concurrent interest. Informal arrangements and agreements within the spirit of this MOU are permissible with respect to specific crimes or investigations.

C. INVESTIGATIVE AND PROSECUTIVE JURISDICTION

1. CRIMES ARISING FROM THE DEPARTMENT OF DEFENSE OPERATIONS

a. Corruption Involving the Department of Defense Personnel
MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE

The Department of Defense investigative agencies will refer to the FBI on receipt all significant allegations of bribery and conflict of interest involving military or civilian personnel of the Department of Defense. In all corruption matters the subject of a referral to the FBI, the Department of Defense shall obtain the concurrence of the Department of Justice prosecutor or the FBI before initiating any independent investigation preliminary to any action under the Uniform Code of Military Justice. If the Department of Defense is not satisfied with the initial determination, the matter will be reviewed by the Criminal Division of the Department of Justice.

The FBI will notify the referring agency promptly regarding whether they accept the referred matters for investigation. The FBI will attempt to make such decision in one (1) working day of receipt in such matters.

DoD Supplemental Guidance

A. Certain bribery and conflict of interest allegations (also referred to as "corruption" offenses in the MOU) are to be referred immediately to the FBI.

B. For the purposes of this section, bribery and conflict of interest allegations are those which would, if proven, violate 18 U.S.C., Sections 201, 203, 205, 208, 209, or 219 (reference (c)).

C. Under paragraph C.1.a., DoD criminal investigative organizations shall refer to the FBI those "significant" allegations of bribery and conflict of interest that implicate directly military or civilian personnel of the Department of Defense, including allegations of bribery or conflict of interest that arise during the course of an ongoing investigation.

1. All bribery and conflict of interest allegations against present, retired, or former General or Flag officers and civilians in grade GS-16 and above, the Senior Executive Service and the Executive Level will be considered "significant" for purposes of referral to the FBI.

2. In cases not covered by subsection C.1., above, the determination of whether the matter is "significant" for purposes of referral to the FBI should be made in light of the following factors: sensitivity of the DoD program, involved, amount of money in the alleged bribe, number of DoD personnel implicated, impact on the affected DoD program, and with respect to military personnel, whether the matter normally would be handled under the Uniform Code of Military Justice (reference (d)). Bribery and conflicts of interest allegations warranting consideration of Federal prosecution, which were not referred to the FBI based on the application of these guidelines and not otherwise disposed of under reference (d), will be developed and brought to the attention of the Department of Justice through the "conference" mechanism described in paragraph C.1.b. of the MOU (reference (b)).

D. Bribery and conflict of interest allegations when military or DoD civilian personnel are not subjects of the investigation are not covered by the referral requirement of paragraph C.1.a. of reference (b). Matters in which the suspects are solely DoD contractors and their subcontractors, such as commercial bribery between a DoD subcontractor and a DoD prime contractor, do not require referral upon receipt to the FBI. The "conference" procedure described in paragraph C.1.b. of reference (b) shall be used in these types of cases.

E. Bribery and conflict of interest allegations that arise from events occurring outside the United States, its territories, and possessions, and requiring investigation outside the United States, its territories, and possessions need not be referred to the FBI.

Frauds Against the Department of Defense and Theft and Embezzlement of Government Property

The Department of Justice and the Department of Defense have investigative responsibility for frauds against the Department of Defense and theft and embezzlement of Government property from the Department of Defense. The Department of Defense will investigate frauds against the Department of Defense and theft of government property from the Department of Defense. Whenever a Department of Defense investigative agency identifies a matter which, if developed by investigation, would warrant federal prosecution, it will confer with the United States Attorney or the Criminal Division, the Department of Justice, and the FBI field office. At the time of this initial conference, criminal investigative responsibility will be determined by the Department of Justice in consultation with the Department of Defense.

DoD Supplemental Guidance

A. Unlike paragraph C.1.a. of the MOU (reference (b)), paragraph C.1.b. does not have an auto-
APPENDIX 3

matic referral requirement. Under paragraph C.1.b., DoD criminal investigative organizations shall confer with the appropriate federal prosecutor and the FBI on matters which, if developed by investigation, would warrant Federal prosecution. This "conference" serves to define the respective roles of DoD criminal investigative organizations and the FBI on a case-by-case basis. Generally, when a conference is warranted, the DoD criminal investigative organization shall arrange to meet with the prosecutor and shall provide notice to the FBI that such meeting is being held. Separate conferences with both the prosecutor and the FBI normally are not necessary.

B. When investigations are brought to the attention of the Defense Procurement Fraud Unit (DPFU), such contact will satisfy the "conference" requirements of paragraph C.1.b. (reference (b)) as to both the prosecutor and the FBI.

C. Mere receipt by DoD criminal investigative organizations of raw allegations of fraud or theft does not require conferences with the DoJ and the FBI. Sufficient evidence should be developed before the conference to allow the prosecutor to make an informed judgment as to the merits of a case dependent upon further investigation. However, DoD criminal investigative organizations should avoid delay in scheduling such conferences, particularly in complex fraud cases, because an early judgment by a prosecutor can be of assistance in focusing the investigation on those matters that most likely will result in criminal prosecution.

2. CRIMES COMMITTED ON MILITARY INSTALLATIONS

a. Subject(s) can be Tried by Court-Martial or are Unknown

Crimes (other than those covered by paragraph C.1.) committed on a military installation will be investigated by the Department of Defense investigative agency concerned and, when committed by a person subject to the Uniform Code of Military Justice, prosecuted by the Military Department concerned. The Department of Defense will provide immediate notice to the Department of Justice of significant cases in which an individual subject/victim is other than a military member or dependent thereof.

b. One or More Subjects cannot be Tried by Court-Martial

When a crime (other than those covered by paragraph C.1.) has occurred on a military installation and there is reasonable basis to believe that it has been committed by a person or persons, some or all of whom are not subject to the Uniform Code of Military Justice, the Department of Defense investigative agency will provide immediate notice of the matter to the appropriate Department of Justice investigative agency unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

DoD Supplemental Guidance

A. Subsection C.2. of the MOU (reference (b)) addresses crimes committed on a military installation other than those listed in paragraphs C.1.a. (bribery and conflict of interest) and C.1.b. (fraud, theft, and embezzlement against the Government).

B. Unlike paragraph C.1.a. of reference (b), which requires "referral" to the FBI of certain cases, and paragraph C.1.b., which requires "conferences" with respect to certain cases, subsection C.2. requires only that "notice" be given to DoJ of certain cases. Relief from the reporting requirement of subsection C.2. may be granted by the local U.S. attorney as to types or classes of cases.

C. For purposes of paragraph C.2.a. (when the subjects can be tried by court-martial or are unknown), an allegation is "significant" for purposes of required notice to the DoJ only if the offense falls within the prosecutorial guidelines of the local U.S. attorney. Notice should be given in other cases when the DoD Component believes that Federal prosecution is warranted or otherwise determines that the case may attract significant public attention.

3. CRIMES COMMITTED OUTSIDE MILITARY INSTALLATIONS BY PERSONS WHO CAN BE TRIED BY COURT-MARTIAL

a. Offense is Normally Tried by Court-Martial

Crimes (other than those covered by paragraph C.1.) committed outside a military installation by persons subject to the Uniform Code of Military Justice which, normally, are tried by court-martial will be investigated and prosecuted by the Department of Defense. The Department of Defense will provide immediate notice of significant cases to the appropriate Department of Justice investigative agency. The Department of Defense will provide immediate notice in all cases where one or more subjects is not
MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE

under military jurisdiction unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

DoD Supplemental Guidance

For purposes of this paragraph, an allegation is “significant” for purposes of required notice to the DoJ only if the offense falls within prosecutorial guidelines of the local U.S. attorney. Notice should be given in other cases when the DoD Component believes that Federal prosecution is warranted, or otherwise determines that the case may attract significant public attention.

b. Crimes Related to Scheduled Military Activities

Crimes related to scheduled Military activities outside of a military installation, such as organized maneuvers in which persons subject to the Uniform Code of Military Justice are suspects, shall be treated as if committed on a military installation for purposes of this Memorandum. The FBI or other Department of Justice investigative agency may assume jurisdiction with the concurrence of the United States Attorney or the Criminal Division, Department of Justice.

c. Offense is not Normally Tried by Court-Martial

When there are reasonable grounds to believe that a Federal crime (other than those covered by paragraph C.1.) normally not tried by court-martial, has been committed outside a military installation by a person subject to the Uniform Code of Military Justice, the Department of Defense investigative agency will immediately refer the case to the appropriate Department of Justice investigative agency unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

D. REFERRALS AND INVESTIGATIVE ASSISTANCE

1. REFERRALS

Referrals, notices, reports, requests and the general transfer of information under this Memorandum normally should be between the FBI or other Department of Justice investigative agency and the appropriate Department of Defense investigative agency at the field level.

If a Department of Justice investigative agency does not accept a referred matter and the referring Department of Defense investigative agency then, or subsequently, believes that evidence exists supporting prosecution before civilian courts, the Department of Defense agency may present the case to the United States Attorney or the Criminal Division, Department of Justice, for review.

2. INVESTIGATIVE ASSISTANCE

In cases where a Department of Defense or Department of Justice investigative agency has primary responsibility and it requires limited assistance to pursue outstanding leads, the investigative agency requiring assistance will promptly advise the appropriate investigative agency in the other Department and, to the extent authorized by law and regulations, the requested assistance should be provided without assuming responsibility for the investigation.

E. PROSECUTION OF CASES

1. With the concurrence of the Department of Defense, the Department of Justice will designate such Department of Defense attorneys as it deems desirable to be Special Assistant United States Attorneys for use where the effective prosecution of cases may be facilitated by the Department of Defense attorneys.

2. The Department of Justice will institute civil actions expeditiously in United States District Courts whenever appropriate to recover monies lost as a result of crimes against the Department of Defense; the Department of Defense will provide appropriate assistance to facilitate such actions.

3. The Department of Justice prosecutors will solicit the views of the Department of Defense prior to initiating action against an individual subject to the Uniform Code of Military Justice.

4. The Department of Justice will solicit the views of the Department of Defense with regard to its Department of Defense-related cases and investigations in order to effectively coordinate the use of civil, criminal and administrative remedies.

DoD Supplemental Guidance

Prosecution of Cases and Grants of Immunity

A. The authority of court-martial convening authorities to refer cases to trial, approve pretrial agreements, and issue grants of immunity under the UCMJ (reference (d)) extends only to trials by
court-martial. In order to ensure that such actions do not preclude appropriate action by Federal civilian authorities in cases likely to be prosecuted in the U.S. district courts, court-martial convening authorities shall ensure that appropriate consultation as required by this enclosure has taken place before trial by court-martial, approval of a pretrial agreement, or issuance of a grant of immunity in cases when such consultation is required.

B. Only a general court-martial convening authority may grant immunity under the UCMJ (reference (d)), and may do so only in accordance with R.C.M. 704 (reference (e)).

1. Under reference (d), there are two types of immunity in the military justice system:
   a. A person may be granted transactional immunity from trial by court-martial for one or more offenses under reference (d).
   b. A person may be granted testimonial immunity, which is immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial.

2. Before a grant of immunity under reference (d), the general court-martial convening authority shall ensure that there has been appropriate consultation with the DoJ with respect to offenses in which consultation is required by this enclosure.

3. A proposed grant of immunity in a case involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of rules or statutes concerning classified information or the foreign relations of the United States shall be forwarded to the General Counsel of the Department of Defense for the purpose of consultation with the DoJ. The General Counsel shall obtain the views of other appropriate elements of the Department of Defense in furtherance of such consultation.

C. The authority of court-martial convening authorities extends only to grants of immunity from action under reference (d). Only the Attorney General or other authority designated under 18 U.S.C. Secs. 6001-6005 (reference (c)) may authorize action to obtain a grant of immunity with respect to trials in the U.S. district courts.

F. MISCELLANEOUS MATTERS
1. THE DEPARTMENT OF DEFENSE ADMINISTRATIVE ACTIONS

Nothing in this Memorandum limits the Department of Defense investigations conducted in support of administrative actions to be taken by the Department of Defense. However, the Department of Defense investigative agencies will coordinate all such investigations with the appropriate Department of Justice prosecutive agency and obtain the concurrence of the Department of Justice prosecutor or the Department of Justice investigative agency prior to conducting any administrative investigation during the pendency of the criminal investigation or prosecution.

2. SPECIAL UNIFORM CODE OF MILITARY JUSTICE FACTORS

In situations where an individual subject to the Uniform Code of Military Justice is a suspect in any crime for which a Department of Justice investigative agency has assumed jurisdiction, if a Department of Defense investigative agency believes that the crime involves special factors relating to the administration and discipline of the Armed Forces that would justify its investigation, the Department of Defense investigative agency will advise the appropriate Department of Justice investigative agency or the Department of Justice prosecuting authorities of these factors. Investigation of such a crime may be undertaken by the appropriate Department of Defense investigative agency with the concurrence of the Department of Justice.

3. ORGANIZED CRIME

The Department of Defense investigative agencies will provide to the FBI all information collected during the normal course of agency operations pertaining to the element generally known as “organized crime” including both traditional (La Cosa Nostra) and nontraditional organizations whether or not the matter is considered prosecutable. The FBI should be notified of any investigation involving any element of organized crime and may assume jurisdiction of the same.

4. DEPARTMENT OF JUSTICE NOTIFICATIONS TO DEPARTMENT OF DEFENSE INVESTIGATIVE AGENCIES

a. The Department of Justice investigative agencies will promptly notify the appropriate Department of Defense investigative agency of the initiation of the Department of Defense related investigations which are predicated on other than a Department of Defense referral except in those rare
MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE

instances where notification might endanger agents or adversely affect the investigation. The Department of Justice investigative agencies will also notify the Department of Defense of all allegations of the Department of Defense related crime where investigation is not initiated by the Department of Justice.

b. Upon request, the Department of Justice investigative agencies will provide timely status reports on all investigations relating to the Department of Defense unless the circumstances indicate such reporting would be inappropriate.

c. The Department of Justice investigative agencies will promptly furnish investigative results at the conclusion of an investigation and advise as to the nature of judicial action, if any, taken or contemplated.

d. If judicial or administrative action is being considered by the Department of Defense, the Department of Justice will, upon written request, provide existing detailed investigative data and documents (less any federal grand jury material, disclosure of which would be prohibited by Rule 6(e), Federal Rules of Criminal Procedure), as well as agent testimony for use in judicial or administrative proceedings, consistent with Department of Justice and other federal regulations. The ultimate use of the information shall be subject to the concurrence of the federal prosecutor during the pendency of any related investigation or prosecution.

5. TECHNICAL ASSISTANCE

a. The Department of Justice will provide to the Department of Defense all technical services normally available to federal investigative agencies.

b. The Department of Defense will provide assistance to the Department of Justice in matters not relating to the Department of Defense as permitted by law and implementing regulations.

6. JOINT INVESTIGATIONS

a. To the extent authorized by law, the Department of Justice investigative agencies and the Department of Defense investigative agencies may agree to enter into joint investigative endeavors, including undercover operations, in appropriate circumstances. However, all such investigations will be subject to Department of Justice guidelines.

b. The Department of Defense, in the conduct of any investigation that might lead to prosecution in Federal District Court, will conduct the investigation consistent with any Department of Justice guidelines. The Department of Justice shall provide copies of all relevant guidelines and their revisions.

DoD Supplemental Guidance

When DoD procedures concerning apprehension, search and seizure, interrogation, eyewitnesses, or identification differ from those of DoJ, DoD procedures will be used, unless the DoJ prosecutor has directed that DoJ procedures be used instead. DoD criminal investigators should bring to the attention of the DoJ prosecutor, as appropriate, situations when use of DoJ procedures might impede or preclude prosecution under the UCMJ (reference (d)).

7. APPREHENSION OF SUSPECTS

To the extent authorized by law, the Department of Justice and the Department of Defense will each promptly deliver or make available to the other suspects, accused individuals and witnesses where authority to investigate the crimes involved is lodged in the other Department. This MOU neither expands nor limits the authority of either Department to perform apprehensions, searches, seizures, or custodial interrogations.

G. EXCEPTION

This Memorandum shall not affect the investigative authority now fixed by the 1979 “Agreement Governing the Conduct of the Defense Department Counter intelligence Activities in Conjunction with the Federal Bureau of Investigation” and the 1983 Memorandum of Understanding between the Department of Defense, the Department of Justice and the FBI concerning “Use of Federal Military Force in Domestic Terrorist Incidents.”
MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND TRANSPORTATION (COAST GUARD) RELATING TO THE INVESTIGATIONS AND PROSECUTION OF CRIMES OVER WHICH THE TWO DEPARTMENTS HAVE CONCURRENT JURISDICTION.

Whereas, certain crimes committed by Coast Guard personnel subject to the Uniform Code of Military Justice may be prosecuted by Coast Guard tribunals under the Code or by civilian authorities in the Federal Courts; and

Whereas, it is recognized that although the administration and discipline of the Coast Guard requires that certain types of crimes committed by its personnel be investigated by that service and prosecuted before Coast Guard military tribunals other types of crimes committed by such military personnel should be investigated by civil authorities and prosecuted before civil tribunals; and

Whereas, it is recognized that it is not feasible to impose inflexible rules to determine the respective responsibility of the civilian and Coast Guard military authorities as to each crime over which they may have concurrent jurisdiction and that informal arrangements and agreements may be necessary with respect to specific crimes or investigations; and

Whereas, agreement between the Department of Justice and the Department of Transportation (Coast Guard) as to the general areas in which they will investigate and prosecute crimes to which both civil and military jurisdiction attach will, nevertheless, tend to make the investigation and prosecution of crimes more expeditious and efficient and give appropriate effect to the policies of civil government and the requirements of the United States Coast Guard;

It is hereby agreed and understood between the Department of Justice and the Department of Transportation (Coast Guard) as follows:

1. **Crimes committed on military installations (including aircraft and vessels).** Except as hereinafter indicated, all crimes committed on a military installation by Coast Guard personnel subject to the Uniform Code of Military Justice shall be investigated and prosecuted by the Coast Guard if the Coast Guard makes a determination that there is a reasonable likelihood that only Coast Guard personnel subject to the Uniform Code of Military Justice are involved in such crimes as principals or accessories, and except in extraordinary cases, that there is no victim other than persons who are subject to the Uniform Code of Military Justice or who are bonafide dependents or members of a household of military or civilian personnel residing on the installation. Unless such a determination is made, the Coast Guard shall promptly advise the Federal Bureau of Investigation of any crime committed on a military installation if such crime is within the investigative authority of the Federal Bureau of Investigation. The Federal Bureau of Investigation shall investigate any serious crime of which it has been so advised for the purpose of prosecution in the civil courts unless the Department of Justice determines that investigation and prosecution may be conducted more efficiently and expeditiously by the Coast Guard. Even if the determination provided for in the first sentence of this paragraph is made by the Coast Guard, it shall promptly advise the Federal Bureau of Investigation of any crime committed on a military installation in which there is a victim who is not subject to the Uniform Code of Military Justice or a bona fide dependent or member of the household of military or civilian personnel residing on the installation and that the Coast Guard is investigating the crime because it has been determined to be extraordinary. The Coast Guard shall promptly advise the Federal Bureau of Investigation whenever the crime, except in minor offenses, involves fraud against the government, misappropriation, robbery, or theft of government property of funds, or is of a similar nature. All such crimes shall be investigated by the Coast Guard unless it receives prompt advice that the Department of Justice has determined that the crime should be investigated by the Federal Bureau of Investigation and that the Federal Bureau of Investigation will undertake the investigation for the purpose of prosecution in the civil courts.

2. **Crimes committed outside of military installations.** Except as hereinafter indicated, all crimes committed outside of military installations, which fall within the investigative jurisdiction of the Federal Bureau of Investigation and in which there is in-
volved as a suspect an individual subject to the Uniform Code of Military Justice, shall be investigated by the Federal Bureau of Investigation for the purpose of prosecution in civil courts, unless the Department of Justice determines that investigation and prosecution may be conducted more efficiently and expeditiously by other authorities. All such crimes which come first to the attention of Coast Guard authorities shall be referred promptly by them to the Federal Bureau of Investigation, unless relieved of this requirement by the Federal Bureau of Investigation as to particular types or classes of crime. However, whenever Coast Guard military personnel are engaged in scheduled military activities outside of military installations such as organized maneuvers or organized movement, the provisions of paragraph 1 above shall apply, unless persons not subject to the Uniform Code of Military Justice are involved as principals, accessories or victims.

If, however, there is involved as a suspect or as an accused in any crime committed outside of a military installation and falling within the investigative authority of the Federal Bureau of Investigation, an individual who is subject to the Uniform Code of Military Justice and if the Coast Guard authorities believe that the crime involves special factors relating to the administration and discipline of the Coast Guard which would justify investigation by them for the purpose of prosecution before a Coast Guard military tribunal, they shall promptly advise the Federal Bureau of Investigation of the crime and indicate their views on the matter. Investigation of such a crime may be undertaken by the Coast Guard military authorities if the Department of Justice agrees.

3. Transfer of investigative authority. An investigative body of the Coast Guard which has initiated an investigation pursuant to paragraphs 1 and 2 hereof, shall have exclusive investigative authority and may proceed therewith to prosecution. If, however, any Coast Guard investigative body comes to the view that effectuation of those paragraphs requires the transfer of investigative authority over a crime, investigation of which has already been initiated by that or by any other investigative body, it shall promptly advise the other interested investigative body of its views. By agreement between the Departments of Justice and Transportation (Coast Guard), investigative authority may then be transferred.

4. Administrative action. Exercise of exclusive investigative authority by the Federal Bureau of Investigation pursuant to this agreement shall not preclude Coast Guard military authorities from making inquiries for the purpose of administrative action related to the crime being investigated. The Federal Bureau of Investigation will make the results of its investigations available to Coast Guard military authorities for use in connection with such action.

Whenever possible, decisions with respect to the application in particular cases of the provisions of this Memorandum of Understanding will be made at the local level, that is, between the Special Agent in Charge of the local office of the Federal Bureau of Investigation and the local Coast Guard military commander.

5. Surrender of suspects. To the extent of the legal authority conferred upon them, the Department of Justice and Coast Guard military authorities will each deliver to the other promptly suspects and accused individuals if authority to investigate the crimes in which such accused individuals and suspects are involved is lodged in the other by paragraphs 1 and 2 hereof.

Nothing in this memorandum shall prevent the Coast Guard from prompt arrest and detention of any person subject to the Uniform Code of Military Justice whenever there is knowledge or reasonable basis to believe that such a person has committed an offense in violation of such code and detaining such person until he is delivered to the Federal Bureau of Investigation if such action is required pursuant to this memorandum.

APPROVED:

/s/ Ramsy Clark /s/ Alan S. Boyd
Ramsy Clark Alan S. Boyd
Attorney General Secretary of Transportation

Date: 9 October 1967 Date: 24 October 1967
APPENDIX 4

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)
   James, Reuben J.

2. SSN
   111-11-1111

3. GRADE OR RANK
   PFC

4. PAY GRADE
   E-3

5. UNIT OR ORGANIZATION
   Co A, 1st Battalion, 61st Inf Bde, Fort Blank, MO

6. INITIAL DATE
   1 April 1983

7. TERM
   3 years

7. PAY PER MONTH

   $500

8. BASIC

   None

9. SEA/FOREIGN DUTY

   $500

10. TOTAL

   Restriction

11. DATE(S) IMPOSED

   1 August 1984

II. CHARGES AND SPECIFICATIONS

10. CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 86

   SPECIFICATION: In that Private First Class Reuben J. James, U.S. Army, Company A, 61st Battalion, 1st Infantry Brigade, Fort Blank, Missouri, on active duty, did, on or about 15 July 1984, without authority, absent himself from his unit, to wit: Company A, 1st Battalion, 61st Infantry Brigade, located at Fort Blank, Missouri, and did remain so absent until on or about 30 July 1984.

   Charge II: VIOLATION OF THE UCMJ, ARTICLE 112a

   Specification: In that Private First Class Reuben J. James, U.S. Army, Company A, 1st Battalion, 1st Infantry Brigade, Fort Blank, Missouri, on active duty, did at Fort Blank, Missouri, on or about 12 July 1984, wrongfully possess 10 grams of marijuana.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)
    Richards, Jonathan E.

12. GRADE
    Captain

13. ORGANIZATION OF ACCUSER
    Co A, 1st Bn, 61st Inf Bde

14. SIGNATURE OF ACCUSER
    [Signature]

15. DATE
    1 August 1984

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 1ST day of OCTOBER, 1984, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Will M. Wilson
61st Bn, 1st Inf Bde
Captain
Adjutant

[Signature]

DD FORM 458
EDITION OF OCT 89 IS OBSOLETE
APPENDIX 4

12. On 2 August, 1984, the accused was informed of the charges against him and of the name(s) of the accuser(s) known to me (See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)

Jonathan E. Richards  
Co A, 1st Rn, 61st Inf Bde  
Typed Name of Immediate Commander

Captain

Grade

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 11:00 hours, 2 August, 1984 at 1st Battalion, 1st Inf Brigade

Designation of Command or Officer Executing Summary Court-Martial Jurisdiction (See R.C.M. 403)

Will M. Wilson  
Adjutant

Typed Name of Officer

Grade

Signature

V. REFERRAL: SERVICE OF CHARGES

14. Designation of Command of Convening Authority

1st Infantry Brigade  
Fort Blank, Missouri  
7 August, 1984

Commander  
Carlo E. Nevins  
Commander, 1st Inf Brigade

Typed Name of Officer

Grade

Signature

15. On 8 August, 1984, I accused was served a copy hereof on the above named accused.

Hamilton Burger  
Captain, JAGC

Typed Name of Trial Counsel

Grade or Rank of Trial Counsel

FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are struck.
2 - See R.C.M. 601(e) concerning instructions. If none, so state.
APPENDIX 5

INVESTIGATING OFFICER’S REPORT
(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)

1a. FROM: (Name of Investigating Officer — Last, First, MI)  
   Adamson, Adam A.  
   b. GRADE: Major  
   c. ORGANIZATION: 1st Bn, 61st Inf Bde  
   d. DATE OF REPORT: 1 Sep 1993

1b. TO: (Name of Officer who directed the investigation — Last, First, MI)  
   Harrison, Harry A.  
   b. TITLE: Commanding Officer  
   c. ORGANIZATION: 1st Bn, 61st Inf, Fort Custer, Texas

2a. NAME OF ACCUSED (Last, First, MI)  
   Benson, Ben B.  
   b. GRADE: PVT  
   c. SSN: 111-11-1111  
   d. ORGANIZATION: Co A, 1st Bn, 61st Inf  
   e. DATE OF CHARGES: 24 Aug 1993

3a. (Check appropriate answer)  
   a. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (SELECT 1)
   b. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below) YES  
   c. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 4061d)2d) YES

3b. NAME OF DEFENSE COUNSEL (Last, First, MI)  
   Carlson, Carl C.  
   b. GRADE: CPT  
   c. ORGANIZATION (If appropriate)  
   d. ADDRESS (If appropriate)

3c. NAME OF ASSISTANT DEFENSE COUNSEL (If any)  
   b. GRADE

3d. SIGNATURE OF ACCUSED
   a. PLACE
   b. DATE

4. I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.

5a. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: (Check appropriate answers)  
   a. THE CHARGE(S) UNDER INVESTIGATION YES  
   b. THE IDENTITY OF THE ACCUSER NO  
   c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31 YES  
   d. THE PURPOSE OF THE INVESTIGATION YES  
   e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE YES  
   f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT YES  
   g. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED YES  
   h. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION YES  
   i. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING YES  
   j. THE ACCUSED AND ACCUSED’S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE (If the accused or counsel were absent during any part of the presentation of evidence, complete b below.) X

5b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL.

NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading (Example: “7c.”) Securely attach any additional sheets to the form and add a note in the appropriate item of the form: “See additional sheet.”

DD FORM 457  
EDITION OF OCT 69 IS OBSOLETE.  
A5-1
APPENDIX 5

The following witnesses testified under oath:

<table>
<thead>
<tr>
<th>NAME (Last, First, MI)</th>
<th>GRADE (If any)</th>
<th>ORGANIZATION/ADDRESS (Whichever is appropriate)</th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dodson, Dodd D.</td>
<td>Captain</td>
<td>Co A, 1st Bn, 61st Inf</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Evanson, Evan E.</td>
<td>Sergeant</td>
<td>Co A, 1st Bn, 61st Inf</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Fordson, Ford F.</td>
<td>Sergeant</td>
<td>400th MP Co.</td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>

The substance of the testimony of these witnesses has been reduced to writing and is attached.

The following statements, documents, or matters were considered; the accused was permitted to examine each:

<table>
<thead>
<tr>
<th>ITEM</th>
<th>DESCRIPTION OF ITEM</th>
<th>LOCATION OF ORIGINAL (If not attached)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Statement of Gregg Greggson</td>
<td>CID, Bldg 10, Fort Custer, Texas</td>
</tr>
<tr>
<td>2</td>
<td>CID Lab Report (fingerprint analysis)</td>
<td>CID, Bldg 10, Fort Custer, Texas</td>
</tr>
</tbody>
</table>

Each item considered, or a copy or recital of the substance or nature thereof, is attached.

There are grounds to believe that the accused was not mentally responsible for the offense(s) or not competent to participate in the defense. (See R.C.M. 909, 918h.)

The defense did request objections to be noted in this report. (If Yes, specify in Item 21 below.)

All essential witnesses will be available in the event of trial.

The charges and specifications are in proper form.

There are reasonable grounds to believe that the accused committed the offense(s) alleged.

I am not aware of any grounds which would disqualify me from acting as investigating officer. (See R.C.M. 406d.)

I recommend:

- Trial by ☐ Summary ☐ Special ☑ General Court-Martial

Remarks (include, as necessary, explanation for any denial in the investigation, and explanation for any 'no' answers above.)

Examples of other matters which may be discussed here are:

1. Discussion of evidence, credibility of witnesses, and sufficiency of proof.
2. Recommendations to dismiss or change any specifications.
3. Statement of any anticipated offenses or of any anticipated difficulties in proving any specification on which trial is recommended.
4. Any other matter which should be known to the convening authority or subsequent reviewing authorities.

Typed Name of Investigating Officer: Adam A. Adamson

Grade: Major

Organization: 1st Bn, 61st Inf Bde

Date: September 9, 1993

M.S. R.P.O. 0532-20-41-267444
APPENDIX 6
FORMS FOR ORDERS CONVENING COURTS-MARTIAL

a. General and special court-martial convening orders

(1) Convening orders.

[Note 1. See R.C.M. 504(d)]

(Date) __________________________________________

(Designation of command of officer convening court-martial)

[Pursuant to (para. ___________ General Order No. ___________, Department of the ___________, 19___) (SECNAV ltr ser ___________ of ___________) a] (A) (general) (special) court-martial is convened with the following members (and shall meet at ____________, unless otherwise directed):

(Captain) (Colonel) ________________________________
(Commander) (Lieutenant Colonel) _____________________________
(Lieutenant Commander) (Major) _____________________________
(Lieutenant) (Captain) ________________________________
(Lieutenant, j.g.) (First Lieutenant) _____________________________

[Note 2. The name, rank, and position of the convening authority should be shown. The order may be authenticated by the signature of the convening authority or a person acting under the direction of the convening authority.]

[Note 3. The language in brackets or parentheses in the foregoing samples should be used when appropriate. The Secretary concerned may prescribe additional requirements for convening orders. See R.C.M. 504(d)(3). Service regulations should be consulted when preparing convening orders.]

[Note 4. When a new court-martial is convened to replace one in existence, the following should be added below the names of the personnel of the court-martial and before the authentication line:]

All cases referred to the (general) (special) court-martial convened by order no. ____________, this (headquarters) (ship) (___________), dated ___________, 19___, in which the proceedings have not begun, will be brought to trial before the court-martial hereby convened.

(2) Order amending convening orders.

[Note 5. The same heading and authentication used on convening order should be used on amending orders.]

[Note 6. A succession of amending orders may result in error. Care should be used in amending convening orders.]

(a) Adding members.

[Note 7. Members may be added in specific cases or for all cases.]

The following members are detailed to the (general) (special) court-martial convened by order no. ____________, this (headquarters) (ship) (___________), dated ___________, 19___, (for the trial of ____________, only).

(b) Replacing members.

[Note 8. Members may be replaced in specific cases or for all cases.]
(Captain) (Colonel) ____________, is detailed as a member of the (general) (special) court-martial convened by order no. ____________, this (headquarters) (ship) (__________), dated ____________ 19___, relieved (for the case of ____________ only).

b. Summary court-martial convening orders

(Date) ____________________________________________

(Designation of command of officer convening court-martial)

[Pursuant to (para. ____________, General Order No. ____________, Department of the ____________, 19____,) (SECNAV ltr ser ____________ of ____________ 19____,)] (Lieutenant Commander) (Major) ____________ is detailed a summary court-martial (and shall sit at ____________, unless otherwise directed).

[Note 9. The name, rank, and position of the convening authority should be shown. The order may be authenticated by the signature of the convening authority or a person acting under the direction of the convening authority.]

[Note 10. The summary court-martial convening order may be a separate page or a notation on the charge sheet. See R.C.M. 504(d)(2) and 1302(c).]
APPENDIX 7

SUBPOENA

The President of the United States, to Mr. James E. Pinelli

(Name and Title of Person being Subpoenaed)

You are hereby summoned and required to appear on the 1st day of October, 1993, at 9 o'clock A.M. at Station, Oakton, FL, to testify as a witness in the matter of United States v. Roberts

(Place of Proceeding) (Name and Title of Deposition Officer)

designated as a witness by a court-martial of the United States, appointed by General Court-Martial Convening Order No. 10, dated 1 September 1993, to testify as a witness in the matter of United States v. Roberts

(Identification of Convening Order or Convening Authority)

Failure to appear and testify is punishable by a fine of not more than $500 or imprisonment for a period not more than six months, or both, 10 U.S.C. § 847. Failure to appear may also result in your being taken into custody and brought before the court-martial under a Warrant of Attachment (DD Form 454). Manual for Courts-Martial R.C.M. 703(e)(2)(G).

Bring this subpoena with you and do not depart from the proceeding without proper permission.

Subscribed at Naval Station, Oakton, FL this 1st day of September 1993

(Signature (See R.C.M. 703(e)(2)(G))

The witness is requested to sign one copy of this subpoena and to return the signed copy to the person serving the subpoena.

I hereby accept service of the above subpoena.

Signature of Witness

NOTE: If the witness does not sign, complete the following:

Personally appeared before me, the undersigned authority, , on , on , who, being first duly sworn according to law, deposes and says that at , on , he personally delivered to in person a duplicate of this subpoena.

Grade

Signature

Subscribed and sworn to before me at , this day of , 19

Grade

Official Status

Signature

EDITION OF OCT 69 IS OBSOLETE.

© GPO : 1984 O - 421-646 (170365)
TRAVEL ORDER

Payment of travel allowances is authorized pursuant to 10 U.S.C. § 847 and 28 U.S.C. § 1821. You should travel from Smithburg, Georgia, on the date and at the time specified. You will be paid fees and expenses for attendance at the specified hearing and travel directly to and from that place. You may travel by rail, commercial or military aircraft, bus, or privately owned automobile.

You have not been given a “Government Transportation Request” to exchange for commercial tickets. No mileage will be paid for any transportation provided by the Government in kind or by Government Transportation Request. If a Government Transportation Request is not given to you and you travel by commercial carrier at personal expense, reimbursement for your cost of transportation will be limited to:

a. The least costly regularly scheduled air service between the points involved; or

b. The cost of the rail fare and a lower berth, or the lowest first-class rail accommodation available at the time reservations were made; or

c. Actual cost of commercial bus fare.

If you travel by private automobile, you will be reimbursed at the rate of twenty cents $0.20 a mile, plus the cost of necessary parking fees, bridge, ferry, and other highway tolls incurred while traveling under this travel order. The total reimbursement will be limited to the cost of travel by the usual mode of common carrier, including per diem. Receipts and ticket stubs will be required to support your claim for cost of transportation and subsistence for each item in excess of $15.00.

You will be traveling to a high-cost area.

The travel regulations designate certain cities as high cost areas. Because your attendance requires travel to one of these cities, you will be authorized an actual expense allowance instead of a per diem allowance. You will be reimbursed for the actual expenses incurred, not to exceed the maximum amount prescribed for the city involved. The expenses may include lodgings, meals, tips to waiters, bellboys, maids, porters; personal laundry, pressing and dry-cleaning; local transportation (including rental taxis) between places of lodging and duty; and other necessary expenses. You must itemize your daily actual expenses on your claim and receipts for lodging and any items over $10.00 are required.

You will not be traveling to a high-cost area.

Because you are not traveling to a high-cost area, you will be entitled to a per diem allowance to cover your expenses for lodging, meals, and incidentals. While traveling and attending the specified hearing within the continental United States, you will be authorized a per diem equal to the daily average you pay for lodging, plus $3.00 per day for meals and incidentals, rounded off to the next dollar. If the resulting amount is more than the maximum per diem allowable, which is $80.00, then you will be reimbursed only the maximum per diem allowed. You are required to state on your reimbursement claim that the per diem claimed is based on the average cost to you for lodging while on required travel within the continental United States during the period covered by the claim. Receipts are required for lodging. The per diem allowance for travel overseas is based on rates set by the Department of Defense, and you will be reimbursed the amount specified for the particular overseas area involved.

You are entitled to an attendance fee of $30.00 per day under 28 U.S.C. § 1821.

Address any inquiries regarding the matter to: Lieutenant R. Mueller, Naval Legal Service Office, Building 13, Naval Station, Oakton, FL. Tel. No. (111) 111-1111

This is travel order number 93-7, dated 20 September 1993.

TDN: Accounting Citation XX111122211-XX-O

FOR THE COMMANDER

R. Mueller, Lt. JAGC, USN, Trial Counsel

Lem J. Berger, LCDR, SC, USN, Disbursing Officer

Signature of Approving Official

Signature of Authorizing Official
APPENDIX 8

GUIDE FOR GENERAL AND SPECIAL COURTS-MARTIAL

[Note 1. This guide outlines the sequence of events ordinarily followed in general and special courts-martial, and suggests ways to conduct various procedures prescribed in the Rules for Courts-Martial. The guide is not mandatory; it is intended solely as an aid to users of the Manual for Courts-Martial.]

Section I. Opening Session Through Pleas

[Note 2. See R.C.M. 901–911.]

[Note 3. When a military judge has been detailed, the proceedings outlined in this section will be conducted at an Article 39(a) session. See R.C.M. 901(e). In special courts-martial without a military judge, these procedures should be followed in general; the president of a special court-martial without a military judge should also carefully examine pertinent Rules for Courts-Martial.]

Sessions called to order

MJ: This Article 39(a) session is called to order. (Be seated.)

Convening orders and referral of charges

TC: The court-martial is convened by (general) (special) court-martial convening order(s) number __________________, (HQ________________) (USS________________) (________________), (as amended by ______________), copies of which have been furnished to the military judge, counsel, and the accused, (and to the reporter for insertion at this point in the record) (and which will be inserted at this point in the record). (Copies of any written orders detailing the military judge and counsel will be inserted at this point in the record.)

[Note 4. When detailed, the reporter records all proceedings verbatim. See R.C.M. 502(e)(3)(B), 808, and 1103. The reporter should account for the parties to the trial and keep a record of the hour and date of each opening and closing of the session, whether a recess, adjournment, or otherwise, for insertion in the record. See R.C.M. 813(b) and 1103. See also Appendices 13 and 14.]

[Note 5. The military judge should examine the convening order and any amending orders.]

Accounting for parties

TC: The charges have been properly referred to this court-martial for trial and were served on the accused on ________________.

[Note 6. In time of peace, if less than 5 days have elapsed since service of the charges in a general court-martial (3 days in case of a special court-martial), the military judge should inquire whether the accused objects to proceeding. If the accused objects, the military judge must grant a continuance. See R.C.M. 901(a).]

TC: (The following corrections are noted on the convening orders: ________________).

[Note 7. Only minor changes, such as typographical errors or changes of grade due to promotion, may be made. Any correction which affects the identity of the individual concerned must be made by an amending or correcting order.]

[Note 8. See R.C.M. 813.]
TC: The accused and the following persons detailed to this court-martial are present: ____________. The members and the following persons detailed to this court-martial are absent: ____________.

Reported detailed
[Note 9. When a reporter is detailed, the following announcement will be made. See R.C.M. 813(a)(8).]
TC: ______________ has been detailed reporter for this court-martial and has previously been sworn (will now be sworn).

[Note 10. See R.C.M. 807(b)(2) Discussion (D) concerning the oath to be administered the reporter.]

Detail of trial counsel
TC: (I) (All members of the prosecution) have been detailed to this court-martial by _____________.

Qualifications of TC: (I am) (All members of the prosecution are) Prosecution qualified and certified under Article 27(b) and sworn under Article 42(a). _______________.

TC: (I have not) (No member of the prosecution has) acted in any manner which might tend to disqualify (me) (him) (or) (her) in this court-martial _______________.

Detail of defense counsel
DC: (I) (All detailed members of the defense) have been detailed to this court-martial by _____________.

Qualifications of defense DC: (All detailed members of the defense are) (I Counsel am) qualified and certified under Article 27(b) and sworn under Article 42(a). _______________.

DC: (I have not) (No member of the defense has) acted in any manner which might tend to disqualify (me) (him) (or) (her) in this court-martial. _______________.

Qualifications of individual counsel when present IDC: My qualifications are _______________. I have not acted in any manner which might tend to disqualify me in this court-martial.

[Note 11. If it appears that any counsel may be disqualified, the military judge must decide the matter and take appropriate action. See R.C.M. 901(d)(3).]

Rights to counsel
[Note 12. See R.C.M. 506.]
MJ: _____________, you have the right to be represented in this court- 
martial by __________ (and __________), your detailed 
defense counsel, or you may be represented by military counsel of 
your own selection, if the counsel you request is reasonably 
available. If you are represented by military counsel of your own 
selection, you would lose the right to have __________ (and 
___________), your detailed counsel, continue to help in your 
defense. However, you may request that __________ (and 
___________, or one of them), your detailed counsel, continue 
to act as associate counsel with the military counsel you select, and 
___________, the detailing authority, may approve such a 
request. Do you understand?

ACC: _____________.

MJ: In addition, you have the right to be represented by civilian counsel, 
at no expense to the United States. Civilian counsel may represent 
you alone or along with your military counsel. Do you understand?

[Note 13. If two or more accused in a joint or common trial are represented by the same counsel, or 
by civilian counsel who are associated in the practice of law, the military judge must inquire into 
the matter. See R.C.M. 901(d)(4)(D).]

MJ: Do you have any questions about your rights to counsel?

ACC: _____________.

MJ: Whom do you want to represent you?

ACC: _____________.

[Note 14. If appropriate, the court-martial should be continued to permit the accused to obtain 
individual military or civilian counsel.]

MJ: Counsel for the parties have the necessary qualifications, and have 
been sworn (except ____________, who will now be sworn.)

MJ: I have been detailed to this court-martial by ____________.

[Note 15. See R.C.M. 807(b)(2) Discussion (C) concerning the oath to be administered to counsel.]

General nature of charges

TC: The general nature of the charge(s) in this case is ___________.
The charge(s) were preferred by ____________, forwarded with 
recommendations as to disposition by _______________ (, and 
investigated by ________________). ________________ is also an 
accuser in this case.)

Challenge of military judge

[Note 16. See R.C.M. 902.]

TC: Your honor, are you aware of any matter which may be a ground for 
challenge against you?
APPENDIX 8

Accused's elections on composition of court-martial

[Note 17. See R.C.M. 903. See also R.C.M. 501(a) and 503(b).]

MJ: __________, do you understand that you have the right to be tried by a court-martial composed of members (including, if you request in writing, at least one-third enlisted persons) and that, if you are found guilty of any offense, those members would determine a sentence?

ACC: __________.

MJ: Do you also understand that you may request in writing or orally here in the court-martial trial before me alone, and that if I approve such a request, there will be no members and I alone will decide whether you are guilty and, if I find you guilty, determine a sentence?

ACC: __________.

MJ: Have you discussed these choices with your counsel?

ACC: __________.

MJ: By which type of court-martial do you choose to be tried?

ACC: __________.

[Note 18. See R.C.M. 903(a) concerning whether the accused may defer a decision on composition of court-martial.]

[Note 19. If the accused chooses trial by court-martial composed of members proceed to arraignment below. Any request for enlisted members will be marked as an Appellate Exhibit and inserted in the record of trial. See R.C.M. 1103(b)(2)(D)(iii). In a special court-martial without a military judge, the members should be sworn, and the challenge procedure conducted at this point. See Notes 38-17 below.]

Election to be tried by military judge alone

[Note 20. A request for trial by military judge alone must be written and signed by the accused and should identify the military judge by name or it may be made orally on the record. A written request will be marked as an Appellate Exhibit and inserted in the record of trial. See R.C.M. 103(b)(2)(D)(iii).]

MJ: __________, a request for trial before me alone.) (I am (Colonel) (Captain) __________) __________ Have you discussed this request and the rights I just described with your counsel?
ACC: ____________________.

MJ: If I approve your request for trial by me alone you give up your right to trial by a court-martial composed of members (including, if you requested, enlisted members). Do you wish to request trial before me alone?

ACC: ____________________.

MJ: (Your request is approved. The court-martial is assembled.) (Your request is disapproved because ____________________.)

[Note 21. See R.C.M. 903(c)(2)(B) concerning approval or disapproval. See R.C.M. 911 concerning assembly of the court-martial.]

Arraignment

[Note 22. See R.C.M. 904.]

MJ: The accused will now be arraigned.

TC: All parties and the military judge have been furnished a copy of the charges and specifications. Does the accused want them read?

DC: The accused (waives reading of the charges) (wants the charges read).

MJ: (The reading may be omitted.)

TC: ____________________

TC: The charges are signed by ______________, a person subject to the code, as accuser; are properly sworn to before a commissioned officer of the armed forces authorized to administer oaths, and are properly referred to this court-martial for trial by ______________, the convening authority.

MJ: ______________, how do you plead? Before receiving your pleas, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time.

[Note 23. See R.C.M. 801(e), 905–907 concerning motions. See R.C.M. 908 if the Government elects to appeal a ruling adverse to it.]

DC: The defense has (no) (the following) motion(s). ________________.

[Note 24. After any motions are disposed of pleas are ordinarily entered. See R.C.M. 910.]

DC: ________________ pleads ________________.

[Note 25. If the accused enters any pleas of guilty proceed with the remainder of section I. If no pleas of guilty are entered, proceed to section II if trial is before members, or section III if trial is before military judge alone.]
Guilty plea inquiry

[Note 26. If trial is before members in a contested case, the military judge should examine the copy of the charge(s) to be provided the members, discuss any preliminary instructions with the parties, and determine whether other matters should be addressed before the Article 39(a) session is ended.]

[Note 26. See R.C.M. 910(c), (d), (e), and (f). If a conditional guilty plea is entered, see R.C.M. 90(a)(2).]

Introduction

MJ: ________________, your plea of guilty will not be accepted unless you understand its meaning and effect. I am going to discuss your plea of guilty with you now. If you have any questions, please say so. Do you understand?

ACC: ________________

MJ: A plea of guilty is the strongest form of proof known to the law. On your plea alone, without receiving any evidence, this court-martial could find you guilty of the offense(s) to which you are pleading guilty. Your plea will not be accepted unless you understand that by pleading guilty you admit every element of each offense and you are pleading guilty because you really are guilty. If you do not believe that you are guilty, you should not plead guilty for any reason. You have the right to plead not guilty and place the burden upon the prosecution to prove your guilt. Do you understand that?

ACC: ________________

Waiver of rights

MJ: By your plea of guilty you waive, or in other words, you give up certain important rights. (You give up these rights only as to the offense(s) to which you have pleaded guilty. You keep them as to the offense(s) to which you have pleaded not guilty). The rights you give up are: First, the right against self-incrimination, that is the right to say nothing at all about (this) (these) offense(s). Second, the right to a trial of the facts by the court-martial, that is, the right to have this court-martial decide whether or not you are guilty based on evidence presented by the prosecution and, if you chose to do so, by the defense. Third, the right to be confronted by the witnesses against you, that is to see and hear the witnesses against you here in the court-martial and to have them cross-examined, and to call witnesses in your behalf. Do you understand these rights?

ACC: ________________

MJ: If you plead guilty, there will not be a trial of any kind as to the offense(s) to which you are pleading guilty, so by pleading guilty you give up the rights I have just described. Do you understand that?

ACC: ________________
GUIDE FOR GENERAL AND SPECIAL COURTS-MARTIAL

Maximum penalty

MJ: Defense counsel, what advice have you given as to the maximum punishment for the offense(s) to which the accused pleaded guilty?

DC:  

MJ: Trial counsel, do you agree with that?

TC:  

[Note 28. If there is a question as to the maximum punishment, the military judge must resolve it. If the maximum punishment may be subject to further dispute, the military judge should advise the accused of the alternative possibilities and determine whether this affects the accused's decision to plead guilty.]

MJ: , by your plea of guilty this court-martial could sentence you to the maximum authorized punishment, which is . Do you understand that?

ACC:  

MJ: Do you feel you have had enough time to discuss your case with your counsel, ?

ACC:  

MJ: , do you feel that you have had enough time to discuss the case with your client?

DC:  

MJ: , are you satisfied with (and ), your defense counsel, and do you believe (his) (her) (their) advice has been in your best interest?

ACC:  

MJ: Are you pleading guilty voluntarily?

ACC:  

MJ: Has anyone tried to force you to plead guilty?

ACC:  

Factual basis for plea

[Note 29. The accused will be placed under oath at this point. See R.C.M. 910(e). The military judge may inquire whether there is a stipulation in connection with the plea, and may inquire into the stipulation at this point. See R.C.M. 811.]
MJ: In a moment, you will be placed under oath and we will discuss the facts of your case. If what you say is not true, your statements may be used against you in a prosecution for perjury or false statement. Do you understand?

ACC: __________.

TC: Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

ACC: __________

MJ: I am going to explain the elements of the offense(s) to which you have entered pleas of guilty. By “elements” I mean the facts which the Government would have to prove by evidence beyond a reasonable doubt before you could be found guilty if you pleaded not guilty. When I state each of these elements ask yourself if it is true, and whether you want to admit that its true. Then be ready to talk about these facts with me.

MJ: Please look at your copy of the charges and specifications. You have pleaded guilty to Charge __________, Specification __________, a violation of Article __________ of the Uniform Code of Military Justice. The elements of that offense are __________.

[Note 30. See subparagraph b of the appropriate paragraph in Part IV. The description of the elements should be tailored to the allegations in the specification. Legal terms should be explained.]

MJ: Do you understand those elements?

ACC: __________

MJ: Do the elements correctly describe what you did?

ACC: __________

Accused's description of offense(s) [Note 31. The military judge should elicit from the accused facts supporting the guilty plea by questioning the accused about the offense(s). The questioning should develop the accused's description of the offense(s) and establish the existence of each element of the offense(s). The military judge should be alert to discrepancies in the accused's description or between the accused's description and any stipulation. If the accused's discussion or other information discloses a possible defense, the military judge must inquire into the matter, and may not accept the plea if a possible defense exists. The military judge should explain to the accused the elements of a defense when the accused's description raises the possibility of one. The foregoing inquiry should be repeated as to each offense to which the accused has pleaded guilty.]

Identification of accused

MJ: Do you admit that you are __________, the accused in this case?

ACC: __________
Jurisdiction

MJ: On (date of earliest offense) 19 _____________, were you a member of the United States (Army) (Navy) (Air Force) (Marine Corps) (Coast Guard) on active duty, and have you remained on active duty since then?

ACC: ____________.

[Note 32. The military judge should determine whether jurisdiction might be affected by a post-offense reenlistment.]

Pretrial agreement

MJ: Is there a pretrial agreement in this case?

TC or DC: ____________.

[Note 33. If the answer is yes proceed to note 35; if the answer is no, proceed as follows.]

MJ: ____________ are you pleading guilty because of any promise by the Government that you will receive a sentence reduction or other benefit from the Government if you plead guilty?

ACC: ____________

[Note 34. If the answer is no, proceed to acceptance of the plea. If the answer is yes, the military judge should determine from the accused and counsel whether any agreement exists. If so, the plea agreement inquiry should continue. If not, then the military judge should clarify any misunderstanding the accused may have, and ascertain whether the accused still wants to plead guilty. Once any issue is resolved, if the accused maintains the plea of guilty, proceed to acceptance of the plea.]

[Note 35. If there is a pretrial agreement, the military judge must: (1) ensure that the entire agreement is presented, provided that in trial by military judge alone the military judge ordinarily will not examine any sentence limitation at this point; (2) ensure that the agreement complies with R.C.M. 705; and (3) inquire to ensure that the accused understands the agreement and that the parties agree to it. See R.C.M. 910(f). If the agreement contains any ambiguous or unclear terms, the military judge should obtain clarification from the parties.]

[Note 36. The agreement should be marked as an Appellate Exhibit. If the agreement contains a sentence limitation and trial is before military judge alone, the sentence limitation should be marked as a separate Appellate Exhibit, if possible.]

[Note 37. The language below is generally appropriate when trial is before military judge alone. It should be modified when trial is before members.]

MJ: ____________, I have here Appellate Exhibit ____________, which is part of a pretrial agreement between you and ____________, the convening authority. Is this your signature which appears (on the bottom of page ____________), (__________) and did you read this part of the agreement?

ACC: ____________

MJ: Did you also read and sign Appellate Exhibit ____________, which is the second part of the agreement?
ACC:  

MJ: Do you believe that you fully understand the agreement?

ACC:  

MJ: I don't know, and I don't want to know at this time the sentence limitation you have agreed to. However, I want you to read that part of the agreement over to yourself once again.

MJ: [After accused has done so.] Without saying what it is, do you understand the maximum punishment the convening authority may approve?

ACC:  

MJ: In a pretrial agreement, you agree to enter a plea of guilty to (some of) the charge(s) and specification(s), and, in return, the convening authority agrees to (approve no sentence greater than that listed in Appellate Exhibit ____________, which you have just read) (__________). [In addition, (you have agreed to testify against ____________) (__________) (the convening authority has agreed to withdraw Charge ____________ and its specification) (__________)]. Do you understand that?

ACC:  

MJ: If the sentence adjudged by this court-martial is greater than the one provided in the agreement, the convening authority would have to reduce the sentence to one no more severe than the one in your agreement. On the other hand, if the sentence adjudged by this court-martial is less than the one in your agreement, the convening authority cannot increase the sentence adjudged. Do you understand that?

ACC:  

[Note 38. The military judge should discuss the agreement with the accused, and explain any terms which the accused may not understand. If the accused does not understand a term, or if the parties disagree as to a term, the agreement should not be accepted unless the matter is clarified to the satisfaction of the parties. If there are any illegal terms, the agreement must be modified in accordance with R.C.M. 705. The trial counsel should be granted a recess on request to secure the assent of the convening authority to any material modification in the agreement.]

MJ: ____________ is this agreement, Appellate Exhibit(s) ____________ (and ____________) the entire agreement between you and the convening authority? In other words, is it correct that there are no other agreements or promises in this case?

ACC:  


MJ: Do counsel agree?

TC: 

DC: 

MJ: ____________, do you understand your pretrial agreement?

ACC: 

MJ: Do counsel disagree with my explanation or interpretation of the agreement in any respect?

TC: 

DC: 

MJ: (To DC), did the offer to make a pretrial agreement originate with the defense?

DC: 

MJ: ____________ are you entering this agreement freely and voluntarily?

AC: 

MJ: Has anyone tried to force you to enter this agreement?

ACC: 

MJ: Have you fully discussed this agreement with your counsel, and are you satisfied that (his) (her) advice is in your best interest?

ACC: 

MJ: ____________, although you believe you are guilty, you have a legal and a moral right to plead not guilty and to require the Government to prove its case against you, if it can, by legal and competent evidence beyond a reasonable doubt. If you were to plead not guilty, then you would be presumed under the law to be not guilty, and only by introducing evidence and proving your guilt beyond a reasonable doubt can the Government overcome that presumption. Do you understand?

ACC: 

MJ: Do you have any questions about your plea of guilty, your pretrial agreement, or anything we have discussed?

ACC: 

A8-11
Acceptance of guilty plea

MJ: Do you still want to plead guilty?

ACC: 

MJ: I find that the accused has knowingly, intelligently, and consciously waived (his) (her) rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against (him) (her); that the accused is, in fact guilty; and (his) (her) plea of guilty is accepted.

MJ: , you may request to withdraw your plea of guilty any time before the sentence is announced in your case and if you have a good reason for your request, I will grant it. Do you understand?

ACC: 

Announcement of findings based on a guilty plea

[Note 39. Findings of guilty may, and ordinarily should, be entered at this point except when: (1) not permitted by regulations of the Secretary concerned; or (2) the plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged. See R.C.M. 910(g)(1) and (2). See also R.C.M. 910(g)(3) in special courts-martial without a military judge. In trials before military judge alone, when some offenses are to be contested, the military judge may elect to defer entry of any findings until the end of trial on the merits.]

[Note 40. See R.C.M. 922 and Appendix 10 concerning forms of findings.]

MJ: , in accordance with your plea(s) of guilty, this court-martial finds you (of all charges and specifications) (of Specification ___________ of Charge ___________ and Charge ___________): Guilty.

[Note 41. If trial is before members, and no offenses remain to be contested on the merits, this may be an appropriate point for the military judge to inform the accused of the rights to allocution under R.C.M. 100(a)(3). See Note 88 below. In addition, other issues relating to the information or evidence to be introduced on sentencing should ordinarily be resolved at this point. If other offenses remain to be contested, the military judge should consider, and solicit the views of the parties, whether to inform the members only of the offenses to which the accused pleaded not guilty. The copy of the charges presented to the members should reflect this decision. See also Note 26.]

Section II. Trial With Members; Preliminary Session

[Note 42. The following procedure is suggested for a trial with members after completion of the Article 39(a) session.

Before calling the court-martial to order, the military judge should examine the convening order and any amending orders and ensure that all members required to be present are present. Witnesses should be excluded from the courtroom except when they testify.

When the court-martial is ready to proceed the military judge should direct the bailiff, if any, or the trial counsel to call the members. Whenever the members enter the courtroom, all persons present except the military judge and reporter should rise.

The members are seated alternatively to the right and left of the president according to rank.]

MJ: The court-martial will come to order. You may be seated.
This court-martial is convened by (general) (special) court-martial convening order number ___________, (HQ ___________) (USS ___________) (___________), as amended by _____________, a copy of which has been furnished to each member.

The accused and the following persons named in the convening orders are present: _____________.

The following persons named in the convening orders are absent: _____________.

[Note 43. Persons who have been relieved (viced) by written orders need not be mentioned. The reason for any other absences should be stated.]

The prosecution is ready to proceed with the trial in the case of United States v. (who is present).

"Do you [name(s) of member(s)] (swear) (affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court-martial (upon a challenge or) upon the findings or sentence unless required to do so in due course of law, (so help you God)?"

Each member: I do.

The members will now be sworn.

All persons please rise.

Be seated please. The court-martial is assembled.

[Note 44. See R.C.M. 911 concerning assembly.]

[Note 45. At this point, the military judge may give the members preliminary instructions. These may include instructions on the general nature of the member’s duties (see R.C.M. 502(a)(2) and Discussion, 922, 1006), the duties of the military judge (see R.C.M. 801, 920, 1005; Mil. R. Evid. 103), and the duties of counsel (see R.C.M. 502(d)(5) and (6)); on voir dire and possible grounds for challenge (see R.C.M. 912); on the procedures for questioning witnesses (see Mil. R. Evid. 611, 614); on taking notes; and such other matters as may be appropriate. The military judge may elect to defer giving instructions on some of these matters until after voir dire, or until another appropriate point in the proceedings.]

[Note 46. Trial counsel should distribute copies of the charges and specifications to the members.]
APPENDIX 8

TC: The general nature of the charge(s) in this case (is) (are) ____________. The charge(s) were preferred by ____________; forwarded with recommendations as to disposition by ____________; (and investigated by ____________.)

TC: The records of this case disclose (no grounds for challenge) (grounds for challenge of ____________, on the following grounds ____________.)

TC: If any member is aware of any matter which may be a ground for challenge by any party, the member should so state.

[Note 47. In case of a negative response, trial counsel should announce "Apparently not."]

[Note 48. The military judge and, if permitted by the military judge, counsel may examine the members on voir dire. See R.C.M. 912(d) and Discussion. The parties may present evidence relating to challenges for cause. See R.C.M. 912(e). Upon completion of voir dire and taking evidence, if any, the parties will be called upon to enter challenges for cause. Ordinarily trial counsel enters challenges for cause before defense counsel. After any challenges for cause, the parties may be called upon to enter peremptory challenges. Ordinarily trial counsel enters a peremptory challenge before the defense. The parties must be permitted to enter challenges outside the presence of members. See R.C.M. 912(f) and (g). In special courts-martial without a military judge, see R.C.M. 912(h).]

[Note 49. If any members are successfully challenged, they should be excused in open session in the presence of the parties. The record should indicate that they withdrew from the courtroom. The members who remain after challenges should be reseated according to rank, as necessary.]

[Note 50. The military judge should ensure that a quorum remains, and, if the court-martial is composed with enlisted persons, that at least one-third of the remaining members are enlisted persons. See R.C.M. 912(g)(2) Discussion.]

[Note 51. If the members have not yet been informed of the plea(s), this should now be done.]

MJ: Members of the court-martial, at an earlier session the accused was arraigned and entered the following pleas: ____________.

[Note 52. In a special court-martial without a military judge, the accused should now be arraigned. See Notes 22-39.]

[Note 53. If the military judge entered findings based on pleas of guilty and no offenses remain to be contested, the military judge should give the following instruction and proceed to SECTION IV, below.]

MJ: I accepted the accused's pleas of guilty and entered findings of guilty as to (the) (all) Charge(s) (__________) and Specification(s) (__________) and ____________. Therefore, we will now proceed to determine a sentence in the case.

[Note 54. If the accused pleaded guilty to some offenses, but others remain to be contested, and the members have been informed of the offenses to which the accused pleaded guilty, the military judge should instruct as follows.]
MJ: Members, you will not be required to reach findings regarding Charge (_____________) and Specification(s) (____________) (and ______________) (and ______________). Findings will be required, however, as to Charge (_____________) and Specification(s) (____________) (and ______________) (and ______________), to which the accused has pleaded not guilty. You may not consider the fact that the accused pleaded guilty to (one) (some) offense(s) in any way in deciding whether the accused is guilty of the offense(s) to which (he) (she) has pleaded not guilty.

[Note 55. If the accused has pleaded guilty to a lesser included offense and the prosecution intends to prove the greater offense, the military judge should instruct as follows.]

MJ: The accused's plea of guilty to the lesser included offense of ______________ admits some of the elements of the offense charged in (the) Specification (____________) of (the) Charge (____________). These elements are, therefore, established by the accused's plea without need of further proof. However, the accused's plea of guilty to this lesser included offense provides no basis for a finding of guilty as charged, because there still remains in issue the elements of ______________. No inference of guilt of such remaining elements may be drawn from the accused's plea. Before the accused may be found guilty of the offense charged, the prosecution must prove the remaining element(s) beyond a reasonable doubt.

[Note 56. The military judge may give such additional preliminary instructions as may be appropriate at this point.]

SECTION III. TRIAL

[Note 57. See R.C.M. 913.]

MJ: Will the prosecution make an opening statement?
TC: (No) (Yes. ______________.)
MJ: Will the defense make an opening statement?
DC: (No) (The defense will make its statement after the prosecution has rested.) (Yes. ______________.)
TC: The prosecution calls as its first witness ______________.

Oath of witness

[Note 58. See R.C.M. 807.]

TC: Do you (swear) (affirm) that the evidence you give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth, (so help you God)?
WIT: ______________.
Preliminary questions

TC: (Are you (state name, grade, organization, station, and armed force) (state name and address, if civilian)?) (Please state your name (grade, organization, station, and armed force) (and address).

WIT: ____________________

[Note 59. The address of witnesses should be omitted in appropriate cases, as where it might endanger the witness.]

[Note 60. Except when an identification is inappropriate (e.g., when the witness is a laboratory technician) or where a foundation must be laid, Trial Counsel ordinarily should ask the witness to identify the accused.]

TC: Do you know the accused?

WIT: ____________________

[Note 61. If the witness answers affirmatively:]

TC: Please point to the accused and state (his) (her) name.

WIT: ____________________

TC: Let the record show that the witness pointed to the accused when stating (his) (her) name.

Testimony

TC: No further questions.

MJ: ________________, you may cross-examine.

[Note 62. Trial counsel should now conduct direct examination of the witness. See Mil. R. Evid. 611.]

DC: No (further) questions.

[Note 63. Defense counsel may cross-examine the witness.]

[Note 64. The parties should be permitted to conduct such redirect and recross-examination as may reasonably be necessary. See Mil. R. Evid. 611. After the parties have completed their questioning, the military judge and members may ask additional questions. See Mil. R. Evid. 614. The members should be instructed on the procedures for questioning. Each member's questions will be collected by the bailiff, if any, or trial counsel, marked as an Appellate Exhibit, examined by counsel for each side, and given to the military judge. If there are any objections, they should be raised at an Article 39(a) session or at a side-bar conference.]

[Note 65. After questioning of a witness is completed, the military judge should determine whether the witness will be excused temporarily or permanently. The military judge should advise the witness as follows.]
MJ: ______________ thank you. You are (temporarily) excused. (Please wait in the waiting room) ______________). (You are free to go.) As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone except counsel. If anyone else tries to talk to you about the case, stop them and report the matter to one of the counsel.

[Note 66. The witness will withdraw from the courtroom. See Mil. R. Evid. 615.]

TC: The prosecution calls as its next witness ______________.

[Note 67. Trial counsel continues to present the prosecution case. If exhibits were admitted at an Article 39(a) session, trial counsel may, with the permission of the military judge, read or present the evidence to the court-martial.]

Recess, adjournment, or Article 39(a) session

[Note 68. In the event of a recess, continuance, adjournment, or Article 39(a) session, the military judge should announce when the court-martial will reconvene, and should instruct or remind the members not to discuss the case with anyone, not to consult legal references, and to avoid exposure to matters relating to the case.]

Reopening

[Note 69. When the court-martial is reopened, the following announcement is appropriate.]

MJ: The court-martial will come to order.

TC: The members, the parties, and the military judge are all present.

Prosecution rests

[Note 70. A motion for a finding of not guilty may be raised at this point. See R.C.M. 917. Any such motion should be made outside the presence of the members. If a motion is made in the presence of members, and is denied, the military judge should instruct the members that the military judge applies a different standard in ruling on the motion than they must apply in reaching their findings, and that the denial must have no effect on their deliberations and findings.]

Presentation of evidence by defense

[Note 71. Defense counsel may make an opening statement if one was not made previously.]

DC: The defense calls as its first witness ______________.

[Note 72. Trial counsel administers the oath to each witness. Defense counsel conducts direct examination, and trial counsel cross-examination of each witness. Redirect and recross-examination may be conducted as appropriate. The military judge and members may question each witness. See note 64.]

[Note 73. Defense counsel continues to present the defense case. If exhibits were admitted at an Article 39(a) session, defense counsel may, with the permission of the military judge, read or present the evidence to the court-martial.]

DC: The defense rests.

Rebuttal and surrebuttal

[Note 74. The parties may present evidence in rebuttal and surrebuttal. See R.C.M. 913(c)(1). After the parties complete their presentations, additional evidence may be presented when the military judge so directs. See R.C.M. 801(c), 913(c)(1)(F).]

[Note 75. When a witness is recalled, the following is appropriate.]
TC: Are you the same __________ who testified earlier in this court martial?

WIT: I am.

TC: You are reminded that you are still under oath.

[Note 76. If trial is by military judge alone, counsel should be permitted to make closing arguments. See R.C.M. 919. After arguments, proceed to announcement of findings.]

Out of court hearing on findings instructions
[Note 77. Ordinarily the military judge will conduct Article 39(a) session to discuss findings instructions and examine the findings worksheet. See R.C.M. 920,921(d). If such instructions are discussed at a conference, see R.C.M. 802.]

Closing arguments
[Note 78. See R.C.M. 919.]

TC: __________.

DC: __________.

TC: __________.

Instructions
[Note 79. See R.C.M. 920.]

MJ: __________.

MJ: Does any member have any questions concerning these instructions?

MEMBERS: __________.

MJ: Do counsel have any objections to these instructions not previously raised?

TC: __________.

DC: __________.

[Note 80. See R.C.M. 920(f).]

[Note 81. Any exhibits which the members are to consider should be given to the president before the court-martial closes.]

Closing
MJ: The court-martial is closed.

[Note 82. While the members are deliberating, the military judge may take up certain matters which may arise if the accused is found guilty of any offense. The admissibility of evidence during sentencing proceedings and advice to the accused about allocution rights may be considered at an Article 39(a) session at this point. See R.C.M. 1001. See Note 88 below concerning allocution advice.]

After findings reached
MJ: The court-martial will come to order.

TC: All parties and members and the military judge are present.
MJ: (To president) have the members reached findings?

PRES: 

MJ: Are the findings on Appellate Exhibit ?

PRES: Yes.

MJ: Would (the bailiff) (trial counsel), without examining it please bring me Appellate Exhibit ?

MJ: I have examined Appellate Exhibit . It appears to be in proper form. Please return it to the president.

[Note 83. See R.C.M. 921(d) concerning a findings worksheet, and the procedure to be followed if any problems are indicated. See R.C.M. 924 if reconsideration of a finding may be necessary.]

Announcement of findings

MJ: , would you and your counsel stand up please (and approach the president).

MJ: , announce the findings please.

PRES: , this court-martial finds you 

MJ: Please be seated.

[Note 84. If the accused is found not guilty of all charges and specifications, the court-martial is ordinarily adjourned at this point.]

SECTION IV. PRESENTENCING PROCEDURE

[Note 85. If the accused pleaded guilty to some specifications and the members have not yet been informed of these, the members should now be given copies of these specifications and be informed of the accused's plea to them. See text following Note 51.]

Data from charge sheet

[Note 86. See R.C.M. 1001(b)(1).]

MJ: The court-martial will now hear the data concerning the accused shown on the charge sheet.

TC: 

Matters presented by prosecution

MJ: Does the prosecution have other matters to present?

[Note 87. The prosecution may present certain matters from the accused's personnel records, evidence of previous convictions, evidence in aggravation, and evidence of rehabilitative potential. See R.C.M. 1001(b)(2) through (5).]

TC: The prosecution has nothing further.

Matters presented by defense

[Note 88. If the accused has not previously been advised in accordance with R.C.M. 1001(a)(3), such advice should now be given. In trial before members, this advice should be given at an Article 39(a) session.]
MJ: ______________, you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself which you want the court-martial to consider in deciding a sentence. Included in your right to present evidence are the rights you have to testify under oath, to make an unsworn statement, or to remain silent. If you testify, you may be cross-examined by the trial counsel and questioned by me (and the members). If you decide to make an unsworn statement you may not be cross-examined by trial counsel or questioned by me (or the members). You may make an unsworn statement orally or in writing, personally, or through your counsel, or you may use a combination of these ways. If you decide to exercise your right to remain silent, that cannot be held against you in any way. Do you understand your rights?

ACC: ______________.

MJ: Which of these rights do you want to exercise?

ACC: ______________.

[Note 89. The defense may present matters in rebuttal and extenuation and mitigation. See R.C.M. 1001(c).]

DC: The defense has nothing further.

Rebuttal

[Note 90. The parties may present additional matters in rebuttal, as appropriate. See R.C.M. 1001(a)(1)(C).]

Out of court hearing on sentencing instructions

[Note 91. If trial is by military judge alone, counsel should be permitted to make arguments on sentencing. After arguments proceed to announcement of the sentence.]

[Note 92. Ordinarily the military judge will conduct an Article 39(a) session to discuss sentencing instructions and examine the sentence worksheet. See R.C.M. 1005. If such instructions are discussed at a conference, see R.C.M. 802.]

Closing arguments

[Note 93. See R.C.M. 1001(g).]

TC: ______________.

DC: ______________.

Instructions

[Note 94. See R.C.M. 1005.]

MJ: ______________

MJ: Does any member have any questions concerning these instructions?

MEMBERS: ______________

MJ: Do counsel have any objections concerning these instructions not previously raised?

TC: ______________
DC:  

[Note 95. See R.C.M. 1005(f).]

[Note 96. Any exhibits which the members are to consider should be given to the president before the court-martial closes.]

Closing

MJ:  The court-martial is closed.

MJ:  The court-martial will come to order.

TC:  All parties and members and the military judge are present.

MJ:  (To president) _______________, have the members reached a sentence?

PRES:  _______________

MJ:  Is the sentence on Appellate Exhibit _______________?

PRES:  Yes.

MJ:  Would (the bailiff) (trial counsel), without examining it, please bring me Appellate Exhibit _______________.

MJ:  I have examined Appellate Exhibit _______________. It appears to be in proper form. Please return it to the president.

[Note 97. See R.C.M. 1006(e) concerning a sentence worksheet, and the procedure to be followed if any problems are indicated. See R.C.M. 1009 if reconsideration of the sentence may be necessary.]

Announcement of sentence

MJ:  _______________, would you and your counsel stand up please (and approach the president).

MJ:  _______________, would you announce the sentence please.

PRES:  _______________, this court-martial sentences you to:  

__________________

MJ:  Please be seated.

[Note 98. In trial before members, ordinarily the members should be excused at this point. If no other matters remain to be considered, the court-martial should be adjourned. If there are additional matters to be considered (e.g., punishment limitation in a pretrial agreement in a trial by military judge alone, see R.C.M. 910(f)(3) or, if the accused was represented by more than one counsel, which counsel will prepare any response to the post-trial review) these matters should be addressed before the court-martial is adjourned.]

Advice of post-trial and appellate rights

[Note 99. The military judge must advise the accused of the accused's post-trial and appellate rights. See R.C.M. 1010.]

MJ:  _______________, I will explain to you your post-trial and appellate rights.
After the record of trial is prepared in your case, the convening authority will act on your case. The convening authority can approve the sentence (adjudged) (provided in your pretrial agreement), or (he) (she) can approve a lesser sentence or disapprove the sentence entirely. The convening authority cannot increase the sentence. The convening authority can also disapprove (some or all of) the findings of guilty. The convening authority is not required to review the case for legal errors, but may take action to correct legal errors. Do you understand?

[Note 100. In cases subject to review by a Court of Military Review, the following advice should be given. In other cases proceed to Note 101 or 102 as appropriate.]

I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights you have the right to the advice and assistance of military counsel provided free of charge or civilian counsel provided at your own expense.

You have the right to submit any matters you wish the convening authority to consider in deciding whether to approve all, part, or any of the findings and sentence in your case. Such matters must be submitted within 10 days after you or your counsel receive a copy of the record of trial and the recommendation of the (staff judge advocate) (legal officer).

If the convening authority approves the discharge or confinement at hard labor for a year or more, your case will be reviewed by a Court of Military Review.

After the Court of Military Review completes its review, you may request that your case be reviewed by the Court of Military Appeals; if your case is reviewed by that Court, you may request review by the United States Supreme Court.

You also have the right to give up review by the Court of Military Review, or to withdraw your case from appellate review at any time before such review is completed.

If you give up your right to review by the Court of Military Review or later withdraw your case from appellate review.

(a) That decision is final and you cannot change your mind later.

(b) Your case will be reviewed by a military lawyer for legal error. It will also be sent to the (general court-martial*) convening authority for final action.

(*Use only for special court-martial.)
(c) Within 2 years after final action is taken on your case, you may request The Judge Advocate General to take corrective action.

Do you have any questions?

ACC: 

MJ: The court-martial is adjourned.

GCM subject to review under Article 69

[Note 101. In general courts-martial subject to review under Article 69, the following advice should be given. In other cases, proceed to Note 102.]

MJ: I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights you have the right to the advice and assistance of military counsel provided free of charge or civilian counsel provided at your own expense.

You have the right to submit any matters you wish the convening authority to consider in deciding whether to approve all, part, or any of the findings and sentence in your case. Such matters must be submitted within 10 days after you or your counsel receive a copy of the record of trial and the recommendation of the (staff judge advocate) (legal officer). If the convening authority approves any part of your sentence, your case will be examined in the Office of The Judge Advocate General for any legal errors and to determine whether your sentence is fair. The Judge Advocate General may take corrective action, if appropriate. You also have the right to give up examination by The Judge Advocate General or to withdraw your case from such examination at any time before such examination is completed. If you give up your right to examination by The Judge Advocate General or later withdraw your case from such examination:

(a) That decision is final and you cannot change your mind later.

(b) Your case will be reviewed by a military lawyer for legal error. It will also be sent to the convening authority for final action.

(c) Within 2 years after action is taken on your case, you may request The Judge Advocate General to take corrective action.

Do you have any questions?

ACC: 

MJ: The court-martial is adjourned.

SPCM not involving a BCD

[Note 102. In special courts-martial not involving BCD, the following advice should be given.]
MJ: I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights, you have the right to the advice and assistance of military counsel provided free of charge or civilian counsel provided at your own expense. You have the right to submit any matters you wish the convening authority to consider in deciding whether to approve all, part, or any of the findings and sentence in your case. Such matters must be submitted within 10 days after you or your counsel receive a copy of the record of trial. If the convening authority approves any part of the findings or sentence, your case will be reviewed by a military lawyer for legal error. It may be sent to the general court-martial convening authority for final action on any recommendation by the lawyer for corrective action. Within 2 years after final action is taken on your case, you may request The Judge Advocate General to take corrective action. Do you have any questions?

ACC: 

MJ: The court-martial is adjourned.
APPENDIX 9
GUIDE FOR SUMMARY COURTS-MARTIAL

[General Note to SCM: It is not the purpose of this guide to answer all questions which may arise during a trial. When this guide, chapter 13 of the Rules for Courts-Martial, and other legal materials available fail to provide sufficient information concerning law or procedure, the summary court-martial should seek advice on these matters from a judge advocate. See R.C.M. 1301(b). If the accused has obtained, or wishes to obtain, defense counsel, see R.C.M. 1301(c). The SCM should examine the format for record of trial at appendix 15. It may be useful as a checklist during the proceedings to ensure proper preparation after trial. The SCM should become familiar with this guide before using it. Instructions for the SCM are contained in brackets, and should not be read aloud. Language in parentheses reflects optional or alternative language. The SCM should read the appropriate language aloud.]

Preliminary Proceeding

Identity of SCM

SCM: I am _____________. I have been detailed to conduct a summary court-martial (by Summary Court-Martial Convening Order (Number ________________), Headquarters, ______________, dated [see convening order]).

Referral of charges to trial

Charges against you have been referred to me for trial by summary court-martial by ([name and title of convening authority]) on ([date of referral]) [see block IV on page 2 of charge sheet].

[Note 1. Hand copy of charge sheet to the accused.]

Providing the accused with charge sheet

I suggest that you keep this copy of the charge sheet and refer to it during the trial. The charges are signed by [see first name at top of page 2 of charge sheet], a person subject to the Uniform Code of Military Justice, as accuser, and are properly sworn to before a commissioned officer of the armed forces authorized to administer oaths. (________________ ordered the charges to be preferred.) The charges allege, in general, violation of Article ______________, in that you ______________ (and Article ______________, in that you ______________). I am now going to tell you about certain rights you have in this trial. You should carefully consider each explanation because you will soon have to decide whether to object to trial by summary court-martial. Until I have completed my explanation, do not say anything except to answer the specific questions which I ask you. Do you understand that?

ACC: ______________.
**Duties of SCM**

**SCM:** As summary court-martial it is my duty to obtain and examine all the evidence concerning any offense(s) to which you plead not guilty, and to thoroughly and impartially inquire into both sides of the matter. I will call witnesses for the prosecution and question them, and I will help you in cross-examining those witnesses. I will help you obtain evidence and present the defense. This means that one of my duties is to help you present your side of the case. You may also represent yourself, and if you do, it is my duty to help you. You are presumed to be innocent until your guilt has been proved by legal and competent evidence beyond a reasonable doubt. If you are found guilty of an offense, it is also my duty to consider matters which might affect the sentence, and then to adjudge an appropriate sentence. Do you understand that?

**ACC:**

**Right to object to SCM**

**SCM:** You have the absolute right to object to trial by summary court-martial. If you object the appropriate authority will decide how to dispose of the case. The charges may be referred to a special or general court-martial, or they may be dismissed, or the offenses charged may be disposed of by (nonjudicial punishment [if not previously offered and refused] or) administrative measures. [See R.C.M. 306.] Do you understand that?

**ACC:**

**Right to inspect allied papers and personnel records.**

**SCM:** You may inspect the allied papers and personnel records [Hand those documents which are available to the accused for examination in your presence.] (You may also inspect [identify personnel records or other documents which are not present] which are located at ________________. You may have time to examine these if you wish.)

**Witnesses/other evidence for the government**

**SCM:** The following witnesses will probably appear and testify against you: ________________. The following documents and physical evidence will probably be introduced: ________________.

**Right to cross-examine**

After these witnesses have testified in response to my questions, you may cross-examine them. If you prefer, I will do this for you after you inform me of the matters about which you want the witness to be questioned. Do you understand that?

**ACC:**

**Right to present evidence**

**SCM:** You also have the right to call witnesses and present other evidence. This evidence may concern any or all of the charges. (I have arranged to have the following witnesses for you present at the trial.) I will arrange for the attendance of other witnesses and the production of other evidence requested by you. I will help you in any way possible. Do you understand that?
Evidence to be considered

SCM: In deciding this case, I will consider only evidence introduced during the trial. I will not consider any other information, including any statements you have made to me, which is not introduced in accordance with the Military Rules of Evidence during the court-martial. Do you understand that?

ACC: ______________

Right to remain silent

SCM: You have the absolute right during this trial to choose not to testify and to say nothing at all about the offense(s) with which you are charged. If you do not testify, I will not hold it against you in any way. I will not consider it as an admission that you are guilty. If you remain silent, I am not permitted to question you about the offense(s).

ACC: ______________

Right to testify concerning the offense(s)

However, if you choose, you may be sworn and testify as a witness concerning the offense(s) charged against you. If you do that, I will consider your testimony just like the testimony of any other witness.

[Note 2. Use the following if there is only one specification.]

If one specification

If you decide to testify concerning the offense, you can be questioned by me about the whole subject of the offense. Do you understand that?

ACC: ______________

[Note 3. Use the following if there is more than one specification.]

If more than one specification

SCM: If you decide to testify, you may limit your testimony to any particular offense charged against you and not testify concerning any other offense(s) charged against you. If you do this, I may question you about the whole subject of the offense about which you testify, but I may not question you about any offense(s) concerning which you do not testify. Do you understand that?

ACC: ______________

Right to testify, remain silent or make an unsworn statement in extenuation and mitigation

SCM: In addition, if you are found guilty of an offense, you will have the right to testify under oath concerning matters regarding an appropriate sentence. You may, however, remain silent, and I will not hold your silence against you in any way. You may, if you wish, make an unsworn statement about such matters. This statement may be oral, in writing, or both. If you testify, I may cross-examine you. If you make an unsworn statement, however, I am not permitted to question you about it, but I may receive evidence to contradict anything contained in the statement. Do you understand that?
APPENDIX 9

ACC: __________________

Maximum punishment

SCM: If I find you guilty (of the offense) (of any of the offenses charged), the maximum sentence which I am authorized to impose is:

[Note 4. For an accused of a pay grade of E-4 or below, proceed as follows.]

E-4 and below

(1) reduction to lowest enlisted pay grade; and
(2) forfeiture of two-thirds of 1 month's pay; and
(3) confinement for 1 month (or, [if the accused is attached to or embarked in a vessel] to confinement on bread and water or diminished rations for 3 days and confinement for 24 days).

[Note 5. For an accused of a pay grade above E-4, proceed as follows.]

E-5 and above

(1) reduction to the next inferior pay grade; and
(2) forfeiture of two-thirds of 1 month's pay; and
(3) restriction to specified limits for 2 months.

SCM: Do you understand the maximum punishment which this court-martial is authorized to adjudge?

ACC: __________________

Plea options

SCM: You may plead not guilty or guilty to each offense with which you are charged. You have an absolute right to plead not guilty and to require that your guilt be proved beyond a reasonable doubt before you can be found guilty. You have the right to plead not guilty even if you believe you are guilty. Do you understand that?

ACC: __________________

SCM: If you believe you are guilty of an offense, you may, but are not required to, plead guilty to that offense. If you plead guilty to an offense, you are admitting that you committed that offense, and this court-martial could find you guilty of that offense without hearing any evidence, and could sentence you to the maximum penalty I explained to you before. Do you understand that?

ACC: __________________
Lesser included offenses

SCM: [Examine the list of lesser included offenses under each punitive article alleged to have been violated. See Part IV. If a lesser included offense may be in issue, give the following advice.] You may plead not guilty to Charge _______________, Specification _______________, as it now reads, but plead guilty to the offense of _______________, which is included in the offense charged. Of course, you are not required to do this. If you do, then I can find you guilty of this lesser offense without hearing evidence on it. Furthermore, I could still hear evidence on the greater offense for purposes of deciding whether you are guilty of it. Do you understand that?

ACC: ____________

SCM: Do you need more time to consider whether to object to trial by summary court-martial or to prepare for trial?

ACC: ____________

SCM: [If time is requested or otherwise appropriate.] We will convene the court-martial at _______________. When we convene, I will ask you whether you object to trial by summary court-martial. If you do not object, I will then ask for your pleas to the charge(s) and specification(s), and for you to make any motions you may have.

Trial Proceedings

Convene

SCM: This summary court-martial is now in session.

Objection/consent to trial by SCM

SCM: Do you object to trial by summary court-martial?

ACC: ____________

Entries on record of trial

[Note 6. If there is an objection, adjourn the court-martial and return the file to the convening authority. If the accused does not object, proceed as follows. The accused may be asked to initial the notation on the record of trial that the accused did or did not object to trial by summary court-martial. This is not required, however.]

Readings of the charges

SCM: Look at the charge sheet. Have you read the charge(s) and specification(s)?

ACC: ____________

SCM: Do you want me to read them to you?

ACC: ____________

[If accused requests, read the charge(s) and specification(s).]
SCM: How do you plead? Before you answer that question, if you have any motion to dismiss (the) (any) charge or specification, or for other relief, you should make it now.

ACC: ____________________

Motions

[Note 7. If the accused makes a motion to dismiss or to grant other relief, or such a motion is raised by the summary court-martial, do not proceed with the trial until the motions have been decided. See R.C.M. 905-907, and R.C.M. 1304(b)(2)(c). After any motions have been disposed of and if termination of the trial has not resulted, have the accused enter pleas and proceed as indicated below.]

ACC: I plead: ____________________

[Note 8. If the accused refuses to plead to any offense charged, enter pleas of not guilty. If the accused refuses to enter any plea, evidence must be presented to establish that the accused is the person named in the specification(s) and is subject to court-martial jurisdiction. See R.C.M. 202, 1301(c).]

[Note 9. If the accused pleads not guilty to all offenses charged, proceed to the section entitled "Procedures-Not Guilty Pleas."]

[Note 10. If the accused pleads guilty to one or more offenses, proceed as follows.]

Procedures-guilty pleas

SCM: I will now explain the meaning and effect of your pleas, and question you so that I can be sure you understand. Refer to the charge(s) and specification(s). I will not accept your pleas of guilty unless you understand their meaning and effect. You are legally and morally entitled to plead not guilty even though you believe you are guilty, and to require that your guilt be proved beyond a reasonable doubt. A plea of guilty is the strongest form of proof known to the law. On your pleas of guilty alone, without receiving any evidence, I can find you guilty of the offense(s) to which you have pleaded guilty. I will not accept your pleas unless you realize that by your pleas you admit every element of the offense(s) to which you have pleaded guilty, and that you are pleading guilty because you really are guilty. If you are not convinced that you are in fact guilty, you should not allow anything to influence you to plead guilty. Do you understand that?

ACC: ____________________

SCM: Do you have any questions?

ACC: ____________________

SCM: By your pleas of guilty you give up three very important rights. (You keep these rights with respect to any offense(s) to which you have pleaded not guilty.) The rights which you give up when you plead guilty are:
First, the right against self-incrimination. This means you give up the right to say nothing at all about (this) (these) offense(s) to which you have pleaded guilty. In a few minutes I will ask you questions about (this) (these) offense(s), and you will have to answer my questions for me to accept your pleas of guilty.

Second, the right to a trial of the facts by this court-martial. This means you give up the right to have me decide whether you are guilty based upon the evidence which would be presented.

Third, the right to be confronted by and to cross-examine any witnesses against you. This means you give up the right to have any witnesses against you appear, be sworn and testify, and to cross-examine them under oath.

Do you understand these rights?

ACC: __________________

SCM: Do you understand that by pleading guilty you give up these rights?

ACC: __________________

SCM: On your pleas of guilty alone you could be sentenced to

____________________

[Note 11. Re-read the appropriate sentencing section at notes 4 or 5 above unless the summary court-martial is a rehearing or new or other trial, in which case see R.C.M. 810(d).]

Do you have any questions about the sentence which could be imposed as a result of your pleas of guilty?

ACC: __________________

SCM: Has anyone made any threat or tried in any other way to force you to plead guilty?

ACC: __________________

SCM: Are you pleading guilty because of any promises or understandings between you and the convening authority or anyone else?

ACC: __________________

[Note 12. If the accused answers yes, the summary court-martial must inquire into the terms of such promises or understandings in accordance with R.C.M. 910. See Appendix 8, Note 35 through acceptance of plea.]

[Note 13. If the accused has pleaded guilty to a lesser included offense, also ask the following question.]
Effect of guilty pleas to lesser included offenses

SCM: Do you understand that your pleas of guilty to the lesser included offense of _______________ confess all the elements of the offense charged except _______________, and that no proof is necessary to establish those elements admitted by your pleas?

ACC: _______________.

SCM: The following elements state what would have to be proved beyond a reasonable doubt before the court-martial could find you guilty if you had pleaded not guilty. As I read each of these elements to you, ask yourself whether each is true and whether you want to admit that each is true, and then be prepared to discuss each of these elements with me when I have finished.

The elements of the offense(s) which your pleas of guilty admit are _______________

[Note 14. Read the elements of the offense(s) from the appropriate punitive article in Part IV. This advice should be specific as to names, dates, places, amounts, and acts.]

Do you understand each of the elements of the offense(s)?

ACC: _______________.

SCM: Do you believe, and admit, that taken together these elements correctly describe what you did?

ACC: _______________.

[Note 15. The summary court-martial should now question the accused about the circumstances of the offense(s) to which the accused has pleaded guilty. The accused will be placed under oath for this purpose. See oath below. The purpose of these questions is to develop the circumstances in the accused's own words, so that the summary court-martial may determine whether each element of the offense(s) is established.]

Oath to accused for guilty plea inquiry

SCM: Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

ACC: _______________.

SCM: Do you have any questions about the meaning and effect of your pleas of guilty?

ACC: _______________.

SCM: Do you believe that you understand the meaning and effect of your pleas of guilty?

ACC: _______________.

[Note 14. Read the elements of the offense(s) from the appropriate punitive article in Part IV. This advice should be specific as to names, dates, places, amounts, and acts.]

Do you understand each of the elements of the offense(s)?

ACC: _______________.

SCM: Do you believe, and admit, that taken together these elements correctly describe what you did?

ACC: _______________.

[Note 15. The summary court-martial should now question the accused about the circumstances of the offense(s) to which the accused has pleaded guilty. The accused will be placed under oath for this purpose. See oath below. The purpose of these questions is to develop the circumstances in the accused's own words, so that the summary court-martial may determine whether each element of the offense(s) is established.]
GUIDE FOR SUMMARY COURTS-MARTIAL

Determination of providence of pleas of guilty

[Note 16. Pleas of guilty may not be accepted unless the summary court-martial finds that they are made voluntarily and with understanding of their meaning and effect, and that the accused has knowingly, intelligently, and consciously waived the rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses. Pleas of guilty may be improvident when the accused makes statements at any time during the trial which indicate that there may be a defense to the offense(s), or which are otherwise inconsistent with an admission of guilt. If the accused makes such statements and persists in them after questioning, then the summary court-martial must reject the accused's guilty pleas and enter pleas of not guilty for the accused. Turn to the section entitled "Procedures-Not Guilty Pleas" and continue as indicated. If (the) (any of the) accused's pleas of guilty are found provident, the summary court-martial should announce findings as follows.]

Acceptance of guilty pleas

SCM: I find that the pleas of guilty are made voluntarily and with understanding of their meaning and effect. I further specifically find that you have knowingly, intelligently, and consciously waived your rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against you. Accordingly, I find the pleas are provident, and I accept them. However, you may ask to take back your guilty pleas at any time before the sentence is announced. If you have a sound reason for your request, I will grant it. Do you understand that?

ACC: ____________.

If any not guilty pleas remain

[Note 17. If no pleas of not guilty remain, go to note 26. If the accused has changed pleas of guilty to not guilty, if the summary court-martial has entered pleas of not guilty to any charge(s) and specification(s), or if the accused has pleaded not guilty to any of the offenses or pleaded guilty to a lesser included offense, proceed as follows.]

Witnesses for the accused

SCM: If there are witnesses you would like to call to testify for you, give me the name, rank, and organization or address of each, and the reason you think they should be here, and I will arrange to have them present if their testimony would be material. Do you want to call witnesses?

ACC: ____________.

Calling witnesses

SCM: I call as a witness ________________.

Witness oath

SCM: [To the witness, both standing] Raise your right hand.

Do you swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth (. so help you God)? [Do not use the phrase, "so help you God," if the witness prefers to affirm.]

WIT: ____________.
SCM: Be seated. State your full name, rank, organization, and armed force (or if a civilian witness) full name, address, and occupation.

WIT: _____________________________

[Note 19. The summary court-martial should question each witness concerning the alleged offense(s). After direct examination of each witness, the accused must be given an opportunity to cross-examine. If the accused declines to cross-examine the witness, the summary court-martial should ask any questions that it feels the accused should have asked. If cross-examination occurs, the summary court-martial may ask questions on redirect examination and the accused may ask further questions in recross-examination.]

[Note 20. After each witness has testified, instruct the witness as follows.]

SCM: Do not discuss this case with anyone except the accused, counsel, or myself until after the trial is over. Should anyone else attempt to discuss this case with you, refuse to do so and report the attempt to me immediately. Do you understand that?

WIT: _____________________________

SCM: [To the witness] You are excused.

Recalling witnesses

[Note 21. Witnesses may be recalled if necessary. A witness who is recalled is still under oath and should be so reminded.]

[Note 22. After all witnesses against the accused have been called and any other evidence has been presented, the summary court-martial will announce the following.]

SCM: That completes the evidence against you. I will now consider the evidence in your favor.

Presentation of defense case

[Note 23. Witnesses for the accused should now be called to testify and other evidence should be presented. Before the defense case is terminated the summary court-martial should ask the accused if there are other matters the accused wants presented. If the accused has not testified, the summary court-martial should remind the accused of the right to testify or to remain silent.]

SCM: I have now heard all of the evidence. You may make an argument on this evidence before I decide whether you are guilty or not guilty.

Closing argument

[Note 24. The court-martial should normally close for deliberations. If the summary court-martial decides to close, proceed as follows.]

SCM: The court-martial is closed so that I may review the evidence. Wait outside the courtroom until I recall you.

Deliberations on findings

[Note 25. The summary court-martial should review the evidence and applicable law. It must acquit the accused unless it is convinced beyond a reasonable doubt by the evidence it has received in court in the presence of the accused that each element of the alleged offense(s) has been proved beyond a reasonable doubt. See R.C.M. 918. It may not consider any facts which were not admitted into evidence, such as a confession or admission of the accused which was excluded because it was taken in violation of Mil.R.Evid. 304. The summary court-martial may find the accused guilty of only the offense(s) charged, a lesser included offense, or of an offense which does not change the identity of an offense charged or a lesser included offense thereof.]
Announcing the findings

[Note 26. The summary court-martial should recall the accused, who will stand before the court-martial when findings are announced. All findings including any findings of guilty resulting from guilty pleas, should be announced at this time. The following forms should be used in announcing findings.]

Not guilty of all offenses
SCM: I find you of (the) (all) Charge(s) and Specification(s): Not Guilty.

Guilty of all offenses
SCM: I find you of (the) (all) Charge(s) and Specification(s): Guilty.

Guilty of some but not all offenses
SCM: I find you of (the) Specification (__________) of (the) Charge (__________): Not Guilty; of (the) Specification (__________) of (the) Charge (__________): Guilty; of (the) Charge (__________): Guilty.

Guilty of lesser included offense or with exceptions and substitutions
SCM: I find you of (the Specification (__________) of (the) Charge (__________): Guilty, except the words ____________ and ____________; (substituting therefor, respectively, the words ____________ and ____________;) of the excepted words: Not Guilty; (of the substituted words: Guilty;) of the Charge: (Guilty) (Not Guilty, but Guilty of a violation of Article ____________, UCMJ, a lesser included offense).

Entry of findings
[Note 27. The summary court-martial shall note all findings on the record of trial.]

Procedure if total acquittal
[Note 28. If the accused has been found not guilty of all charges and specifications, adjourn the court-martial, excuse the accused, complete the record of trial, and return the charge sheet, personnel records, allied papers, and record of trial to the convening authority.]

Procedure if any findings of guilty
[Note 29. If the accused has been found guilty of any offense, proceed as follows.

SCM: I will now receive information in order to decide on an appropriate sentence. Look at the information concerning you on the front page of the charge sheet. Is it correct?

[Note 30. If the accused alleges that any of the information is incorrect, the summary court-martial must determine whether it is correct and correct the charge sheet, if necessary.]

[Note 31. Evidence from the accused's personnel records, including evidence favorable to the accused, should now be received in accordance with R.C.M. 1001(b)(2). These records should be shown to the accused.]

SCM: Do you know any reason why I should not consider these?

ACC: ________________.

[Note 32. The summary court-martial shall resolve objections under R.C.M. 1002(b)(2) and the Military Rules of Evidence and then proceed as follows. See also R.C.M. 1001(b)(3), (4), and (5) concerning other evidence which may be introduced.]
Extenuation and mitigation

SCM: In addition to the information already admitted which is favorable to you, and which I will consider, you may call witnesses who are reasonably available, you may present evidence, and you may make a statement. This information may be to explain the circumstances of the offense(s), including any reasons for committing the offense(s), and to lessen the punishment for the offense(s) regardless of the circumstances. You may show particular acts of good conduct or bravery, and evidence of your reputation in the service for efficiency, fidelity, obedience, temperance, courage, or any other trait desirable in a good servicemember. You may call available witnesses or you may use letters, affidavits, certificates of military and civil officers, or other similar writings. If you introduce such matters, I may receive written evidence for the purpose of contradicting the matters you presented. If you want me to get some military records that you would otherwise be unable to obtain, give me a list of these documents. If you intend to introduce letters, affidavits, or other documents, but you do not have them, tell me so that I can help you get them. Do you understand that?

ACC: ______________.

Rights of accused to testify, remain silent, and make an unsworn statement

SCM: I informed you earlier of your right to testify under oath, to remain silent, and to make an unsworn statement about these matters.

SCM: Do you understand these rights?

ACC: ______________.

SCM: Do you wish to call witnesses or introduce anything in writing?

ACC: ______________.

[Note 33. If the accused wants the summary court-martial to obtain evidence, arrange to have the evidence produced as soon as practicable.]

[Note 34. The summary court-martial should now receive evidence favorable to the accused. If the accused does not produce evidence, the summary court-martial may do so if there are matters favorable to the accused which should be presented.]

SCM: Do you wish to testify or make an unsworn statement?

ACC: ______________.

Questions concerning pleas of guilty

[Note 35. If as a result of matters received on sentencing, including the accused's testimony or an unsworn statement, any matter is disclosed which is inconsistent with the pleas of guilty, the summary court-martial must immediately inform the accused and resolve the matter. See Note 16.]

Argument on sentence

SCM: You may make an argument on an appropriate sentence.

ACC: ______________.
GUIDE FOR SUMMARY COURTS-MARTIAL  

Deliberations prior to announcing sentence
[Note 36. After receiving all matters relevant to sentencing, the summary court-martial should normally close for deliberations. If the summary court-martial decides to close, proceed as follows.]

Closing the court-martial
SCM: This court-martial is closed for determination of the sentence. Wait outside the courtroom until I recall you.

[Note 37. See Appendix 11 concerning proper form of sentence. Once the summary court-martial has determined the sentence, it should reconvene the court-martial and announce the sentence as follows.]

Announcement of sentence
SCM: Please rise. I sentence you to ____________

[Note 38. If the sentence includes confinement, advise the accused as follows.]

SCM: You have the right to request in writing that [name of convening authority] defer your sentence to confinement. Deferment is not a form of clemency and is not the same as suspension of a sentence. It merely postpones the running of a sentence to confinement.

[Note 39. Whether or not the sentence includes confinement, advise the accused as follows.]

SCM: You have the right to submit in writing a petition or statement to the convening authority. This statement may include any matters you feel the convening authority should consider, a request for clemency, or both. This statement must be submitted within 7 days, unless you request and convening authority approves an extension of up to 20 days. After the convening authority takes action, your case will be reviewed by a judge advocate for legal error. You may suggest, in writing, legal errors for the judge advocate to consider. If, after final action has been taken in your case, you believe that there has been a legal error, you may request review of your case by The Judge Advocate General of _____________. Do you understand these rights?

ACC: _____________.

Adjourning the court-martial
SCM: This court-martial is adjourned.

Entry on charge sheet
[Note 40. Record the sentence in the record of trial, inform the convening authority of the findings, recommendations for suspension, if any, and any deferment request. If the sentence includes confinement, arrange for the delivery of the accused to the accused's commander, or someone designated by the commander, for appropriate action. Ensure that the commander is informed of the sentence. Complete the record of trial and forward to the convening authority.]
APPENDIX 10
FORMS OF FINDINGS

a. Announcement of findings

See R.C.M. 922.

In announcing the findings the president or, in cases tried by military judge alone, the military judge should announce:

“(Name of accused), this court-martial finds you ________________.”

The findings should now be announced following one of the forms in b below, or any necessary modification or combination thereof.

b. Forms

[Note: The following may, in combination with the format for announcing the findings in a above, be used as a format for a findings worksheet, appropriately tailored for the specific case.]

Forms of Findings

I. Acquittal of all Charges

Of all Specifications and Charges: Not Guilty

II. Findings of Not Guilty only by Reason of Lack of Mental Responsibility

Of (the) Specification (______________) of (the) Charge (______________) and of (the) Charge (______________): Not Guilty only by Reason of Lack of Mental Responsibility

III. Conviction of all Charges

Of all Specifications and Charges: Guilty

IV. Conviction of all Specifications of some Charges

Of all Specification(s) of Charge I: Guilty

Of Charge I: Guilty

Of all Specification(s) of Charge: Not Guilty

Of Charge II: Not Guilty

V. Conviction of some Specifications of a Charge

Of Specification(s) ______________ of Charge I: Guilty
APPENDIX 10

Of Specification(s) __________ of Charge I: Not Guilty

Of Charge I: Guilty

VI. Conviction by exceptions

Of (the) Specification (__________) of Charge I: Guilty except the words “__________”; Of the excepted words: Not Guilty

Of Charge I: (Guilty) (Not Guilty, but Guilty of a violation of Article __________)

VII. Conviction by exceptions and substitutions

Of (the) Specification (__________) of Charge I: Guilty except the words “__________,” substituting therefor the words “__________”; Of the excepted words: Not Guilty Of the substituted words: Guilty

Of Charge I: (Guilty) (Not Guilty, but Guilty of a violation of Article __________)

VIII. Conviction under one Charge of offenses under different Articles

Of Specification 1 of (the) Charge (__________): Guilty, of Specification 2 of (the) Charge (__________): Guilty, except the words “__________.”

Of (the) Charge (__________), as to Specification 1: Guilty, as to Specification 2: Not Guilty, but Guilty of a violation of Article __________.
APPENDIX 11
FORMS OF SENTENCES

a. Announcement of sentence

See R.C.M. 1007.

In announcing the sentence, the president or, in cases tried by military judge alone, the military judge should announce:

"(Name of accused), this court-martial sentences you ____________ ."

The sentence should now be announced following one of the forms contained in b below, or any necessary modification or combination thereof. Each of the forms of punishment prescribed in b are separate, that is, the adjudging of one form of punishment is not contingent upon any other punishment also being adjudged. The forms in c, however, may be combined and modified so long as the punishments adjudged is not forbidden by the code and does not exceed the maximum authorized by this Manual (see R.C.M. 1003 and Part IV) in the particular case being tried. In announcing a sentence consisting of combined punishments, the president or military judge may, for example, state:

"To be dishonorably discharged from the service, to be confined for one year, to forfeit all pay and allowances, and to be reduced to Private, E-1;” or

"To be discharged from the service with a bad-conduct discharge, to be confined for six months, and to forfeit $35.00 pay per month for six months;” or

"To be dismissed from the service, to be confined for one year, and to forfeit all pay and allowances;” or

"To perform hard labor without confinement for one month and to forfeit $25.00 pay per month for one month."

b. Single punishment forms

[Note: The following may, in combination with the format for announcing the sentence in a above, be used as a format for a sentence worksheet, appropriately tailored for the specific case.]

1. To no punishment

Reprimand

2. To be reprimanded.

Forfeitures, Etc.

3. To forfeit $___________ pay per month for ____________ (months) (years).

4. To forfeit all pay and allowances.
5. To pay the United States a fine of $__________ (and to serve (additional) confinement of __________ (days) (months) (years) if the fine is not paid).

Loss of Numbers, Etc.

6. To (lose __________ unrestricted numbers) (be placed at the foot of the __________’s list of present date and to remain there until you shall have lost unrestricted numbers) (lose __________unrestricted line officer running mate numbers).

7. To lose __________ month’s seniority in the date of his warrant (as machinist) (___________), and to lose corresponding rank in the list of (machinists) (___________) of the (Navy) (___________).

Reduction of Enlisted Personnel

8. To be reduced to __________

Restraint and Hard Labor

9. To be restricted to the limits of __________ for (days) (months).

10. To perform hard labor without confinement for __________ (days) (months).

11. To be confined for __________ (days) (months) (years) (the length of your natural life).

12. To be confined on (bread and water) (diminished rations) for __________ days.

Punitive Discharge

13. To be discharged from the service with a bad-conduct discharge (Enlisted Personnel only).

14. To be dishonorably discharged from the service (Enlisted Personnel and Noncommissioned Warrant Officers only).

15. To be dismissed from the service (Commissioned Officers, Commissioned Warrant Officers, Cadets, and Midshipmen only).

Death

16. To be put to death.

[Note: A court-martial has no authority to suspend a sentence or any part of a sentence. Numbers 6 and 7 apply only in the Navy, Marine Corps, and Coast Guard.]
## APPENDIX 12
### MAXIMUM PUNISHMENT CHART

This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

<table>
<thead>
<tr>
<th>Article</th>
<th>Offense</th>
<th>Discharge</th>
<th>Confinement</th>
<th>Forfeitures</th>
</tr>
</thead>
<tbody>
<tr>
<td>77</td>
<td>Principals (see Part IV, ¶ 1 and pertinent offenses)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>78</td>
<td>Accessory after the fact (see Part IV, ¶ 3.e.)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>79</td>
<td>Lesser included offenses (see Part IV, ¶ 2 and pertinent offenses)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>80</td>
<td>Attempts (see Part IV, ¶ 4.e.)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>81</td>
<td>Conspiracy (see Part IV, ¶ 5.e.)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>82</td>
<td>Solicitation</td>
<td>DD, BCD 3 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td></td>
<td>If solicited offense committed, or attempted, see Part IV, ¶ 6.e.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>If solicited offense not committed:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Solicitation to desert ¹</td>
<td>DD, BCD 10 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Solicitation to mutiny ¹</td>
<td>DD, BCD 10 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Solicitation to commit act of misbehavior before enemy ¹</td>
<td>DD, BCD 10 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Solicitation to commit act of sedition ¹</td>
<td>DD, BCD 10 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td>83</td>
<td>Fraudulent enlistment, appointment</td>
<td>DD, BCD 2 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td>84</td>
<td>Fraudulent separation</td>
<td>DD, BCD 5 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td>85</td>
<td>Desertion</td>
<td>DD, BCD 5 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Intent to avoid hazardous duty, shirk important service ¹</td>
<td>DD, BCD 5 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other cases</td>
<td>DD, BCD 3 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Terminated by apprehension</td>
<td>DD, BCD 2 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Otherwise terminated</td>
<td>DD, BCD 2 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td>86</td>
<td>Absence without leave, etc.</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Failure to go, going from place of duty</td>
<td>1 mo.</td>
<td>2/3 1 mo.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Absence from unit, organization, etc.</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Not more than 3 days</td>
<td>None</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>More than 3, not more than 30 days</td>
<td>None</td>
<td>2/3 6 mos.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>More than 30 days</td>
<td>DD, BCD 1 yr.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td></td>
<td>More than 30 days and terminated by apprehension</td>
<td>DD, BCD 1 yr., 6 mos.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Absence from guard or watch</td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
<tr>
<td></td>
<td>Absence from guard or watch with intent to abandon</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Absence with intent to avoid maneuvers, field exercises</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td>87</td>
<td>Missing movement</td>
<td>DD, BCD 2 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Through design</td>
<td>DD, BCD 1 yr.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Through neglect</td>
<td>BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td>88</td>
<td>Contempt toward officials</td>
<td>Dismissal</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td>89</td>
<td>Disrespect toward superior commissioned officer</td>
<td>BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td>90</td>
<td>Assaulting, wilfully disobeying superior commissioned officer</td>
<td>DD, BCD 10 yrs.</td>
<td>Total</td>
<td></td>
</tr>
</tbody>
</table>

¹ Striking, drawing or lifting up any weapon or offering any violence toward superior commissioned officer execution of duty.
This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1063 for specific limits and additional information concerning maximum punishments.

<table>
<thead>
<tr>
<th>Article</th>
<th>Offense</th>
<th>Discharge</th>
<th>Confine ment 5 yrs.</th>
<th>Forfeitures Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>91</td>
<td>Willfully disobeying lawful order of superior commissioned officer 1</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Striking or assaulting:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Warrant officer</td>
<td>DD, BCD</td>
<td></td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Superior noncommissioned officer</td>
<td>DD, BCD</td>
<td></td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Other noncommissioned or petty officer</td>
<td>DD, BCD</td>
<td></td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Willfully disobeying:</td>
<td>DD, BCD</td>
<td>2 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Noncommissioned or petty officer</td>
<td>BCD</td>
<td>1 yr.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Contempt, disrespect toward:</td>
<td>BCD</td>
<td>9 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Warrant Officer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Superior noncommissioned or petty officer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other noncommissioned or petty officer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>92</td>
<td>Failure to obey order, regulation</td>
<td>DD, BCD</td>
<td>2 yrs.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Violation, failure to obey general order or regulation 2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Derteliction in performance of duties</td>
<td>BC D</td>
<td>6 mos.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Through neglect, culpable inefficiency</td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
<tr>
<td>93</td>
<td>Cruelty, maltreatment of subordinates</td>
<td>DD, BCD</td>
<td>1 yr.</td>
<td></td>
</tr>
<tr>
<td>94</td>
<td>Mutiny &amp; sedition</td>
<td>Death, DD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td>95</td>
<td>Resisting apprehension, breach of arrest; escape</td>
<td>BCD</td>
<td>1 yr.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Resisting apprehension</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Breaking arrest</td>
<td>BCD</td>
<td>6 mos.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Escape from custody, pretrial confinement, or confinement on bread and</td>
<td>DD, BCD</td>
<td>1 yr.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>water or diminished rations</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Escape from post-trial confinement</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td></td>
</tr>
<tr>
<td>96</td>
<td>Releasing prisoner without proper authority</td>
<td>DD, BCD</td>
<td>2 yrs.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Suffering prisoner to escape through neglect</td>
<td>BCD</td>
<td>1 yr.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Suffering prisoner to escape through design</td>
<td>DD, BCD</td>
<td>2 yrs.</td>
<td></td>
</tr>
<tr>
<td>97</td>
<td>Unlawful detention</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td></td>
</tr>
<tr>
<td>98</td>
<td>Noncompliance with procedural rules, etc.</td>
<td>BCD</td>
<td>6 mos.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Unnecessary delay in disposition of case</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td></td>
</tr>
<tr>
<td>99</td>
<td>Misbehavior before enemy</td>
<td>Death, DD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td>100</td>
<td>Subordinate compelling surrender</td>
<td>Death, DD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td>101</td>
<td>Improper use of countersign</td>
<td>Death, DD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td>102</td>
<td>Forcing safeguard</td>
<td>Death, DD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td>103</td>
<td>Captured, abandoned property; failure to secure, etc.</td>
<td>BCD</td>
<td>6 mos.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Of value of $100.00 or less</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Looting, pillaging</td>
<td>DD, BCD</td>
<td>Life</td>
<td></td>
</tr>
<tr>
<td>104</td>
<td>Aiding the enemy</td>
<td>Death, DD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td>105</td>
<td>Misconduct as prisoner</td>
<td>DD, BCD</td>
<td>Life</td>
<td>Total</td>
</tr>
</tbody>
</table>
This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

<table>
<thead>
<tr>
<th>Article</th>
<th>Offense</th>
<th>Discharge</th>
<th>Confinement</th>
<th>Forfeitures</th>
</tr>
</thead>
<tbody>
<tr>
<td>106</td>
<td>Spying</td>
<td>Mandatory Death,</td>
<td>DD, BCD</td>
<td></td>
</tr>
<tr>
<td>106a</td>
<td>Espionage Cases listed in Art. 106a(a)(I)(A)-(D)</td>
<td>Death, DD, BCD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Other cases</td>
<td>DD, BCD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td>107</td>
<td>False official statements</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>108</td>
<td>Military property; loss, damage, destruction, disposition</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Selling, otherwise disposing</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Of value of $100 or less</td>
<td>BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Of value of more than $100.00</td>
<td>DD, BCD</td>
<td>10 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Any firearm, explosive or incendiary device</td>
<td>DD, BCD</td>
<td>10 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Damaging, destroying, losing or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Through neglect, of a value of:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>$100.00 or less</td>
<td>None</td>
<td>6 mos.</td>
<td>2/3 6 mos.</td>
</tr>
<tr>
<td></td>
<td>More than $100.00</td>
<td>BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Willfully, of a value of</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>$100.00 or less</td>
<td>BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>More than $100.00</td>
<td>DD, BCD</td>
<td>10 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Any firearm, explosive, or incendiary device</td>
<td>DD, BCD</td>
<td>10 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>109</td>
<td>Property other than military property of U.S.: loss, damage, destruction, dispostion:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Wasting, spoiling, destroying, or damaging property of a value of:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>$100.00 or less</td>
<td>BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>More than $100.00</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>110</td>
<td>Hazarding a vessel</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Willfully and wrongfully</td>
<td>Death, DD, BCD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Negligently</td>
<td>DD, BCD</td>
<td>2 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>111</td>
<td>Drunken driving</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Resulting in personal injury</td>
<td>DD, BCD</td>
<td>1 yr., 6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Other cases</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td>112</td>
<td>Drunk on duty</td>
<td>BCD</td>
<td>9 mos.</td>
<td>Total</td>
</tr>
<tr>
<td>112a</td>
<td>Wrongful use, possession, etc. of controlled substances 3</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Wrongful use, possession, manufacture, or introduction of:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Amphetamine, cocaine, heroin, lysergic acid diethylamide,</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>marijuana (except possession of less than 30 grams or use),</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>methamphetamine, opium, phencyclidine, secobarbital, and</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Schedule I, II, and III controlled substances</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Marijuana (possession of less than 30 grams or use), phenoabital,</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>and Schedule IV and V controlled substances</td>
<td>DD, BCD</td>
<td>2 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Wrongful distribution of, or, with intent to distribute, wrongful</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>possession, manufacture, introduction, or wrongful importation of or</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>exportation of:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Amphetamine, cocaine, heroin, lysergic acid diethylamide,</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>marijuana, methamphetamine, opium, phencyclidine, secobarbital, and</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Schedule I, II, and III controlled substances</td>
<td>DD, BCD</td>
<td>15 yrs.</td>
<td>Total</td>
</tr>
</tbody>
</table>
This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

<table>
<thead>
<tr>
<th>Article</th>
<th>Offense</th>
<th>Discharge</th>
<th>Confinement</th>
<th>Forfeitures</th>
</tr>
</thead>
<tbody>
<tr>
<td>113</td>
<td>Misbehavior of sentinel or lookout</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>In time of war</td>
<td>Death, DD, BCD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>In other time:</td>
<td>DD, BCD</td>
<td>10 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>While receiving special pay under 37 U.S.C. 310</td>
<td>DD, BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Other places</td>
<td>DD, BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td>114</td>
<td>Dueling</td>
<td>DD, BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td>115</td>
<td>Malingering</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Feigning illness, etc.</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>In time of war, or while receiving special pay under 37 U.S.C. 310</td>
<td>DD, BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Other</td>
<td>DD, BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td>116</td>
<td>Riot</td>
<td>DD, BCD</td>
<td>10 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>117</td>
<td>Provoking speech, gestures</td>
<td>None</td>
<td>6 mos.</td>
<td>2/3 6 mos.</td>
</tr>
<tr>
<td>118</td>
<td>Murder</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Article 118(1) or (4)</td>
<td>Death, mandatory minimum life, DD, BCD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Article 118(2) or (3)</td>
<td>DD, BCD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td>119</td>
<td>Manslaughter</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Voluntary</td>
<td>DD, BCD</td>
<td>10 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Involuntary</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>120</td>
<td>Rape</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Carnal knowledge</td>
<td>Death, DD, BCD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td>121</td>
<td>Larceny</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Of military property of a value of $100.00 or less</td>
<td>BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Of property other than military property of a value of $100.00 or less</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Of military property of a value of more than $100.00 or of any military motor vehicle, aircraft, vessel, firearm, or explosive</td>
<td>DD, BCD</td>
<td>10 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Of property other than military property of a value of more than $100.00 or any motor vehicle, aircraft, vessel, firearm, or explosive</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Wrongful appropriation</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Of value of $100.00 or less</td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 3 mos.</td>
</tr>
<tr>
<td></td>
<td>Of value of more than $100.00</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Of vehicle, aircraft, vessel</td>
<td>DD, BCD</td>
<td>2 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>122</td>
<td>Robbery</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Committed with a firearm</td>
<td>DD, BCD</td>
<td>15 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Other cases</td>
<td>DD, BCD</td>
<td>10 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>123</td>
<td>Forgery</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>123a</td>
<td>Checks, etc., insufficient funds, intent to deceive</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>To procure anything of value of:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>$100.00 or less</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>More than $100.00</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
</tbody>
</table>
MAXIMUM PUNISHMENT CHART

This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

<table>
<thead>
<tr>
<th>Article</th>
<th>Offense</th>
<th>Discharge</th>
<th>Confinement</th>
<th>Forfeitures</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td>124</td>
<td>Maiming</td>
<td>DD, BCD</td>
<td>7 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>125</td>
<td>Sodomy</td>
<td>DD, BCD</td>
<td>20 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>By force and without consent</td>
<td>DD, BCD</td>
<td>20 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>With child under age of 16 years</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>126</td>
<td>Arson</td>
<td>DD, BCD</td>
<td>20 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Aggravated</td>
<td>DD, BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Other cases, where property value is:</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>$100.00 or less</td>
<td>DD, BCD</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>More than $100.00</td>
<td>DD, BCD</td>
<td></td>
<td></td>
</tr>
<tr>
<td>127</td>
<td>Extortion</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>128</td>
<td>Assaults</td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
<tr>
<td></td>
<td>Simple assault</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Assault consummated by battery</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Assault upon commissioned officer of U.S. or friendly power not in</td>
<td>DD, BCD</td>
<td>1 yr., 6</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>execution of office</td>
<td></td>
<td>mos.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Assault upon warrant officer, not in execution of office</td>
<td>DD, BCD</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Assault upon noncommissioned or petty officer not in execution of</td>
<td>DD, BCD</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>office</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Assault upon, in execution of office, person serving as sentinel,</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>lookout, security policeman, military policeman, shore patrol, master</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>at arms, or civil law enforcement</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Assault consummated by battery upon child under age of 16 years</td>
<td>DD, BCD</td>
<td>2 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Assault with dangerous weapon or means likely to produce grievous</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>bodily harm or death:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Committed with loaded firearm</td>
<td>DD, BCD</td>
<td>8 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Other cases</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Assault in which grievous bodily harm is intentionally inflicted:</td>
<td>DD, BCD</td>
<td>10 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>With a loaded firearm</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other cases</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>129</td>
<td>Burglary</td>
<td>DD, BCD</td>
<td>10 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>130</td>
<td>Housebreaking</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>131</td>
<td>Perjury</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>132</td>
<td>Frauds against the United States</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Offenses under article 132(1) or (2)</td>
<td>DD, BCD</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Offenses under article 132(3) or (4)</td>
<td>DD, BCD</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>$100.00 or less</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>More than $100.00</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>133</td>
<td>Conduct unbecoming officer (see Part IV, para. 59e)</td>
<td>Dismissal</td>
<td>1 yr. or as</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>as prescribed</td>
<td></td>
</tr>
<tr>
<td>134</td>
<td>Abusing public animal</td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
<tr>
<td></td>
<td>Adultery</td>
<td>DD, BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Assault, indecent</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
</tbody>
</table>
This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

<table>
<thead>
<tr>
<th>Article</th>
<th>Offense</th>
<th>Discharge</th>
<th>Confinement</th>
<th>Forfeitures</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Assault</td>
<td>DD, BCD</td>
<td>20 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>With intent to commit murder or rape</td>
<td></td>
<td></td>
<td>10 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>With intent to commit voluntary manslaughter, robbery, sodomy, arson, or burglary</td>
<td></td>
<td></td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>With intent to commit housebreaking</td>
<td></td>
<td></td>
<td>2 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>Bigamy</td>
<td></td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>Bribery</td>
<td></td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>Graft</td>
<td></td>
<td>DD, BCD</td>
<td>10 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>Burning with intent to defraud</td>
<td></td>
<td>DD, BCD</td>
<td>4 mos.</td>
<td>2/3 4 mos.</td>
</tr>
<tr>
<td>Check, worthless, making and uttering—by dishonorably failing to maintain funds</td>
<td></td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td>Cohabitation, wrongful</td>
<td></td>
<td>None</td>
<td>4 mos.</td>
<td>2/3 4 mos.</td>
</tr>
<tr>
<td>Correctional custody, escape from</td>
<td></td>
<td>DD, BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td>Correctional custody, breach of</td>
<td></td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td>Debt, dishonorably failing to pay</td>
<td></td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td>Disloyal statements</td>
<td></td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>Disorderly conduct</td>
<td></td>
<td></td>
<td>6 mos.</td>
<td>2/3 6 mos.</td>
</tr>
<tr>
<td>Under such circumstances as to bring discredit</td>
<td>None</td>
<td>4 mos.</td>
<td>2/3 4 mos.</td>
<td></td>
</tr>
<tr>
<td>Other cases</td>
<td></td>
<td>None</td>
<td>1 mo.</td>
<td>2/3 1 mo.</td>
</tr>
<tr>
<td>Drunkenness</td>
<td>Aboard ship or under such circumstances as to bring discredit</td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
<tr>
<td>Other cases</td>
<td></td>
<td>None</td>
<td>1 mo.</td>
<td>2/3 1 mo.</td>
</tr>
<tr>
<td>Drunk and disorderly</td>
<td>Aboard ship</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td>Under such circumstances as to bring discredit</td>
<td>None</td>
<td>6 mos.</td>
<td>2/3 6 mos.</td>
<td></td>
</tr>
<tr>
<td>Other cases</td>
<td></td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
<tr>
<td>Drinking liquor with prisoner</td>
<td></td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
<tr>
<td>Drunk prisoner</td>
<td></td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
<tr>
<td>Drunkenness—in capacitating oneself for performance of duties through prior indulgence in intoxicating liquor or drugs</td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
<td></td>
</tr>
<tr>
<td>False or unauthorized pass offenses</td>
<td>Possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>All other cases</td>
<td></td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td>False pretenses, obtaining services under</td>
<td>Of a value of $100.00 or less</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td>Of a value of more than $100.00</td>
<td></td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>False swearing</td>
<td></td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td>Firearm, discharging—through negligence</td>
<td></td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
</tbody>
</table>
This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

<table>
<thead>
<tr>
<th>Article</th>
<th>Offense</th>
<th>Discharge</th>
<th>Confinement</th>
<th>Forfeitures</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Firearm, discharging—willfully, under such circumstances as to endanger human life</td>
<td>DD, BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Fleeing scene of accident</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Fraternization</td>
<td>Dismissal</td>
<td>2 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Gambling with subordinates</td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
<tr>
<td></td>
<td>Homicide, negligent</td>
<td>BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td>Impersonation</td>
<td>With intent to defraud</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>All other cases</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Indecent act, liberties with child</td>
<td>DD, BCD</td>
<td>7 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Indecent exposure</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Indecent language</td>
<td>DD, BCD</td>
<td>2 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Other cases</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Indecent acts with another</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Jumping from vessel into the water</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Kidnapping</td>
<td>DD, BCD</td>
<td>Life</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Mail, taking, opening, secreting, destroying, or stealing</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Mails, depositing or causing to be deposited obscene matters in</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Misprision of serious offense</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Obstructing justice</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Wrongful interference with an adverse administrative proceeding</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Pandering</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Prostitution</td>
<td>DD, BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Parole, violation of</td>
<td>BCD</td>
<td>6 mos.</td>
<td>2/3 6 mos.</td>
</tr>
<tr>
<td></td>
<td>Perjury, subornation of</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Public record, altering, concealing, removing, mutilating, obliterating, or destroying</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Quarantine, breaking</td>
<td>None</td>
<td>6 mos.</td>
<td>2/3 6 mos.</td>
</tr>
<tr>
<td></td>
<td>Restriction, breaking</td>
<td>None</td>
<td>1 mo.</td>
<td>2/3 1 mo.</td>
</tr>
<tr>
<td></td>
<td>Seizure, destruction, removal, or disposal of property to prevent</td>
<td>DD, BCD</td>
<td>1 yr.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Sentinel, lookout</td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
<tr>
<td></td>
<td>Disrespect to</td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
<tr>
<td></td>
<td>Loitering or wrongfully sitting on post by</td>
<td>DD, BCD</td>
<td>2 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>In time of war or while receiving special pay</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Other cases</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Soliciting another to commit an offense (see Part IV, para. 105e)</td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
<tr>
<td></td>
<td>Stolen property, knowingly receiving, buying, concealing</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Of a value of $100.00 or less</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Of a value of more than $100.00</td>
<td>None</td>
<td>3 mos.</td>
<td>2/3 3 mos.</td>
</tr>
<tr>
<td></td>
<td>Straggling</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Testify, wrongfully refusing to</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>Threat, bomb, or hoax</td>
<td>DD, BCD</td>
<td>5 yrs.</td>
<td>Total</td>
</tr>
</tbody>
</table>
This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

<table>
<thead>
<tr>
<th>Article</th>
<th>Offense</th>
<th>Discharge</th>
<th>Confinement</th>
<th>Forfeitures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Threat, communicating</td>
<td>DD, BCD</td>
<td>3 yrs.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td>Unlawful entry</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td>Weapon, concealed, carrying</td>
<td>BCD</td>
<td>1 yr.</td>
<td>Total</td>
<td></td>
</tr>
<tr>
<td>Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button</td>
<td>BCD</td>
<td>6 mos.</td>
<td>Total</td>
<td></td>
</tr>
</tbody>
</table>

Notes:
1. Suspended in time of war.
2. See paragraph 16(e)(1) & (2) Note, Part IV
3. When any offense under paragraph 37, Part IV, is committed: while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under the control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; while receiving special pay under 37 U.S.C. sec. 310; in time of war; or in a confinement facility used by or under the control of the armed forces, the maximum period of confinement authorized for such offense shall be increased by 5 years.
APPENDIX 13

GUIDE FOR PREPARATION OF RECORD OF TRIAL BY GENERAL COURT-MARTIAL AND BY SPECIAL COURT-MARTIAL WHEN A VERBATIM RECORD IS NOT REQUIRED

a. Record of trial

Note. See first three notes at beginning of Appendix 14. If a verbatim record is not required (see R.C.M. 1103(h)(2)(C) and (c)(2)), a summarized report of testimony, objections, and other proceedings is permitted. In the event of an acquittal of all charges and specifications, or termination of the proceedings prior to findings by withdrawal, mistrial, or dismissal, the record may be further summarized and need only contain sufficient information to establish lawful jurisdiction over the accused and the offenses. See R.C.M. 1103(e).

This appendix is to be used as a general guide; the actual record may depart from it as appropriate. The manner of summarizing several items of procedure is shown in Appendix 14a.

Note. All records of trial should begin as follows:

Title

RECORD OF TRIAL

of

(Name last, first, middle initial) (Service No.) (Grade)

(Organization and armed force) (Station or ship)

by

COURT-MARTIAL

Convened by

(Title of convening authority)

(Command of convening authority)

Tried at

on 19

(Date or dates of trial)

COPIES OF RECORD

Copies of record

A13-1
 RECEIPT FOR COPY OF RECORD

I hereby acknowledge receipt of a copy of the above-described record of trial, delivered to me at ________ this ________ day of ________, 19_______.

(Signature of accused or defense counsel)

Note. See R.C.M. 1104(b)(1) concerning service of record on the accused or defense counsel.

CERTIFICATE

I certify that on this day delivery of a copy of the above-described record of trial was made to the accused, ________ at ________, by ________.

(Signature of trial counsel)

Note. If accused's defense counsel receives the record, the trial counsel must attach an explanation to the record. See R.C.M. 1104(b)(1)(C). The following format may be used:

The accused's defense counsel was served the accused's copy of the record because (the accused so requested in a written request, which is attached) (the accused so requested on the record at the court-martial) (the accused was transferred to ________) (the accused is absent without authority) ________.

(Signature of trial counsel)

Note. If the accused cannot be served and has no counsel to receive the record, an explanation for failure to serve the record will be attached to the record. See R.C.M. 1104(b)(1)(C). The following format may be used:

The accused was not served a copy of this record because the accused (is absent without authority) ________. Accused has no defense counsel to receive the record because (defense counsel has been excused under R.C.M. 505(d)(2)(B)) ________.
PROCEEDINGS OF A COURT-MARTIAL ARTICLE 39(a) SESSION. The summarized record of an Article 39(a) session should proceed as follows:

Note. If trial was before a special court-martial without a military judge, there will have been no Article 39(a) session. However, generally the same sequence will be followed except as noted below. In special courts-martial without a military judge, substitute “president” for “military judge” when it appears, and “court-martial” for “Article 39(a) session.”

The military judge called the Article 39(a) session to order (at) (on board) ________________, at ________________ hours, ________________ 19______________, pursuant to the following orders:

Note. Here insert a copy of the convening orders and copies of any amending orders. Any written orders detailing the military judge and counsel will be attached. Any request of an enlisted accused for enlisted members will be inserted immediately following the convening orders, together with any declaration of the nonavailability of such enlisted persons. Any written request for trial by the military judge alone will also be inserted at this point. See R.C.M. 503(a)(2), 903.

The session was called to order at ________________ hours, ________________ 19______________
The session (adjourned) (recessed) at ________________ hours, ________________ 19______________.

PERSONS PRESENT

Note. Here list the names of the military judge, counsel, accused, and members if present.

PERSONS ABSENT

Note. The names of the members need not be listed if members are not present. The absence of other detailed persons should be noted. The record should include any reasons given for the absence of detailed persons. If the accused was questioned about the absence of any detailed defense counsel, this inquiry should be summarized at the point in the record at which such inquiry occurred.

Accused and defense counsel present

The accused and the following (detailed defense counsel and associate or assistant defense counsel) (civilian or individual military counsel) were present:

The following detailed (reporter) (and) (interpreter) (was) (were) (had previously been) sworn:

Note. Applicable only when a reporter or interpreter is used.

Swearing reporter; interpreter

The trial counsel announced the legal qualifications and status as to oaths of all members of the prosecution (and that (he) (she) (they) had been detailed by ________________).
The trial counsel further stated that no member of the prosecution had acted in a manner which might tend to disqualify (him) (her) except as indicated below.

Note. If a member of the prosecution is unqualified or disqualified under R.C.M. 502(d) that will be shown, together with the action taken under R.C.M. 901(d). Any inquiry or hearing into the matter should be summarized.

The detailed defense counsel announced the legal qualifications and status as to oaths of all members of the defense (and) that he (and ____________) had been detailed by _____________.

Note. Legal qualifications of any civilian or individual military counsel will be shown.

The defense counsel stated that no member of the defense had acted in a manner which might tend to disqualify (him) (her) except as indicated below.

Note. If a member of the defense is unqualified or disqualified under R.C.M. 502(d), the record will show that fact and the action taken under R.C.M. 901(d). Any inquiry or hearing into the matter should be summarized.

The military judge informed the accused of the rights concerning counsel as set forth in Article 38(b) and R.C.M. 901(d).

The accused responded that he/she understood the rights with respect to counsel, and that he/she chose to be defended by ____________.

The military judge and the personnel of the prosecution and defense who were not previously sworn in accordance with Article 42(a) were sworn. The prosecution and each accused were extended the right to challenge the military judge for cause.

The military judge was (not) challenged for cause (by ____________) (on the ground that ____________).

Note. The record should show the grounds for the challenge, a summary of evidence presented, if any, and the action taken.

The military judge ascertained that the accused had been advised of his right to request trial by the military judge alone and that the accused did (not) desire to submit such a request.

Note. If the accused requests trial by the military judge alone, any written request will be included in the record. The action on the request, whether oral or written, should be indicated as follows:

After ascertaining that the accused had consulted with defense counsel and had been informed of the identity of the military judge and of the right to trial by members, the military judge (approved) (disapproved) the accused's request for trial by military judge alone.

Note. If the military judge announced at this point that the court-martial was assembled, the record should so reflect. If assembly was announced at a different point it should be so shown in the record.
GUIDE FOR PREPARATION OF RECORD

Note. If the military judge disapproved the accused's request, this fact and any reasons given for the disapproval should be summarized.

Note. If the accused did not submit, or the military judge disapproved, a request for trial by military judge alone, and if the accused is an enlisted person, the following should be included:

Request for enlisted members

The trial counsel announced that the accused had (not) made a request in writing that the membership of the court-martial include enlisted persons. The defense counsel announced that the accused had been advised of the right to request enlisted members and that the accused did (not) want to request enlisted members.

Note. If the accused did request enlisted members, the written request will be included in the record.

Convening authority identified

(Name, rank, and organization of convening authority) convened the court-martial and referred the charges and specifications to it.

Note. In a special court-martial without a military judge, ordinarily the examination and challenges of members would occur at this point. The format used below for examination and challenges may be inserted here as appropriate.

Arraignment

The accused was arraigned on the following charges and specifications:

Note. Here insert the original charge sheet. If there are not enough copies of the charge sheet to insert in each copy of the record, copy verbatim from the charge sheet the charges and specifications, and the name of the accuser, the affidavit, and the reference to the court-martial for trial.

Motions

Note. If any motions were made at arraignment, the substance of the motion, a summary of any evidence presented concerning it, and the military judge's ruling will be included in the record. Motions or objections made at other times in the court-martial should be similarly treated at a point in the record corresponding to when they were raised.

Pleas

The accused pleaded as follows:
To all the Specifications and Charges: (Not Guilty) (Guilty)
To Specification 1 of Charge I: (Not Guilty) (Guilty)
To Specification 2 of Charge 1: (Not Guilty) (Guilty)
To Charge I: (Not Guilty) (Guilty)

etc.

Note. If the accused pleads guilty the plea inquiry should be summarized. The following may be used as a guide.
The military judge inquired into the providence of the accused's pleas of guilty. The military judge informed the accused of: the right to counsel [if the accused had no counsel]; of the right to plead not guilty and to be tried by court-martial and that at such court-martial the accused would have the right to confront and cross-examine witnesses against the accused and the right against self-incrimination; that by pleading guilty the accused waived the rights to trial of the offense(s), to confront and cross-examine witnesses, and against self-incrimination; and that the military judge would question the accused, under oath, about the offense(s) to which the accused pleaded guilty and that if the accused answered those questions under oath, on the record, and in the presence of counsel, the accused's answers could be used against the accused in a prosecution for perjury or false statement. The accused stated that he/she understood these rights. The military judge questioned the accused and determined that the plea(s) of guilty (was) (were) voluntary and not the result of force or threats or of promises (other than those in the pretrial agreement). The military judge informed the accused of the elements of the offense(s) and the maximum punishment which could be imposed for (this) (these) offense(s). The accused stated that he/she understood.

The military judge asked the accused about the offense(s) to which the accused pleaded guilty. Under oath the accused stated as follows:

Note. Here summarize the accused's description of the offense(s).

The military judge ascertained that there was (not) a pretrial agreement in the case.

Note. If there was a pretrial agreement, the military judge's inquiry into it should be summarized. The following may be used as a guide:

The pretrial agreement was marked as Appellate Exhibit(s) _____________.
(The military judge did not examine Appellate Exhibit _____________ at this time.) The military judge inquired and ensured that the accused understood the agreement and that the parties agreed to its terms.

Note. If there was a question or dispute as to the meaning of any term in the agreement, the resolution of that matter should be described.

Note. If the accused entered a conditional guilty plea (see R.C.M. 910(a)(2)), this will be included in the record.

The military judge found the accused's pleas of guilty provident and accepted them.

Note. If findings were entered (see R.C.M. 910(g)) on any charges and specifications at this point, the record should so reflect. See FINDINGS below for format.

Note. If the accused pleaded not guilty to any charge(s) and specification(s) which were not dismissed or withdrawn, in trial before military judge alone, proceed with PRESENTATION OF PROSECUTION CASE. If the accused pleaded guilty to all charge(s) and specification(s) in trial before military judge alone, proceed with SENTENCING PROCEEDINGS below. If trial was before members proceed with INITIAL SESSION WITH MEMBERS below.
Note. If the court-martial recessed, closed, or adjourned, or if an Article 39(a) session terminated and a session of the court-martial begins, the record should indicate the time of the recess, closing, or adjournment, and the time of reopening, using the following formats:

For example:

The Article 39(a) session terminated at _____________ hours, _____________ 19____________. The court-martial (recessed) (adjourned) (closed) at _____________ hours, _____________ 19____________.

Note. Whenever the court-martial reopens after a recess or adjournment, or after being closed, the record should indicate whether any party, member, or the military judge previously present was absent, or, if not previously present, was now present. Persons present for the first time should be identified by name. For example:

The military judge and all parties previously present were again present. (The following members were also present _____________.) The members were (not) present.

The military judge and all parties previously present were again present, except _____________, detailed defense counsel who had been excused by _____________, _____________, certified in accordance with Article 27(b) was present as individual military counsel, and was previously sworn.

INITIAL SESSION WITH MEMBERS

Note. Except in a special court-martial without a military judge, ordinarily members will be first present at this point. In a special court-martial without a military judge, ordinarily the members will be sworn and examined immediately after the accused has been afforded the opportunity to request enlisted members. In such cases, the following matters should be inserted at the appropriate point in the record.

Members sworn

The members of the court-martial were sworn in accordance with R.C.M. 807.

Note. If the military judge announced at this point that the court-martial was assembled, the record should so reflect. If assembly was announced at a different point, it should be so shown in the record.

Preliminary instructions

The military judge instructed the members concerning their duties, the conduct of the proceedings, _____________.
Note. If counsel examined the members concerning their qualifications, the record should so state. If any member was challenged for cause, the grounds for challenge should be summarized. In addition, when a challenge is denied, the challenged member’s statements concerning the matter in question should be summarized in the record. For example:

Trial and defense counsel examined the members concerning their qualifications. ____________, member was questioned concerning ____________, and stated, under oath as follows:

The offense charged is, in my opinion, very serious, and worthy of a punitive discharge. My mind is not made up. I would consider all the evidence and the instructions of the military judge before deciding on an appropriate sentence.

The defense challenged ____________ for cause. The challenge was denied. Neither side had any further challenges for cause. The trial counsel challenged ____________ peremptorily. The defense counsel challenged ____________ peremptorily (and stated that it would have challenged another member had the challenge of ____________ for cause been sustained). ____________ and ____________ were excused and withdrew from the courtroom.

Note. If any part of the examination of members is done outside the presence of other members, this should be stated in the record. If challenges are made at an Article 39(a) session this should be stated in the record.

Note. If the accused was arraigned at an Article 39(a) session, ordinarily the military judge will have announced at this point to the members how the accused pleaded to the charges and specifications, and the record should so state. If the pleas were mixed and the members were not made aware at this point of the offense(s) to which the accused pleaded guilty the record should so state.

The military judge informed the members that the accused had entered pleas of (Not Guilty) (Guilty) to (the) (all) Charge(s) and Specification(s) (______________).

PRESENTATION OF PROSECUTION CASE

The trial counsel made (an) (no) opening statement. The defense counsel made (an) (no) opening statement at this time.

Note. The record will contain a summary of the testimony presented. An example of the manner in which testimony may be summarized follows:

The following witnesses for the prosecution were sworn and testified in substance as follows:

(name of witness, rank, and organization)
DIRECT EXAMINATION

I know the accused, ____________, who is in the military service and a member of my company. We both sleep in the same barracks. When I went to bed on the night of October 7, 1984, I put my wallet under my pillow. the wallet had $7.00 in it; a $5.00 bill and two $1.00 bills. Sometime during the night something woke me up but I turned over and went to sleep again. When I woke up the next morning, my wallet was gone.

CROSS-EXAMINATION

I don't know the serial numbers on any of the bills. One of the $1.00 bulls was patched together with scotch tape and one of the fellows told me that the accused had used a $1.00 bill just like that in a poker game the day after my wallet was missing.

Upon objection by the defense, so much of the answer of the witness as pertained to what he had been told was stricken.

The trial counsel offered in evidence a stipulation of fact entered into between the trial counsel, defense counsel, and the accused. The military judge ascertained that the accused understood and consented to the stipulation. It was admitted as Prosecution Exhibit 1.

PRESENTATION OF DEFENSE CASE

The defense counsel made (an) (no) opening statement. The following witnesses for the defense were sworn and testified in substance as follows:

EVIDENCE IN REBUTTAL, SURREBUTTAL

WITNESSES CALLED BY THE COURT-MARTIAL

The trial counsel made (an) (no) argument. 
The defense counsel made (an) (no) argument. 
The trial counsel made (an) (no) argument in rebuttal.

The military judge instructed the members in accordance with R.C.M. 920, including the elements of each offense, (and of the lesser included offense(s) of ____________) (the defense(s) of ____________), (the following evidentiary matters,) the presumption of innocence, reasonable doubt, and burden of proof as required by Article 51(c), and on the procedures for voting on the findings worksheet. (The members were given Appellate Exhibit ____________, findings worksheet.) (The members were given Appellate Exhibit ____________, a copy of the military judge’s instructions.) (There were no objections to the instructions or requests for additional instructions.)

Note. If any party requested instructions which were not given, or objected to the instructions given, these matters should be summarized in the record.
APPENDIX 13

Closing

The court-martial closed at _____________ hours, ____________.

The court-martial reopened at _____________ hours, ____________.

Note. If the military judge examined a findings worksheet and gave additional instructions, these should be summarized.

FINDINGS

The president announced that the accused was found:

Of all Charges and Specifications: (Not Guilty) (Guilty)
Of Specification 1 of Charge I: (Not Guilty) (Guilty)
Of Specification 2 of Charge I: (Not Guilty) (Guilty)
Of Charge I: (Not Guilty) (Guilty)
Of the Specification of Charge II: Not Guilty
Of Charge II: Not Guilty

e tc.

Note. In trial by the military judge alone, there would be no instructions given, but the military judge may make general and special findings. Any request for special findings should be summarized, and if submitted in writing, the request should be attached as an Appellate Exhibit. The general findings must be announced in open session with all parties present and may be recorded in the record in the following form, together with any special findings announced at that time:

The military judge announced the following general (and special) findings (and directed that _____________ be appended to the record as Appellate Exhibit _____________) (and stated that the special findings would be furnished to the reporter prior to authentication for insertion in the record as Appellate Exhibit _____________):

Of all the Specifications and Charges: Guilty

or

Of the Specification of Charge I: Guilty.
Of Charge I: Guilty
Of the Specification of Charge II: Not Guilty.
Of Charge II: Not Guilty

Note. All general findings should be recorded as indicated above. Special findings delivered orally should be summarized. Any written findings, opinion or memorandum of decision should be appended to the record as an appellate exhibit and copies furnished to counsel for both sides.

Note. If the accused was acquitted of all charges and specifications, proceed to adjournment.

SENTENCING PROCEEDINGS

The trial counsel presented the data as to pay, service, and restraint of the accused as shown on the charge sheet. There were no objections to the data.
Introduction of exhibits

The trial counsel offered Prosecution Exhibits ________________, ________________, and ________________ for identification, matters from the accused's personnel records. (The defense did not object.) (The defense objected to Prosecution Exhibit ________________ for identification on grounds that it was not properly authenticated.) (The objection was (overruled) (sustained).) (Prosecution Exhibits ________________, ________________, and ________________ were (not) received in evidence.)

Note. If the prosecution presented evidence in aggravation or of the accused's rehabilitative potential, this evidence should be summarized here, in the same way as evidence on the merits, above.

Inquiry of accused

The military judge informed the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or an unsworn statement or to remain silent. In response to the military judge the accused stated that he/she chose to (testify) (make an unsworn statement) (remain silent).

Note. If the defense calls witnesses in extenuation and mitigation, the testimony should be summarized in the record. If the accused makes an oral unsworn statement, personally or through counsel, this should be shown and the matters contained in the statement summarized.

Argument

The prosecution made (an) (no) argument on sentence. The defense made (an) (no) argument on sentence.

Instructions

The military judge instructed the members that the maximum punishment which could be adjudged for the offense(s) of which the accused had been found guilty was: ________________. The military judge also instructed the members concerning the procedures for voting, the responsibility of the members, and the matters the members should consider in accordance with R.C.M. 1005(e). (The members were given Appellate Exhibit ________________, a sentence worksheet.) (The members were given Appellate Exhibit ________________, a copy of the military judge's instructions.) (There were no objections to the instructions or requests for additional instructions.)

Note. If any party requested instructions which were not given, or objected to the instructions given, these matters should be summarized in the record.

Note. If, in trial before military judge alone, the military judge announces what the military judge considers to be the maximum punishment, the stated maximum should be recorded.

Closing

The court-martial closed at ________________ hours, ________________ 19______________.

Reopening

The court-martial reopened at ________________ hours, ________________ 19______________.

Note. If the military judge examined a sentencing worksheet and gave additional instructions, these should be summarized.

Announcement

The (military judge) (president) announced the following sentence:
Pretrial agreement

The military judge examined Appellate Exhibit ____________. The military judge stated that, based on the sentence adjudged, the convening authority (was obligated, under the agreement to approve no sentence in excess of ____________) (could approve the sentence adjudged if the convening authority so elected) ____________.

Advice concerning post-trial and appellate rights

The military judge informed the accused of: the right to submit matters to the convening authority to consider before taking action; (the right to have the case examined in the Office of The Judge Advocate General and the effect of waiver or withdrawal of such right;) the right to apply for relief from The Judge Advocate General; and the right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

Adjournment

The court-martial adjourned at ____________ hours, ____________ 19__________.

b. Examination of record by defense counsel

Note. When the defense counsel has examined the record of trial before authentication the following form is appropriate:

__________ 19__________

Form

"I have examined the record of trial in the foregoing case.

(Grade) (Name), Defense Counsel"

Note. If the defense counsel was not given the opportunity to examine the record before authentication, the reasons should be attached to the record. See R.C.M. 1103(i)(1)(B).

c. Authentication of record of trial

__________ 19__________

Military judge

(1) By general or special court-martial with members and a military judge

__________ 19__________

(Captain) (Colonel) ____________, Military Judge [or (LTJG) (1LT) ____________, Trial Counsel, because of (death) (disability) (absence) of the military judge.] [(LCDR) (Major) or ____________, a member in lieu of the military judge and the trial counsel because of (death) (disability) (absence) of the military judge and of (death) (disability) (absence) of the trial counsel.]

(2) By general or special court-martial consisting of only a military judge
(Captain) (Colonel) ________, Military Judge [or (LTJG) (1LT) ____________, Trial Counsel, because of (death) (disability) (absence) of the military judge.] [or the court reporter in lieu of the military judge and trial counsel because of (death) (disability) (absence) of the trial counsel.]

President

(3) By special court-martial without a military judge

[(CDR) (LTC) ____________, President [or (LTJG) (1LT) ____________, Trial Counsel, because of (death) (disability) (absence) of the president.] [or (LT) (CPT) ____________ a member in lieu of the president and the trial counsel because of (death) (disability) (absence) of the trial counsel.]

Note. If the rank of any person authenticating the record has changed since the court-martial, the current rank should be indicated, followed by “formerly ____________.”

d. Exhibits. See R.C.M. 1103(b)(2)(D)

Note. Following the end of the transcript of the proceedings, insert any exhibits which were received in evidence, or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence and any appellate exhibits.

e. Attachments

Note. Attach to the record the matters listed in R.C.M. 1103(b)(3).

f. Certificate of correction

Note. See Appendix 14f
GUIDE FOR PREPARATION OF RECORD OF TRIAL BY GENERAL COURT-MARTIAL AND BY SPECIAL COURT-MARTIAL WHEN A VERBATIM RECORD IS REQUIRED

a. Record of trial

As a general rule, all proceedings in the case should be recorded verbatim. See R.C.M. 1103.

This appendix is not a complete record of trial. It is to be used by the reporter and trial counsel as a guide in the preparation of the completed record of trial in all general and special court-martial cases in which a verbatim record is required.

RECORD OF TRIAL

(Name: last, first, middle initial) (Service No.) (Rank or grade)

(Organization and armed force) (Station or ship)

by

COURT-MARTIAL

Convened by

(Title of convening authority)

(Command of convening authority)

(Place or places of trial) 19

(Date or dates of trial)

Note. The title should be followed by an index. The form for this index will be as prescribed in publications of the Secretary concerned. However, it should cover important phases of the trial, witnesses who testified, and exhibits that are appended to the record.

COPIES OF RECORD

Copies of record

_____________ copy of record furnished the accused as per attached certificate or receipt.

_____________ copies of record forwarded herewith.

A14-1
APPENDIX 14

RECEIPT FOR COPY OF RECORD

Receipt for record

I hereby acknowledge receipt of a copy of the above-described record of trial, delivered to me at ______________ this day of ____________, 19___________.

(Signature of accused)

(Name of accused)

CERTIFICATE

_________________________ 19________________________

(Place) (Date)

Certificate in lieu of receipt

I certify that on this day delivery of a copy of the above-described record of trial was made to the accused, ________________ at ____________________

(Name of accused)

(Place of delivery) (Means of Delivery)

I certify that on this day delivery of a copy of the above-described record of trial was made to the accused, ________________ at ____________________

(Name of accused)

not been received on the date this record was forwarded to the convening authority. The receipt of the accused will be forwarded as soon as it is received.

(Signature of trial counsel)

(Name of trial counsel)

Note. If the accused's defense counsel receives the record, the trial counsel must attach an explanation to the record. See R.C.M. 1104(b)(1)(C). The following format may be used:

The accused's defense counsel was served the accused's copy of the record because (the accused so requested in a written request, which is attached) (the accused so requested on the record at the court-martial) (the accused was transferred to ________________) (the accused is absent without authority) ________________.

(Signature of trial counsel)

(Name of trial counsel)

Note. If the accused cannot be served and has no counsel to receive the record, an explanation for failure to serve the record will be attached to the record. See R.C.M. 1104(b)(1)(C). The following format may be used:

The accused was not served a copy of this record because the accused (is absent without authority) ________________. Accused has no defense counsel to receive the record because (defense counsel has been excused under R.C.M. 505(d)(2)(B)) ________________.

(Signature of trial counsel)

(Name of trial counsel)

Convening orders

Proceedings of a ________________ court-martial which met (at) (on board) ________________, at ________________ hours, ________________

19__________________ pursuant to the following orders:
Note. Here insert a copy of the orders convening the court-martial and copies of any amending orders. Copies of any written orders detailing the military judge and counsel will be inserted here. See R.C.M. 503(b) and (c). Any request of an enlisted accused for enlisted court members will be inserted immediately following the convening orders, together with any declaration of the nonavailability of such enlisted persons. See R.C.M. 503(a)(2), 903. Any written request for trial by military judge alone (R.C.M. 903) or statement that a military judge could not be obtained (R.C.M. 201(f)(2)(b)(ii)) will be inserted at this point.

GUIDE FOR PREPARATION OF RECORD OF TRIAL

PERSONS PRESENT

PERSONS ABSENT

Accounting for personnel

Note. List military judge, if any, and all members of the court-martial, prosecution, and defense as present or absent, as announced by the trial counsel. The record of an Article 39(a) session or trial by the military judge alone need only reflect that the members are absent and need not list the absent members by name. Only rank or grade and name should be shown unless service number is necessary to distinguish between two persons.

Presence of accused

The following named accused (was) (were) present: _____________.

Swearing reporter

The detailed reporter, ________________, (was sworn) (had previously been sworn).

Note. The remainder of the record of trial follows the actual proceedings in court-martial. The reporter records all the proceedings verbatim.

Time of session

Note. The reporter should note the time and date of the beginning and ending of each session of the court, including the opening and closing of the court-martial during trial. For example:

The (court-martial) (session) was called to order at ____________ hours, ________________ 19_______________.

The (court-martial) (session was) (adjourned) (recessed) at hours, ________________ 19_______________.

The court-martial (closed) (opened) at ____________ hours, ________________ 19_______________.

Administration of oaths

Note. It is not necessary to record verbatim the oath actually used, whether it be administered to a witness, the military judge, counsel, or the members. Regardless of the form of oath, affirmation, or ceremony by which the conscience of the witness is bound, R.C.M. 807, only the fact that a witness took an oath or affirmation is to be recorded. However, if preliminary qualifying questions are asked a witness prior to the administration of an oath, the questions and answers should be recorded verbatim. These preliminary questions and answers do not eliminate the requirement that an oath be administered. The following are examples of the recording of the administration of various oaths:

The detailed interpreter, ________________, (was sworn) (had previously been sworn).

The military judge and the personnel of the prosecution and defense (were sworn) (had previously been sworn).

The members were sworn.
Accounting for personnel during trial

Note. After the reporter is sworn, the reporter will record verbatim the statements of the trial counsel with respect to the presence of personnel of the court-martial, counsel, and the accused. The reporter should note whether, when a witness is excused, the witness withdraws from the courtroom or, in the case of the accused, whether the accused resumes a seat at counsel table. Similarly, if the military judge excuses a member as a result of challenge and the member withdraws, the reporter should note this fact in the record. In a special court-martial without a military judge, if a challenged member withdraws from the court-martial while it votes on a challenge, and then is excused as a result of challenge or resumes a seat after the court-martial has voted on a challenge, the reporter should note this fact in the record. Examples of the manner in which such facts should be recorded are as follows:

The (witness withdrew from the courtroom) (accused resumed his/her seat at the counsel table)

______________, the challenged member, withdrew from the courtroom.

______________, resumed his/her seat as a member of the court-martial.

Arraignment

Note. The original charge sheet or a duplicate should be inserted here. If the charges are read, the charges should also be transcribed as read. See R.C.M. 1103(b)(2)(D)(i).

Recording testimony

Note. The testimony of a witness will be recorded verbatim in a form similar to that set forth below for a prosecution witness:

______________, was called as a witness for the prosecution, was sworn, and testified as follows:

**DIRECT EXAMINATION**

Questions by the prosecution:

Q. State your full name, (etc.) __________________________.
A. __________________________.
Q. __________________________ ?
A. __________________________.

**CROSS-EXAMINATION**

Questions by the defense:

Q. __________________________ ?
A. __________________________.

**REDIRECT EXAMINATION**

Questions by the prosecution:

Q. __________________________ ?
A. __________________________.

**RECROSS-EXAMINATION**

Questions by the defense:

Q. __________________________ ?
EXAMINATION BY THE COURT-MARTIAL

Questions by (military judge) (member's name):

Q. __________________________________________? 
A. __________________________________________.

REDIRECT EXAMINATION

Questions by the prosecution:

Q. __________________________________________? 
A. __________________________________________.

RECORDS EXAMINATION

Questions by the defense:

Q. __________________________________________? 
A. __________________________________________.

Out-of-court hearings and Article 39(a) sessions should be recorded and incorporated in the record of trial. See R.C.M. 803.

b. Examination of record by defense counsel

Note. When the defense counsel has examined the record of trial prior to its being forwarded to the convening authority, the following form is appropriate:

Form

“I have examined the record of trial in the foregoing case.

(Captain) (Lieutenant) ____________, Defense Counsel.”

Note. If defense counsel was not given the opportunity to examine the record before authentication, the reasons should be attached to the record. See R.C.M. 1103(i)(i)(B).

c. Authentication of record of trial

Note. The authentication should be dated.

_____________ 19_____________

(1) By general or special court-martial with members and a military judge
Military Judge: (Captain) (Colonel) [or (LTJG) (1LT)]

Military Judge, because of (death) (disability) (absence) of the military judge [or (LCDR) (Major)]

a member in lieu of the military judge and the trial counsel because of (death) (disability) (absence) of the military judge, and of (death) (disability) (absence) of the trial counsel.

(2) By general court-martial consisting of only a military judge.

Military Judge: (Captain) (Colonel) [or (LTJG) (1LT)]

Military Judge, because of (death) (disability) (absence) of the military judge [or the court reporter in lieu of the military judge and trial counsel because of (death) (disability) (absence) of the military judge, and of (death) (disability) (absence) of the trial counsel].

(3) By special court-martial without a military judge.

President: (CDR) (LTC)

President, [or (LTJG) (ILT)]

Trial Counsel, because of (death) (disability) (absence) of the president [or (LT) (CPT)]

a member in lieu of the president and the trial counsel because of (death) (disability) (absence) of the president, and of (death) (disability) (absence) of the trial counsel.

Note. If the rank of any person authenticating the record has changed since the court-martial, the current rank should be indicated, followed by “formerly (list the former rank).”

d. Exhibits. See R.C.M. 1103(b)(2)(D)

Note. Following the end of the transcript of the proceedings, insert any exhibits which were received in evidence, or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence, and any appellate exhibits.

e. Attachments

Note. Attach to the record the matters listed in R.C.M. 1103(b)(3).

f. Certificate of correction. See R.C.M. 1104(d)

United States

v.

The record of trial in the above case, which was tried by the court-martial convened by , dated , on , is corrected by the insertion on page , immediately following line , of the following:
“The detailed reporter, ______________ was sworn.”

This correction is made because the reporter was sworn at the time of trial but a statement of that effect was omitted, by error, from the record.

R.C.M. 1104(d) has been complied with.

Note. The certificate of correction is authenticated as indicated above for the record of trial in the case.

Copy of the certificate received by me this _____________ day of ______________, 19______________

(Signature of accused)
(Name of accused)

Note. The certificate of correction will be bound at the end of the original record immediately before the action of the convening authority.

g. Additional copies of the record

An original and four copies of the record will be prepared of a verbatim record. In a joint or common trial, an additional copy of the record must be prepared for each accused. See R.C.M. 1103(g)(1)(A).
APPENDIX 15

RECORD OF TRIAL BY SUMMARY COURT-MARTIAL

<table>
<thead>
<tr>
<th>a. NAME OF ACCUSED (Last, First, MIL)</th>
<th>b. GRADE OR RANK</th>
<th>c. UNIT OR ORGANIZATION OF ACCUSED</th>
<th>d. SEN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arthur N. Sherry</td>
<td>PFC</td>
<td>Co A, 1st Battalion, 61st Inf</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>a. NAME OF CONVENING AUTHORITY (Last, First, MIL)</th>
<th>b. RANK</th>
<th>c. POSITION</th>
<th>d. ORGANIZATION OF CONVENING AUTHORITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gail L. Busybody</td>
<td>COL</td>
<td>Commander</td>
<td>61st Infantry Brigade</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>a. NAME OF SUMMARY COURT-MARTIAL (If SCM was accused, so state)</th>
<th>b. RANK</th>
<th>c. UNIT OR ORGANIZATION OF SUMMARY COURT-MARTIAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ron F. Andrews</td>
<td>MAJ</td>
<td>2d Battalion, 61st Inf</td>
</tr>
</tbody>
</table>

(Enter name(s) and rank(s) of accuser(s).

<table>
<thead>
<tr>
<th>a. A preliminary proceeding held on 20 September 1993, the summary court-martial gave the accused a copy of the charge sheet.</th>
</tr>
</thead>
<tbody>
<tr>
<td>YES                                                                 I NO</td>
</tr>
<tr>
<td>X                                                                   I X</td>
</tr>
</tbody>
</table>

At that preliminary proceeding, the summary court-martial informed the accused of the following:

- The fact that the charge(s) had been referred to a summary court-martial for trial and the date of referral. X
- The identity of the convening authority. X
- The name(s) of the accuser(s). X
- The general nature of the charge(s). X
- The accused's right to object to trial by summary court-martial. X
- The accused's right to inspect the allied papers and immediately available personnel records. X
- The names of the witnesses who could be called to testify and any documents or physical evidence which the summary court-martial expected to introduce into evidence. X
- The accused's right to cross-examine witnesses and have the summary court-martial cross-examine on behalf of the accused. X
- The accused's right to call witnesses and produce evidence with the assistance of the summary court-martial if necessary. X
- That during the trial the summary court-martial would not consider any matters, including statements previously made by the accused to the summary court-martial, unless admitted in accordance with the Military Rules of Evidence. X
- The accused's right to testify on the merits or to remain silent, with the assurance that no adverse inference would be drawn by the summary court-martial from such silence. X
- If any findings of guilty were announced, the accused's right to remain silent, to make an unwarned statement, oral or written or both, and to testify and to introduce evidence in extenuation or mitigation. X
- The maximum sentence which could be adjudged if the accused was found guilty of the offense(s) alleged. X
- The accused's right to plead guilty or not guilty. X
- At the trial proceeding held on 21 September 1993, the accused, after being given a reasonable time to decide, did not object to trial by summary court-martial. (Note: The SCM may ask the accused to initial this entry at the time the election is made.) X

7a. The accused was not represented by counsel. (If the accused was represented by counsel, complete b, c, and d below.) X

<table>
<thead>
<tr>
<th>a. NAME OF COUNSEL (Last, First, MIL)</th>
<th>b. RANK (If any)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

8. COUSSEL QUALIFICATIONS
APPENDIX 15

8. The accused was arraigned on the attached charge(s) and specification(s). The accused’s pleas and the findings reached are shown below:

<table>
<thead>
<tr>
<th>CHARGE(S) AND SPECIFICATION(S)</th>
<th>PLEA(S)</th>
<th>FINDINGS (including any exceptions and substitutions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. I</td>
<td>NG</td>
<td>G</td>
</tr>
<tr>
<td>Spec. 1</td>
<td>NG</td>
<td>NG</td>
</tr>
<tr>
<td>Spec. 2</td>
<td>NG</td>
<td>G except &quot;$74.00&quot; substituting &quot;$25.00&quot;</td>
</tr>
<tr>
<td>Ch. II</td>
<td>G</td>
<td>G</td>
</tr>
<tr>
<td>Spec.</td>
<td>G</td>
<td>G</td>
</tr>
<tr>
<td>Add'l Ch.</td>
<td>NG</td>
<td>NG</td>
</tr>
<tr>
<td>Spec.</td>
<td>NG</td>
<td>NG</td>
</tr>
</tbody>
</table>

9. The following sentence was adjudged:
Confinement for 15 days, forfeiture of $200.00 pay per month for 1 month, and reduction to grade of E-1.

10. The accused was advised of the right to request that confinement be deferred. (Note: When confinement is adjudged)

   YES □ NO

11. The accused was advised of the right to submit written matters to the convening authority, including a request for clemency, and of the right to request review by the Judge Advocate General.

   YES □ NO

12. AUTHENTICATION:

   Rene J. Andrews
   Signature of Summery Court-Martial
   21 September 1993
   Date

13. ACTION BY CONVENING AUTHORITY

   The sentence is approved and will be executed.

   Gail L. Busybody
   Commander
   Typed Name of Convening Authority
   Position of Convening Authority

   Date

   29 September 1993

   Signature of Convening Authority
APPENDIX 16
FORMS FOR ACTION

The forms in this appendix are guides for preparation of the convening authority's initial action. Guidance is also provided for actions under R.C.M. 1112(f). Appendix 17 contains forms for later actions. The forms are guidance only, and are not mandatory. They do not provide for all cases. It may be necessary to combine parts of different forms to prepare an action appropriate to a specific case. Extreme care should be exercised in using these forms and in preparing actions. See R.C.M. 1107(f) concerning contents of the convening authority's action.

In addition to the matters contained in the forms below, the action should show the headquarters and place, or the ship, of the convening authority taking the action, and the date of the action. The signature of the convening authority is followed by the grade and unit of the convening authority, and "commander" or "commanding" as appropriate.

When the sentence includes confinement, the place of confinement is designated in the action unless the Secretary concerned prescribes otherwise. If the place of confinement is designated in the action, service regulations should be consulted first. See R.C.M. 1107(f)(4).

In actions on a summary court-martial, when the action is written on the record of trial (see Appendix 15) the words "In the case of _________" may be omitted.

INITIAL ACTION ON COURT-MARTIAL SENTENCE—FINDINGS NOT AFFECTED

Forms 1–10 are appropriate when the adjudged sentence does not include death, dismissal, or a dishonorable or bad-conduct discharge.

Adjudged sentence approved and ordered executed without modification. See R.C.M. 1107(f)(4).

1. In the case of ___________, the sentence is approved and will be executed. (___________ is designated as the place of confinement.)

2. In the case of ___________, only so much of the sentence as provides for ___________ is approved and will be executed. (___________ is designated as the place of confinement.)

—Adjudged sentence approved; part of confinement changed to forfeiture of pay.

3. In the case of ___________, so much of the sentence extending to ___________ months of confinement is changed to forfeiture of ___________ pay per month for ___________ months. The sentence as changed is approved and will be executed. (___________ is designated as the place of confinement.)

Credit for illegal pretrial confinement. See R.C.M. 305(k); 1107(f)(4)(F).

4. In the case of ___________, the sentence is approved and will be executed. The accused will be credited with ___________ days of confinement against the sentence to confinement. (___________ is designated as the place of confinement.)

Suspension of sentence. See R.C.M. 1107(f)(4)(B); 1108(d).

—Adjudged sentence approved and suspended.

5. In the case of ___________, the sentence is approved. Execution of the sentence is suspended for ___________ (months) (years) at which time, unless the suspension is sooner vacated, the sentence will be remitted without further action.

—Adjudged sentence approved; part of sentence suspended.

6. In the case of ___________, the sentence is approved and will be executed but the execution of that part of the sentence extending to (confinement) (confinement in excess of ___________ months) (forfeiture of pay) (___________) is suspended for ___________ (months) (years) at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. (___________ is designated as the place of confinement.)

Deferment of confinement and termination of deferment. See R.C.M. 1101(c); 1107(f)(4)(E).

—Adjudged sentence approved; confinement deferred pending final review.

7. In the case of ___________, the sentence is approved and, except for that portion extending to confinement, will be executed. Service of the sen-
tence to confinement (is) (was) deferred effective 19__________, and will not begin until (the conviction is final) (__________), unless sooner rescinded by competent authority.

—Adjudged sentence approved; deferment of confinement terminated.

8. In the case of ____________, the sentence is approved and will be executed. The service of the sentence to confinement was deferred on ____________ 19__________, (__________) is designated as the place of confinement.)

—Adjudged sentence approved; deferment of confinement terminated previously.

9. In the case of ____________, the sentence is approved and will be executed. The service of the sentence to confinement was deferred on ____________ 19__________, and the deferment ended on ____________ 19__________; (__________ is designated as the place of confinement.)

Disapproval of sentence; rehearing on sentence only ordered. See R.C.M. 1107(e), (f)(4)(A).

10. In the case of ____________, it appears that the following error was committed: (evidence of a previous conviction of the accused was erroneously admitted) (__________). This error was prejudicial as to the sentence. The sentence is disapproved. A rehearing is ordered before a (summary) (special) (general) court-martial to be designated.

When the adjudged sentence includes death, dismissal, or a dishonorable or a bad-conduct discharge, forms 1-10 are generally appropriate, but several will require modification depending on the action to be taken. This is because death, dismissal, or a dishonorable or bad-conduct discharge may not be ordered executed in the initial action. Therefore, unless an adjudged punishment of death, dismissal, or a dishonorable or bad-conduct discharge is disapproved, changed to another punishment, or (except in the case of death) suspended, the initial action must specifically except such punishments from the order of execution. This is done by adding the words “except for the (part of the sentence extending to death) (dismissal) (dishonorable discharge) (bad-conduct discharge),” after the words “is approved and” and before the words “will be executed” in the action. (A death sentence cannot be suspended. See R.C.M. 1108(b).)

Forms 11-14 provide examples of actions when the sentence includes death, dismissal, or a dishonorable or bad-conduct discharge.

Adjudged sentence approved and, except for death, dismissal, or discharge, ordered executed. See R.C.M. 1107(f)(4).

11. In the case of ____________, the sentence is approved and, except for the (part of the sentence extending to death) (dismissal) (dishonorable discharge) (bad-conduct discharge), will be executed. (__________ is designated as the place of confinement.)

Adjudged sentence modified. See R.C.M. 1107(d)(1), (f)(4). Note if the part of the sentence providing for death, dismissal, or a dishonorable or a bad-conduct discharge is disapproved, see Form 2 above.

12. In the case of ____________, only so much of the sentence as provides for (death) (dismissal) (a dishonorable discharge) (a bad-conduct discharge) (and ____________) is approved and, except for the part of the sentence extending to (death) (dismissal) (dishonorable discharge) (bad-conduct discharge), will be executed. (__________ (and ____________) is designated as the place of confinement.)

—Adjudged sentence approved; discharge changed to confinement.

13. In the case of ____________, so much of the sentence extending to a (dishonorable discharge) (bad conduct discharge) is changed to confinement for ____________ months (thereby making the period of confinement total ____________ months). The sentence as changed is approved and will be executed. (__________ ____________ is designated as the place of confinement.)

Suspension of sentence. See R.C.M. 1107(f)(4)(B); 1108(d). Note. If the portion of the sentence extending to dismissal or a dishonorable or a bad-conduct discharge is suspended, Form 5 or Form 6, as appropriate, may be used. If parts of the sentence other than an approved dismissal or discharge are suspended, the following form may be used:

—Adjudged sentence approved; part of sentence, other than dismissal or dishonorable or bad-conduct discharge, suspended.

14. In the case of ____________, the sentence is approved and, except for that part of the sentence
FORMS FOR ACTION

extending to (dismissal) (a dishonorable discharge) (a bad-conduct discharge), will be executed, but the execution of that part of the sentence adjudging (confine ment in excess of (forfeiture of pay) (________________) is suspended for ____________________ (months) (years) at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. (________________ is designated as the place of confinement.)

INITIAL ACTION ON COURT-MARTIAL

WHEN FINDINGS AFFECTED. Findings are addressed in the action only when any findings of guilty are disapproved, in whole or part. See R.C.M. 1107(c), (o)(3). The action must also indicate what action is being taken on the sentence. Appropriate parts of the foregoing forms for action on the sentence may be substituted in the following examples as necessary.

Some findings of guilty disapproved; adjudged sentence approved.

15. In the case of __________________, the finding of guilty of Specification 2, Charge I is disapproved. Specification 2, Charge I is dismissed. The sentence is approved and (except for that part of the sentence extending to (dismissal) (a dishonorable discharge) (a bad-conduct discharge)) will be executed. (________________ is designated as the place of confinement.)

Finding of guilty of lesser included offense approved; adjudged sentence modified.

16. In the case of __________________, the finding of guilty of Specification 1, Charge II is changed to a finding of guilty of (assault with a means likely to produce grievous bodily harm, to wit: a knife) (absence without authority from the (unit) (ship) (________________) alleged from ____________ to ____________

19 __________ (in violation of Article 86)) (________________). Only so much of the sentence as provides for __________ is approved and (, except for the (dismissal) (dishonorable discharge) (bad-conduct discharge)), will be executed. (________________ is designated as the place of confinement.)

Some findings of guilty and sentence disapproved; combined rehearing ordered. See 1107(c). A rehearing may not be ordered if any sentence is approved. See R.C.M. 1107(c)(2)(B); (e)(1)(c)(i).

17. In the case of __________, it appears that the following error was committed: (Exhibit 1, laboratory report, was not properly authenticated and was admitted over the objection of the defense) ___________. This error was prejudicial as to Specifications 1 and 2 of Charge II. The findings of guilty as to Specifications 1 and 2 of Charge II and the sentence are disapproved. A combined rehearing is ordered before a court-martial to be designated.

All findings of guilty and sentence disapproved; rehearing ordered. See R.C.M. 1107(c)(2)(B).

18. In the case of __________, it appears that the following error was committed: (evidence offered by the defense to establish duress was improperly excluded) ___________. This error was prejudicial to the rights of the accused as to all findings of guilty. The findings of guilty and the sentence are disapproved. A rehearing is ordered before a court-martial to be designated.

All findings of guilty and sentence disapproved based on jurisdictional error; another trial ordered. See R.C.M. 1107(e)(2). Note. This form may also be used when a specification fails to state an offense.

19. In the case of __________, it appears that (the members were not detailed to the court-martial by the convening authority) ___________. The proceeding s, findings, and sentence are invalid. Another trial is ordered before a court-martial to be designated.

All findings of guilty and sentence disapproved; charges dismissed. See R.C.M. 1107(c)(2)(B).

20. In the case of __________, the findings of guilty and the sentence are disapproved. The charges are dismissed.

ACTION ON A REHEARING. The action on a rehearing is the same as an action on an original court-martial in most respects. It differs first in that, as to any sentence approved following the rehearing, the accused must be credited with those parts of the sentence extending to (dismissal) (a dishonorable discharge) (a bad-conduct discharge), will be executed, but the execution of that part of the sentence adjudging (confine ment in excess of (forfeiture of pay) (________________) is suspended for ____________________ (months) (years) at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. (________________ is designated as the place of confinement.)

Some findings of guilty and sentence disapproved; combined rehearing ordered. See 1107(c). A rehearing may not be ordered if any sentence is approved. See R.C.M. 1107(c)(2)(B); (e)(1)(c)(i).

17. In the case of __________, it appears that the following error was committed: (Exhibit 1, laboratory report, was not properly authenticated and was admitted over the objection of the defense) ___________. This error was prejudicial as to Specifications 1 and 2 of Charge II. The findings of guilty as to Specifications 1 and 2 of Charge II and the sentence are disapproved. A combined rehearing is ordered before a court-martial to be designated.

All findings of guilty and sentence disapproved; rehearing ordered. See R.C.M. 1107(c)(2)(B).

18. In the case of __________, it appears that the following error was committed: (evidence offered by the defense to establish duress was improperly excluded) ___________. This error was prejudicial to the rights of the accused as to all findings of guilty. The findings of guilty and the sentence are disapproved. A rehearing is ordered before a court-martial to be designated.

All findings of guilty and sentence disapproved based on jurisdictional error; another trial ordered. See R.C.M. 1107(e)(2). Note. This form may also be used when a specification fails to state an offense.

19. In the case of __________, it appears that (the members were not detailed to the court-martial by the convening authority) ___________. The proceedings, findings, and sentence are invalid. Another trial is ordered before a court-martial to be designated.

All findings of guilty and sentence disapproved; charges dismissed. See R.C.M. 1107(c)(2)(B).

20. In the case of __________, the findings of guilty and the sentence are disapproved. The charges are dismissed.

ACTION ON A REHEARING. The action on a rehearing is the same as an action on an original court-martial in most respects. It differs first in that, as to any sentence approved following the rehearing, the accused must be credited with those parts of the sentence extending to (dismissal) (a dishonorable discharge) (a bad-conduct discharge), will be executed, but the execution of that part of the sentence adjudging (confine ment in excess of (forfeiture of pay) (________________) is suspended for ____________________ (months) (years) at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. (________________ is designated as the place of confinement.)

Some findings of guilty and sentence disapproved; combined rehearing ordered. See 1107(c). A rehearing may not be ordered if any sentence is approved. See R.C.M. 1107(c)(2)(B); (e)(1)(c)(i).
ble discharge) (bad-conduct discharge)), will be executed. The accused will be credited with any portion of the punishment served from ________ 19__________ to ________ 19__________ under the sentence adjudged at the former trial of this case.

Action on rehearing; restoration of rights.

22. In the case of _________, the findings of guilty and the sentence are disapproved and the charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the execution of the sentence adjudged at the former trial of this case on _________ 19__________ will be restored.

23. In the case of _________, the accused was found not guilty of all the charges and specifications which were tried at the former hearing. All rights, privileges, and property of which the accused has been deprived by virtue of the execution of the sentence adjudged at the former trial of this case on _________ 19__________ will be restored.

WITHDRAWAL OF PREVIOUS ACTION.

Form 24 is appropriate for withdrawal of an earlier action. See R.C.M. 1107(f)(2) concerning modification of an earlier action. Form 24a is appropriate for withdrawal of previous action pursuant to instructions from reviewing authority pursuant to R.C.M. 1107(f)(2) or (g). When the action of a predecessor in command is withdrawn due to ambiguity, see United States v. Lower, 10 M.J. 263 (C.M.A. 1981).

24. In the case of _________, the action taken by (me) (my predecessor in command) on _________ 19__________ is withdrawn and the following substituted therefor:

24a. In the case of _________, in accordance with instructions from (The Judge Advocate General) (the _________ Court of Military Review) pursuant to Rule for Courts-Martial [1107(f)(2)] [1107(g)], the action taken by (me) (my predecessor in command) is withdrawn. The following is substituted therefor: _________

FORMS FOR ACTIONS APPROVING AND SUSPENDING PUNISHMENTS MENTIONED IN ARTICLE 58a AND RETAINING ACCUSED IN PRESENT OR INTERMEDIATE GRADE.

Under the authority of Article 58a, the Secretary concerned may, by regulation, limit or specifically preclude the reduction in grade which would otherwise be effected under that Article upon the approval of certain court-martial sentences by the convening authority. The Secretary concerned may provide in regulations that if the convening or higher authority taking action on the case suspends those elements of the sentence that are specified in Article 58a the accused may be retained in the grade held by the accused at the time of the sentence or in any intermediate grade. Forms 25-27 may be used by the convening or higher authority in effecting actions authorized by the Secretary concerned in regulations pursuant to the authority of Article 58a.

If the convening authority or higher authority when taking action on a case in which the sentence includes a punitive discharge, confinement, or hard labor without confinement elects to approve the sentence and to retain the enlisted member in the grade held by that member at the time of sentence or in any intermediate grade, that authority may do so if permitted by regulations of the Secretary concerned whether or not the sentence also includes a reduction to the lowest enlisted grade, by using one of the following forms of action. The first action, Form 25, is appropriate when the sentence does not specifically provide for reduction. The second and third actions, Forms 26 and 27, are appropriate when the sentence specifically provides for reduction to the grade of E-1. The action set forth in Form 26 is intended for a case in which the accused is to be probationally retained in the grade held by that accused at the time of sentence. The action set forth in Form 27 is for a case in which the accused is to serve probationally in an intermediate grade.

Automatic reduction suspended; sentence does not specifically include reduction.

25. In the case of _________, the sentence is approved and will be executed, but the execution of that part of the sentence extending to (a dishonorable discharge) (a bad-conduct discharge) (confinement) (hard labor without confinement) (and ) is suspended for (months) (years) at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. The accused will (continue to) serve in the grade of _________ unless the suspension of (the dishonorable discharge) (the bad-conduct discharge) (confinement) (hard labor without
confinement) is vacated, in which event the accused will be reduced to the grade of E-1 at that time.

Automatic reduction and adjudged reduction to E-1 suspended; accused retained in grade previously held.

26. In the case of _____________, the sentence is approved and will be executed, but the execution of that part of the sentence extending to (a dishonorable discharge) (a bad-conduct discharge) (confine-
ment) (hard labor without confinement) (__________), and reduction to the grade of E-

1 is suspended for _____________ (months) (years), at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. The accused will continue to serve in the grade of _____________ unless the suspension of (the dis-
honorable discharge) (the bad-conduct discharge) (confine-
tment) (hard labor without confinement), or reduction to the grade of E-1, is vacated, in which event the accused will be reduced to the grade of E-1 at that time.

Automatic reduction and adjudged reduction to E-1 suspended; accused retained in intermediate grade.

27. In the case of _____________, the sentence is approved and will be executed but the execution of that part of the sentence extending to (a dishonorable discharge) (a bad-conduct discharge) (CONFINE-
MENT) (Hard labor without confinement), and that part of the reduction which is in excess of reduction to the grade of _____________ is suspended for _____________ (months) (years) at which time, unless the suspension is sooner vacated, the sus-
pended part of the sentence will be remitted without further action. The accused will serve in the grade of _____________ unless the suspension of (the dis-
honorable discharge) (the bad-conduct discharge) (CONFINE-
MENT) (hard labor without confinement), or reduction to the grade of E-1, is vacated, in which event the accused will be reduced to the grade of E-1 at that time.

ACTION UNDER R.C.M. 1112(f). The forms for action for the officer taking action under R.C.M. 1112(f) are generally similar to the foregoing actions. The officer taking action under R.C.M. 1112 (f) may order executed all parts of the approved sentence, including a dishonorable or bad-conduct dis-
charge, except those parts which have been sus-
pended without later vacation unless the record must be forwarded under R.C.M. 1112(g)(1). See R.C.M. 1113(c)(1)(A). The following are additional forms which may be appropriate:

Sentence approved when convening authority sus-
pended all or part of it.

28. In the case of _____________, the sentence as approved and suspended by the convening authority is approved.

Sentence approved and, when confinement was de-
ferred, ordered executed. See R.C.M. 1101(c)(6).

29. In the case of _____________, the sentence is approved and the confinement will be executed. The service of the sentence to confinement was deferred on _____________ 19 _____________

(__________ is designated as the place of con-
finement.)

Sentence includes unsuspended dishonorable or bad-
conduct discharge; order of execution. See R.C.M.
1113(c)(1) and (2).

30. In the case of _____________, the sentence is approved. The (dishonorable discharge) (bad-con-
duct discharge) will be executed.

Findings and sentence disapproved; restoration as to parts ordered executed by convening authority. See R.C.M. 1208(b).

31. In the case of _____________, the findings of guilty and the sentence are disapproved. The charges are dismissed. (The accused will be released from the confinement adjudged by the sentence in this case and all) (All) rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence disapproved will be restored.

Findings and sentence disapproved; rehearing au-
thorized. See R.C.M. 1112(f).

32. In the case of _____________, it appears that the following error was committed: (Exhibit 1, a statement of the accused, was not shown to have been preceded by Article 31 warnings as required and was admitted over the objection of the defense) (__________). This error was prejudicial to the rights of the accused as to the findings and the sen-
tence. The case is returned to the convening author-
ity who may order a rehearing or dismiss the charges.

Action taken is less favorable to the accused than that recommended by the judge advocate. See R.C.M. 1112(e), (f).

33. In the case of _____________, the sentence is approved. As this action is less favorable to the ac-
cused than that recommended by the judge advocate, the record and this action shall be forwarded to the Judge Advocate General for review under Article 69(b).

*Action when approved sentence includes dismissal.*
*See R.C.M. 1113(c)(2).*

34. In the case of ___________, the sentence is approved. The record shall be forwarded to the Secretary of the ___________.
APPENDIX 17
FORMS FOR COURT-MARTIAL ORDERS

a. Forms for initial promulgating orders

[Note. The following is a form applicable in promulgating the results of trial and the action of the convening authority in all general and special court-martial cases. Omit the marginal side notes in drafting orders. See R.C.M. 1114(c).]

Heading

(General) (Special) (Headquarters) (USS)

Court-Martial Order No. 19

[Note. The date must be the same as the date of the convening authority's action, if any.]

(Grade) (Name) (Service No.) (Armed Force)

(Unit)

Arraignment

was arraigned (at/on board ________________) on the following offenses at a court-martial convened by (this command) (Commander, ________________).

Offenses

CHARGE I. ARTICLE 86. Plea: G. Finding: G.


[Note. Specifications may be reproduced verbatim or may be summarized. Specific factors, such as value, amount, and other circumstances which affect the maximum punishment should be indicated in a summarized specification. Other significant matters contained in the specification may be included. If the specification is copied verbatim, include any amendment made during trial. Similarly, information included in a summarized specification should reflect any amendment to that information made during the trial.]


[Note. If a finding is not entered to a specification because, for example, a motion to dismiss was granted, this should be noted where the finding would otherwise appear.]


CHARGE III. ARTICLE 112a. Plea: G. Finding: G.


CHARGE IV. ARTICLE 121. Plea: NG. Finding: G.


If the accused was acquitted of all charges and specifications, the date of the acquittal should be shown: "The findings were announced on ____________ 19 ____________ ."

SENTENCE

Sentence adjudged on ____________ 19 ____________: Dishonorable discharge, forfeiture of all pay and allowances, confinement for 2 years, and reduction to the lowest enlisted grade.

ACTION

[Note. Summarize or enter verbatim the action of the convening authority. Whether or not the action is recited verbatim, the heading, date, and signature block of the convening authority need not be copied from the action if the same heading and date appear at the top of this order and if the name and rank of the convening authority are shown in the authentication.]

[Note. See R.C.M. 1114(e) concerning authentication of the order.]

[Note. In case of a joint or common trial, separate trial orders should be issued for each accused. The description of the offenses on which each accused was arraigned may, but need not, indicate that there was a co-accused.]

b. Forms for supplementary orders promulgating results of affirming action

[Note. Court-martial orders publishing the final results of cases in which the President or the Secretary concerned has taken final action are promulgated by departmental orders. In other cases the final action may be promulgated by an appropriate convening authority, or by an officer exercising general court-martial jurisdiction over the accused at the time of final action, or by the Secretary concerned. The following sample forms may be used where such a promulgating order is published in the field. These forms are guides. Extreme care should be exercised in using them. If a sentence as ordered into execution or suspended by the convening authority is affirmed without modifications and there has been no modification of the findings, no supplementary promulgating order is required.]

Heading

*See above.
In the (general) (special) court-martial case of (name, grade or rank, branch of service, and service number of accused,) the sentence to bad-conduct discharge, forfeiture of __________, and confinement for __________, as promulgated in (General) (Special) Court-Martial Order No. __________, (Headquarters) (Commandant, __________ Naval District) dated __________ 19__________, has been finally affirmed. Article 71(c) having been complied with, the bad-conduct discharge will be executed.

or

In the (general) (special) court-martial case of (name, grade or rank, branch of service, and service number of accused,) only so much of the sentence promulgated in (General) (Special) Court-Martial Order No. __________, (Headquarters) (Commandant, __________ Naval District) __________, dated __________ 19__________, as provides for __________, has been finally affirmed. Article 71(c) having been complied with, the bad-conduct discharge will be executed.

or

In the (general) (special) court-martial case of (name, grade or rank, branch of service, and service number of accused,) the findings of guilty of Charge I and its specification have been set aside and only so much of the sentence promulgated in (General) (Special) Court-Martial Order No. __________, (Headquarters) (Commandant, __________ Naval District) __________, dated __________ 19__________, as provides for __________, has been finally affirmed. Article 71(c) having been complied with, the bad-conduct discharge will be executed.

or

In the (general) (special) court-martial case of (name, grade or rank, branch of service, and service number of accused,) the proceedings of which are promulgated in (General) (Special) Court-Martial Order No. __________, (Headquarters) (Commandant, __________ Naval District) __________, dated __________ 19__________, the findings of guilty of Charge I and its specification, and so much of the sentence as in excess of __________ have been set aside and the sentence, as thus modified, has been finally affirmed. Article 71(c) having been complied with, all rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and that portion of the sentence so set aside will be restored.
Finding and sentence set aside

In the (general)(special) court-martial case of (name, grade or rank, branch of service, and service number of accused,) the findings of guilty and the sentence promulgated by (General) (Special) Court-Martial Order No. _______________, (Headquarters) (Commandant, ________________ Naval District), ________________, dated ________________ 19______________, were set aside on ________________ 19______________. (The charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and the sentence so set aside will be restored.) (A rehearing is ordered before another court-martial to be designated.)

Authentication

See R.C.M. 1114(e).

c. Forms for orders remitting or suspending unexecuted portions of sentence

Heading

See a above.

Remissions; suspension

The unexecuted portion of the sentence to ________________, in the case of (Name, grade or rank, branch of service and service number of accused,) promulgated in (General) (Special) Court-Martial Order No. ________________, (this headquarters) (this ship) (Headquarters ________________s) (USS ________________), ________________, 19______________, is (remitted) (suspended for ________________, months, at which time, unless the suspension is sooner vacated, the unexecuted portion of the sentence will be remitted without further action).

Authentication

See R.C.M. 1114(e).

d. Forms for orders vacating suspension

[Note. Orders promulgating the vacation of the suspension of a dismissal will be published by departmental orders of the Secretary concerned. Vacations of any other suspension of a general court-martial sentence, or of a special court-martial sentence which as approved and affirmed includes a bad-conduct discharge, will be promulgated by the officer exercising general court-martial jurisdiction over the probationer (Article 72(b)). The vacation of suspension of any other sentence may be promulgated by an appropriate convening authority under Article 72(c). See R.C.M. 1109.]

Heading

See a above.
Vacation of Suspension

So much of the order published in (General) (Special) (Summary) (Court-Martial Order No. ______________) (the record of summary court-martial), (this headquarters) (this ship) (Headquarters ______________) (USS ______________), ______________, 19______________ in the case of (name, grade or rank, branch of service, and service number of accused), as suspends, effective ______________, 19______________, execution of the approved sentence to (a bad-conduct discharge) (confinement for ______________ (months) (years)) (forfeiture of ______________), (and subsequently modified by (General) (Special) Court-Martial Order No. ______________, (this headquarters) (this ship) (Headquarters ______________) (USS ______________), ______________, 19______________, is vacated. (The unexecuted portion of the sentence to ______________ will be executed.) (____________ is designated as the place of confinement.)

[Note. See R.C.M. 1113 concerning execution of the sentence.]

Authentication

See R.C.M. 1114(e).

e. Forms for orders terminating deferment

[Note: When any deferment previously granted is rescinded after the convening authority has taken action in the case, such rescission will be promulgated in a supplementary order. See R.C.M. 1101(c)(7)(G).]

Heading

See a above.

Recission of deferment

The deferment of that portion of the sentence that provides for confinement for ______________ (months) (years) published in (General) (Special) Court-Martial Order ______________ (this headquarters) (this ship) (Headquarters ______________) (USS ______________), ______________, 19______________, in the case of (name, grade or rank, branch of service, and service number accused) (is rescinded) (was rescinded on ______________ 19______________). The portion of the sentence to confinement will be executed. (____________ is designated as the place of confinement.)

Authentication

See R.C.M. 1114(e).

[Note. Deferment may be terminated by an appropriate authority once the conviction is final under Article 71(c) and R.C.M. 1208(a). See R.C.M. 1101(c)(7).]

Heading

See a above.
In the (general) (special) court-martial case of (name, grade or rank, branch of service, and service number of accused,) the sentence to confinement (and _______________), as promulgated in (General) (Special) Court-Martial Order No. ________________, (Headquarters) (Commandant, ________________ Naval District) ________________, dated ________________ 19______________, has been finally affirmed. Service of confinement was deferred on ________________ 19______________. Article 71(c) having been complied with, the (bad-conduct discharge and the) sentence to confinement will be executed. (______________ is designated as the place of confinement.)

Authentication

See R.C.M. 1114(e).
# APPENDIX 18

## REPORT OF PROCEEDINGS TO VACATE SUSPENSION OF A GENERAL COURT-MARTIAL SENTENCE OR OF A SPECIAL COURT-MARTIAL SENTENCE INCLUDING A BAD-CONDUCT DISCHARGE

UNDER ARTICLE 72, UCMJ, and R.C.M. 1109

<table>
<thead>
<tr>
<th>TO:</th>
<th>FROM:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Name of Officer exercising general court-martial jurisdiction — Last, First, MI)</td>
<td>(Name of Officer exercising special court-martial jurisdiction — Last, First, MI)</td>
</tr>
<tr>
<td>Rabino, Arthur K.</td>
<td>Roberts, Leonard E.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>TITLE</th>
<th>ORGANIZATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commander</td>
<td>5000th Support Wing APO AP 99999</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NAME OF PROBATIONER (Last, First, MI)</th>
<th>RANK</th>
<th>SSN</th>
<th>ORGANIZATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dice, Morris L.</td>
<td>Airman</td>
<td>000-00-0000</td>
<td>5001st Support Group</td>
</tr>
</tbody>
</table>

4. **DATA AS TO TRIAL BY COURT-MARTIAL.**
   - ATTACH A COPY OF THE COURT-MARTIAL ORDER AND ANY SUPPLEMENTARY ORDERS OR, IF NO COURT-MARTIAL ORDER HAS BEEN PROMULGATED OR IS AVAILABLE, ATTACH A SUMMARY OF THE CHARGES AND SPECIFICATIONS, FINDINGS, SENTENCE, INITIAL ACTION, AND ANY SUPPLEMENTARY ACTIONS. ATTACH A COPY OF THE WRITTEN NOTICE OF SUSPENSION (see R.C.M. 1108(c)).

5. **ALLEGED VIOLATION(S) OF THE CONDITIONS OF SUSPENSION.**
   - **BRIEF STATEMENT AND DATE.** See R.C.M. 1108(c) and 1109(a) CONCERNING THE CONDITIONS OF SUSPENSION:

   Assault on Master Sgt Vic Timm, while in the execution of duties on 15 September 1993, in violation of Article 91.

   (Check appropriate answer)

<table>
<thead>
<tr>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

6. **PURSUANT TO THE PROVISIONS OF ARTICLE 72, UCMJ, AND R.C.M. 1109, A HEARING WAS HELD ON THE ALLEGED VIOLATION(S) OF THE CONDITIONS OF SUSPENSION.**

7. **BEFORE THE HEARING, THE AUTHORITY CONDUCTING THE HEARING CAUSED THE PROBATIONER TO BE NOTIFIED OF:**
   - THE TIME, PLACE, AND PURPOSE OF THE HEARING.
   - THE RIGHT TO BE PRESENT AT THE HEARING.
   - THE ALLEGED VIOLATION(S) OF THE CONDITIONS OF SUSPENSION AND THE EVIDENCE EXPECTED TO BE RELIED ON.
   - THE RIGHT TO BE REPRESENTED AT THE HEARING BY CIVILIAN COUNSEL PROVIDED BY THE PROBATIONER OR, UPON REQUEST, BY MILITARY COUNSEL DETAILED FOR THIS PURPOSE.
   - THE OPPORTUNITY TO BE HEARD, TO PRESENT WITNESSES AND OTHER EVIDENCE, AND THE RIGHT TO CONFRONT AND CROSS EXAMINE ADVERSE WITNESSES UNLESS THE HEARING OFFICER DETERMINES THAT THERE IS GOOD CAUSE FOR NOT ALLOWING CONFRONTATION AND CROSS-EXAMINATION.
   - THE PROBATIONER REQUESTED DETAILED MILITARY COUNSEL.

8. **NAME OF DETAILED COUNSEL (Last, First, MI) | RANK | ORGANIZATION**

   | Young, Louise | Captain | Area Defense Counsel, APO AP 99999 |

9. **DETAILED COUNSEL WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b), UCMJ, AND R.C.M. 502(a).**

   X

**NOTE:** If this form is used and additional space is required for any item, enter the additional material in Block 18 or on a separate sheet. Identify such material with the proper heading (Example: “See Block 18” or “See additional sheet.” This form may be used to vacate a suspended special court-martial sentence not including a bad-conduct discharge or a suspended summary court-martial sentence under R.C.M. 1109(a) by lining through or altering the form, as appropriate.
APPENDIX 18

<table>
<thead>
<tr>
<th>(Check appropriate answer)</th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>9a. THE PROBATIONER INDICATED THAT HE/SHE WOULD BE REPRESENTED BY CIVILIAN COUNSEL PROVIDED BY HIM/HER.</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>9b. NAME OF CIVILIAN COUNSEL (Last, First, MI)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9c. ADDRESS OF CIVILIAN COUNSEL</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9d. ENTRY OF APPEARANCE BY PROBATIONER'S CIVILIAN COUNSEL. I HEREBY ENTER MY APPEARANCE FOR THE ABOVE NAMED PROBATIONER AND REPRESENT THAT I AM A MEMBER IN GOOD STANDING OF THE FOLLOWING BAR(S) LISTED OR LICENSED OR OTHERWISE AUTHORIZED TO PRACTICE LAW (EXPLAIN) (See R.C.M. 502(6)(13) CONCERNING QUALIFICATIONS):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9e. SIGNATURE OF COUNSEL</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9f. DATE</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10a. DETAILED COUNSEL OR CIVILIAN COUNSEL WAS PRESENT THROUGHOUT THE PROCEEDINGS. (If probationer waived the right to have counsel present throughout part or all of the proceedings after requesting detailed counsel or employing civilian counsel, complete b below.)</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>10b. STATE CIRCUMSTANCES AND SPECIFIC PROCEEDINGS CONDUCTED IN ABSENCE OF COUNSEL.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10c. SIGNATURE OF PROBATIONER</td>
<td></td>
<td></td>
</tr>
<tr>
<td>10d. DATE</td>
<td>October 1993</td>
<td></td>
</tr>
<tr>
<td>10e. THE PROBATIONER WAS AFFORDED THE RIGHT TO OBTAIN WITNESSES AND PRODUCE EVIDENCE (See R.C.M. 405(g)).</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>10f. IN THE PRESENCE OF PROBATIONER I QUESTIONED UNDER OATH ALL AVAILABLE WITNESSES AND EXAMINED DOCUMENTARY AND REAL EVIDENCE FOR BOTH SIDES. ANY DOCUMENTS AND REAL EVIDENCE WERE SHOWN TO THE PROBATIONER.</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>11a. THE PROBATIONER WAS AFFORDED THE RIGHT TO CROSS-EXAMINE ALL AVAILABLE WITNESSES.</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>11b. I HAVE SUMMARIZED THE EVIDENCE CONSIDERED IN EXHIBIT.</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>11c. THE FOLLOWING WITNESSES REQUESTED BY THE ACCUSED WERE NOT AVAILABLE UNDER R.C.M. 405(g) FOR THE REASONS INDICATED. (Explain why requested witnesses were unavailable and any alternatives to testimony under R.C.M. 405(g)(4) used.)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NAME (Last, First, MI)</td>
<td>REASON UNAVAILABLE</td>
<td>ALTERNATIVES</td>
</tr>
<tr>
<td>12a. AFTER HAVING BEEN INFORMED OF THE RIGHT TO REMAIN SILENT OR MAKE A STATEMENT, THE PROBATIONER</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>12b. INDICATED THAT HE/SHE DID NOT WISH TO MAKE A STATEMENT.</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>12c. MADE A STATEMENT SUMMARIZED IN EXHIBIT.</td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>

2
I recommend that the suspension of the sentence be vacated.

Indicate the grounds for such belief and the action taken:

A report of medical officers under R.C.M. 706 is attached in Exhibit.

If probationer was confined pending vacation proceedings under R.C.M. 1106(b):

- I find that there is probable cause to believe that the probationer violated the conditions of suspension.
- I do not find that there is probable cause to believe that the probationer violated the conditions of suspension and order higher release under R.C.M. 1106(b)(3)(b).

Recommendation of the officer exercising special court-martial jurisdiction over the probationer:

- I recommend that the suspension of the sentence be vacated. (Indicate type and amount of punishment, if any, to be imposed.)
  - Bad-Conduct Discharge

If proceedings to vacate suspension be dropped:

I recommend (state other recommendations):

Name of officer exercising special court-martial jurisdiction over probationer: Leonard E. Roberts

R. Rank: LTC

C. Organization: 5001st Support Group

Signature: Leonard E. Roberts

Date: 1 October 1993

Airman Basic Dice struck Master Sgt Timm in the face twice with a closed fist after Timm directed Dice to clean up his living area. Although Airman Dice testified that Timm was prejudiced against him because he was a probationer, no evidence of such bias was offered. Dice offered no other extenuating or mitigating evidence and the record reveals none. Dice had served under the suspended sentence for 2 weeks before this offense without previous incident. Dice was previously convicted by a special court-martial of disrespect and disobedience toward superior NCOs on two different occasions. I am satisfied that Dice is guilty of the offense of assaulting a superior NCO in the execution of office. I recommend that the suspension of the bad-conduct discharge be vacated.
APPENDIX 18

REMARKS (Continued)

<table>
<thead>
<tr>
<th>(Check appropriate answer)</th>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
<tbody>
<tr>
<td>19. DECISION OF THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION OVER PROBATIONER.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. VACATE SUSPENSION OF THE SENTENCE TO (specify type/amount of punishment to be vacated):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suspension of bad-conduct discharge vacated.</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>b. NOT TO VACATE.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c. OTHER (specify):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>d. IF DECISION IS TO VACATE, INDICATE EVIDENCE RELIED ON:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Testimony of Master Sgt Timm and Airman I.C. Mitt and Warren Teed established Airman Dice assaulted Timm, without provocation, while Timm was in the execution of his office. Medical report reflects Timm was bruised on cheek and forehead, Dice therefore violated conditions of suspension.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>e. IF DECISION IS TO VACATE, INDICATE REASONS FOR VACATING:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Airman Dice's offense strikes at the heart of military discipline and reflects his failure to adapt despite second chance. Bad-conduct discharge is appropriate.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

20a. NAME OF OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION OVER PROBATIONER

Arthur K. Rubino

20b. RANK

MGT

20c. ORGANIZATION

Commander
5000th Support Wing
AFO AP 99999

20d. SIGNATURE

Arthur K. Rubino

4. DATE

30 October 1983
NOTE: See R.C.M. 1203(b) concerning which cases are subject to review by a Court of Military Review. See R.C.M. 1110 concerning waiver or withdrawal of appellate review.

I have read the attached action dated 1 November 1993.

I have consulted with Lieutenant Fender, my (associate) defense counsel concerning my appellate rights and I am satisfied with his/her advice.

I understand that:

1. If I do not waive or withdraw appellate review —
   a. My court-martial will be reviewed by the Navy-Marine Corps Court of Military Review.
   b. The Court of Military Review will review my case to determine whether the findings and sentence are correct in law and fact and whether the sentence is appropriate.
   c. After review by the Court of Military Review, my case could be reviewed for legal error by the United States Court of Military Appeals, on petition by me or on request of the Judge Advocate General.
   d. If the Court of Military Appeals reviews my case, my case could be reviewed for legal error by the United States Supreme Court on petition by me or the Government.
   e. I have the right to be represented by military counsel, at no cost to me, or by civilian counsel, at no expense to the United States, or both, before the Court of Military Review, the Court of Military Appeals, and the Supreme Court.

2. If I waive or withdraw appellate review —
   a. My case will not be reviewed by the Court of Military Review, or be subject to further review by the Court of Military Appeals, or by the Supreme Court under 28 U.S.C. 1269.
   b. My case will be reviewed by a judge advocate for legal error, and I may submit in writing allegations of legal error for consideration by the judge advocate.
   c. After review by the judge advocate and final action in my case, I may petition the Judge Advocate General for correction of legal errors under Article 69(b). Such a petition must be filed within 2 years of the convening authority's action, unless I can show good cause for filing later.
   d. A waiver or withdrawal, once filed, cannot be revoked, and bars further appellate review.

Understanding the foregoing, I (waive my rights to appellate review) —

James R. Richards

PFC

PFC

RANK OF ACCUSED

DATE

DD FORM 2330

A19-1
1. I represented the accused at his/her court-martial.

☐ 2. I am associate counsel detailed under R.C.M. 1110(b). I have communicated with the accused's (detailed) (individual military) (civilian) (appellate) defense counsel concerning the accused's waiver/withdrawal and discussed this communication with the accused.

☐ 3. I am substitute counsel detailed under R.C.M. 1110(b).

☐ 4. I am a civilian counsel whom the accused consulted concerning this matter. I am a member in good standing of the bar of ________________________________.

☐ 5. I am appellate defense counsel for the accused.

I have advised the accused of his/her appellate rights and of the consequences of waiving or withdrawing appellate review. The accused has elected to (waive) (withdraw) appellate review.

Dudley D. Fender

Dudley D. Fender

5 November 1993
### APPENDIX 20

**WAIVER/WITHDRAWAL OF APPELLATE RIGHTS IN GENERAL COURTS-MARTIAL**  
SUBJECT TO EXAMINATION IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL

**NOTE:** See R.C.M. 1201(b)(1) concerning which cases are subject to examination in the Office of the Judge Advocate General. See R.C.M. 1110 concerning waiver or withdrawal of appellate review.

I have read the attached action, dated ________________.

I have consulted with, ________________, my (associate) defense counsel concerning my appellate rights and I am satisfied with his/her advice.

I understand that:

1. If I do not waive or withdraw appellate review —
   a. My case will be examined in the Office of the Judge Advocate General to determine whether the findings and sentence are legally correct and whether the sentence is appropriate.
   b. After examination in the Office of the Judge Advocate General and final action in my case, I may petition the Judge Advocate General for review under Article 69(b). Such a petition must be filed within 2 years after the convening authority took action in my case, unless I can show good cause for filing later.

2. If I waive or withdraw appellate review —
   a. My case will not be examined in the Office of the Judge Advocate General under Article 69(a), UCMJ.
   b. My case will be reviewed by a judge advocate for legal error, and I may submit in writing allegations of legal error for consideration by the judge advocate.
   c. After review by the judge advocate and final action in my case, I may petition the Judge Advocate General for review under Article 69(b). Such a petition must be filed within 2 years after the convening authority took action in my case, unless I can show good cause for filing later.
   d. A waiver or withdrawal, once filed, may not be revoked.

3. Understanding the above, I hereby (waive my rights to appellate review) (WITHDRAWAL OF APPELLATE REVIEW). I make this decision freely and voluntarily. No one has made any promises that I would receive any benefits from this waiver, withdrawal, and no one has forced me to make it.

---

**Gregory C. Johns**  
LCPL, USMC  
5 November 1993
STATEMENT OF COUNSEL

(Check appropriate block)

☐ 1. I represented the accused at his/her court-martial.

☐ 2. I am associate counsel detailed under R.C.M. 1110(b). I have communicated with the accused's (detailed) (individual military) (civilian) (appellate) defense counsel concerning the accused's waiver/withdrawal and discussed this communication with the accused.

☐ 3. I am substitute counsel detailed under R.C.M. 1110(b).

☐ 4. I am a civilian counsel whom the accused consulted concerning this matter. I am a member in good standing of the bar of

☐ 5. I am appellate defense counsel for the accused.

I have advised the accused of his/her appellate rights and of the consequences of waiving or withdrawing appellate review. The accused has elected to (waive) [underline] (appellate review).

Libby Rater

LSSS, Camp Blank, Ga

Captain, USMC

5 November 1993

Signature of Counsel
APPENDIX 21

ANALYSIS

Introduction
The Manual for Courts-Martial, United States, 1984, includes Executive Order No. 12473 signed by President Reagan on 13 April 1984. This publication also contains various supplementary materials for the convenience of the user.

History of the Manual for Courts-Martial. The President traditionally has exercised the power to make rules for the government of the military establishment, including rules governing courts-martial. See W. Winthrop, *Military Law and Precedents* 27–28 (2d ed. 1920 reprint). Such rules have been promulgated under the President's authority as commander-in-chief, see U.S. Const., Art. II, sec. 2, cl.1., and, at least since 1813, such power also has been provided for in statutes. See W. Winthrop, supra at 26–27.

In 1875 Congress specifically provided for the President to make rules for the government of courts-martial. Act of March 1, 1875, Ch. 115. 18Stat. 337. Similar authority was included in later statutes (see e.g., A.W. 38 (1916)), and continues in Article 36 of the Uniform Code of Military Justice. See also Articles 18 and 56. See generally *Hearings on H.R. 3804 Before the Military Personnel Subcom. of the House Comm. on Armed Services, 96th Cong., 1st Sess. 5–6, 14, 17–18, 20–21, 52, 106 (1979).* In 1979, Article 36 was amended to clarify the broad scope of the President's rulemaking authority for courts-martial. Act of November 9, 1979, Pub. L. No. 96-107, Section 801(b), 93 Stat. 810,811. See generally *Hearings on H.R. 3804,* supra.

In the nineteenth century the President promulgated, from time to time, regulations for the Army. Those regulations were published in various forms, including "Manuals". W. Winthrop, supra at 28. Such publications were not limited to court-martial procedures and related matters; however, they were more in the nature of compendiums of military law and regulations. The early manuals for courts-martial were informal guides and were not promulgated by the President. See MCM, 1895 at 1,2; MCM, 1905 at 3; MCM, 1910 at 3; MCM, 1917 at III. See also MCM, 1921 at XIX.

The forerunner of the modern *Manual for Courts-Martial* was promulgated by the Secretary of War in 1895. See MCM, 1895 at 2. See also *Hearings on H.R. 3805, supra* at 5. (Earlier Manuals were prepared by individual authors. See e.g., A. Murray, *A Manual for Courts-Martial* (3d ed. 1893); H. Coppee, *Field manual for Courts-Martial* (1863)). Subsequent Manuals through MCM, 1969 (Rev.) have had the same basic format, organization, and subject matter as MCM, 1895, although the contents have been modified and considerably expanded. See e.g., MCM, 1921 at XIX–XX. The format has been a paragraph format, numbered consecutively and divided into chapters. The subject matter has included pretrial, trial, and post-trial procedure. In MCM, 1917, rules of evidence and explanatory materials on the punitive articles were included. See, MCM, 1917 at XIV. The President first promulgated the Manual for Courts-Martial as such in 1921. See MCM, 1921 at XXVI.

Background of this Manual. During the drafting of the Military Rules of Evidence (see Analysis, Part III, introduction, infra), the drafters identified several portions of MCM, 1969 (Rev.) in specific areas. However, the project to draft the Military Rules of Evidence had demonstrated the value of a more comprehensive examination of existing law. In addition, changing the format of the Manual for Courts-Martial was considered desirable. In this regard it should be noted that, as indicated above, the basic format and organization of the Manual for Courts-Martial had remained the same for over 80 years, although court-martial practice and procedure had changed substantially.

Upon completion of the Military Rules of Evidence in early 1980, the General Counsel, Department of Defense, with the concurrence of the Judge Advocates General, directed that the Manual for Courts-Martial be revised. There were four basic goals for the revision. First, the new Manual was to conform to federal practice to the extent possible, except where the Uniform Code of Military Justice requires otherwise or where specific military requirements render such conformity impracticable. See Article 36. Second, current court-martial practice and applicable judicial precedent was to be thoroughly examined and the Manual was to be brought up to date, by modifying such practice and precedent or conforming to it as appropriate. Third, the format of the Manual was to be modified to make it more useful to lawyers (both military and civilian) and nonlawyers. Specifically, a rule as opposed to paragraph format was to be used and prescriptive rules would be separated from nonbinding discussion. Fourth, the procedures in the new Manual had to be workable across the spectrum of circumstances in which courts-martial are conducted, including combat conditions.

These goals were intended to ensure that the Manual for Courts-Martial continues to fulfill its fundamental purpose as a comprehensive body of law governing the trial of courts-martial and as a guide for lawyers and nonlawyers in the operation and application of such law. It was recognized that no single source could resolve all issues or answer all questions in the criminal process. However, it was determined that the Manual for Courts-Martial should be sufficiently comprehensive, accessible, and understandable so it could be reliably used to dispose of matters in the military justice system properly, without the necessity to consult other sources, as much as reasonably possible.


APPENDIX 21


In the summer of 1980, Commander James E. Pinnell, USN, and Major Frederic I. Lederer, USA, prepared an initial outline of the new Manual.

Drafting was done by the Working Group of the Joint-Service Committee on Military Justice. Since September 1980, when the drafting process began, the Working Group consisted of: Major John S. Cooke, USA (Chairman); Commander James E. Pinnell, USN; Lieutenant Colonel Richard R. James, USAF (October 1980–December 1982); Lieutenant Colonel Robert Leonard, USAF (December 1982 to January 1984); Major Jonathan R. Rubens, USMC, and Mr. John Cutts, and Mr. Robert Mueller of the staff of the Court of Military Appeals. Mr. Francis X. Glandhart and Mr. Jack McKay of the staff of the Court of Military Appeals also participated early in the drafting process. Clerical support was provided by the Court of Military Appeals. In this regard, Mrs. Gail L. Bissi has been instrumental in the success of this project.

The Working Group drafted the Manual in fourteen increments. Each increment was circulated by each service to various field offices for comment. Following such comment, each increment was reviewed in the respective offices of the Judge Advocate General, the Director, Judge Advocate Division, Headquarters, USMC, and the Chief Counsel, USCG, and in the Court of Military Appeals. Following such review, the Joint-Service Committee met and took action on each increment. After all increments had been reviewed and approved, the Code Committee approved the draft. At this time the Code Committee consisted of Chief Judge Robinson O. Everett, Judge William H. Cook, and Judge Albert B. Fletcher, of the Court of Military Appeals; Rear Admiral James J. McHugh, the Judge Advocate General, USN; Major General Hugh J. Clausen, The Judge Advocate General; USA; Major General Thomas Bruton, The Judge Advocate General, USAF; and Rear Admiral Edward Daniels, Chief Counsel, USCG. Brigadier General William H. J. Tiernan, USMC, also sat as an ex officio member.

Following approval by the Code Committee, the draft was made available for comment by the public. 48 Fed. Reg. 23688 (May 26, 1983). In September and October 1983, the comments were reviewed. The Working Group prepared numerous modifications in the draft based on comments from the public and from within the Department of Defense, and on judicial decisions and other developments since completion of the draft. In October 1983, the Joint-Service Committee approved the draft for forwarding to the General Counsel, Department of Defense, for submission to the President after coordination by the Office of Management and Budget.

On November 18, 1983, Congress passed the Military Justice Act of 1983. This act was signed into law by the President on December 6, 1983, Pub. L. No. 98–209, 97 Stat. 1393 (1983). The Working Group had previously drafted proposed modifications to the May 1983 draft which would be necessary to implement the act. These proposed modifications were approved by the Joint-Service Committee in November 1983 and were made available to the public for comment in December 1983. 48 Fed. Reg. 54263 (December 1, 1983). These comments were reviewed and modifications made in the draft by the Working Group, and the Joint-Service Committee approved these changes in January 1984. The draft of the complete Manual and the proposed executive order were forwarded to the General Counsel, Department of Defense in January 1984. These were reviewed and forwarded to the Office of Management and Budget in January 1984. They were reviewed in the Departments of Justice and Transportation. The Executive Order was finally prepared for submission to the President, and the President signed it on 13 April 1984.

A note on citation form. The drafters generally have followed the Uniform System of Citation (13th ed., 1981), copyrighted by the Columbia, Harvard, and University of Pennsylvania Law Reviews and the Yale Law Journal, subject to the following.

This edition of the Manual for Courts-Martial is referred to generally as “this Manual”. The Rules for Courts-Martial are cited, e.g., as R.C.M. 101. The Military Rules of Evidence are cited, e.g., as Mil. R. Evid. 101. Other provisions of this Manual are cited to the applicable part and paragraph, e.g., MCM, Part V, paragraph 1a(1) (1984).


Each individual section is denominated in the statute as an “Article” and will be cited to the corresponding Article. E.g., 10 U.S.C. Section 801 will be cited as “Article 1”; 10 U.S.C. Section 802 will be cited as “Article 2”; 10 U.S.C. Section 940 will be cited as “Article 140”. The entire legislation, Articles 1 through 140, will be referred to as “the Code” or “the UCMJ” without citation to the United States Code. When a change from MCM, 1969 (Rev.) is based on the Military Justice Act of 1983, Pub. L. No. 98–209, 97 Stat. 1393 (1983), this will be noted in the analysis, with citation to the appropriate section of the act. When this analysis was drafted, the specific page numbers in the statutes at large were not available.


Executive Order (1983)

The Executive Order includes the Manual for Courts-Martial, which consists of the Preamble, Rules for Courts-Martial, Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedure. Each rule states binding requirements except when the text of the rule expressly provides otherwise. Normally, failure to comply with a rule constitutes error. See Article 59 concerning the effect of errors.

Supplementary Materials

As a supplement to the Manual, the Department of Defense, in conjunction with the Department of Transportation, has published a Discussion (accompanying the Preamble, the Rules for
The civilian sector that affect the underlying rationale for a rule do "true with respect to rules derived from the decisions of military tribunals. Once incorporated into the Executive Order, such matters have an independent source of authority and are not dependent upon continued support from the judiciary. Conversely, to the extent that judicial precedent is set forth only in the Discussion or is otherwise omitted from the Rules or the Discussion, the continuing validity of the precedent will depend on the force of its rationale, the doctrine of "stare decisis," and similar jurisprudential considerations. Nothing in this Introduction should be interpreted to suggest that the placement of matter in the Discussion (or the Analysis), rather than the rule, is to be taken as disapproval of the precedent or as an invitation for a court to take a different approach; rather, the difficult drafting problem of choosing between a codification and common law approach to the law frequently resulted in noncodification of decisions which had the unanimous support of the drafters. To the extent that future changes are made in the Rules or Discussion, corresponding materials will be included in the Analysis.

The Appendices contain various nonbinding materials to assist users of this Manual. The Appendices also contain excerpts from pertinent statutes. These excerpts are appropriated for judicial notice, see Mil. R. Evid. 201A, but nothing herein precludes a party from proving a change in law through production of an official codification or other appropriate evidence.

PART I. PREAMBLE


1. Sources of military jurisdiction.

This subsection is based on paragraph 1 of MCM, 1969 (Rev.). The provisions of the Constitution which are sources of jurisdiction of military courts or tribunals include: Art I, sec. 8, cl. 1, 9-16, 18; Art. II, sec. 2; Art. IV, sec. 4; and the fifth amendment. As to sources in international law, see e.g., Ex Parte Quirin, 317 U.S. 1 (1942); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 82-84, 6 U.S.T. 3316, 3382, T.I.A.S. No. 3365, 75 U.N.T.S. 287. See generally DA Pam 27-174, supra at paragraph 1-3.

2. Exercise of military jurisdiction.

Subsection (a) is based on the first paragraph of paragraph 2 of MCM, 1969 (Rev.).

For additional materials on military law, see W. Winthrop, Military Law and Precedent 817-30 (2d ed. 1920 reprint); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). See also paragraph 3, sec. 1 of MCM, 1910 (concerning the exercise of martial law over military affiliated persons).

For additional materials on military government, see W. Winthrop, supra at 798-817; Madsen v. Kinsella, 343 U.S. 341 (1952); Mechanics' and Traders' Bank v. Union Bank, 89 U.S. (22 Wall.) 276 (1875).

For additional materials on the exercise of military jurisdiction under the law of war, see W. Winthrop, supra at 831-46; Trials of War Criminals Before the Nuremberg Tribunals (U.S. Gov't Printing Off., 1950-51); Trials of the Major War Criminals Before the International Military Tribunal (International Military Tribunal, Nuremberg 1947); In re Yamashita, 327 U.S. 1 (1946); Ex parte Quirin, supra; Ex parte Milligan, supra; Articles 18 and 21.
The drafters have attempted to minimize the number of definitions to the Uniform Code of Military Justice. MCM, 1969 (Rev.)

1. The term “Commander” was added to ensure that no construction of the Manual could result in delays of cases for the sake of unavailable specialized forms or office equipment.

2. “Capital case.” This definition is based on the first two sentences of paragraph 15a (3) of MCM, 1969 (Rev.).

3. “Capital offense.” This definition is based on the first sentence of paragraph 15a(2) of MCM, 1969 (Rev.).

4. “Code.” This definition was added to avoid frequent repetition of “Uniform Code of Military Justice.”

5. “Commander.” This definition was added to avoid frequent repetition of the longer phrase, “commanding officer or officer in charge.” See Articles 1(3) and (4).

6. “Convening authority.” This provision is based on paragraph 84a of MCM, 1969 (Rev.).

7. “Copy.” This definition was added to ensure that no construction of the Manual could result in delays of cases for the sake of unavailable specialized forms or office equipment.

8. “Court-martial.” Articles 16 and 39(a).


13. “Joint.” This definition is based on Joint Chiefs of Staff Publication 1, Dictionary of Military and Associated Terms 187 (1 Jun 79).

14. “Members.” This term is defined to avoid confusion about the membership of courts-martial.

15. “Military judge.” Article 1 (10). As to presidents of special courts-martial, see Mir. R. Evid. 101(c). The latter aspect was added for convenience and brevity in drafting.

16. “Party.” This definition was required by adoption of the texts of federal civilian rules, which frequently use the term. The code uses the same term. See e.g., Article 49. The Military Rules of Evidence also use the term.

17. “Staff judge advocate.” This term was not defined in the previous Manuals. It is defined to avoid variations in nomenclature among the services.

18. “Sua sponte.” “sua sponte” has been used frequently to avoid gender-specific language ("on his or her own motion"). Its use has been limited to passages expected to be used mainly by lawyers or with their assistance. Nonetheless, a definition is necessary for the benefit of a president of a special court-martial without a military judge.

19. “War, time of.” This definition applies only to R.C.M. 1004(c)(6) and to Parts IV and V of the Manual. Parts II (except for R.C.M. 1004(c)(6) and III do not use or refer to “time of war.” The phrase appears in several articles of the code, other than punitive articles. See Articles 2(a)(10); 43(a), (e), and (f); 71(b). The discussions of several rules address “time of war” in relation to these articles. See R.C.M. 202(a) Discussion (4); 407(b) Discussion; 907(b)(2)(B) Discussion.

“Time of war” is used in six punitive articles. See Articles 101, 105, and 106 (which define offenses that can occur only in time of war—Articles 101 and 106 are capital offenses), and Articles 85, 90, and 113 (which are capital offenses in time of war). See also Article 82. In addition, three offenses in Part IV use time of war as an aggravating circumstance. See paragraphs 37, 40, and 104.

The code does not define “time of war,” and Congress has not generally defined the term elsewhere, despite the appearance of “time of war” and similar language in many statutes. See e.g., 18...
ANALYSIS

App. 21, R.C.M. (19)

U.S.C. § 3287; 37 U.S.C. §§ 301(d); 301a(c), 301(a). In at least one instance Congress has expressly qualified the phrase "time of war" by saying "time of war declared by Congress." 37 U.S.C. § 310(a). Compare 37 U.S.C. § 310(a) with 37 U.S.C. § 301(d); 301a(c). See also S.Rep. No. 544, 89th Cong., 1st Sess. 13 (1965) which equates "all out war" to a declared war.

The legislative history of the code contains few references to this matter. The only direct reference, relating to the deletion of the phrase from Article 102, indicates that the working group which initially drafted the code considered "time of war" to mean "a formal state of war." Hearings on H.R. 2498 Before a Subcomm. of the House of Comm. on Armed Services, 81st Cong., 1st Sess. 1228-29 (1949). This reference is not cited in any of the decisions of the Court of Military Appeals construing "time of war."


The Court of Military Appeals has held that time of war, as used in several provisions of the code, does not necessarily mean declared war. Under the court's analysis, whether a time of war exists depends on the purpose of the specific article in which the phrase appears, and on the circumstances surrounding application of that article. See United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970) ("time of war" under Article 2(a)(10) means declared war; court-martial jurisdiction over civilians is to be construed narrowly); United States v. Anderson, 17 U.S.C.M.A. 558, 38 C.M.R. 386 (1968) (Vietnam war was time of war for purpose of suspension of statute of limitations under Article 43(a); accord Broussard v. Patton, 466 F.2d 816 (9th Cir. 1972)); United States v. Andertan, 4 U.S.C.M.A. 354, 15 C.M.R. 354 (1954) (Korean war was time of war for purpose of Article 85); United States v. Taylor, 4 U.S.C.M.A. 232, 15 C.M.R. 232 (1954) (Korean war was time of war for purpose of suspension of statute of limitations under Article 43(f)); United States v. Ayers, supra (Korea war was time of war for purpose of suspension of statute of limitations under Article 43(a)); United States v. Ayers v. Ayers, supra (Korea war was time of war for purpose of suspension of statute of limitations under Article 43(a)); United States v. Ayers v. Ayers, supra (Korea war was time of war for purpose of suspension of statute of limitations under Article 43(a)); United States v. Ayers v. Ayers, supra (Korea war was time of war for purpose of suspension of statute of limitations under Article 43(a)); United States v. Ayers v. Ayers, supra (Korea war was time of war for purpose of suspension of statute of limitations under Article 43(a)); United States v. Ayers v. Ayers, supra (Korea war was time of war for purpose of suspension of statute of limitations under Article 43(a)); United States v. Ayers v. Ayers, supra (Korea war was time of war for purpose of suspension of statute of limitations under Article 43(a)). United States v. Sanders, 7 U.S.C.M.A. 21, 21 C.M.R. 147 (1956); United States v. Ayers, supra.

During the Korean war it was suggested that "time of war" existed only in the Far Eastern theater. The court did not have to decide this issue with respect to whether the death penalty was authorized for Articles 85, 90, or 113 because the President suspended the Table of Maximum Punishments (paragraph 117c of MCM (Army), 1949; paragraph 127c of MCM, 1951), only in the Far Eastern command. See Exec. Order No. 10149, 3 C.F.R. 1949-53 Comp. 326 (1950); Exec. Order No. 10247, 3 C.F.R. 1949-53 Comp. 754 (1951). See also United States v. Greco, 36 C.M.R. 559 (A.B.R. 1965). The question as to Articles 85, 90, or 113 did not arise during the Vietnam war because the Table of Maximum Punishments was not suspended. There are no reported cases concerning Articles 101 and 106, and the only prosecutions under Article 105 were, of course, for offenses arising in the theater of operations. See, e.g., United States v. Dickenson, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955); United States v. Galagher, 23 C.M.R. 591 (A.B.R. 1957).

The Court of Military Appeals rejected the argument that "time of war" is geographically limited with respect to Article 43. See United States v. Taylor, supra; United States v. Ayers, supra. See also United States v. Anderson, supra. The court's analysis in Taylor and Ayers suggests, however, that for some purposes "time of war" may be geographically limited. For purposes of the death penalty, the requisite findings of aggravating circumstances under R.C.M. 1004 would screen out offenses which did not substantially affect the war effort. Therefore, possible geographic limitations in "time of war" would be subsumed in the necessary findings under R.C.M. 1004.

Based on the foregoing, for at least some purposes of the punitive articles, "time of war" may exist without a declaration of war. The most obvious example would be a major attack on the United States and the following period during which Congress may be unable to meet. Cf. New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946), cert. denied, 331 U.S. 811 (1947). Moreover, as both the Korean and Vietnam conflicts demonstrated, United States forces may be committed to combat of substantial proportions and for extended periods, while for many possible reasons (see Bas v. Tingy, supra at 44) war is not formally declared.

It should be noted that, under the article-by-article analysis used by the Court of Military Appeals to determine whether time of war exists, "time of war" as used in Article 106 may be narrower than in other punitive articles, at least in its application to civilians. See United States v. Averette, supra. See also Article 104.

The definition does not purport to give the President power to declare war. See United States v. Ayers, supra at 227, 15 C.M.R. at 227; United States v. Bancroft, supra at 5, 11 C.M.R. at 5. Instead, it provides a mechanism by which the President may recognize, for purposes of removing or specifically raising the maximum limits on punishments for certain offenses under Part IV, that a "time of war" exists. This determination would be based on the existing circumstances. For purposes of codal provisions triggered by "time of war," this determination would be subject to judicial review to ensure it is consistent with congressional intent. Cf. United States v. Bancroft, supra. Nevertheless, a determination by the President that time of war exists for these purposes would be entitled to great weight.
Paragraph 127c(5) of MCM, 1969 (Rev.) and the ninth paragraph 127c of MCM, 1951 provided for suspension of the Table of Maximum Punishments as to certain articles upon a declaration of war. The President could, and did in the Korean war, suspend the limits the President had established for those offenses. Thus, the effect of the definition of "time of war" in R.C.M. 103(19) is similar to the operation of those paragraphs. In either case, a declaration of war or specific action by the President affects the maximum punishments. The definition under R.C.M. 103(19) also provides guidance, subject to judicial review as noted above, on the application of codal provisions.


1990 Amendment: The change to the discussion corrects a previous typographical omission of clause (20) and misplacement of definitions of rank and rating. The note following clause (19) is not part of the definitions 10 U.S.C. § 101 and was added to clarify usage of the terms "rank" and "grade" in this Manual.

Rule 104. Unlawful command influence
This rule based on Article 37 and paragraph 38 of MCM, 1969 (Rev.). See also United States v. Charette, 15 M.J. 197 (C.M.A. 1983); United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983); United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976); United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967); United States v. Wright, 17 U.S.C.M.A. 110, 37 C.M.R. 374 (1967); United States v. Hawthorne, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956). The discussion is based on H.R. Rep. No. 491, 81st Cong., 1st Sess. 21 (1949). As to supervision of military judges and counsel, see Articles 6, 26, and 27. Subsection (b)(2)(B) is retained. It is rare that a military judge in a special court-martial is not assigned to the judicial agency or activity of the service concerned. See e.g., AR 27-10, para. 8-6b (3) (Nov. 1982). Subsection (b)(2)(B) ensures that in the unusual situation that it is necessary to detail a military judge not so assigned, the military judge's performance of judicial duties will not be the subject of comment or evaluation in an efficiency or fitness report prepared or reviewed by the convening authority. The second sentence in subsection (b)(2)(B) clarifies that the convening authority may comment only on the military judge's nonjudicial duties in such a report. Subsection (D) is new and clarifies that the military judge, members, and counsel are not immune from action for any offense they might commit while in that capacity, e.g. failure to repair.

Rule 105. Direct communications: convening authorities and staff judge advocates; among staff judges advocates
This rule, while new to the Manual for Courts-Martial, is based on Article 6(b). Congress intended that Article 6(b) serve several purposes. First, by requiring convening authorities to communicate directly with their staff judge advocates on matters relating to the administration of military justice, it was intended that the position and effectiveness of the staff judge advocate be enhanced. Second, by providing for communications among judge advocates, it was intended to emphasize the independence of staff judge advocates, which in turn would ensure that staff judge advocates exercise their judicial functions in a fair and objective manner. Lastly, and most importantly, Article 6(b) was intended to help prevent interference with the due administration of military justice. See H.R. Rep. No. 491, 81st Cong., 1st Sess. 12–13 (1949); S.Rep. 486, 81st Cong., 1st Sess.9 (1949); 95 Cong. Rec.H. 5721 (1949); 96 Cong. Rec.S 1356 (1950). See also Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982); United States v. Davis, 18 U.S.C.M.A. 170, 39 C.M.R. 170 (1969); United States v. Walsh, 11 M.J. 858 (N.M.C.M.R. 1981).

Rule 106. Delivery of military offenders to civilian authorities
This rule is based on Article 14(a) and on the second paragraph of paragraph 12 of MCM, 1969 (Rev.). See also United States v. Reed, 2 M.J. 64 (C.M.A. 1976) (delivery and speedy trial); 18 U.S.C. Appendix II. The second sentence is new. It provides express authority for restraining an offender to be delivered to civilian authorities, but only when such restraint is justified under the circumstances. Note that this rule does not apply to delivery to a foreign government; this situation ordinarily is governed by status of forces agreements. This rule applies to delivery to authorities of the United States or its political subdivisions. Occasionally when civilian authorities request delivery of a servicemember, the delivery cannot be effected immediately, e.g., when the offender is overseas. In such situations, reasonable restraint may be necessary to ensure that the delivery can be effected and to protect the community. The person responsible for deciding whether to relinquish the offender must decide whether there are adequate grounds for restraint in such cases. This rule is not intended to permit the military to restrain an offender on behalf of civilian authorities pending trial or other disposition. Restraint imposed under this rule is strictly limited to the time reasonably necessary to effect the delivery. Thus, if the civilian authorities are dilatory in taking custody, the restraint must cease.

The discussion is based on Article 14(b).

Rule 107. Dismissed officer's right to request trial by court-martial
This rule is based on Article 4 and paragraph 111 of MCM, 1969 (Rev.). See also H.R. Rep. No. 491, 81st Cong., 1st Sess. 12 (1949); W. Winthrop, Military Law and Precedents 64 (2d ed. 1920 reprint). The text of 10 U.S.C. § 1161(a) is as follows:
(a) No commissioned officer may be dismissed from any armed force except—
(1) by sentence of a general court-martial;
(2) in communication of a sentence of a general court-martial; or
(3) in time of war, by order of the President.

Rule 108. Rules of court
This rule is new and is based on Fed.R.Crim. P. 57(a) and Article 140. Cf. Article 66(f). See also United States v. Kelson, 3 M.J. 139 (C.M.A. 1977). Depending on the regulations, rules of court may be promulgated on a service-wide, judicial circuit, or trial judge level, or a combination thereof. The rule recognizes that differences in organization and operations of services and regional and local conditions may necessitate variations in practices and procedures to supplement those prescribed by the code and this Manual.
The manner in which rules of court are disseminated is within the sole discretion of the Judge Advocate General concerned. Service-wide rules, for example, may be published in the same manner as regulations or specialized pamphlets or journals. Local rules may be published in the same manner as local regulations or other publications, for example. Parties to any court-martial are entitled to a copy, without cost, of any rules pertaining thereto. Members of the public may obtain copies under rules of the military department concerned. The penultimate sentence ensures that failure to publish in accordance with the rules of the Judge Advocate General (or a delegate) will not affect the validity of a rule if a person has actual and timely notice or if there is no prejudice within the meaning of Article 59. Cf. 5 U.S.C. § 552(a)(1).

Rule 109. Professional supervision of military judges and counsel

This rule is based on paragraph 43 of MCM, 1969, (Rev.). See also Articles 1(13), 6(a), 26, and 27. The previous rule was limited to conduct of counsel in courts-martial. This rule also applies to military trial and appellate judges and to all judge advocates and other lawyers who practice in military justice, including the administration of nonjudicial punishment and pretrial and posttrial matters relating to courts-martial. The rule also applies to civilian lawyers so engaged, as did its predecessor. The rule does not apply to lay persons. Nothing in this rule is intended to prevent a military judge from excluding, in a particular case, a counsel from representing a party before the court-martial over which the military judge is presiding, on grounds of lack of qualifications under R.C.M. 502(d), or to otherwise exercise control over counsel in accordance with these rules. See e.g., R.C.M. 801.

1993 Amendment: Subsection (a) was amended to conform with subsection (c). The amendment to subsection (a) clarifies that the Judge Advocates General are responsible for the supervision and discipline of judges and attorneys. The amendment to subsection (a) is not intended to limit the authority of a Judge Advocate General in any way.


Subsection (c)(2) is based on the committee report accompanying the FY 90 Defense Authorization Act. See Conf. Rep. No. 331 at 658. This subsection is designed to increase public confidence in the military justice system while contributing to the integrity of the system. See, Landmark Communications v. Virginia, 435 U.S. 829 (1978).


Subsection (c)(3), (c)(5), and (c)(7) reflect, and adapt to the conditions of military practice, the general principle that judges should investigate judges.

The first paragraph of the Discussion to subsection (c)(3) is based on the commentary to ABA Model Standard 4.1.

The discussion to subsection (c)(4) is based on the commentary to ABA Model Standard 4.6.

The clear and convincing standard found in subsection (c)(6) is based on ABA Model Standard 7.10.

Under subsection (c)(7), the principle purpose of the commission is to advise the Judge Advocate General concerned as to whether the allegations contained in a complaint constitute a violation of applicable ethical standards. This subsection is not intended to preclude use of the commission for other functions such as rendering advisory opinions on ethical questions. See, ABA Model Standard 9 on the establishment and role of an advisory committee.

Subsection (c)(7)(a) is based on ABA Model Standard 2.3, which provides that one-third of the members of a commission should be active or retired judges.

CHAPTER II. JURISDICTION

Rule 201. Jurisdiction in general

Introduction. The primary source of court-martial jurisdiction is Art. I, sec. 8, cl. 14 of the Constitution, which empowers Congress to make rules for the government and regulation of the armed forces of the United States. Courts-martial are recognized in the provisions of the fifth amendment expressly exempting “cases arising in the land or naval forces” from the requirement of presentment and indictment by grand jury. See also Part I, Preamble, for a fuller discussion of the nature of courts-martial and the sources of their jurisdiction.

(a) Nature of court-martial jurisdiction. Subsection (1) reiterates the first sentence of the second paragraph of paragraph 8 of MCM, 1969 (Rev.). The discussion is based on paragraph 8 of MCM, 1969 (Rev.). Cf. Fed R. Crim. P.7(c)(2); 18 U.S.C. §§ 3611–20. Courts-martial generally have the power to resolve issues which arise in connection with litigating criminal liability and punishment for offenses, to the extent that such resolution is necessary to a disposition of the issue of criminal liability or punishment.

Subsection (3) restates the third paragraph of paragraph 8 of MCM, 1969 (Rev.). See also Chenoweth v. Van Arsdall, 22 U.S.C.M.A. 183, 46 C.M.R. 183 (1973), which held that Art. III, sec, 2, cl. 3 of the Constitution (requiring crimes to be tried in the state in which committed) does not apply to courts-martial. The second sentence is based on Article 18. See also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

(b) Requisites of court-martial jurisdiction. This rule is derived from the fourth paragraph of paragraph 8 of MCM, 1969 (Rev.). The first sentence in the rule is new. See Rosado v. Wyman, 397 U.S. 375, 370 (1970); Wickham v. Hall, 12 M.J. 145, 152 n.8 (C.M.A. 1981). Cf. Ex parte Poresky, 290 U.S. 30 (1933). The rule expands the list of requisites for court-martial jurisdiction to conform more accurately to practice and case law. Requisite (3) has been added to reflect the distinction, long recognized in military justice, between creating a court-martial by convening it, and extending to a court-martial the power to resolve certain issues by referring charges to it. Thus, a court-martial has power to dispose only of those offenses which a convening authority has referred to it. Not all defects in a referral are jurisdictional. See United States v. Baplock, 15 M.J. 190 (C.M.A. 1983). Requisite (5) is listed separately for the first time. This requisite makes clear that courts-martial have the power to hear only those cases which they are authorized by the code to try (i.e., offenses made punishable by the code, and, in the case of general courts-martial, certain offenses under the law of war). Second, it recognizes the important effect of O'Callahan v. Parker, 395 U.S. 258 (1969), on courts-martial. Although nothing in this rule or R.C.M. 203 is intended to codify the service-connection requirement of O'Callahan or later decisions, the requirement cannot be ignored in the Manual for Courts-Martial.

Requisites (1) and (2) restate two requisites in paragraph 8 of MCM, 1969 (Rev.). See Generally United States v. Ryan, 5 M.J. 97 (C.M.A. 1978); United States v. Newcomb, 5 M.J. 4 (C.M.A. 1978). Contrary to the holdings in Ryan and Newcomb, "errors in the assignment or excusal of counsel, members, or a military judge that do not affect the required composition of a court-martial will be tested solely for prejudice under Article 59." S.Rep. No. 53, 98th Cong., 1st Sess. 12 (1983). The second sentence of subsection (2) makes this clear, and also emphasizes that counsel is not a jurisdictional component of a court-martial. See Wright v. United States, 2 M.J. 9 (C.M.A. 1976). Requisite (4) is somewhat broader than the statement in MCM, 1969 (Rev.), since jurisdiction over the person has been affected by judicial decisions. See e.g., McElroy v. United States ex rel. Guariglia, 361 U.S. 281 (1960); Reid v. Cooke, 354 U.S. 1 (1957); United States v. Avrette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970). Thus it is misleading to refer solely to the code as determining whether jurisdiction over the person exists. The discussion restates the basic principle that the judgment of a court-martial without jurisdiction is void.

(c) Contempt. This subsection restates Article 48, except for the deletion of military commissions and provost courts. These tribunals are also governed by Article 48, but need to be mentioned in rules pertaining to courts-martial.

(d) Exclusive and nonexclusive jurisdiction. Subsection (d) is based on paragraph 12 of MCM, 1969 (Rev.). Military offenses are those, such as unauthorized absence, disrespect, and disobedience, which have no analog in civilian criminal law. The second paragraph of paragraph 12 is omitted here, as the subject now appears at R.C.M. 106. Concurrent jurisdiction of courts-martial and domestic tribunals was formerly discussed separately from concurrent jurisdiction of courts-martial and foreign tribunals. The present rule treats both at once since, for purposes of the rule, each situation is treated the same. The differing considerations and legal implications in the domestic and foreign situations are treated in the discussion. See R.C.M. 907(b)(2)(c) for a discussion of the former jeopardy aspects of exercise of jurisdiction by more than one agency or tribunal. With respect to the exercise of jurisdiction by the United States or a foreign government. Wilson v. Girard, 534 U.S. 524 (1957), establishes that the determination of which nation will exercise jurisdiction is not a right of the accused.

The first paragraph in the discussion reaffirms the policy found in DOD Directive 5525.1, Jan. 22, 1966 (superseded by DOD Directive 5525.1, Aug. 7, 1979), which is implemented by a triservice regulation, AR 27–50/SECNAVINST 5820.4E/AFR 110–12, Dec. 1, 1978, that the United States seeks to maximize jurisdiction over its personnel.

The second paragraph in the discussion restates the third paragraph in paragraph 12 of MCM, 1969 (Rev.), which was based on The Schooner Exchange v. McFaddan and Others, 11 U.S. (7 Cranch) 116 (1812). See also Wilson v. Girard, supra.

(e) Reciprocal jurisdiction. This subsection is based on Article 17 and paragraph 13 of MCM, 1969 (Rev.). It continues the express presidential authorization for the exercise of reciprocal jurisdiction and the delegation of authority (Article 140) to the Secretary of Defense to empower commanders of joint commands or task forces to exercise such power. See United States v. Hooper, 5 U.S.C.M.A. 391, 18 C.M.R. 15 (1955). It also continues the guidance in MCM, 1969 (Rev.) concerning the exercise of reciprocal jurisdiction by commanders other than those empowered under R.C.M. 201(e)(2). The language is modified to clarify that manifest injury is not limited to a specific armed force. The subsection adds a clarification at the end of subsection (3) that a court-martial convened by a commander of a service different from the accused's is not jurisdictionally defective nor is the service of which the convening authority is a member an issue in which the accused has a recognized interest. The rule and its guidance effectuate the congressional intent that reciprocal jurisdiction ordinarily not be exercised outside of joint commands or task forces (Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess. 612–615, 957–958 (1949)) and is designed to protect the integrity of intraservice lines of authority. See United States v. Hooper, supra (Brosman, J. and Latimer, J., concurring in the result).

1986 Amendment: Subsections (e)(2) and (e)(3) were revised to implement the Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub.L. No. 99-433, tit. II, § 211(b), 100 Stat. 992. Because commanders of unified and specified commands (the combatant commands) derive court-martial convening authority from Article 22(a)(3), as added by this legislation, they need not be established as convening authorities in the Manual.

Paragraph 2(a), which sets forth the authority of the combatant commanders to convene courts-martial over members of any of the armed forces, is an exercise of the President's authority under Article 17(a). In paragraph 2(b), the first clause is a dele-
gation from the President to the Secretary of Defense of the President's authority to designate general court-martial convening authorities. This provision, which reflects the current Manual, may be used by the Secretary of Defense to grant general court-martial convening authority to commanders of joint commands or joint task forces who are not commanders of a unified or specified command. The second clause of paragraph 2(b) is an exercise of the President's authority under Article 17(a).

Nothing in this provision affects the authority of the President or Secretary of Defense, as superior authorities, to withhold court-martial convening authority from the combatant commanders in whole or in part.

Subsection (4) has been added to avoid possible questions concerning detailing military judges from different services.

Subsection (5) restates Article 17(b).

1986 Amendment: Subsection (6) was inserted in the context of the Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, tit. II, 100 Stat. 992, to specify the process for resolving disagreements when two organizations, at the highest levels of each, assert competing claims for jurisdiction over an individual case or class of cases. Under this legislation, the commanders of unified and specified commands are authorized to convene courts-martial. At the same time, the military departments retain authority over all aspects of personnel administration, including administration of discipline, with respect to all persons assigned to joint duty or otherwise assigned to organizations within joint commands. In effect, the combatant commands and the military departments have concurrent jurisdiction over persons assigned to such commands. Under most circumstances, any issues as to jurisdiction will be resolved between the military department and the joint command. Paragraph (6) has been added to provide a means for resolving the matter when the Service Secretary and the commander of the joint organization cannot reach agreement. See H.R. Rep. No. 824, 99th Cong., 2d Sess. (1986), at 125. Paragraph (6) also requires use of the same procedure when there is a disagreement between two Service Secretaries as to the exercise of reciprocal jurisdiction.

Subsection (7) was added to ensure that the Secretaries of the military departments retain responsibility for the administration of discipline, including responsibility for all persons in their departments assigned to joint duty.

Paragraphs (6) and (7) apply only when the commander is acting solely in his joint capacity or when he is seeking to assert jurisdiction over a member of a different armed force. There are various provisions of the Manual addressing the duties or responsibilities of superior authorities, and it was considered more useful to establish who may act as a superior authority as a general proposition rather than to specify in great detail the relationship between joint commanders and Service Secretaries as to each such matter. Accordingly, when action is required to be taken by an authority superior to a combatant commander, the responsibility is given to the Secretary of the Military Department that includes the armed force of which the accused is a member. This includes responsibility for acting on matters such as a request for counsel of the accused's own selection. An exception is expressly set forth in paragraph (6), however, which specifically provides the procedure for resolving disagreements as to jurisdiction. The Service Secretary cannot withhold or limit the exercise of jurisdiction under R.C.M. 504(b) or under Part V (Nonjudicial Punishment Procedure) by a combatant commander over persons assigned to the joint command. Such action may be taken, however, by the Secretary of Defense, who may assign responsibility to the military department or the unified command for any case or class of cases as he deems appropriate.

The amendments to R.C.M. 201 are designed to govern organizational relationships between joint commands and military departments over a range of issues, and are not intended to confer rights on accused servicemembers. These provisions reflect the President's inherent authority as Commander-in-Chief to prescribe or modify the chain of command, his specific authority under Article 17 to regulate reciprocal jurisdiction and his authority (and that of the Secretary of Defense) under 10 U.S.C. §§ 161-65 (as added by the 1986 legislation) to prescribe or modify the chain of command.

To the extent that a commander of a joint organization is "dual-hatted" (i.e., simultaneously serving as commander of a joint organization and a separate organization within a military department), subsections (6) and (7) apply only to the actions taken in a joint capacity.

(f) Types of courts-martial. The source for subsection (1) is Article 18. This subsection is substantially the same as paragraph 14 of MCM, 1969 (Rev.), although it has been reorganized for clarity. Several statements in MCM, 1969 (Rev.) concerning punishments by general courts-martial have been placed in the discussion. As to the second sentence in subsection (1)(A)(i), see also Wickham v. Hall, 12 M.J. 145 (C.M.A. 1983); Wickham v. Hall, 706 F.2d 713 (5th Cir. 1983).

The source for subsection (2) is Article 19. Subsection (2) is based on paragraph 15 of MCM, 1969 (Rev.), although it has been reorganized for clarity. Note that under subsection (2)(C)(ii) a general court-martial convening authority may permit a subordinate convening authority to refer a capital offense to a special court-martial. This is a modification of paragraph 15(a)(1) of MCM, 1969 (Rev.), which said a general court-martial convening authority could "cause" a capital offense to be referred to a special court-martial without specifying whether the convening authority had to make the referral personally. Subsection (2)(C)(iii) permits the Secretary concerned to authorize special court-martial convening authorities to refer capital offense to special courts-martial without first getting authorization from a general court-martial convening authority. Several statements in MCM, 1969 (Rev.) have been placed in the discussion.

As to subsection (3) summary courts-martial are treated separately in R.C.M. 1301-1306.

(g) Concurrent jurisdiction of other military tribunals. This subsection is based on the last paragraph in paragraph 12 of MCM, 1969 (Rev.).

Rule 202. Persons subject to the jurisdiction of courts-martial

(a) In general. This subsection incorporates by reference the provisions of the code (see Articles 2, 3, 4, and 73) which provide jurisdiction over the person. See also Articles 83, 104, 106. The discussion under this subsection briefly described some of the more important requirements for court-martial jurisdiction over persons. Standards governing active duty servicemembers (Article 2(a)(1)) are emphasized, although subsection (4) brings attention...
to limitations on jurisdiction over civilians established by judicial decisions.


The second paragraph under (i) Enlistment is based on United States v. Bean, 13 U.S.C.M.A. 203, 32 C.M.R. 203 (1962); United States v. Overton, 9 U.S.C.M.A. 684, 26 C.M.R. 464 (1958); and 10 U.S.C. § 1170. The last sentence is based on Article 2(c) which provides that in case of constructive enlistment, jurisdiction continues until "terminated in accordance with law or regulations promulgated by the Secretary concerned."

The last paragraph restates Article 2(c). The last sentence of that paragraph takes account of the legislative history of Article 2(c). See S.Rep. No. 197, 96th Cong., 1st Sess. 122 (1979), which indicates that United States v. King, 11 U.S.C.M.A. 19, 28 C.M.R. 243 (1959) is overruled by the statute. This is also reflected in the first paragraph under (ii) Induction.


The second paragraph under (ii) Induction is based on United States v. Scheunemann, 14 U.S.C.M.A. 479, 34 C.M.R. 259 (1964). See also United States v. Wilson, 44 C.M.R. 891 (A.C.M.R. 1971). Although no military case has so held, dicta and Scheunemann supports the second sentence.


1986 amendment: Paragraph (2)(A)(ii) of the Discussion was amended and paragraph (5) was added to reflect amendments to Articles 2 and 3 of the UCMJ contained in the "Military Justice Amendment of 1986," tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub L. No. 99-661, 100 Stat. 3905 (1986), which, among other things, preserves the exercise of jurisdiction over reservists for offenses committed in a duty status, notwithstanding their release from duty status, if they have time remaining on their military obligation. The legislation also provides express statutory authority to order reservists, including members of the National Guard of the United States and the Air National Guard of the United States who commit offenses while serving on duty under Title 10 of the United States Code, to active duty for disciplinary action, including the service of any punishment imposed.


The exceptions is subsection (B)(iii) are restated in slightly different language for clarity from paragraph 11b of MCM, 1969 (Rev.). Exception (b) is based on United States v. Clardy, supra. See also 14 M.J. 123 (C.M.A. 1982). As to exception (c), jurisdiction over prisoners in the custody of the armed forces, see Kahn v. Anderson, 255 U.S. 1 (1921); United States v. Nelson, 14 U.S.C.M.A. 93, 33 C.M.R. 305 (1965). See also Mosher v. Hunter, 143 F.2d 745 (10th Cir. 1944), cert. denied, 323 U.S. 800 (1945). Although it has not been judicially interpreted, the sentence of paragraph 11b of MCM, 1969 (Rev.) has been included here. The principle it expressed has long been recognized. See the last sentence in paragraph 11b of MCM, 1951; the last sentence of the third paragraph of paragraph 10 of MCM (Army), 1949; and the last sentence of the fourth paragraph of paragraph 10 of MCM, 1928. As to jurisdiction under Article 3(b), see Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981); Wickham v. Hall, 706 F.2d 713 (5th Cir. 1983).

Subsection (3) described the jurisdiction under Article 2(a)(8). See also 33 U.S.C. § 855; 42 U.S.C. § 217.

Subsection (4) of the discussion points out that jurisdiction over civilians has been restricted by judicial decisions. See generally Reid v. Covert, 354 U.S. 1 (1957); Toth v. Quarles, supra. The MCM 1969 (Rev.) referred to such limitations only in footnotes to Articles 2(a)(10) and (11) and (3a). The discussion of R.C.M. 202 is a more appropriate place to bring attention to these matters. A brief reference in the discussion was considered sufficient, while the analysis provides primary sources of law in the area, should an issue arise on the subject.

The second sentence in the subsection (4) of discussion is based on McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960); Reid v. Covert, supra. It is not settled whether "peacetime" as used in these decisions means all times other than a period of declared war or whether "peacetime" ceases when armed forces are involved in undeclared wars or hostilities. There is some authority for the latter view. See W. Winthrop, Military Law and Precedents, 101 (2d ed. 1920 re-
With respect to Article 2(a)(10), the Court of Military Appeals has held that “time of war” means a formally declared war (based on U.S. Const., art. I, sec. 8, cl. 11). United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970). But cf. Lawton v. Ignatius, 416 F.2d 821 (D.C. Cir. 1969) (assuming without deciding that Article 2(a)(10) could be invoked during period of undeclared war, no court-martial jurisdiction existed over civilian merchant seaman for murder in Vietnam because crime and accused were not sufficiently connected with the military). See also Analysis, R.C.M. 103(19).

The words “in the field” and “accompanying an armed force” have also been judicially construed. “In the field” implies military operations with a view to the enemy. 14 Ops. Atty Gen. 22 (1872). The question whether an armed force is “in the field” is not to be determined by the locality in which it is found, but rather by the activity in which it is engaged. Hines v. Mikell, 259 F.28, 34 (4th Cir. 1919). Thus, forces assembled in the United States for training preparatory for service in the actual theater of war were held to be “in the field.” Hines v. Mikell, supra. A merchant ship and crew transporting troops and supplies to a battle zone constitute a military expedition “in the field.” In re Berue, 54 F. Supp. 252 (S.D. Ohio 1944); McCune v. Kilpatrick, 53 F.Supp. 80 (E.D. Va. 1943). See also Ex parte Gerlach, 247 F.616 (S.D.N.Y. 1917); United States v. Burney, 6 U.S.C.M.A. 776, 21 C.M.R. 98 (1956); Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 872-3 (1949). But see, W. Winthrop, supra at 100-102; Reid v. Covert, supra at 34 n. 61.

One may be “accompanying an armed force” although not directly employed by it or the Government. For example, an employee of a contractor engaged on a military project or serving on a merchant ship carrying supplies or troops is “accompanying an armed force,” Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945), cert. dim., 328 U.S. 822 (1946); In re DiBartolo, 50 F.Supp. 929 (S.D.N.Y. 1943); In re Berue, supra; McCune v. Kilpatrick, supra. To be “accompanying an armed force” one’s presence within a military installation must be more than merely incidental; it must be connected with or dependent upon the activities of the armed forces or its personnel. Although a person “accompanying an armed force” may be “serving with” it as well, the distinction is important because even though a civilian’s contract with the Government ended before the commission of an offense, and hence the person is no longer “serving with” an armed force, jurisdiction may remain on the ground that the person is “accompanying an armed force” because of continued connection with the military. Perlstein v. United States, supra; Grewe v. France, 75 F.Supp. 433 (E.D. Wis. 1948).

McElroy v. Guagliardo, supra at 285-87, discusses possible methods for extending court-martial jurisdiction over civilians in some circumstances. To date these methods remain undeveloped. See also Everett and Hourcie, Crime Without Punishment—Exservicemen, Civilian Employees and Dependents, 13 A.F.JAG L. Rev. 184 (1971). Civilians may be tried by general court-martial under Article 18 and the law of war. See R.C.M. 201(b)(1)(B); 202(b). See also Article 21. This includes trial by court-martial in places where the United States is an occupying power. See e.g., Madsen v. Kinsella, 343 U.S. 341 (1952) [upholding jurisdiction of military commission to try a dependent spouse in occupied Germany in 1950. Although a state of war with Germany still technically existed (see Proclamation No. 2950, 3 C.F.R. (1948-53 Comp.) 135 (1951)) hostilities were declared terminated on 31 December 1946 (see Proclamation No. 2714, 3 C.F.R. (1948-53 Comp.) 99 (1947)) and the United States Supreme Court observed in dicta that military courts might have jurisdiction in occupied territory even in peacetime, 343 U.S. at 360]. See also Wilson v. Bohlender, 361 U.S. 281, 283 n. 2 (1960); Kinsella v. Singleton, supra at 244.

(b) Offenses under the law of war. This subsection is based on Article 18. See also Article 21. The phrase “offense subject to trial by court-martial” or “offense triable by court-martial” is used in the R.C.M. in recognition of the fact that the Manual for Courts-Martial governs courts-martial for offenses under the law of war as well as under the code. See e.g., R.C.M. 301(b); 302(c); 304(c); 305(d). In such contexts, the phrase does not include a requirement for a jurisdictional determination.

(c) Attachment of jurisdiction over the person. This subsection is based on paragraph 11d of MCM, 1969 (Rev.), and states the basic principle that once the jurisdiction of a court-martial attaches, it continues until the process of trial, appeal, and punishment is complete. See generally United States v. Douse, 12 M.J. 473 (C.M.A. 1982); United States v. Sippel, 4 U.S.C.M.A. 50, 15 C.M.R. 50 (1954).


Subsection (2) includes examples of means by which jurisdiction may attach. They are taken from paragraph 11d of MCM, 1969 (Rev.) although “filing of charges” has been clarified to mean preferal of charges. See United States v. Hout, supra. This list is not exhaustive. See United States v. Self, 13 M.J. 132 (C.M.A. 1982); United States v. Douse, supra; United States v. Smith, supra. See also United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983); United States v. Handy, 14 M.J. 202 (C.M.A. 1982); United States v. Wheelely, supra; United States v. Rubenstein, supra; United States v. Mansbarger, 20 C.M.R. 449 (A.B.R. 1955).

Rule 203. Jurisdiction over the offense
This rule is intended to provide for the maximum possible court-martial jurisdiction over offenses. Since the constitutional limits of subject-matter jurisdiction are matters of judicial interpretation, specific rules are of limited value and may unnecessarily restrict jurisdiction more than is constitutionally required. Specific standards derived from current case law are treated in the discussion.

The discussion begins with a brief description of the rule under O'Callahan v. Parker, 395 U.S. 258 (1969). It also describes the requirements established in United States v. Alef, 3 M.J. 414 (C.M.A. 1977) to plead and prove jurisdiction. See also R.C.M. 907(b)(1)(A). The last three sentences in subsection (b) of the discussion are based on United States v. Lockwood, 15 M.J. 1

A21-11
(C.M.A. 1983). The remainder of the discussion reflects the Working Group’s analysis of the application of service-connection as currently construed in judicial decisions. It is not intended as endorsement or criticism of that construction.

Subsection (c) of the discussion lists the Reiford factors, which are starting points in service-connection analysis, although the nine additional considerations in Reiford are also significant. These factors are not exhaustive. United States v. Lockwood, supra. See also United States v. Trottier, 9 M.J. 337 (C.M.A. 1980). Reiford itself establishes the basis for (c)(2) and (c)(3) of the discussion. It has never been seriously contended that purely military offenses are not service-connected per se. See Reiford factor number 12. Decisions uniformly have held that offenses committed on a military installation are service-connected. See, e.g., United States v. Hedlund, supra; United States v. Daniels, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970). See Reiford factors 2, 3, 10, and 11. As to the third sentence in (c)(3), see United States v. Seivers, 8 M.J. 63 (C.M.A. 1979); United States v. Escobar, 7 M.J. 197 (C.M.A. 1979); United States v. Crapo, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); Harkcom v. Parker, 439 F.2d 265 (3d Cir. 1971). With respect to the fourth sentence of (c)(3), see United States v. Hedlund, supra; United States v. Riehle, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969). But cf. United States v. Lockwood, supra. Although much of the reasoning in United States v. McCarthy, 2 M.J. 26 (C.M.A. 1976) has been repudiated by United States v. Trottier, supra, the holding of McCarthy still appears to support the penultimate sentence in (c)(3). See also United States v. Lockwood, supra; United States v. Gladue, 4 M.J. 1 (C.M.A. 1977). The last sentence is based on United States v. Lockwood, supra.

The discussion of drug offenses in (c)(4) is taken from United States v. Trottier, supra.

As to (c)(5), the first sentence is based on United States v. Lockwood, supra. Whether the military status of the victim or the accused’s use of military identification card can independently support service-connection is not established by the holding in Lockwood. The second sentence is based on United States v. Whatley, 5 M.J. 39 (C.M.A. 1978); United States v. Moore, 1 M.J. 448 (C.M.A. 1976). The last sentence is based on United States v. Conn, supra; United States v. Borys, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969) (officer status of accused does not establish service-connection under Article 134) (note: service-connection of Article 133 offenses has not been judicially determined); United States v. Sautler, 5 M.J. 281 (C.M.A. 1978); United States v. Conn, supra (fact that accused was military policeman did not establish service-connection); United States v. Armes, 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969) (wearing uniform during commission of offense does not establish service-connection).

Subsection (c)(6) of the discussion indicates that virtually all offenses by servicemembers in time of declared war are service-connected. There is little case authority on this point. The issue was apparently not addressed during the conflict in Vietnam; of course, the overseas exception provided jurisdiction over offenses committed in the theater of hostilities. The emphasis in O’Callahan on the fact that the offenses occurred in peacetime (see Reiford factor number 5) strongly suggests a different balance in time of war. Furthermore, in Warner v. Flemings, a companion case decided with Gosa v. Mayden, 413 U.S. 665 (1973), Justices Douglas and Stewart concurred in the result in upholding Flemings’ court-martial conviction for stealing an automobile while off post and absent without authority in 1944, on grounds that such an offense, during a congressionally declared war, is service-connected. The other Justices did not reach this question. Assigning Reiford factor number 5 such extensive, indeed controlling, weight during time of declared war is appropriate in view of the need for broad and clear jurisdictional lines in such a period.

Subsection (d) of the discussion lists recognized exceptions to the service-connection requirement. The overseas exception was first recognized in United States v. Weinstein, 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969). See also United States v. Keaton, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969). The overseas exception flows from O’Callahan’s basic premise: that the service-connection requirement is necessary to protect the constitutional right of service members to indictment by grand jury and trial by jury. While this premise might not be evident from a reading of O’Callahan alone, the Supreme Court subsequently confirmed that this was the basis of the O’Callahan rule. See Gosa v. Mayden, supra at 677. Since normally no civilian court in which the accused would have those rights is available in the foreign setting, the service-connection limitation does not apply.


Several Federal courts which have addressed this issue have also held that the foreign situs of a trial is sufficient to support court-martial jurisdiction, although the rationale for this result has not been uniform. See e.g., Williams v. Froehlke, 490 F.2d 998 (2d Cir. 1974); Wimberly v. Laird, 472 F.2d 921 (7th Cir.), cert. denied, 413 U.S. 921 (1973); Gallagher v. United States, 423 F.2d 1371 ( Ct. Cl.), cert. denied, 400 U.S. 849 (1970); Bell v. Clark, 308 F.Supp. 384 (ED. Va. 1970), aff’d, 437 F.2d 200 (4th Cir. 1971). As several of these decisions recognize, the foreign situs of an offense is a factor weighing heavily in favor of service-connection even without an exception for overseas offenses. See Reiford factors 4 and 8. The logistical difficulties, the disruptive effect on military activities, the delays in disposing of offenses, and the need for an armed force in a foreign country to control its own members all militate toward service-connection for offenses committed abroad. Another consideration, often cited by the courts, is the likelihood that if the service-connection rule were applied overseas as it is in the United States, the practical effect would be far more frequent exercise of jurisdiction by host nations, thus depriving the individual of constitutional protections the rule is designed to protect.

The petty offenses exception rests on a similar doctrinal foundation as the overseas exception. Because there is no constitutional right to indictment by grand jury or trial by jury for petty offenses (see Baldwin v. New York, 399 U.S. 66 (1970); Duncan v.
Rule 204. Jurisdiction over certain reserve component personnel
1987 Amendment: R.C.M. 204 and its discussion were added to implement the amendments to Articles 2 and 3, UCMJ, contained in the "Military Justice Amendments of 1986," tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, 100 Stat. 3905 (1986). Use of the term "member of a reserve component" in Article 3(d) means membership in the reserve component at the time disciplinary action is initiated. The limitation in subsection (b)(1) restricting general and special courts-martial to periods of active duty is based upon the practical problems associated with conducting a court-martial only during periods of scheduled inactive-duty training, and ensures that the exercise of court-martial jurisdiction is consistent with the policies set forth in Article 2(d). The last sentence of subsection (d) reflects legislative intent "not to disturb the jurisprudence of United States ex rel. Hirschberg v. Cooke, 336 U.S. 210 (1949)" (H.R. Rep. No. 718, 99th Cong., 2d Sess. at 227 (1986)).

CHAPTER III. INITIATION OF CHARGES; APPREHENSION; PRETRIAL RESTRAINT; RELATED MATTERS
Rule 301. Report of offense
The primary sources of this rule are paragraphs 29a and 31 of MCM, 1969 (Rev.). Those provisions were adopted in substance except that subsection (b) provides that reports be conveyed to the "immediate commander" of suspects, meaning the "commander exercising immediate jurisdiction . . . under Article 15." The language was changed because the previous language was cumbersome and legalistic. There is no corresponding provision in the Federal Rules of Criminal Procedure. The most closely analogous provision of the Federal Rules of Criminal Procedure is Rule 3 (complaints). However, "[w]ith respect to the complaint, in general, it should be noted that its principle purpose is to serve as the basis for an arrest warrant." J. Moore, Moore's Federal Practice, Rules Pamphlet (part 3) 10 (1982). That purpose is not the same as the purpose of R.C.M. 301. R.C.M. 301 is simply to assure that ordinarily information relating to offenses is conveyed promptly to the suspect's immediate commander.

Rule 302. Apprehension
(a) Definition and scope. The definition of "apprehension" in subsection (1) is taken from Article 7(a), as was its predecessor, paragraph 18a of MCM, 1969 (Rev.).


The discussion of "apprehension" is also consistent with paragraphs 18a and 18b of MCM, 1969 (Rev.). The discussion draws a distinction between apprehensions and detentions. The distinction is based upon the duration of the status, the legal consequences of the impairment of liberty, and the circumstances under which the two forms are used. Brown v. Texas, 443 U.S. 47 (1979); Dunaway v. New York, 442 U.S. 200 (1979); Terry v. Ohio, 392 U.S. 1 (1968); United States v. Schneider, 14 M.J. 189 (C.M.A. 1982); United States v. Texidor-Perez, 7 M.J. 356 (C.M.A. 1979).

This rule conforms in intent with the substance of Fed. R. Crim. P. 3 through 5. However, the formal warrant application process and initial appearance requirement of those rules are impracticable, and, given the command control aspects of the military, unnecessary for military criminal practice. The purposes of Fed. R. Crim. P. 3 through 5 are achieved by later rules in this chapter.

Subsection (2) clarifies the scope of the rule. It does not affect apprehensions of persons not subject to trial by court-martial. Apprehension and detention of such persons by military law enforcement personnel is not part of the court-martial process; it is based on the commander's inherent authority to maintain law and order on the installation and on various state laws concerning citizen's arrest. See United States v. Banks, 539 F.2d 14 (9th Cir. 1976). The rule also does not affect the authority of persons not listed in subsection (b) to apprehend. The discussion gives some examples of such categories.

(b) Who may apprehend. This subsection restates the substance of Articles 7(b) and (c) and 8, and paragraphs 19a and 23 of MCM, 1969, (Rev.). Subsection (3), Federal civilian law enforcement officers, is the only new provision.

Subsection (1) is taken from paragraph 19a of MCM, 1969 (Rev.). The phrase "whether subject to the code or not" is added to the present rule to make clear that contract civilian guards and police and similar civilian law enforcement agents of the military have the power to apprehend persons subject to the code.

The discussion of subsection (1) reflects the elimination of the previous restrictive policy against apprehensions of commissioned and warrant officers by enlisted and civilian law enforcement personnel. This recognizes the authority of such personnel commensurate with their law enforcement duties. The rule does not foreclose secretarial limitations on the discretion of such personnel.

1987 Amendment: The Discussion was amended to clarify that special agents of the Defense Criminal Investigative Service have the authority to apprehend persons subject to trial by courts-martial.

Subsection (2) restates the previous exercise of delegated authority under Article 7(b) to designate persons authorized to ap-
preprehend which appeared in the first clause in the first sentence of paragraph 19a of MCM, 1969 (Rev.). The accompanying discussion is based on the second sentence of paragraph 19a of MCM, 1969 (Rev.).


Subsection (3) restates Article 8. This seemingly duplicative statement is required because the codal provision as to deserters extends the Federal arrest power to state and local law enforce- ment agents who do not have the kind of Federal arrest power possessed by their colleagues listed in subsection (3). The fact that a person who apprehended a deserter was not authorized to do so is not a ground for discharging the deserter from military custody. See paragraph 23 of MCM, 1969 (Rev.).

(c) Grounds of apprehension. This subsection concerns apprehension of persons subject to the code or to trial by court-martial. Note that such persons may be apprehended under this rule only for offenses subject to trial by court-martial. See also the analysis of subsection (a)(2) of this rule. The power to apprehend under this rule lasts as long as the person to be apprehended is subject to the code or to trial by court-martial. This provision has no explicit parallel in MCM, 1969 (Rev.) but is consistent with the limitation of the apprehension power in both the code and that Manual to persons subject to the code. The Federal Rules of Criminal Procedure have no similar provision either, because the arrest power of civilian law enforcement officials is not similarly limited by the status of the suspect.

The subsection states alternative circumstances which must exist to permit apprehension during this period. The first two sentences restate the probable cause requirement for apprehension of suspects, the main use of the apprehension power of which Article 7(b) and paragraph 19a of MCM, 1969 (Rev.) took note. They are consistent with Fed. R. Crim. P. 4(a). No change to the substance of those provisions has been made, but the discussion provides that probable cause may be based on "the reports of others" to make clear that hearsay may be relied upon as well as personal knowledge. This addition is consistent with Fed.R. Crim. P. 4(b). The wording has been changed to eliminate the legal term, "hearsay."

The last sentence of the subsection restates the codal authority of commissioned, warrant, petty, and noncommissioned officers to use the apprehension power to quell disorders, and is based on Article 7(c) and paragraph 19b of MCM, 1969 (Rev.), changed only as necessary to accommodate format. Cf. paragraph 19a of MCM, 1951, and of MCM, 1969 (Rev.) (authority of military law enforcement official to apprehend on probable cause). See also Article of War 68 (1920). Compare paragraph 20b (authority of military police) with paragraph 20c (quarrels and frays) of MCM (Army), 1949 and of MCM (AF), 1949. Article 7(b) expressly requires probable cause to believe an offense has been committed; Article 7(c) does not.

(d) How an apprehension may be made. In subsection (1) the general statement of procedure to make an apprehension is based on paragraph 19c, MCM, 1969 (Rev.) but it has been amplified in accord with United States v. Kinane, 1 M.J. 309 (C.M.A. 1976). See also United States v. Sanford, 12 M.J. 170 (C.M.A. 1981).

Subsection (2) is consistent with military law. It is superficially inconsistent with Fed.R. Crim. P. 4, but the inconsistency is more apparent than real. Civilian law enforcement officials generally have power to arrest without warrant for offenses committed in their presence and for felonies upon probable cause. See e.g. 18 U.S.C. §§ 3052, 3053, and 3056. To restrict the military apprehension power by requiring warrants in all or most cases would actually be inconsistent with civilian practice. The problem of apprehensions in dwellings is addressed by cross-reference to subsection (e) (2).

Subsection (3) clarifies the power of military law enforcement officials to secure the custody of a person. There is no similar provision in the Federal Rules of Criminal Procedure. It is general, leaving to the services ample breadth in which to make more definitive regulations.

Subsection (4) repeats the warrant requirement of Article 19d of MCM, 1969 (Rev.). There is no corollary provision in the Federal Rules of Criminal Procedure. The purpose of the notification is twofold. First, it ensures that the unit commander of the person in custody will know the status of that member of the command and can participate in later decisionmaking that will affect the availability of the member apprehended. Second, it ensures that law enforcement officials will promptly bring the case and suspect before the commander, thus ensuring that later procedural requirements of the code and these rules will be considered and met if appropriate. This is parallel in intent to Fed. R. Crim. P. 5 and 5.1.

(e) Where an apprehension may be made. Subsection (1) is based on Article 5. It is similar to Fed. R. Crim. P. 4(d)(2) but broader because the code is not similarly limited by geography.

Subsection (2) adds the warrant requirement of Payton v. New York, 445 U.S. 573 (1980), conforming the procedure to military practice. See also Steagald v. United States, 451 U.S. 204 (1981); United States v. Mitchell, 12 M.J. 265 (C.M.A. 1982); United States v. Davis, 8 M.J. 79 (C.M.A. 1979); United States v. Jamison, 2 M.J. 906 (A.C.M.R. 1976). The first sentence clarifies the extent of Payton by citing examples of the kinds of dwellings in which one may and may not reasonably expect privacy to be protected to such a degree as to require application of Payton. Subsection (C) joins the warrant requirement to the traditional power of military commanders, and military judges when empowered, to authorize similar intrusions for searches generally and other kinds of seizures. The first sentence of the last paragraph in subsection (2) is based on Steagald, v. United States, supra. The Working Group does not regard Steagald as requiring an exclusionary rule or supplying standing to an accused on behalf of a third party when the accused's right to privacy was not violated. See Rakas v. Illinois, 439 U.S. 128 (1978). Failure to secure authorization or warrant to enter a private dwelling not occupied by the person to be apprehended may violate the rights of residents of that private dwelling.

Rule 303. Investigation of charges
This rule is based on paragraph 32 of MCM, 1969 (Rev.). Much of the predecessor now appears in the accompanying discussion.

Rule 304. Pretrial restraint
(a) Types of pretrial restraint. Except for the "conditions on liberty" provision, which is new, this subsection is based on paragraphs 20a, b, and c of MCM, 1969 (Rev.). Some of the for-
mer Manual which explained the distinction between arrest and restriction in lieu thereof and which described the consequences of breaking restrictions has been moved to the Discussion.

The "conditions on liberty" provision is set out separately in the Manual for the first time, although such conditions (several examples of which are included in the Discussion) have been in practice previously and have received judicial recognition. See United States v. Heard, 3 M.J. 14, 20 (C.M.A. 1977); cf. Pearson v. Cox, 10 M.J. 517, 321 n. 2 (C.M.A. 1981) (conditions during period of deferment of adjudged sentence). Such conditions also parallel the conditions on release described in 18 U.S.C. § 3146(a). See also ABA Standards, Pretrial Release § 10-5.2 (1979).


1986 Amendment: A paragraph was added to the Discussion to provide a cross-reference to the speedy trial rule in R.C.M. 707(a).

(b) Who may order pretrial restraint. This subsection restates, in a reorganized format, paragraph 21a of MCM, 1969 (Rev.). It is based on Article 9(b) and (c). The code does not address forms of restraint less severe than arrest; there is no reason to permit a broader class of persons than those who may impose arrest or confinement to impose less severe forms of restraint. Subsection (4) is based on United States v. Gray, 6 U.S.C.M.A. 615, 20 C.M.R. 331 (1956). A commander who, under subsection (4), has withheld authority to order pretrial restraint may, of course, later modify or rescind such withholding. Even if such modification or rescission is denominated a "delegation," it would be a rescission of the earlier withholding. The limits of subsection (3) would not apply.

(c) When a person may be restrained. This subsection is based on Articles 9(d) and 10. Although forms of restraint less severe than arrest are not addressed by these articles, it is appropriate to require probable cause and a need for restraint for all forms of pretrial restraint. An officer imposing restraint has considerable discretion in determining how much restraint is necessary (cf. 18 U.S.C. §§ 3146(a) and 3147), although a decision to confine is subject to thorough review under R.C.M. 305. The Discussion borrows from the language of Article 13 to admonish that the restraint must serve only the limited purpose of this rule. See subsection (f). See also United States v. Haynes, 15 U.S.C.M.A. 122, 35 C.M.R. 94 (1964).

(d) Procedures for ordering pretrial restraint. This subsection is based on Article 9(b) and (c) and on paragraph 20d(2) and (3) of MCM, 1969 (Rev.). Since all forms of restraint other than confinement are moral rather than physical, they can be imposed only by notifying the person restrained.

(e) Notice of basis for restraint. This subsection is based on Article 10. Since all forms of restraint other than confinement involve some form of communication with the accused or suspect, this subsection will impose no undue burden on commanders. The Discussion refers to R.C.M. 305(e) which contains additional notice requirements for a person who is confined. Failure to comply with this subsection does not entitle the accused to specific relief in the absence of a showing of specific prejudice. Cf. United States v. Jernigan, 582 F. 2d 1211 (9th Cir.), cert. denied, 439 U.S. 991 (1978); United States v. Grandi, 424 F. 2d 399 (2d Cir. 1970); cert. denied, 409 U.S. 870 (1972).

Pretrial restraint other than pretrial confinement (see R.C.M. 305(e)(2) and (f)) does not alone require advice to the suspect of the right to detailed counsel or civilian counsel. Fed.R.Crim. P.5(c) is not analogous because the advice at the initial appearance serves multiple purposes other than for pretrial restraint. The advice at the initial appearance is designed to protect the defendant not only when pretrial confinement is imposed, but for events in the criminal process which follow shortly thereafter. Thus, it is necessary under that provision to inform a defendant of the right to counsel immediately before the suspect or accused may shortly thereafter be called upon to make important decisions. In contrast, the Rules for Courts-Martial treat each step in the pretrial process separately and provide for advice of the right to counsel when counsel is necessary. R.C.M. 305(e)(2) and (f) (pretrial confinement); 406 (detailing counsel for an accused in an investigation under Article 32); 503 and 506 (detailing counsel for an accused in courts-martial); Mil.R. Evid. 305 (warnings to accompany interrogations). The difference is a result of the structural differences between these Rules and the Federal Rules of Criminal Procedure. The intent and result of both systems are the same.


(g) Release. This subsection is based on 21d and on the second and third sentences of paragraph 22 of MCM, 1969 (Rev.).

1986 Amendment: The Discussion was amended to clarify that pretrial restraint may be imposed not only when charges are to be reinstated but also when a convening authority intends to order a rehearing or an "other" trial. See R.C.M. 1107(e). Restraint imposed during any of these situations is considered "imposed before and during disposition of offenses." See R.C.M. 304(a).

(h) Administrative restraint. This subsection clarifies the scope of this rule.

Rule 305. Pretrial confinement

Introduction. This rule clarifies the basis for pretrial confinement, and establishes procedures for the imposition and review of pretrial confinement. The rule conforms with requirements established by recent decisions. See United States v. Lynch, 13 M.J. 394 (C.M.A. 1982); United States v. Malia, 6 M.J. 65 (C.M.A. 1978); United States v. Heard, 3 M.J. 14 (C.M.A. 1977); Cortney v. Wil-
liams, 1 M.J. 267 (C.M.A. 1976). The most significant changes include: prevention of foreseeable serious misconduct as a basis for pretrial confinement; a system of review of pretrial confinement by neutral and detached officials; specific authority for a military judge to direct release of an accused from pretrial confinement; and a specific and meaningful remedy for violation of the rule.

The Working Group considered various procedural mechanisms for imposition and review of pretrial confinement. Numerous practical, as well as legal, concerns were analyzed and weighed in striking a balance between individual liberty and protection of society. The Working Group proceeded from the premise that no person should be confined unnecessarily. Neither the prisoner nor the government benefits from unnecessary confinement. On the other hand, in determining when confinement may be necessary, the nature of the military and its mission is an important consideration. Moreover, some of the collateral impact associated with pretrial confinement in civilian life (loss of job, income, and access to defense counsel) is normally absent in the military setting and pretrial confinement is seldom lengthy. See R.C.M. 707. Finally, the procedures for imposition and review of pretrial confinement had to be compatible with existing resources. More specific considerations are addressed below.

(a) In general. This subsection is based on the first sentence of paragraph 20c of MCM, 1969 (Rev.). The second sentence of that paragraph is deleted here; the subject is treated at subsections (d) and (h)(2) of this rule. The first sentence of the discussion, with the addition of the words “of the United States,” is Article 12. The second sentence is new, and restates current practice.

(b) Who may be confined. This subsection is new. It restates current law.

(c) Who may order confinement. See Analysis, R.C.M. 304(b).

(d) When a person may be confined. This subsection contains the two basic codal prerequisites for pretrial confinement: (1) probable cause to believe an offense has been committed by the person to be confined (Article 9(d)); and (2) circumstances require it (Article 10). This basic standard, which applies to all forms of pretrial restraint, was selected here in lieu of a more detailed formulation since the initial decision to confine often must be made under the pressure of events. The discussion encourages consideration of the factors discussed under (h)(2)(B) of this rule before confinement is ordered, and, as a practical matter, this will probably occur in many cases, since persons ordering confinement usually consider such matters in making their decision. An initial decision to confine is not illegal, however, merely because a detailed analysis of the necessity for confinement does not precede it. Cf. Gerstein v. Pugh, 420 U.S. 103, 113-14 (1975).

The discussion notes that confinement must be distinguished from custody incident to an apprehension. See R.C.M. 302. This paragraph is based on Article 9(e) and paragraphs 19d and 174c and d of MCM. 1969 (Rev.). Article 9(e) expressly distinguishes confinement from measures to “secure the custody of an alleged offender until proper authority may be notified.” Such periods of custody are not confinement within the meaning of this rule. See United States v. Ellis, 16 U.S.C.M.A. 455, 37 C.M.R. 75 (1966). Such custody may continue only for the period of time reasonably necessary for a proper authority under R.C.M. 304 to be notified and to act. See Article 9(e). See also paragraphs 21 and 22, Part IV.

(e) Advice to the accused upon confinement. Except for subsection (e)(1), which is based on Article 10 and appeared in subparagraph 20d(4) of MCM, 1969 (Rev.) this subsection is new. It is similar to Fed.R.Crim.P. 5(c) which requires the magistrate to give such advice to the defendant at the initial appearance. The rule does not specify who shall inform the accused. This affords considerable flexibility in implementing this provision.

Note that violation of this subsection does not trigger the remedy in subsection (k) of this rule. Consequently, a violation of this subsection must be tested for prejudice. See Article 59.

(f) Military counsel. This subsection is new. The primary purpose of the rule is to help protect the accused’s interest in the pretrial confinement determinations. Secondarily, this requirement should enable the accused to avoid injury to the defense in subsequent proceedings, and, when necessary, to begin to marshal a defense. See e.g., Article 49(a). The assignment of counsel at this stage is of central importance to ensuring the fairness of the pretrial confinement process. The requirement parallels similar requirements in federal practice (Fed.R.Crim.P. 5(c) and 44(a) and under the District of Columbia Code (D.C. Code § 23-1322(c)(4)). See generally United States v. Jackson, 5 M.J. 223 (C.M.A. 1978); United States v. Mason, 21 U.S.C.M.A. 389, 45 C.M.R. 163 (1972); United States v. Pryzbycien, 19 U.S.C.M.A. 120, 122n, 2,41 C.M.R. 120, 122n. 2 (1969). Consequently, failure to do so triggers the remedy in subsection (k) of this rule.

The subsection does not require that counsel appointed at this stage will represent the prisoner throughout subsequent proceedings. Although this would be desirable, the mobility of the armed forces, the locations of confinement facilities, and the limits on legal resources render an inflexible requirement in this regard impracticable. Nothing in the code or the Constitution requires such early appointment of defense counsel for purposes of representation at trial. Cf. Gerstein v. Pugh, supra at 123; Kirby v. Illinois, 406 U.S. 682 (1972). But see United States v. Jackson, supra. Current case law permits assignment of counsel for a limited duration, at least if the limited nature of the relationship is made clear to the client at the outset. See United States v. Timberlake, 22 U.S.C.M.A. 117, 46 C.M.R. 117 (1973); Stanten v. United States, 21 U.S.C.M.A. 431, 45 C.M.R. 205 (1972); United States v. Kelker, 4 M.J. 323 (C.M.A. 1978); cf. United States v. Booker, 5 M.J. 238 (C.M.A. 1977). Where such a limited relationship is the practice, it should be included in the advice under subsection (e) of this rule to help prevent misunderstanding. If the limited nature of the relationship is not explained to the prisoner, it may not be possible, without the prisoner’s consent, to terminate the relationship for the convenience of the government. United States v. Cati, 1 M.J. 41 (C.M.A. 1975); United States v. Eason, 21 U.S.C.M.A. 335, 45 C.M.R. 109 (1972); United States v. Murray, 20 U.S.C.M.A. 61, 42 C.M.R. 253 (1970).

Nothing in this rule requires that counsel assigned for pretrial confinement purposes be located near the prisoner. Once again, as desirable as this may be, such a requirement would be impracticable. It is not uncommon for a prisoner to be confined, at least initially, far from any available counsel. The rule is designed to afford the services considerable flexibility in dealing with such situations. The distance between the prisoner and defense counsel should not pose a serious problem for the defense. They can communicate by telephone, radio, or other means, and, under Mil.R.Evid. 502, such communications would be protected by the
attorney-client privilege. Moreover, since the initial review may be accomplished without the presence of prisoner or defense counsel, the defense counsel may submit appropriate written matters without personal contact with either the prisoner or the reviewing officer.

1993 Amendment: The amendment to subsection (f) provides a specific time period by which to measure compliance. Because it is possible to obtain credit for violations of this section under subsection (k), a standard of compliance was thought necessary. See e.g., United States v. Chapman, 26 M.J. 515 (A.C.M.R. 1988), pet. denied 27 M.J. 404 (C.M.A. 1989). This amendment, while protecting the rights of the prisoner, also gives reasonable protection to the Government in those cases where the prisoner is confined in a civilian facility and the request is never, or is belatedly, communicated to military authorities. While it is expected that military authorities will have procedures whereby civilian confinement authorities communicate such requests in a timely fashion, the failure to communicate such a request, or the failure to notify military authorities in a timely manner should be tested for prejudice under Article 59 U.C.M.J., and should not be considered as invoking the credit provisions of subsection (k) of this rule.

(g) Who may direct release from confinement. This subsection is a substantial change from the following language from paragraph 22 of MCM, 1969 (Rev.): "The proper authority to release from confinement in a military confinement facility is the commanding officer to whose authority that facility is subject." Notwithstanding this provision, the authority of the commander to whose authority the confinement facility is subject was often treated as ministerial in nature, at least in some of the services. Authority to direct release was recognized to repose in a commander of the accused. See generally Boller, Pretrial Restraint in the Military, 50 Mil. L. Rev. 71, 96-99 (1970); see also United States v. Pingle, 19 U.S.C.M.A. 324, 41 C.M.R. 324 (1970). More recently, the authority of military judges (see Porter v. Richardson, 23 U.S.C.M.A. 704, 50 C.M.R. 910 (1975); Courtney v. Williams, supra) and officials appointed to do so under regulations (see United States v. Malia, supra) to order release from pretrial confinement has been recognized. The subsection expressly establishes the authority of such officials to direct release from pretrial confinement.

(h) Notification and action by commander. Subsection (1) is based on Article 11(b), although the terminology has been changed somewhat since the terms "commander of a guard" and "master at arms" no longer accurately describes the confinement personnel who are responsible for making the report. This subsection is also important in setting in motion the procedures for approval or disapproval of confinement. See also, Fed.R.Crim. P.5(a). The discussion is based on Hearings on H.R. 2498 Before a Subcomm. of the Comm. on Armed Services of the House of Representatives, 81st Cong., 1st Sess. 913 (1949).

Subsection (2)(A) places the real initial decision for pretrial confinement with the prisoner's commander. Although the immediate commander may not be a neutral and detached official for pretrial confinement purposes (United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981); but cf. United States v. Ezell, 6 M.J. 307 (C.M.A. 1979); Courtney v. Williams, supra), it is appropriate to give this officer the initial decision on pretrial confinement, so that the command implications of this determination may be fully considered and developed for later review. See subsections (B) and (C). This will enable the commander, who is in the best position to assess the predictive elements of the pretrial confinement decision, including not only the prisoner's likely behavior, but also the impact of release or confinement on mission performance, to make a record of such factors for the initial review. Subsection (2)(B) provides additional guidance for the commander in making this decision.

The 72-hour requirement is intended to ensure reasonably prompt action by the commander, while at the same time allowing for situations in which the commander is not immediately available. If a commander were unavailable for a longer period, then some other official would normally qualify as acting commander (see United States v. Kalscheuer, 11 M.J. 373 (C.M.A. 1981); United States v. Murray, 12 U.S.C.M.A. 434, 31 C.M.R. 20 (1961); United States v. Bunting, 4 U.S.C.M.A. 84, 15 C.M.R. 84 (1954)) or the prisoner would be attached to another unit whose commander could act for these purposes.

1993 Amendment: The amendment to subsection (h)(2)(A) clarifies that the 72-hour period operates in two distinct situations: (a) if the commander orders the prisoner into pretrial confinement, the commander has 72 hours to decide whether pretrial confinement will continue; but (b) if someone other than the prisoner's commander orders the prisoner into pretrial confinement, the prisoner's commander has 72 hours from receipt of a report that the prisoner has been confined to decide whether pretrial confinement will continue.

Subsection (2)(B) sets forth the standards for pretrial confinement. Probable cause has long been recognized as a prerequisite to confinement in military law. See Article 9(d); paragraph 20d(1) of MCM, 1969 (Rev.). Preventing flight is also well established as basis for confinement. See paragraph 20c of MCM, 1969 (Rev.); United States v. Bayhard, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956). Preventing foreseeable serious criminal misconduct has not been expressly recognized in the Manual before, although it was probably included in the "seriousness of the offense charged" language of paragraph 20c. See e.g., United States v. Nixon, 21 U.S.C.M.A. 480, 45 C.M.R. 254 (1972). "Seriousness of the offense charged" was rejected as an independent justification for pretrial confinement in United States v. Heard, supra, at least insofar as it implied confinement may be ordered regardless of the need to prevent flight or serious criminal misconduct. Cf. United States v. Nixon, supra; United States v. Jennings, 19 U.S.C.M.A. 88, 41 C.M.R. 88 (1969).

ularly acute in the military. The business of military units and the interdependence of their members render the likelihood of serious criminal misconduct by a person awaiting trial of even graver concern than in civilian life. Moreover, as expressed in the last sentence of subsection (B), these concerns render a broader range or misconduct of a potentially serious nature. For example, the "quitter" who disobeys orders and refuses to perform duties, while others are expected to carry out unpleasant or dangerous tasks, has immensely adverse effect on morale and discipline which, while intangible, can be more dangerous to a military unit than physical violence. Thus, although the "pain in the neck" (United States v. Heard, supra) may not be confined before trial solely on that basis, the accused whose behavior is not merely an irritant to the commander, but is rather an infection in the unit may be so confined. Even constant supervision accomplishes little in such cases, and military resources do not permit, nor is it reasonable to require, the establishment of some holding facility other than a confinement facility for such persons.


The factors for consideration in the discussion are taken from 18 U.S.C. § 3146(b), with minor modifications. See also ABA Standards, Pretrial Release §§ 10-3.2, 10-3.3, 10-4.4(d), 10-5.1(b) (1979), "embraced" in United States v. Heard, supra at 23-24. The discussion also notes that the Military Rules of Evidence do not apply to the information considered. Although the commander’s decision is not directly analogous to a bail determination before a magistrate, this provision is consistent with 18 U.S.C. § 3146(f).

The factors in the discussion are a reminder of the obligation to consider less severe forms of restraint before approving continued confinement. United States v. Heard and United States v. Gaskins, both supra (e). The alternatives, which are also referred to in R.C.M. 304, are derived from 18 U.S.C. § 3146(a).

The procedures in the rule are the same whether the basis of confinement is risk of flight or foreseeable serious misconduct. This is appropriate since bail is unavailable in the military. United States v. Heard, supra; 18 U.S.C. § 3156. Cf. Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967). Since the decision is whether or not to confine, whether the basis is risk of flight or foreseeable misconduct, and since the factual, predictive, and discretionary determinations are qualitatively the same in either case, there is no reason for procedures to differ concerning them. Indeed, the District of Columbia Court of Appeals acknowledged that even where possibility of bail exists in potential flight cases, the two determinations involve the same fundamental considerations. See United States v. Edwards, supra at 1336-37.

The requirement for a memorandum in subsection (2)(C) is new although not to military practice. See e.g., AR 27–10, para. 9-5(b)(1), 16-5a (1 September 1982); SECNAVINST 1640.10, para. 6 (16 August 1978). The memorandum is important to the remaining pretrial confinement procedures since it ordinarily provides the primary basis for subsequent decisions concerning pre-trial confinement.

(i) Procedures for review of pretrial confinement. This subsection is new, although it roughly parallels current practice in the services. The requirement for review by an official, other than the commander ordering the confinement, who is neutral and detached, in subsection (2) is consistent with the requirement of Courtney v. Williams, supra. Although in United States v. Malia, supra, the Court of Military Appeals identified the term “magistrate” with the term “judge,” the Working Group did not construe this to require that a military judge must conduct the initial review. Cf. United States v. Lynch, supra. Judicial review is provided in subsection (i). Instead, the term as used in Malia appears to denote a neutral and detached official with independent power to review and order release from pretrial confinement. In any event, it is not practicable to require that the reviewing officer be a military judge, especially if the review is to occur promptly and if the accused is to be permitted to appear personally before the reviewing officer. There are not enough military judges available to accomplish this task. Moreover, a legally trained magistrate is not necessary since the pretrial confinement decision is essentially factual and predictive. Cf. Shadwick v. City of Tampa, 407 U.S. 345 (1972) (magistrate need not be a lawyer). Thus the rule leaves the selection of reviewing officers to service Secretaries.

The review must take place within 7 days of the imposition of confinement under R.C.M. 305. This is a more extended period than is the norm for an initial appearance in federal courts. See Fed.R.Crim. P.5(a); Gerstein v. Pugh, supra. However, Federal courts are willing to tolerate delays of several days, so long as the defendant does not suffer prejudice beyond the confinement itself during such periods. See e.g., United States v. Motes-Zarate, 552 F.2d 1330 (9th Cir. 1977), cert. denied, 435 U.S. 947 (1978); see generally 8 J. Moore, Moore's Federal Practice, ch. 5 (1982). The 7-day period is more closely analogous to the time periods authorized for the preventive detention hearing under D.C. Code § 23-1322(c)(3). The 7-day period, with a possible extension up to 10 days, is intended to accommodate a wide variety of circumstances. Because the review may be conducted entirely with written documents, without the prisoner's presence when circumstances so dictate, there should be no reason why a reviewing officer cannot conduct a review of the imposition of confinement within that time. Note that the 7-day period begins running from the time confinement is imposed by a person authorized to do so under subsection (c) of this rule.

1993 Amendment: The amendment to subsection (i)(l) provides that the required review only becomes applicable whenever the accused is confined under military control. For example, if the prisoner was apprehended and is being held by civilian authorities as a military deserter in another state from where the prisoner's unit is located and it takes three days to transfer the prisoner to an appropriate confinement facility, the seven day period under this rule would not begin to run until the date of the prisoner's transfer to military authorities. Any unreasonable period of time that it may take to bring a prisoner under military control should be tested for prejudice under Article 59, U.C.M.J., and should not be considered as invoking the credit provisions of subsection (k) of this rule absent evidence of bad faith by military authorities in utilizing civilian custody. But see United States v. Ballesteros, 29 M.J. 14 (C.M.A. 1989). However, any time spent in civilian custody at the request of military authorities would be subject to pre-
The amendment further clarifies the method of calculation to determine if the rule has been violated. See United States v. DeLoatch, 25 M.J. 718 (A.C.M.R. 1987); contra, United States v. New, 23 M.J. 889 (A.C.M.R. 1987).

The rule calls for a limited proceeding. Matters are to be presented in writing to facilitate the promptness of the proceeding and to ensure that a record is kept of the matters considered by the reviewing officer. Notwithstanding some authority to the contrary (United States v. Heard, supra at 25 (Fletcher, C.J., concurring); ABA Standards, Pretrial Release §10-5.9 (1979)), an adversary hearing is not required. Gerstein v. Pugh and United States v. Edwards, both supra. Even if a more elaborate hearing might be called for in the civilian sphere (ABA Standards, supra; cf. United States v. Wind, 527 F.2d 672 (6th Cir. 1975)), it is appropriate to consider the institutional goals and needs of the military in measuring the due process requirements for pretrial confinement. Cf. Wolff v. McDonnell, 418 U.S. 539 (1974). See Middendorf v. Henry, 425 U.S. 25 (1976); Parker v. Levy, 417 U.S. 733 (1974).

The procedures in the review include the opportunity for representation by counsel, access to all information presented to the reviewing officer, the right to present matters for the defense, and, ordinarily, the opportunity for the prisoner and defense counsel to personally address the reviewing officer. Measured against the military's mission, its structure and organization, and the resources available to it, these procedures, coupled with the opportunity for judicial review at an Article 39(a) session, adequately protect the liberty interests of the prisoner.

The review procedures are patterned after the procedures for parole revocation proceedings prescribed in Morrissey v. Brewer, 408 U.S. 471 (1972). There the Supreme Court required that an initial review of parole revocation must be conducted by a neutral person, who need not be a judge; the prisoner must receive notice and have an opportunity to be present and speak, and to present written matters; and the hearing officer must prepare an informal summary of the findings. (A later, more thorough hearing, to be held within approximately 2 months is required under Morrissey; judicial review under Article 39(a) coupled with the trial itself fulfills these purposes for pretrial confinement). These requirements are virtually identical to those in R.C.M. 305(6)(1). The only requirement in Morrissey not present in 305 is that the hearing officer have discretionary power to call witnesses for purposes of confrontation. On the other hand, R.C.M. 305 provides the prisoner with the opportunity to obtain counsel in all cases. This is not required for parole or probation revocation. Gagnon v. Scarpelli, 411 U.S. 778 (1973).

Although parole and probation revocations differ from pretrial confinement in that in the former there has already been an adjudication of guilt, the distinction cuts in the opposite direction insofar as (as was emphasized by the Supreme Court in Morrissey v. Brewer, supra at 482) the probationer or parolee typically faces a long period of confinement, unlike the pretrial confinee who, especially in the military, is not subjected to such a lengthy period. Moreover, in Gerstein v. Pugh, supra, the Supreme Court, noting the burden of adversary hearings at this pretrial stage (id. at 121 n. 23), distinguished Morrissey and Gagnon from pretrial probable cause hearings (id. at 121 n. 21) and did not require an adversary hearing at such pretrial proceedings. The District of Colum-
may be more accessible to the parties than the military judge, so that it was considered unwise to rule out further action by the reviewing officer.

The remedy for certain violations of the rule is prescribed in subsection (k) of this rule and is analyzed below. Note that the military judge must order the remedy when one or more of the identified violations occur.

(k) Remedy. The requirement for an administrative credit for violations in subsection (f), (h), (i), or (j) of this rule is based on United States v. Larner, 1 M.J. 371 (C.M.A. 1976). This credit is the sole remedy for violation of these provisions. See United States v. Nelson, 18 U.S.C.M.A. 177, 39 C.M.R. 177 (1969). Violations of other provisions would not render confinement illegal and hence would not trigger the sentence relief requirements. Such violations would be tested for specific prejudice, and, where such was found, would trigger a requirement to grant relief appropriate to cure the prejudice suffered. Note that if one of the required steps is omitted, but the next step occurs within the time period for the omitted step, and pretrial confinement is otherwise valid, no credit is required. For example, if the commander does not prepare a memorandum under subsection (h)(2)(C), but the review under subsection (i)(j) occurs within 72 hours of imposition of restraint, and the grounds for pretrial confinement are established, the accused is entitled to no credit. Similarly, if the military judge reviews pretrial confinement under subsection (j) within 7 days of the imposition of confinement and confinement is approved, the omission of the review under subsection (i)(j) would not entitle the accused to credit.

The one day credit is in addition to the day for day credit provided by DOD Instruction 1325.4 as interpreted by United States v. Allen, 17 M.J. 126 (C.M.A. 1984) and is intended as an additional credit to deter violations of the rule. This remedy does not replace sanctions against persons who intentionally violate these rules. See Articles 97, and 98. The credit for illegal pretrial confinement (in addition to any other administrative credit) is provided as a matter of policy, and does not reflect a determination that such cumulative credit is otherwise required.

The credit applies against confinement, if adjusted, and then against several other specified penalties. Thus an accused entitled to sentence relief whose adjusted sentence includes no confinement usually will receive some form of sentence relief. Note, however, that the remedy does not apply to other forms of punishment including punitive discharges or reduction in grade. This is because these penalties are so qualitatively different from confinement that the fact that an accused has served confinement which was technically illegal should not automatically affect these forms of punishment.

The rule does not prescribe the mechanics for implementing the credit since this will depend on the stage at which the violation of the rule is discovered. Cf. United States v. Larner, supra.

Usually the illegality will be determined by the trial judge, who shall also announce the remedy. After the sentence is announced, the military judge should announce on the record how the credit shall also announce the remedy. After the sentence is announced, the sentence relief whose adjusted sentence includes no confinement would usually will receive some form of sentence relief. Note, however, that the remedy does not apply to other forms of punishment including punitive discharges or reduction in grade. This is because these penalties are so qualitatively different from confinement that the fact that an accused has served confinement which was technically illegal should not automatically affect these forms of punishment.

The rule does not prescribe the mechanics for implementing the credit since this will depend on the stage at which the violation of the rule is discovered. Cf. United States v. Larner, supra.

Usually the illegality will be determined by the trial judge, who shall also announce the remedy. After the sentence is announced, the military judge should announce on the record how the credit will apply to it. Where after application of this credit no confinement would remain to be served the accused should not be confined after trial. It is the responsibility of the convening authority to apply credit when action is taken on the sentence. See Article 57.

APPENDIX 21

Rule 306. Initial disposition

Introduction. Rule 306 describes who may dispose of offenses and the options available to such authorities. Although these matters are covered more thoroughly elsewhere (see R.C.M. 401-407, and R.C.M. 601) they are included here to facilitate a chronological approach to disposition of offenses.

(a) Who may dispose of offenses. This rule and the first paragraph of the discussion are based on Articles 15, 22-24, and 30(b), and paragraphs 30-33, 35, and 128 of MCM, 1969 (Rev.). The second sentence of the rule and the discussion are also based on paragraphs 5b(4) and 5c of MCM, 1969 (Rev.);


As noted in the second paragraph of the discussion a referral decision commits the disposition of an offense to the jurisdiction of a specific judicial forum, and thus bars other action on that offense until it is withdrawn from that court-martial by the convening authority or superior competent authority. See United States v. Charette, United States v. Blaylock both supra. But see Article 44; R.C.M. 97(b)(2)(C). Neither dismissal of charges nor nonjudicial punishment (for a serious offense) bars subsequent contrary action by the same or a different commander. Thus, a decision to dismiss charges does not bar a superior commander from acting on those charges if reREFERRED or from personally preferring charges relating to the same offenses, if no jeopardy attached to the earlier dismissal. See Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, 47. Cf. United States v. Thompson, 251 U.S. 407 91920); Fed.R.Crim. P. 48; United States v. Clay, 481 F.2d 133 (7th Cir.), cert. denied, 414 U.S. 1009 (1973); Mann v. United States, 304 F.2d 394 (D.C.Cir.), cert. denied, 371 U.S. 896 (1962). See also Article 44, and R.C.M. 905(g) and Analysis, and R.C.M. 907(b)(3) and Analysis. Similarly, imposition of nonjudicial punishment does not bar a superior commander from referring the same offenses, if they are serious, to a court-martial (Article 15(6); see also United States v. Fretwell, 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960)), or from setting aside punishment already imposed. Article 15(c).See generally Part V. (b) Policy. This subsection is based on paragraph 30g of MCM, 1969 (Rev.). Although it is guidance only, it is sufficiently important to warrant inclusion in the rules as a presidential statement.

The second paragraph of the discussion provides guidelines for the exercise of the discretion to dispose of offenses. Guideline (A) is based on paragraph 33h of MCM, 1969 (Rev.). Guidelines (B)
through (G) are based on *ABA Standards, Prosecution Function* § 3-3.9(b) (1979). The other guidelines in § 3-3.9 are not needed here: § 3-3.9(a) (probable cause) is followed in the rule; § 3-3.9(b)(i) is inconsistent with the convening authority’s judicial function; §§ 3-3.9(c) and (d) are unnecessary in military practice; and § 3-3.9(e) is implicit in § 3-3.9(a) and in the rule requiring probable cause. Guidelines (H), (I), and (J) were added to acknowledge other practical considerations.

(c) How offenses may be disposed of. This subsection is based generally on Articles 15, 22-24 and 30, and paragraphs 32-35, and 128 of MCM, 1969 (Rev.). The discussion provides additional guidance on the disposition options.

**Rule 307. Preferral of Charges**

(a) Who may prefer charges. This subsection is based on Article 30 and paragraph 29b of MCM, 1969 (Rev.).

The first sentence of the first paragraph of the discussion is a new version of the former rule at paragraphs 5a(4) and 29c of MCM, 1969 (Rev.), which provided that “A person subject to the code cannot be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility.” This rule is subsumed in the oath requirement of Article 30 and subsection (b) of the rule. The discussion clarifies the circumstances under which an order to prefer charges may be given, but warns against such orders in some circumstances in which they may tend to encourage litigation or to invalidate an otherwise valid court-martial. The practice of ordering persons to prefer charges has a historical basis. W. Winthrop, *Military Law and Precedents* 154 (2d ed. 1920 reprint); but cf. *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Service*, 81st Cong., 1st Sess. 850 (1949) (reflecting the fact that under the code a person who orders another to prefer charges is an accuser).

The second paragraph of the discussion is a simplified version of paragraph 25 of MCM, 1969 (Rev.). The discussion observes that charges may be preferred against a person subject to trial by court-martial at any time. But see Article 43. Thus, when charges may be preferred depends only on continued or renewed personal jurisdiction. The policy forbidding accumulation of charges in paragraph 25 of MCM, 1969 (Rev.) is now general guidance in the discussion. Furthermore, the “reasonable delay” aspects of the discussion are no longer contingent upon the absence of pre-trial arrest and confinement, because delay for a reasonable period and good cause is always permitted. See also R.C.M. 707.

(b) How charges are preferred; oath. This subsection is taken from Article 30(a). This subsection is similar in purpose to Fed.R.Crim. P. 7(c)(1)’s requirement that the indictment or information “shall be signed by the attorney for the government.” The same concept of requiring accountability for bringing allegations to trial appears again at R.C.M. 601 (referral).

The first paragraph of the discussion is based on Article 30 and paragraph 114i of MCM, 1969 (Rev.).

The last paragraph of the discussion is consistent with Fed.R.Crim. P. 4(b).

(c) How to allege offenses. Subsection (1) is based on paragraph 24a of MCM, 1969 (Rev.). The nomenclature of charge and specification is imbedded in the code. *Compare* Articles 30, 34(b), 43(b), 45(b), 54(a), 61, and 62 with Fed.R.Crim. P. 7(c)(1). Taking both the charge and specifications together, the practice is entirely consistent with Fed.R.Crim. P. 7. There is no need in military practice for the differentiating nomenclature for indictments and informations (Fed.R.Crim P. 7(a)); in military practice the same charges progress through the pretrial system without any change in nomenclature, regardless of the level of court-martial by which they are ultimately disposed. See U.S. Const, amend. V. That further permits military practice to disregard waiver of indictment (Fed.R.Crim. P. 7(b)) insofar as the pleadings are concerned. Finally, military practice does not involve criminal forfeitures in the same sense as federal civilian practice. Cf. Fed.R.Crim. P. 7(c)(2).

Subsection (2) is based on paragraph 24a and appendix 6a of MCM, 1969 (Rev.). The definition is consistent with that part of Fed.R.Crim. P. 7(c)(1) which requires that “The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged therein to have violated.” The first paragraph of the accompanying discussion is based on paragraphs 27 and appendix 6a of MCM, 1969 (Rev.). The sources of the lettered subsections of the discussion are:

- **(A) Numbering charges—**paragraph 24, and paragraph 3 of appendix 6a of MCM, 1969 (Rev.);
- **(B) Additional charges—**id.
- **(C) Preemption—**Article 134;
- **(D) Charges under the law of war—**paragraph 12 of appendix 6a of MCM, 1969 (Rev.).

Subsection (3) restates Fed.R.Crim. P. 7(c)(1) in military terms. That definition is consistent with paragraph 24a and Chapter VI of MCM, 1969 (Rev.). The test of sufficiency of a specification follows *United States v. Sell*, U.S.C.M.A. 202 (1953); paragraph 87a(2) of MCM, 1969 (Rev.). Paragraph 29d of MCM, 1969 (Rev.) is deleted as unnecessary. A specific format for specifications is not prescribed. See also Introductory Discussion, Part IV.

The sources of the lettered subsection of the accompanying discussion are:

- **(A) Sample specifications—**paragraph 26a of MCM, 1969 (Rev.);
- **(B) Numbering specifications—**paragraph 3 of appendix 6a of MCM, 1969 (Rev.);
- **(C) Name and description of the accused;**
  - (i) Name—paragraphs 4 and 5 of appendix 6a of MCM, 1969 (Rev.);
  - (ii) Military association—paragraph 4 of appendix 6a of MCM, 1969 (Rev.);
- **(D) Date and time of offense—**paragraph 7 of appendix 6a of MCM, 1969 (Rev.). As to “on or about,” *see United States v. Heard*, 443 F.2d 856, 859 (6th Cir. 1971);
- **(E) Place of offense—**paragraph 7 of appendix 6a of MCM, 1969 (Rev.);

As to subsection (iii), *United States v. Trotter*, 9 M.J. 337 (C.M.A. 1980) (jurisdiction over drug offenses). As to subsection

**ANALYSIS**

App. 21, R.C.M. (c)(F)
The guidance here is not prescriptive, just as the inclusion of subject-matter jurisdiction in the sample specifications (Part IV) is always parenthetical, a reminder and not as a requirement. The Working Group does not consider any particular format for such pleadings required by Alf.:

Questions of jurisdiction are interlocutory questions to be decided by the military judge applying a preponderance standard. See R.C.M. 905(c); 907(b)(1)(A), and United States v. Ruiz, 4 M.J. 85 (C.M.A.1977); United States v. Kuriger, 4 M.J. 84 (C.M.A. 1977); United States v. Cherry, 4 M.J. 83 (C.M.A. 1977); United States v. McCarthy, 2 M.J. 26, 28n.1 (C.M.A. 1976); United States v. Jessie, 5 M.J. 573 (A.C.M.R.), pet. denied, 5 M.J. 300 (1978). See also United States v. Laws, 11 M.J. 475 (C.M.A. 1981). Ordinarily this finding will not be disturbed by findings by exceptions and substitutions on the general issue of guilt because of the higher standard of proof involved in such determinations. See generally James, Pleadings and Practice under United States v. Alf; 20 A.F.L. Rev. 22 (1978).

(G) Description of offense.—The sources of the section are:

(i) Elements—paragraph 28a(3) of MCM, 1969 (Rev.);

(ii) Words indicating criminality—id.:

(iii) Specificity—paragraphs 28a, 69b, and 87a(2) of MCM, 1969 (Rev.);


(H) Other considerations in drafting specifications.—The sources of the sections are:

(i) Principals—paragraph 9 of appendix 6a of MCM, 1969 (Rev.);

(ii) Victim—paragraph 10 of appendix 6a of MCM, 1969 (Rev.);

(iii) Property—paragraph 13 of appendix 6a of MCM, 1969 (Rev.);

(iv) Value—paragraph 11 of appendix 6a of MCM, 1969 (Rev.);

(v) Documents—paragraph 28c, and paragraph 14 of appendix 6a of MCM, 1969 (Rev.);

(vi) Orders—(a), (b); id.; (c) Negating exceptions—United States v. Cuffee, 10 M.J. 381 (C.M.A. 1981); United States v. Ghahen, 2 U.S.C.M.A. 175, 7 C.M.R. 51 (1953);

(vii) Oral Statements—paragraph 28c of MCM, 1969 (Rev.);

(viii) Joint offenses—paragraph 26d and paragraph 8 of appendix 6a of MCM, 1969 (Rev.);


Subsection (4) is less restrictive than the former and traditional military practice reflected at paragraphs 25, 26b and c of MCM, 1969 (Rev.) which favored trial of all known offenses at a single trial, but complicated that policy with policies against joining major and minor offenses and accumulating charges. The confusion is eliminated by leaving to the discretion of the convening author-

Rule 308. Notification to accused of charges

(a) Immediate commander. This subsection paraphrases paragraphs 32f(1) and 33c of MCM, 1969 (Rev.). See Article 30. This subsection deletes the requirement for a report of the circumstances that make compliance impossible. The use of a certificate of notification is encouraged in the discussion. The identification of known accusers, including persons who ordered charges to be preferred, is new and protects the accused against unauthorized acts by such persons. See Article 19.

The certificate requirement is abandoned only as a requirement, and use of such certificates remains advisable, since they give evidence of compliance with Article 10. However, to require a certificate might risk an excessive remedy for a mere administrative failure to complete the certificate properly.

There is no precisely analogous rule in the federal civilian rules, though the federal civilian rules do reach the same end—to notify an accused of the pendency of the allegations. Fed.R.Crim. P.4 (arrest or summons upon complaint), 5 (initial appearance), 6 (grand jury), 7 (indictment, information), and 9 (warrant or summons upon indictment or information) all provide a civilian defendant with notice of the impending prosecution.

The purpose of the subsection is to permit the accused to begin preparing a defense. United States v. Stebbins, 33 C.M.R. 677 (C.G.B.R. 1963). The subsection originates in Articles 10 and 30 and is one of the fundamental rights of an accused. United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951). It gains additional importance in this respect since the right of both the United States and the accused to take depositions arises upon preferment. Article 49(a).

(b) Commanders at higher echelons. This subsection reflects the same continuing duty to give notice of the preferred charges that appeared at paragraph 33c of MCM, 1969 (Rev.).

(c) Remedy. This subsection is new and is based on the approach taken in United States v. Stebbins, supra, and consistent with paragraph 58 (continuances and postponements) of MCM, 1969 (Rev.).
CHAPTER IV. FORWARDING AND DISPOSITION OF CHARGES

Rule 401. Forwarding and disposition of charges in general

(a) Who may dispose of charges. This subsection is based on paragraphs 5, 32, 33, 35, and 128a of MCM, 1969 (Rev.). See Articles 15, 22-24. The second sentence is based on United States v. Hawthorne, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956); United States v. Rembert, 47 C.M.R. 755 (A.C.M.R. 1973); pet. denied, 23 U.S.C.M.A. 598 (1974). See also United States v. Hardy, 4 M.J. 20 (C.M.A. 1977). A superior authority who withholds from a subordinate the authority to dispose of offenses (see R.C.M. 306) or charges may later modify or rescind such withholding. Even if such modification or rescission is denominated a "delegation," it would be a rescission of the earlier withholding.

(b) Prompt determination. This subsection is based on Article 30(b) and the first sentence of paragraph 30i of MCM, 1969 (Rev.). The discussion is also based on paragraphs 30f, 32b, c f(i), 33a, d, m, and 35a of MCM, 1969 (Rev.).

(c) How charges may be disposed of. This subsection is based on paragraphs 32 and 33 of MCM, 1969 (Rev.). Most matters in those paragraphs, including the mechanics of forwarding charges, have been placed in the discussion as the practices of the services vary because of differing command structures. Specific requirements and additional details may be provided by service regulations.

(d) National security matters. This subsection is based on the first sentence in the second paragraph of paragraph 33 of MCM, 1969 (Rev.). See also R.C.M. 407(b) and Article 43(e).

Rule 402. Action by commander not authorized to convene courts-martial

This rule is based on paragraph 32 of MCM, 1969 (Rev.). Paragraph 32 was written in terms of guidance. The structure of the paragraph and the descriptions of the alternatives available to an immediate commander indicated the powers of such commanders. R.C.M. 402 expresses these powers. The mechanics of forwarding charges, dismissal of charges, the requirement for prompt disposition, and guidance concerning these matters has been placed in R.C.M. 401 and its discussion because these matters apply to commanders at all levels. Other matters contained in paragraph 32 have been placed in other rules. See R.C.M. 303 (preliminary inquiry); 308 (notification of accused); 603 (amending charges). See also R.C.M. 306 which includes guidance on disposition determinations.

Rule 403. Action by commander exercising summary court-martial jurisdiction

This rule and the discussion are based on paragraph 33 of MCM, 1969 (Rev.). See Article 24. Paragraph 33 was written in terms of guidance. The structure of the paragraph and the descriptions of the alternatives available to the commander exercising summary court-martial jurisdiction indicated the powers of such commanders. R.C.M. 403 expresses these powers in clearer terms. Several matters covered in paragraph 33 are now covered in other rules. See R.C.M. 303 (preliminary inquiry); 308 (notification of accused); 401 (forwarding charges; discussion of suspected insanity, joint or common trials); 601 (instructions in referral order; common trials); 603 (amending charges). See also R.C.M. 306.

Rule 404. Action by commander exercising special court-martial jurisdiction

This rule is new. Paragraph 33 of MCM, 1969 (Rev.) treated both special and summary court-martial convening authorities. See paragraph 33(1) of MCM, 1969 (Rev.); Analysis, R.C.M. 403.

Rule 405. Pretrial investigation

(a) In general. This subsection is based on Article 32(a) and (d) and paragraph 34a of MCM, 1969 (Rev.). Except insofar as the code requires otherwise, the rule is generally consistent with Fed.R.Crim. P.6 and 7. See generally Johnson v. Sayre, 158 U.S. 109 (1895); Green v. Convening Authority, 19 U.S.C.M.A. 576, 42 C.M.R. 178 (1970). The last sentence clarifies that the requirements for an Article 32 investigation apply only if charges are referred to a general court-martial. This sentence is not intended, however, to prevent the accused from challenging the fruits of a violation during a pretrial investigation of other rights the accused enjoys independent of the Article 32 investigation (e.g., moving to suppress a statement by the accused to the investigating officer because it was taken in violation of Article 31).

The first and third paragraphs of the discussion are based on paragraph 34a of MCM, 1969 (Rev.). The second sentence has been added based on Hutton v. United States, 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970); United States v. Samuels, 10 U.S.C.M.A. 206, 27 C.M.R. 280 (1959); Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 997 (1949). See also Mil.R.Evid. 804(b) and Analysis. The second paragraph of the discussion is based on the third sentence of paragraph 33e(2) of MCM, 1969(Rev.). The last paragraph in the discussion notes the possibility of waiver of the investigation. See subsection (k) of this rule and analysis. The Government is not required to accept waiver by the accused, and may conduct the investigation notwithstanding the accused’s decision to waive it, since the investigation also serves the Government’s interest.

(b) Earlier investigation. This subsection is based on Article 32(c) and paragraph 33e(1) of MCM, 1969 (Rev.).

(c) Who may direct investigation. This subsection is new. There was previously no prescription of who had authority to direct an investigation under Article 32, although paragraph 33e of MCM, 1969 (Rev.) suggested that the summary or special court-martial convening authority ordinarily would do so. The authority of convening authorities to direct an investigation is analogous to Fed.R.Crim. P.6(a) and the grand jury system generally.

(d) Personnel. This subsection follows Article 32 and paragraph 34 of MCM, 1969 (Rev.). It is consistent with Fed.R.Crim. P.6 in that witnesses, the investigating officer, and a representative of the prosecution may be present, but military practice extends further rights to presence and participation to the accused and defense counsel which are inconsistent with the grand jury system. Compare Article 32(B) with Fed.R.Crim. P.6(d) and (e)(2). Since the investigation under Article 32 is conducted by a single investigating officer, many of the provisions of the grand jury system are inconsistent, e.g., Fed.R.Crim. P.6(b), (f), and (g).

Subsection (1) is based on Article 32 and paragraph 34a of MCM, 1969 (Rev.). See also Articles 25(d)(2); 26(d), 27(a). The
APPENDIX 21

The discussion is also based on United States v. Payne, 3 M.J. 354 (C.M.A. 1977); United States v. Grimm, 6 M.J. 890 (A.C.M.R.), per. den., 7 M.J. 135 (1979). Subsection (2) is based on Articles 32(b) and 38(b) and paragraph 34c of MCM, 1969 (Rev.). See also Article 27(g). Subsections (3)(B) and (C) are new to the Manual but conform to current practice. Fed.R.Crim.P. 6(c) also provides for using reporters.

(e) Scope of investigation. This subsection and the discussion are based on Article 32(a) and paragraph 34a of MCM, 1969 (Rev.).

(f) Rights of the accused. This subsection is based on Article 32 and paragraph 34b, c, and d of MCM, 1969 (Rev.). As to subsection (e)(3), see also R.C.M. 804(b)(2) and Analysis. The accused may waive the right to be present. Cf. R.C.M. 804(b) and Analysis. The accused may waive the right to be present. Cf. R.C.M. 804(b) and Analysis. As to subsection (6), see Fed.R.Crim.P. 5.

(g) Production of witnesses and evidence; alternatives. Subsection (1) is based on the third sentence of Article 32(b) and the first sentence in the first paragraph and the first sentence in the third paragraph of paragraph 34d of MCM, 1969 (Rev.) as amplified in United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976). See also United States v. Roberts, 10 M.J. 308 (C.M.A. 1981); United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976); United States v. Webster, 1 M.J. 496 (A.F.C.M.R. 1975); United States v. Houghton, 31 C.M.R. 579 (A.F.B.R. 1961), aff'd, 13 U.S.C.C.A.M. 3, 32 C.M.R. 3 (1962). Standards for production of evidence are also provided. These parallel the standards for the production of witnesses. Because of the absence of subpoena power at the Article 32 investigation, only evidence under the control of the Government is subject to production under this rule. The discussion amplifies the considerations in determining reasonable availability, and is based on the same sources.

1991 Amendment: Subsection (g)(1)(A) was amended by adding a requirement that a witness be located within 100 miles of the situs of the investigation to be "reasonably available." Given the alternatives to testimony available under subsection (g)(4), a bright-line rule of 100 statute miles simplifies the "reasonably available" determination and improves the efficiency of the investigation without diminishing the quality or fairness of the investigation. If a witness is located within 100 statute miles of the situs of the investigation, the investigating officer must consider the other factors in subsection (g)(1)(A) in determining availability. The remaining provisions of section (g) remain applicable. The production of witnesses located more than 100 statute miles from the situs of the investigation is within the discretion of the witness' commander (for military witnesses) or the commander ordering the investigation (for civilian witnesses).

Subsection (2) is new. The second sentence of the first paragraph of paragraph 34d of MCM, 1969 (Rev.) recognized that the final decision on availability of a military witness is within the authority of that witness' commander. That paragraph did not elaborate on the reasonable availability determination. Subsection (2)(A) recognizes that a command determination of availability (which is essentially whether, and for how long, the witness can be spared without unduly impeding the mission) is ordinarily the first of several factors to be weighed in determining reasonable availability. The investigating officer is in the best position to assess the potential significance of the witness and to weigh that against such factors as cost, difficulty, and delay. In many cases it will be clear that the witness need not be produced without formal application to the witness' commander. (The discussion notes, however, that advance communication with the commander will often be appropriate, as, for example, when the investigating officer needs to know how long a witness will be on leave.) Ultimately, the witness' importance to the witness' unit may outweigh all other factors; consequently, the commander of the witness may make a determination of nonavailability which is reviewable only at trial. Therefore, subsection (2)(A) allocates the responsibilities for determining reasonable availability in accordance with the practical considerations involved. See generally United States v. Chestnut and United States v. Ledbetter, both supra; United States v. Cox, 48 C.M.R. 723 (A.F.C.M.R.), per. denied, 23 U.S.C.C.A.M. 616 (1974).

Subsection (2)(B) and the discussion are based on United States v. Roberts, supra; United States v. Chuculate, 5 M.J. 143 (C.M.A. 1978); United States v. Chestnut, supra and the first paragraph of paragraph 34d of MCM, 1969 (Rev.).

Subsection (2)(C) applies a similar procedure for the production of evidence under the control of the Government. If the investigating officer questions the decision of the commander in subsection (2)(B) or the custodian in subsection (2)(C), the investigating officer may bring the matter to the attention of the commander who directed the investigation. When appropriate the matter can be pursued in command channels. It remains subject to judicial review on motion at trial.

Subsection (3) is based on paragraph 34d of MCM, 1969 (Rev.).

Subsection (4) is based on the third and fourth paragraphs of paragraph 34d of MCM, 1969 (Rev.). See also United States v. Samuels, supra.

1991 Amendment: Subsection (4)(B) was amended by adding a new clause (v) which authorizes the investigating officer to consider, during time of war, unsworn statements of unavailable witnesses over objection of the accused. The burdens of wartime exigencies outweigh the benefits to be gained from requiring sworn statements when unsworn statements are available. Article 32, U.C.M.J., does not require the investigating officer to consider only sworn evidence or evidence admissible at courts-martial. The investigating officer should consider the lack of an oath in determining the credibility and weight to give an unsworn statement.

Subsection (5) is new. It parallels subsection (4).

(h) Procedure. The second and fourth sentences in subsection (1) are based on Article 32(b). The first sentence is based on the first two sentences in the second paragraph of paragraph 34d of MCM, 1969 (Rev.) and on United States v. Samuels, supra. The third sentence is based on the first sentence in the last paragraph of paragraph 34d of MCM, 1969 (Rev.) except that now the investigating officer must allow the defense to examine all matters considered by the investigation officer, without exception. See United States v. Craig, 22 C.M.R. 466 (A.B.R. 1956), aff'd, 8 U.S.C.C.A.M. 218, 24 C.M.R. 28 (1957).

The first paragraph in the discussion is based on paragraph 114j of MCM, 1969 (Rev.), except that the former oath has been divided into two oaths, one for the witness testifying at the investigation, the second to be given when the witness subscribes to a written summary after the hearing. The second oath is described in the second paragraph in the discussion. Note that instead of a second oath, the witness could be requested to sign a statement.
with the express proviso that the signature is made under penalty of perjury. See paragraph 57 of Part IV and Analysis. The second and third paragraph in the discussion are based on the second paragraph of paragraph 34d of MCM, 1969 (Rev.). The admonition concerning the preservation of substantially verbatim notes and tapes of testimony at the end of the second paragraph has been added to avoid potential Jencks Act problems, 18 U.S.C. § 3500. See R.C.M. 914 Analysis.

The fourth paragraph in the discussion of subsection (1) is based on United States v. Pruitt, 48 C.M.R. 495 (A.F.C.M.R. 1974). Cf. United States v. Washington, 431 U.S. 181 (1977). Subsection (2) is new and is intended to promote the early identification of possible defects in the investigation so that they can be corrected promptly. See also subsection (k) of this rule. Subsection (2) clarifies the responsibility of the investigating officer as a judicial officer. See generally United States v. Collins, 6 M.J. 256 (C.M.A. 1979); United States v. Payne, supra. Requiring objections to be made to the investigating officer ensures that they will be placed in proper channels, so that they may be acted upon promptly. Many will concern matters which the investigating officer can rectify. See generally United States v. Roberts, and United States v. Chestnut, both supra. Other matters will fall within the province of the commander who directed the investigation, in whom most pretrial judicial authority repose at this stage. See generally United States v. Nix, 15 U.S.C.M.A. 578, 36 C.M.R. 76 (1965). Nothing in R.C.M. 405 is intended to restrict the authority of the commander who directed the investigation to resolve issues involved in it, as long as that commander does not encroach upon the investigating officer's discretion and ability to personally make conclusions and recommendations.

Subsection (3) is new and is based on MacDonald v. Hodson, 19 U.S.C.M.A. 582, 42 C.M.R. 184 (1970). See also R.C.M. 806 for examples of some reasons why a pretrial investigation hearing might be closed. Fed.R.Crim. P. 6 is generally inapplicable due to its different nature and purposes; it requires closed proceedings. Subsection (3) is not intended to express any preference for closed or open hearings.

(i) Military Rules of Evidence. This subsection is solely a cross-reference to the Military Rules of Evidence. Mil.R.Evid. 412, which concerns testimony of victims of sexual offenses at trial, does not apply at Article 32 hearings. However, there may be circumstances in which questioning should be limited by Mil.R.Evid. 303, which prohibits requiring degrading testimony in pretrial investigations and elsewhere. The privacy interests of the victim may also be protected by closure of the Article 32 hearings during appropriate periods. See subsection (h)(3) of this rule.

The first paragraph of the discussion is consistent with present practice. It is added to give additional guidance not included in paragraph 34 of MCM, 1969 (Rev.). It is also consistent with General civilian practice. See Office of the United States Attorney for the Southern District of Ohio, Proving Federal Crimes 3-3 (1980).

1993 Amendment: The amendment to R.C.M. 405(i) makes the provisions of Mil. R. Evid. 412 applicable at pretrial investigations.

(j) Report of investigation. This subsection is based on paragraphs 34d ande of MCM, 1969 (Rev.). The provision for informal reports in paragraph 34f of MCM, 1969 (Rev.) has been deleted. Because R.C.M. 405 applies only if charges are ultimately referred to a general court-martial, there is no need to describe informal reports. It if becomes apparent before completion of the investigation that charges will not be referred to a general court-martial, no report need be prepared unless the commander who directed the investigation requires it. In other cases a formal report will be necessary.

Subsection (1) is based on Article 32(a) and (b) and paragraph 34e of MCM, 1969 (Rev.).

Subsections (2)(A) through (E) are based on Article 32(b) and paragraph 34e of MCM, 1969 (Rev.). Subsection (2)(F) is new but is consistent with current practice and with the need to account for pretrial delays in relation to speedy trial issues. Subsections (2)(G) and (H) are based on Article 32(a) and paragraph 34e of MCM, 1969 (Rev.). The probable cause standard is based on United States v. Engle, 1 M.J. 387, 389, n. 4 (C.M.A. 1976); Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 91st Cong. 997 (1949). Subsection (2)(I) is based on Article 32(a) and paragraph 34e(6) of MCM, 1969 (Rev.).

Subsection (3) is based on the first sentence of paragraph 34e of MCM, 1969 (Rev.) which implemented the requirement of the last sentence of Article 32(b). Subsection (3) leaves the mechanics of reproduction and distribution of the report to the Secretary concerned, or, in the absence of Secretarial regulations, to the commander concerned. Subsection (4) is new and is intended to encourage the early identification of possible defects in the report so that they can be corrected promptly when necessary. See also subsection (k) and Analysis.

(k) Waiver. The first sentence is based on Article 34(a), as amended. Military Justice Act of 1983, Pub.L. No. 98-209, § 4(4)(a)(2), 97 Stat. 1393 (1983), which expressly permits waiver of the Article 32 investigation. This is consistent with previous practice. See United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982). The remainder of this subsection is also new to the Manual for Courts-Martial. Along with subsections (h)(2) and (j)(4) of this rule, it is intended to promote efficiency in the pretrial process by placing the burden on the defense to raise objections when they can most easily be remedied, instead of waiting until trial. Recent decisions are consistent with this approach. See United States v. Clark, 11 M.J. 179 (C.M.A. 1981); United States v. Cumberledge, 6 M.J. 203 (C.M.A. 1979); United States v. Cruz, 5 M.J. 286 (C.M.A. 1978); United States v. Chuculate, supra. See also Article 34(d). Because the accused always has the right to be represented in the investigation by qualified counsel, this burden is appropriate. The amendment of Article 32(b) (Military Justice Amendments of 1981, Pub.L. No. 97-81, § 4, 95 Stat. 1085, 1088) guarantees that qualified counsel will be detailed to represent the accused for the investigation.

The defense may renew before the military judge any objection for which it has not received satisfactory relief. See R.C.M. 905(b)(2); R.C.M. 906(b)(3).

The last sentence in the discussion is based on United States v. Cumberledge and United States v. Chuculate, both supra.

Rule 406. Pretrial advice

(a) In general. This subsection is based on Article 34(a) as amended, Military Justice Act of 1983, Pub.L. No. 98-209, § 4, 97 Stat. 1392 (1983); and on paragraph 356 of MCM, 1969 (Rev.).

(b) Contents. This subsection is based on Article 34(a). It is consistent with paragraph 35c of MCM, 1969 (Rev.) (except insofar as...
Appendix 21

Rule 502. Qualifications and duties of personnel of courts-martial

(a) Members. Subsection (1) is based on Article 25(a), (b) and (c) and on the first paragraph of paragraph 4b and paragraph 4d of MCM, 1969 (Rev.). Factors which disqualify a person from serving as a member are listed in R.C.M. 912(f)(1).

The discussion is based on the second paragraph of paragraph 4b of MCM, 1969 (Rev.).

The references to use of members of the National Oceanic and Atmospheric Administration and of the Public Health Service carry forward the similar provision at paragraph 4b of MCM, 1969 (Rev.). Similar provisions have been included in naval practice since at least 1937. See, e.g., Naval Courts and Boards § 347 (1937, 1945 reprint). The similar provision in MCM, 1951 was upheld in United States v. Braud, 11 U.S.C.M.A. 192, 29 C.M.R. 8 (1960) (Public Health Service commissioned officer served as member of Coast Guard court-martial), decision below, 28 C.M.R. 692 (C.G.B.R. 1959). Braud upheld the provision even though Article 25 is arguably ambiguous and the P.H.S. officer who served as a member had not been “militarized” and was not himself subject to the code. Cf. 42 U.S.C. § 217 (1976) (P.H.S. may be declared to be a military service in time of war; members become subject to personal jurisdiction of Code); 33 U.S.C. § 855 (NOAA may be transferred by President to military service in national emergency; members become subject to personal jurisdiction of Code); Art. 2(a)(8) (jurisdiction over members of Public Health Service and of Environmental Services Administration). The Environmental Science Services Administration, which succeeded the Coast and Geodetic Survey mentioned in some earlier Manuals, is now defunct. Its functions were transferred to the National Oceanic and Atmospheric Administration. Geogr. Plan No. 4 of 1970, 3 C.F.R. 1075 (1966–1970 Comp.), reprinted in 84 Stat. 2090. NOAA has only a commissioned officer corps. Id. § 2(f); 33 U.S.C.A. § 851 (Supp. 1981). P.H.S. has both commissioned and warrant officers. 42 § 204 (Supp. 1981).

Subsection (2) and the discussion are based on paragraph 41a and b and the last paragraph of paragraph 53d of MCM, 1969 (Rev.). The admonition of MCM, 1969 (Rev.) that misconduct by members may constitute an offense and that members should be attentive and dignified has been deleted as unnecessary.

(b) Counsel in general and special courts-martial. This subsection is based on Article 27(a). Except for the change concerning who details counsel (see R.C.M. 503(c)), it is consistent with paragraph 6a of MCM, 1969 (Rev.). This subsection includes reference to detailing associate defense counsel. This is based on Article 27(a), as amended Pub. L. No. 98–209, § 3(c), (f), 97 Stat. 1393 (1983).

(c) Other personnel. This subsection is based on paragraph 7 of MCM, 1969 (Rev.).

CHAPTER V. COURT-MARTIAL COMPOSITION AND PERSONNEL; CONVENING COURT-MARTIAL

Rule 501. Composition and personnel of courts-martial

(a) Composition of courts-martial. This subsection is based on Article 16. Except for the change in the requirement as to the form of the request for trial by military judge alone, it is consistent with paragraph 4a of MCM, 1969 (Rev.).
description is an inadequate substitute for familiarity with the rules themselves.

(c) Qualifications of military judge. This subsection and the discussion are based on Article 26(b) and (c) and paragraph 4e of MCM, 1969 (Rev.). Reasons for disqualification are described in R.C.M. 902.

(d) Counsel. Subsection (1) is based on Article 27(b) and paragraph 6 of MCM, 1969 (Rev.). The possibility of detailing associate counsel has been added based on the amendment of Article 27(a) and 42(a). See Military Justice Act of 1983, Pub.L. No. 98-209, § 3(c), (f), 97 Stat. 1393 (1983). As the discussion indicates, “associate counsel” ordinarily refers to detailed counsel when the accused has military or civilian counsel. See Article 38(b)(6). An associate defense counsel must be qualified to act as defense counsel. An assistant defense counsel need not be. One other substantive change from MCM, 1969 (Rev.). has been made. Detailed defense counsel in special courts-martial must be certified by the Judge Advocate General concerned although this is not required by Article 27(c). Article 27(c) permits representation of an accused by a counsel not qualified and certified under Article 27(b) if the accused does not request qualified counsel, having been given the opportunity to do so, or when such counsel cannot be obtained on account of physical conditions or military exigencies. In the latter event, no bad-conduct discharge may be adjudged. Article 19. Currently, certified counsel is routinely provided in all special courts-martial, so the modification of the rule will not change existing practice. Moreover, the enforcement of waiver provisions in these rules and the Military Rules of Evidence necessitate, both for fairness and the orderly administration of justice, that the accused be represented by qualified counsel. See also United States v. Rivas, 3 M.J. 282 (C.M.A. 1977). Because of this rule, the rule of equivalency in Article 27(c) and (3) is not necessary.

Subsection (2) is based on the fifth sentence of the first paragraph of paragraph 6c of MCM, 1969 (Rev.).


Subsection (4) is based on Article 27(a) and on the fourth and fifth sentences of paragraph 6a of MCM, 1969 (Rev.). See also United States v. Cutt, 1 M.J. 41 (C.M.A. 1975). The accuser has been added to the list of disqualifications. See ABA Standards, The Prosecution Function, §§ 3–1(c); 3–3.9(c)(1979).

Subsection (5) is based on paragraph 44d and 45a of MCM, 1969 (Rev.) and on Article 38(d). The forum-based distinction as to the powers of an assistant trial counsel has been deleted. The trial counsel is responsible for the prosecution of the case. R.C.M. 805(c) requires the presence of a qualified trial counsel at general courts-martial. The discussion is based on paragraphs 44e, f, g, and h of MCM, 1969 (Rev.). Some of the specific duties are now covered in other rules, e.g., R.C.M. 701; 812, 813; 914; 919. Some examples and explanations have been deleted as unnecessary.

The first sentence of subsections (6) is new. Cf paragraphs 46d and 48e of MCM, 1969 (Rev.). The second sentence of subsection (6) is based on Article 38(e). The rule does not require that defense counsel in the court-martial represent the accused in administrative or civil actions arising out of the same offenses. The discussion is based on paragraphs 46d, 47, and 48e, d, e, f, g, h, j and k of MCM, 1969 (Rev.). The matters covered in paragraph 48h(2) and (3) of MCM, 1969 (Rev.) are modified in the discussion based on the amendment of Articles 38(c) and 61. See Military Justice Act of 1983, Pub.L. No. 98–209, §§ 3(c)(3), (b)(1), 97 Stat. 1393 (1983). See R.C.M. 1105; 1110. As to associate counsel, see the Analysis subsection (d)(1) of this rule. See also United States v. Breese, 11 M.J. 17, 22 n. 13 (C.M.A. 1981); United States v. Rivas, supra; United States v. Palenius, 2 M.J. 86 (C.M.A. 1977); United States v. Goode, 1 M.J. 3 (C.M.A. 1975).

(e) Interpreters, reporters, escorts, bailiffs, clerks, and guards. This subsection is based on paragraphs 7, 49, 50, and 51 of MCM, 1969 (Rev.). The list of disqualifications, except for the accuser, is new and is intended to prevent circumstances which may detract from the integrity of the court-martial.

(f) Action upon discovery of disqualification or lack of qualification. This subsection is based on paragraphs 41c, 44b, 46b of MCM, 1969 (Rev.).

Rule 503. Detailing members, military judge, and counsel

(a) Members. Subsection (1) is based on Article 25. Because of the amendment of Articles 26 and 27, the convening authority is no longer required to detail personally the military judge and counsel. Military Justice Act of 1983, Pub.L. No. 98–209, § 3(c), 97 Stat. 1393 (1983). The last sentence of paragraph 4b of MCM, 1969 (Rev.) is deleted as unnecessary. The second paragraph in the discussion serves the same purpose as the third paragraph of paragraph 4b of MCM, 1969 (Rev.): to alert the convening authority to avoid appointing people subject to removal for cause. Unlike that paragraph, however, no suggestion is now made that the convening authority commits error by appointing such persons, since the disqualifications are waivable. See Analysis, R.C.M. 912(d)(4).

Subsection (2) is based on Article 25(c) and the third paragraph of paragraph 4c of MCM, 1969 (Rev.). The discussion is based on paragraph 36(c)(2) of MCM, 1969 (Rev.).


Subsection (3) is based on paragraphs 4f and g of MCM, 1969 (Rev.). Subsection (3) combines treatment of members from a different command and those from a different armed force. The power of a commander to detail members not under the convening authority’s command is the same whether the members are in the same or a different armed force. Therefore each situation can be covered in one rule. The discussion repeats the preference for members, or at least a majority thereof, to be of the same service as the accused which was found in paragraph 4g(1) of MCM, 1969 (Rev.). Permission for the Judge Advocate General to detail members of another armed force is no longer required in the Manual. Detailing a military judge from a different command or armed force is now covered in subsection (d).

(b) Military Judge. Subsections (1) and (2) are based on Article 26(a), as amended, Military Justice Act of 1983, Pub. L. No.
98-209, § 3(c)(1), 97 Stat. 1393 (1983). The convening authority is no longer required to detail personally the military judge. Id. Subsection (1) requires that responsibility for detailing military judges will be in judicial channels. See Hearings on S.2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 97th Cong., 2nd Sess. 52 (1982). More specific requirements will be provided in service regulations. Subsection (2) is intended to make detailing the military judge administratively efficient. See S. Rep. No. 53, 98th Cong., 1st Sess. 3-5, 12 (1983); H.R. Rep. No. 549, 98th Cong., 1st Sess. 13-14 (1983). As long as a qualified military judge presides over the court-martial, any irregularity in detailing a military judge is not jurisdictional and would result in reversal only if specific prejudice were shown. See S. Rep. No. 53, 98th Cong., 1st Sess. 12 (1983).

Subsection (3) is based on Article 26. See also Article 6(a).

(c) Counsel. Subsections (1) and (2) are based on Article 27(a), as amended, Military Justice Act of 1983, Pub. L. No. 98-209, § 3(c)(2), 97 Stat. 1393 (1983). The convening authority is no longer required to detail personally the counsel. Id. Efficient allocation of authority for detailing counsel will depend on the organizational structure and operational requirements of each service. Therefore, specific requirements will be provided in service regulations. Subsection (2) is intended to make detailing counsel administratively efficient. See S. Rep. No. 53, 98th Cong., 1st Sess. 3-5, 12 (1983); H.R. Rep. No. 549, 98th Cong., 1st Sess. 13-14 (1983). Counsel are not a jurisdictional component of courts-martial. Wright v. United States, 2 M.J. 9 (C.M.A. 1976). Any irregularity in detailing counsel would result in reversal only if specific prejudice were shown. See S. Rep. No. 53, 98th Cong., 1st Sess. 12 (1983).

Subsection (3) is based on Article 27. See also Article 6(a).

Rule 504. Convening courts-martial

(a) In general. This subsection substantially repeats the first sentence of paragraph 36b of MCM, 1969 (Rev.).

(b) Who may convene courts-martial. Subsection (1) is based on Article 22 and paragraph 5a(1) of MCM, 1969 (Rev.). The power of superiors to limit the authority of subordinate convening authorities is based on paragraph 5b(4) of MCM, 1969 (Rev.). Although that paragraph applied only to special and summary courts-martial, the same principle applies to general courts-martial. See Article 22(b). See generally United States v. Hardy, 4 M.J. 20 (C.M.A. 1977); United States v. Hawthorne, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956); United States v. Rembert, 47 C.M.R. 755 (A.C.M.R. 1973), pet. denied, 23 U.S.C.M.A. 598 (1974). The discussion is based on the second and third sentences of paragraph 5a(5) of MCM, 1969 (Rev.).

Subsection (2) is based on Article 23 and paragraphs 5b(1), (3), and (4) of MCM, 1969 (Rev.).

As to subsection (3), see Analysis, R.C.M. 1302(a).


(c) Disqualification. This subsection is based on Articles 22(b) and 23(b) and on paragraph 5a(3) of MCM, 1969 (Rev.). See also Article 1(5) and (9); United States v. Haygood, 12 U.S.C.M.A. 481, 31 C.M.R. 67 (1961); United States v. LaGrange, 1 U.S.C.M.A. 342, 3 C.M.R. 76 (1952); United States v. Kates, 38 C.M.R. 512 (A.B.R. 1967).

(d) Convening orders. This subsection is based on paragraph 36b of MCM, 1969 (Rev.) with two substantive modifications. First, in conformity with the amendment of Articles 26(a) and 27(a), see Military Justice Act of 1983, Pub. L. No. 98-209, § 3(c) 97 Stat. 1393 (1983), the military judge and counsel are no longer included in the convening order. See R.C.M. 503(b) and (e) and Analysis. Second, several matters, such as the unit of any enlisted members, which were required by paragraph 36b are not included here. These may be required by service regulations. Summary courts-martial are treated separately from general and special courts-martial because of their different composition.

(e) Place. This subsection is new. It derives from the convening authority’s power to fix the place of trial (see also R.C.M. 906(b)(11)) and from the convening authority’s control of the resources for the trial. It does not change current practice.

Rule 505. Changes in members, military judge, and counsel

(a) In general. This subsection is based on the first sentence of paragraph 37a of MCM, 1969 (Rev.) except that it has been modified to conform to the amendment of Articles 26(a) and 27(a). See Military Justice Act of 1983, Pub. L. No. 98-209, § 3(c), 97 Stat. 1393 (1983). The discussion is based on the third and fourth sentences of paragraph 37c of MCM, 1969 (Rev.).

(b) Procedure. This subsection is based on the first two sentences of paragraph 37c(1) and on paragraph 37c(2) of MCM, 1969 (Rev.). See also United States v. Ware, 5 M.J. 24 (C.M.A. 1978). It has been modified to reflect that military judges and counsel no longer must be detailed by the convening authority. The second paragraph in the discussion is based on United States v. Herrington, 8 M.J. 194 (C.M.A. 1980). References in paragraph 37b to excusal as a result of challenges are deleted here as challenges are covered in R.C.M. 902 and 912.

(c) Changes of members. This subsection is based on Articles 25(e) and 29, and paragraphs 37b and c, and 39e of MCM, 1969 (Rev.). The limitation on the authority of the convening authority's delegate to excuse no more than one-third of the members is based on S. Rep. No. 53, 98th Cong., 1st Sess. 13 (1983).

(d) Changes of detailed counsel. Subsection (1) is based on that part of the second sentence of paragraph 37a of MCM, 1969 (Rev.) which covered trial counsel.


(e) Change of military judge. This subsection is based on Articles 26(a) and 29(d) and on paragraph 39e of MCM, 1969 (Rev.). See also United States v. Smith, 3 M.J. 490 (C.M.A. 1975).

Rule 506. Accused's rights to counsel

(a) In general. This subsection it taken from the first two sentences of paragraph 48a of MCM, 1969 (Rev.), which was based on Article 38(b) as amended. Act of November 20, 1981, Pub. L. No. 97-81; 95 Stat. 1085. Note that the amendment of Article 38(b) effectively overruled United States v. Jordan, 22 U.S.C.M.A. 164, 46 C.M.R. 164 (1973), which held that an accused who has civilian counsel is not entitled to individual military counsel. The amendment of Article 38(b) provides that the accused may be represented by civilian counsel "and" by detailed or requested military counsel instead of civilian counsel "or" requested military counsel as it formerly did. See also H.R. Rep. No. 306, 97th Cong., 1st Sess. 4-7 (1981).


Subsection (2) is taken from paragraph 48b(3) of MCM, 1969 (Rev.). See also Article 38(b)(7). It ensures substantial uniformity in procedure among the services for handling requests for individual military counsel.


(d) Waiver. This subsection is based on the third sentence of the second paragraph of paragraph 48a of MCM, 1969 (Rev.) and on Faretta v. California, 422 U.S. 806 (1975). As to the last two sentences, see id. at 834 n.46.

(e) Nonlawyer present. This subsection is based on the last sentence of the section of the second paragraph of paragraph 48a of MCM, 1969 (Rev.).

CHAPTER VI. REFERRAL, SERVICE, AMENDMENT, AND WITHDRAWAL OF CHARGES

Rule 601. Referral

(a) In general. This definition is new. MCM, 1969 (Rev.) did not define "referral."

(b) Who may refer. This section is also new, although MCM, 1969 (Rev) clearly implied that any convening authority could refer charges. See also United States v. Hardy, 4 M.J. 29 (C.M.A. 1977). Paragraphs 5(b) and 5e of MCM, 1969 (Rev.) contained similar provisions.

(c) Disqualification. This section is added to the Manual to express the statutory disqualification of an accuser to convene a court-martial in parallel terms in relation to referral. See Articles 22(b), 23(b). Cf. Article 24(b). The discussion follows paragraph 33i of MCM, 1969 (Rev.).

(d) When charges may be referred. Subsection (1) is new. Neither the code nor MCM, 1969 (Rev) have previously provided a standard for referral except in general courts-martial. See Article 34(a). Subsection (1) promotes efficiency by helping to prevent groundless charges from being referred for trial. This is consistent with Fed. R. Crim. P. 5.1(a). Accord ABA Standards Prosecution Function section 3-3.9(a) (1979). Consistent with the amendment of Article 34, subsection (1) does not require the convening authority to evaluate the legal sufficiency of the case personally. In general courts-martial the legal sufficiency determination must be made by the staff judge advocate. See Article 34(a) and subsection (3)(2) of this rule. Subsection (1) requires a similar determination in all courts-martial, including special and summary courts-martial. Because of the judicial limitations on the sentencing power of special and summary courts-martial, any judge advocate may make the determination or the convening authority may do so personally. (A special or summary court-martial convening authority does not always have access to a judge advocate before referring charges; moreover, this subsection does not require reference to a judge advocate, even if one is available, if the convening authority elects to make the determination personally.) A person who serves as a trial counsel is not disqualified from rendering this advice. Cf. ABA Standards Prosecution Function Section 3-3.9(a) (1979). Note that there is no requirement under this subsection that the judge advocate's advice be written or that the convening authority memorialize the basis of the referral in any way.

The "reasonable grounds" standard is based on Article 34's prerequisite to referral of charges to a general court-martial that the charges be warranted by the evidence in the report of the Article 32 investigation. Further, the legislative history of Article 32 strongly suggests that this is the intended standard of the investigation. Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 997-98 (1949). Nothing suggests that the standard governing referral to inferior courts-martial should be different from that applicable to general courts-martial. It appears that the reasonable grounds standard has been in operation even without an explicit requirement. See, e.g., United States v. Eagle, 1 M.J. 387, 389 n.4 (C.M.A. 1976); United States v. Kauffman, 33 C.M.R. 748, 795 (A.F.B.R.), rev'd

The discussion's instructions for subsequent referrals are based on paragraph 33j(1) of MCM, 1969 (Rev.).

The special case of referrals to summary courts-martial by the only officer present in command follows paragraph 33j(1) of MCM, 1969 (Rev.) and Article 24(b).

The discussion of limiting instructions follows paragraphs 33j(1) and k of MCM, 1969 (Rev.). The advice that convening authorities be guided by the criteria for capital punishment found at R.C.M. 1004 is new. See Gregg v. Georgia, 428 U.S. 153, 225 (1976) (White, J., concurring in the judgment).

The last paragraph of the discussion on transmitting the referred charges and allied papers to the trial counsel is based on paragraph 33j(2) of MCM, 1969 (Rev.).

Subsection (2) is less restrictive than the previous military rule found at paragraphs 26b and c of MCM, 1969 (Rev.), which cautioned against joining major and minor offenses. This rule is inconsistent with Fed. R. Crim. P. 8(a), which requires (in general) separate trials for each offense. Such a requirement is too unwieldy to be effective, particularly in combat or deployment. Joiner is entirely within the discretion of the convening authority. The last two sentences of the rule dealing with additional charges are based on paragraph 65b of MCM, 1969 (Rev.). The discussion encourages economy, following paragraph 33h of MCM, 1969 (Rev.). The last sentence in subsection (2) is new and clarifies that the accused may consent to the referral of additional charges after arraignment. Since the prohibition of such referral is for the accused's benefit, the accused may forego it when it would be the accused's advantage. See United States v. Lee, 14 M.J. 983 (N.M.C.M.R. 1983).

The first two sentences of subsection (3) restate Fed. R. Crim. P. 8(b) in military nomenclature. They are consistent with the approach taken by paragraph 26d of MCM, 1969 (Rev.). The last sentence is based on paragraph 33l of MCM, 1969 (Rev.). There is no counterpart in federal civilian practice.

Referred by other convening authorities. This new provision reflects the principle that a subordinate convening authority's decision does not preempt different dispositions by superior convening authorities. See United States v. Charette, 15 M.J. 197 (C.M.A. 1983); United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983). See also Analysis, R.C.M. 306(a), Analysis, R.C.M. 905(g), and Analysis, R.C.M. 907(b)(2)(C).

Rule 602. Service of charges
This rule is based on Article 35 and paragraph 44h of MCM, 1969 (Rev.). Fed. R. Crim. P. 9 is consistent in purpose with this rule, but not in structure. The warrant system of Fed. R. Crim. P. 9(a), (b)(1), and (c)(2) is unnecessary in military practice. The remand provision of Fed. R. Crim. P. 9(d) is inconsistent with the structure of military procedure but consistent with the convening authority's discretion to refer charges to a minor forum. See R.C.M. 306. The provision of Fed. R. Crim. P. 9(c) for service by mail or delivery to a residence is inconsistent with Article 35.

Rule 603. Changes to charges and specifications
(a) Minor changes defined. This definition and the discussion consolidate the tests and examples found at paragraphs 33d, 44f(1) and 69b(1) of MCM, 1969 (Rev.). They are consistent with Fed. R. Crim. P. 7(e).

(b) Minor changes before arraignment. This provision is based on and consolidates the authority of various persons to make minor changes as stated at paragraphs 33d and 44f(1) of MCM, 1969 (Rev.). It is inappropriate for an Article 32 investigating officer to make changes, but an investigating officer may recommend changes. See also Article 34(b) which provides authority for the staff judge advocate or legal officer to amend charges or specifications for the reasons stated therein.

(c) Minor changes after arraignment. This provision is based on Fed. R. Crim. P. 7(e), which is generally consistent with military practice.

(d) Major changes. This subsection is based on paragraphs 33d and 33e(2) of MCM, 1969 (Rev). See also Article 34(b) which provides authority for the staff judge advocate or legal officer to amend charges or specifications for the reasons stated therein.

Rule 604. Withdrawal of charges
(a) Withdrawal. This rule is based on paragraphs 5a(6) and 56(a) of MCM, 1969 (Rev.). The rule parallels Fed. R. Crim. P. 48(a), but leave of the court is not required for the convening authority to withdraw (or dismiss) charges and specifications. This would be inconsistent with the responsibilities of the convening authority under the Code. See Articles 34 and 60. The potential abuses which the leave-of-court requirement in the federal rule are designed to prevent are adequately prevented by the restraint on a later referral of withdrawn charges in the subsection (b).

The first paragraph in the discussion is new. It recognizes the distinction between withdrawal of charges, which extinguishes the jurisdiction of a court-martial over them, and dismissal of charges, which extinguishes the charges themselves. The discussion cautions that withdrawn charges, like any other unrefereed charges, should be disposed of promptly. Dismissal of charges disposes of those charges; it does not necessarily bar subsequent disposition of the underlying offenses (see Analysis, R.C.M. 306(a)), although a later preferential and referral would raise the same issues as are discussed under subsection (b).

The second paragraph in the discussion is based on the last sentence of paragraph 56(a) of MCM, 1969 (Rev.).
The third paragraph in the discussion is based on the second and fourth sentences in paragraph 56a of MCM 1969 (Rev.).

The first sentence of the fourth paragraph is based on the third sentence of paragraph 56a of MCM, 1969 (Rev.) and United States v. Charette, 15 M.J. 197 (C.M.A. 1983); United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983). The remainder of this paragraph is based on the second sentence of paragraph 56a and paragraph 56d of MCM, 1969 (Rev.).

(b) Referral of withdrawn charges. This rule is based on paragraphs 33j(1) and 56 of MCM, 1969 (Rev.) and numerous decisions. See, e.g., United States v. Charette, United States v. Blaylock, and United States v. Hardy, all supra; United States v. Jackson, 1 M.J. 242 (C.M.A. 1976); United States v. Walsh, 22 U.S.C.M.A. 509, 47 C.M.R. 926 (1973); Petty v. Convening Authority, 20 U.S.C.M.A. 438, 43 C.M.R. 278 (1971). The second sentence in the rule is derived from portions of paragraphs 56b and c of MCM, 1969 (Rev.) which were in turn based on Wade v. Hunter, 336 U.S. 684 (1949); Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951 at 64. See Article 44. The second paragraph of paragraph 56b of MCM, 1969 (Rev.) has been deleted. That sentence suggested that withdrawal after introduction of evidence on the merits for reasons other than urgent and unforeseen military necessity would not bar re-referral in some cases. If further prosecution is contemplated, such other possible grounds for terminating the trial after introduction of evidence has begun are more appropriately subject to a judicial determination whether to declare a mistrial under R.C.M. 915.

The first paragraph in the discussion contains a cross-reference to R.C.M. 915, Mistrial. Paragraph 56 of MCM, 1969 (Rev.) dealt with both withdrawal and mistrial. This was unnecessary and potentially confusing. Although the effect of a declaration of a mistrial may be similar to that of withdrawal, the narrow legal bases for a mistrial (see United States v. Simonds, 15 U.S.C.M.A. 641, 36 C.M.R. 139 (1966)) should be distinguished from withdrawal, which involves a far wider range of purposes and considerations. See Analysis, R.C.M. 915.

The second paragraph in the discussion is based on paragraph 56b of MCM, 1969 (Rev.). Unlike paragraph 56b, the current rules does not require a record in certain cases. Instead the discussion suggests that such a record is desirable if the later referral is more onerous to the accused. See United States v. Blaylock, supra at 192 n.1; United States v. Hardy, supra.


The fourth paragraph in the discussion is based generally on paragraphs 56b and c of MCM, 1969 (Rev.), but more specificity is provided as to proper reasons for withdrawal and its effect at certain stages of the proceedings. The grounds for proper withdrawal and later referral are based on United States v. Charette, United States v. Blaylock, United States v. Jackson, all supra; United States v. Lord, 13 U.S.C.M.A. 78, 32 C.M.R. 78 (1962); and current practice. United States v. Hardy and United States v. Walsh, both supra, indicate that the commencement of court-martial proceedings is, by itself, not important in analyzing the propriety of withdrawal. Arraignment is normally the first significant milestone for the same reasons that make it a cut-off point for other procedures. See, e.g., R.C.M. 601; 603; 804. It should be noted that assembly of the court-martial, which could precede arraignment, could also have an effect on the propriety of a withdrawal, since this could raise questions about an improper intent to interfere with the exercise of codal rights or the impartiality of the court-martial. The importance of the introduction of evidence is based on Article 44. See also R.C.M. 907(b)(2)(C) and Analysis.

CHAPTER VII. PRETRIAL MATTERS

Rule 701. Discovery

Introduction. This rule is based on Article 46, as well as Article 36. The rule is intended to promote full discovery to the maximum extent possible consistent with legitimate needs for nondisclosure (see e.g., Mil. R. Evid. 301; Section V) and to eliminate "gamesmanship" from the discovery process. See generally ABA Standards, Discovery and Procedure Before Trial (1978). For reasons stated below, the rule provides for broader discovery than is required in Federal practice. See Fed. R. Crim. P. 12.1; 12.2; 16. See also 18 U.S.C. § 3500.

Military discovery practice has been quite liberal, although the sources of this practice are somewhat scattered. See Articles 36 and 46; paragraphs 34, 44h, and 115c of MCM, 1969 (Rev.). See also United States v. Killebrew, 9 M.J. 154 (C.M.A. 1980); United States v. Cumberledge 6 M.J. 203, 204 n.4 (C.M.A. 1979). Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial. It leads to better informed judgment about the merits of the case and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truth-finding process and to the efficiency with which it functions. It is essential to the administration of military justice; because assembling the military judge, counsel, members, accused, and witnesses is frequently costly and time-consuming, clarification or resolution of matters before trial is essential.

The rule clarifies and expands (at least formally) discovery by the defense. It also provides for the first time some discovery by the prosecution. See subsection (b) of the rule. Such discovery serves the same goal of efficiency.

Except for subsection (e), the rule deals with discovery in terms of disclosure of matters known to or in the possession of a party. Thus the defense is entitled to disclosure of matters known to the trial counsel or in the possession of military authorities. Except as provided in subsection (e), the defense is not entitled under this rule to disclosure of matters not possessed by military authorities or to have the trial counsel seek out and produce such matters for it. But see Mil. R. Evid. 506 concerning defense discovery of government information generally. Subsection (e) may accord the defense the right to have the Government assist the defense to secure evidence or information when not to do so would deny the defense similar access to what the prosecution would have if it were seeking the evidence or information. See United States v. Killebrew, supra; Halfacre v. Chambers, 5 M.J. 1099 (C.M.A. 1976).

(a) Disclosure by the trial counsel. This subsection is based in part on Fed. R. Crim. P. 16(a), but it provides for additional matters to be provided to the defense. See ABA Standards, Discovery and Procedure Before Trial § 11–2.1 (1978). Where a request is necessary, it is required to trigger the duty to disclose as a means of specifying what must be produced. Without the request, a trial
APPENDIX 21

ANX WAPP, 1] (a)

APPENDIX 21

A21-32
Cumberledge, both supra. See also subsection (f) of this rule; Mil. R. Evid. 507.


(f) Information not subject to disclosure. This subsection is based on the privileges and protections in other rules (see, e.g., Mil. R. Evid. 301 and Section V). See also Goldberg v. United States, 425 U.S. 94 (1976); United States v. Nobles, 422 U.S. 225 (1975); Hickman v. Taylor, 329 U.S. 495 (1947). It differs from Fed. R. Crim. P. 16(a)(2) because of the broader discovery requirements under this rule. Production under the Jenks Act, 18 U.S.C. § 3500, is covered under R.C.M. 914.

(g) Regulation of discovery. Subsection (1) is based on the last sentence of Fed. R. Crim. P. 16(d)(2). It is a separate subsection to make clear that the military judge has authority to regulate discovery generally, in accordance with the rule. Local control of discovery is necessary because courts-martial are conducted in such a wide variety of locations and conditions. See also R.C.M. 108.


Subsection (g)(3) is based on Fed. R. Crim. P. 16(d)(2), but it also incorporates the noncompliance provision of Fed. R. Crim. P. 12.1(d) and 12.2(d). But see Williams v. Florida, supra at 83 n. 14; Alicea v. Gagnon, 675 F. 2d 913 (7th Cir. 1982). The discussion is based on United States v. Myers, 550 F.2d. 1036 (5th Cir. 1977), cert. denied, 439 U.S. 847 (1978).

1993 Amendment. The amendment to R.C.M. 701(g)(3)(C), based on the decision of Taylor v. Illinois, 484 U.S. 400 (1988), recognizes that the Sixth Amendment compulsory process right does not preclude a discovery sanction that excludes the testimony of a material defense witness. This sanction, however, should be reserved to cases where the accused has willfully and blatantly violated applicable discovery rules, and alternative sanctions could not have minimized the prejudice to the Government. See Chappee v. Commonwealth Massachusetts, 659 F.Supp. 1220 (D. Mass. 1988). The Discussion to R.C.M. 701(g)(3)(C) adopts the test, along with factors the judge must consider, established by the Taylor decision.

(h) Inspect. This subsection is based on Fed. R. Crim. P. 16.

Rule 702. Depositions

(a) In general. This subsection is based on the first sentence in Fed. R. Crim. P. 15(a). The language concerning preferral of charges is added based on Article 49(a). The language concerning use at Article 32 investigations is also added because depositions may be used at such hearings.

“Exceptional” means out of the ordinary. Depositions are not taken routinely, but only when there is a specific need under the circumstances. As used in Fed. R. Crim. P. 15(a) “exceptional circumstances” is generally limited to preserving the testimony of a witness who is likely to be unavailable for trial. See 8 J. Moore, Moore's Federal Practice ¶ 15.02[1]; 15.03 (1982 rev. ed.); United States v. Singleton, 460 F.2d. 1148 (2d Cir. 1972). A deposition is not a discovery device under the Federal rule. 8 J. Moore, supra ¶ 15.02[1]. See also United States v. Rich, 580 F.2d. 929 (9th Cir.), cert. denied, 439 U.S. 935 (1978); United States v. Adcock, 558 F.2d. 397 (8th Cir.), cert. denied, 434 U.S. 921 (1977). The Court of Military Appeals has held that depositions may serve as a discovery device in certain unusual circumstances. See Analysis, subsection (c)(3)(A) infra. Consequently, “exceptional circumstances” may be somewhat broader in courts-martial. Nevertheless, the primary purpose of this rule is to preserve the testimony of unavailable witnesses for use at trial. See Article 49; Hearings on H.R. 2498 Before a Subcomm. of the Comm. on Armed Services 81st Cong. 1st Sess. 1064–1070 (1949).

The first paragraph in the discussion is based on Article 49(d) and (f) and on paragraph 117b(11) of MCM, 1969 (Rev.). The second and third paragraphs are based on Article 49(d), (e), and (f); paragraph 117b(11) of MCM, 1969 (Rev.); Fed. R. Crim. P. 15(e). The admissibility of depositions is governed by Mil. R. Evid. 804 and by Article 49(d), (e), and (f) so it is unnecessary to prescribe further rules governing their use in R.C.M. 702. As to Article 49(d)(1), see United States v. Davis, 19 U.S.C.M.A. 217, 41 C.M.R. 217 (1970). See also United States v. Bennett, 12 M.J. 463, 471 (C.M.A. 1982); United States v. Gaines, 20 U.S.C.M.A. 557, 43 C.M.R. 397 (1971); United States v. Bryson, 3 U.S.C.M.A. 329, 12 C.M.R. 85 (1953). The fourth paragraph in the discussion is based on paragraphs 75(b)4 and 75(e) of MCM, 1969 (Rev.).

(b) Who may order. This subsection is based on Article 49(a) and on the second and third sentences of paragraph 117b(1) of MCM, 1969 (Rev.). As noted in subsection (i) the express approval of a competent authority is not required in order to take a deposition. See also United States v. Ciarletta, 7 U.S.C.M.A. 606, 23 C.M.R. 70 (1957). Express approval may be necessary in order to secure the necessary personnel or other resources for a deposition, when a subpoena will be necessary to compel the presence of a witness, or when the parties do not agree to the deposition.

(c) Request to take deposition. Subsection (1) is based on the first sentence in paragraph 117b(1) of MCM, 1969 (Rev.). The discussion is based on the fourth sentence of that paragraph. Subsection (2) is based on the fifth and sixth sentences in paragraph 117b(1).

Subsection (3)(A) is based on Article 49(a). The discussion provides guidance on what may be good cause for denial. The discussion indicates that ordinarily the purpose of a deposition is to preserve the testimony of a necessary witness when that witness is likely to be unavailable for trial. See Analysis, subsection (a) of this rule. The Court of Military Appeals has held that a deposition may be required in other circumstances described in the last sentence of the discussion. See United States v. Killebrew, 9 M.J. 154 (C.M.A. 1980); United States v. Cumberledge, 6 M.J. 203, 205, n. 3 (C.M.A. 1979) (deposition may be appropriate means to compel interview with witness when Government improperly impedes defense access to a witness); United States v. Chuculate, 5 M.J. 143, 145 (C.M.A. 1978) (deposition may be an appropriate means to allow sworn cross-examination of an essential witness who was unavailable at the Article 32 hearing); United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976) (deposition may be an appropriate means to cure error where witness was improperly found unavailable at Article 32 hearing). Chuculate and Chestnut have construed Article 49 as means of satisfying the discovery purposes of Article 32 when the Article 32 proceeding fails to do so. Killebrew and Cumberledge have construed Article 49 as a means
Subsection (3) is new and is based on United States v. Jef-

Subsection (3) is new and is based on United States v. Ciarletta, supra.

Subsection (3) is based on United States v. Ciarletta, supra. See also

Subsection (3) is based on United States v. Ciarletta, supra. See also United States v. Gaines and United States v. Bryson, both supra. Matters which ordinarily are waived if not raised include lack of timely notice and lack of qualifications of the deposition officer.

Subsection (3) is new and is based on United States v. Ciarletta, supra. See also United States v. Ciarletta, supra.

Rule 703. Production of witnesses and evidence

(a) In general. This subsection is based on Article 46.

(b) Right to witnesses. Subsections (1) and (2) are based on the fourth paragraph of paragraph 115a of MCM, 1969 (Rev.). The second paragraph in the discussion is based on United States v. Roberts, 10 M.J. 308 (C.M.A. 1981). See also United States v. Jeff-

(c) Determining which witnesses will be produced. This subsection is based generally on paragraph 115a of MCM, 1969 (Rev.). The procedure for obtaining witnesses under Fed. R. Crim. P. 17 is not practicable in courts-martial. Under Fed. R. Crim. P. 17, wit-

APPENDIX 21

A21-34

of permitting full investigation and preparation by the defense when the Government improperly interferes. Whether a deposi-

tion is an appropriate tool for the latter purpose may bear further consideration, especially since R.C.M. 701(e) makes clear that such interference is improper. See also R.C.M. 906(b)(7). Subsection (3)(B) is based on the first sentence of paragraph 117b(1) and on paragraphs 75b(4) and c of MCM, 1969 (Rev.). See also United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

Subsection (3)(C) is new and is self-explanatory.

Subsection (3)(D) is based on United States v. Cumberledge and United States v. Chuculate, both supra.

Subsection (3)(E) is consistent with Fed. R. Crim. P. 16(b). It is organized to provide a deposition officer a concise list of the duties of that office. Subsection (3)(F) is new and reflects the ministerial role of the deposi-

tion officer. Subsection (3)(G) is new and is based on paragraph 117b(4) of MCM, 1969 (Rev.). It is consistent with Fed. R. Crim. P. 15(b).

Subsection (3)(H) is consistent with paragraph 117b(2) of MCM, 1969 (Rev.). The rule does not prohibit the accused from waiving the right to counsel at a deposition. See R.C.M. 506(d); United States v. Howell, 11 U.S.C.M.A. 712, 29 C.M.R. 528 (1960).

Subsection (3) is new and reflects the ministerial role of the deposi-

tion officer.

(e) Notice. This subsection is based on Article 49(b) and para-

graph 117b(4) of MCM, 1969 (Rev.). It is consistent with Fed. R.


(f) Duties of the deposition officer. This subsection is based on paragraphs 117b(5), (7), (8) and c(3) and (4) of MCM, 1969 (Rev.). It is organized to provide a deposition officer a concise list of the duties of that office.

(g) Procedure. Subsection (1)(A) is based on paragraph 117b(2) of MCM, 1969 (Rev.); Fed. R. Crim. P. 15(b). See also United States v. Donati, supra. Subsection (1)(B) is based on paragraph 117b(6) and (7) of MCM, 1969 (Rev.). See also Fed. R. Crim. P. 15(d). Subsection (2) is based on the first sentence of paragraph 117b(2) and paragraph 117e of MCM, 1969 (Rev.). Subsection (2)(B) is based on paragraph 117e of MCM, 1969 (Rev.). Note that if the accused and counsel can be present, it ordinarily is feasible to conduct an oral deposition. Written interrogatories are expressly provided for in Article 49.
pose. The mechanics and costs of producing witnesses are the responsibility of the command which convened the court-martial. Moreover, military judges often do not sit at fixed locations and must be available for service in several commands or places. Note, however, that any dispute as to production of a witness is subject to a judicial determination. Experience has demonstrated that these administrative tasks should be the responsibility of trial counsel.

Subsection (1) is based on the first three sentences in the fourth paragraph of paragraph 115a of MCM, 1969 (Rev.).

Subsection (2) is based generally on the remainder of paragraph 115a of MCM, 1969 (Rev.). The procedure for production of defense witnesses prescribed in paragraph 115a was questioned in several decisions. See United States v. Arias, 3 M.J. 436, 439 (C.M.A. 1977); United States v. Williams, supra at 240 n.2; United States v. Carpenter, supra at 386 n.8. The practical advantages of that procedure were recognized, however, in United States v. Victor, 10 M.J. 69, 77 (C.M.A. 1980) (Everett, C.J., concurring in the result).

Subsection (2) modifies the former procedures to reduce the criticized aspects of the earlier practice while retaining its practical advantages. For reasons stated above, the trial counsel is responsible for the administrative aspects of production of witnesses. Thus, under subsection (2)(A) the defense submits its list of witnesses to the trial counsel so that the latter can arrange for their production. The trial counsel stands in a position similar to a civilian clerk of court for this purpose. Because most defense requests for witnesses are uncontested, judicial economy is served by routing the list directly to the trial counsel, rather than to the military judge first. This also allows the trial counsel to consider such alternatives as offering to stipulate or take a deposition, or recommending to the convening authority that a charge be withdrawn. See United States v. Victor, supra. Further, it allows arrangements to be made in a more timely manner, since the trial counsel is usually more readily available than the military judge.

Only if there is a genuine dispute as to whether a witness must be produced is the issue presented to the military judge by way of a motion.


Subsection (2)(D) provides for resolution of disputes concerning witness production by the military judge. Application to the convening authority for relief is not required. It is permitted under R.C.M. 905(j). The last sentence in this subsection is based on United States v. Carpenter, supra. See subsection (b) of this rule as to the test to be applied.

(d) Employment of expert witnesses. This subsection is based on paragraph 116 of MCM, 1969 (Rev.). See also United States v. Johnson, 22 U.S.C.M.A. 424, 47 C.M.R. 402 (1973); Hutson v. United States, 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970). Because funding for such employment is the responsibility of the command, not the court-martial, and because alternatives to such employment may be available, application to the convening authority is appropriate. In most cases, the military's investigative, medical, or other agencies can provide the necessary service. Therefore the convening authority should have the opportunity to make available such services as an alternative. Cf: United States v. Johnson, supra; United States v. Simmons, 44 C.M.R. 804 (A.C.M.R. 1971), pet. denied, 21 U.S.C.M.A. 628, 44 C.M.R. 940 (1972). This subsection has no reference to ratification of employment of an expert already retained, unlike 18 U.S.C. § 3006A(e). See also Ms. Comp. Gen. B–49109 (June 25, 1949). This subsection does not apply to persons who are government employees or under contract to the Government to provide services which would otherwise fall within this subsection. The reference in paragraph 116 of MCM, 1969 (Rev.), to service regulations has been deleted as unnecessary.

(e) Procedures for production. Subsection (1) and the discussion are based on paragraph 115b of MCM, 1969 (Rev.).

Subsection (2)(A) is consistent with current practice.

Subsection (2)(B) is based on Fed. R. Crim. P. 17(a) and (c) and on Appendix 17 of MCM, 1969 (Rev.). See Article 46. The discussion is taken from the second sentence of the second paragraph of paragraph 115a of MCM, 1969 (Rev.). Note that the purpose of producing books, papers, documents and other objects before a proceeding for inspection is to expedite the proceeding, not as a general discovery mechanism. See Bowman Dairy Co. v. United States, 341 U.S. 214 (1951). See generally United States v. Nixon, 418 U.S. 683 (1974).

Subsection (2)(C) is based on paragraph 79b, the third paragraph of paragraph 115a, and the first sentence of paragraph 115d(1) of MCM, 1969 (Rev.). Authority for the president of a court of inquiry and a deposition officer to issue a subpoena is expressly added to fill the gap left by MCM, 1969 (Rev.) in regard to these procedures. See Article 47a(1)(i), 135(f).

Subsection (2)(D) is based on Fed. R. Crim. P. 17(d) and on the second sentence of the fifth paragraph of paragraph 115d(1) of MCM, 1969 (Rev.). See also 28 U.S.C. § 569(b). The discussion is based on paragraph 115d(1) of MCM, 1969 (Rev.).

Subsection (2)(E) is based on Article 46 and the first sentence of paragraph 115d(1) of MCM, 1969 (Rev.). It parallels Fed. R. Crim. P. 17(e)(1). Process in courts-martial does not extend abroad, except in occupied territory, nor may it be used to compel persons within the United States to attend courts-martial abroad. See Article 46; United States v. Bennett, supra; United States v. Daniels, supra; United States v. Stringer, 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954). But see United States v. Daniels, supra at 97, 48 C.M.R. at 658 (Quinn, J. concurring in the result) (suggesting possible use of 28 U.S.C. § 1783(a) to secure presence of witness overseas to testify in a court-martial). The discussion is based on the last paragraph of paragraph 115d(1) of MCM, 1969 (Rev.). Note that under subsection (2)(E)(iii) any civilians in occupied territory are subject to compulsory process of the occupying force.

Subsection (2)(F) is based on Fed. R. Crim. P. 17(c), but is broader in that it is not limited to a subpoena duces tecum. Cf. Fed. R. Crim. P. 17(f)(2).


The procedure for issuing warrants of attachment is modified somewhat. The warrant must be authorized by the military judge, or, in special courts-martial without a military judge and summary courts-martial (see subsection (e)(2)(G)(v) of this rule), and for depositions and courts of inquiry, the convening authority. Paragraph 115d(3) of MCM, 1969 (Rev.) required only that the trial counsel consult with the convening authority, or “after the court was convened” the military judge. Subsection (e)(2)(G) now requires written authorization from one of these persons. Second, subsection (e)(2)(G)(ii) incorporates as requirements the standards in the third paragraph 115d(3) of MCM, 1969 (Rev.). That paragraph was seemingly advisory in nature. Subsection (e)(2)(G)(v) is based on the second paragraph and the first sentence of the last paragraph of paragraph 115d(3) of MCM, 1969 (Rev.). The last sentence of subsection (e)(2)(G)(iv) is new and is intended to ensure that any detention under this rule is limited to the minimum necessary to effect its purpose. These modifications provide additional safeguards to ensure that detention of witnesses is exercised only when necessary and appropriate. See generally Lederer, Warrants of Attachment—Forecibly Compelling the Attendance of Witnesses; 98 Mil. L. Rev. 1 (1982).

(f) Evidence. This subsection is based generally on paragraph 115c and e of MCM, 1969 (Rev.). See also United States v. Toledo, 15 M.J. 255 (C.M.A. 1983). It parallels the procedures for production of witnesses. Discovery and introduction of classified or other government information is covered by Mil. R. Evid. 505 and 506. Note that unlike the standards for production of witnesses, there is no difference in the standards for production of evidence on the merits and at sentencing. The relaxation of the rules of evidence at presentencing proceedings provides some flexibility as to what evidence must be produced at those proceedings.

Rule 704. Immunity


Subsection (1) makes clear that transactional immunity extends only to trial by court-martial. See Dept. of Defense Dir. 1355.1 (July 21, 1981). Subsection (2) is written somewhat more broadly, however. Use immunity under R.C.M. 704 would extend to a State prosecution. Cf. Murphy v. Waterfront Commission, supra. Moreover, although a convening authority is not independently empowered to grant immunity extending to Federal civilian prosecutions, use immunity extending to such cases may be granted by a convening authority when specifically authorized under 18 U.S.C. §§ 6002 and 6004. See subsection (c) and Analysis.

The second paragraph in the discussion is based on 18 U.S.C. § 6004. The third paragraph in the discussion is based on United States v. Rivera, 1 M.J. 107 (C.M.A. 1975); United States v. Eastman, supra.

(b) Scope. This subsection clarifies the scope of R.C.M. 704. It is based on the last clause in 18 U.S.C. § 6002. Note that this rule relates only to criminal proceedings. A grant of immunity does not extend to administrative proceedings unless expressly covered by the grant.

(c) Authority to grant immunity. This subsection is based on paragraph 68h of MCM, 1969 (Rev.) and on United States v. Kirsch, 15 U.S.C.M.A. 84, 35 C.M.R. 56 (1964). See also United States v. Villines, supra. Kirsch recognized codal authority for a convening authority to grant immunity (see Articles 30, 44, and 60) and found implementing Manual provisions to be a proper exercise of authority under Article 36. (At the time Kirsch was decided, the convening authority’s powers now contained in Article 60 were in Article 64.) The enactment of 18 U.S.C. § 6001–6005 did not remove this power. See United States v. Villines, supra; Department of Justice Memorandum, Subject: Grants of Immunity by Court-Martial Convening Authorities (Sept. 22, 1971) discussed in Grants of Immunity, The Army Lawyer 22 (Dec. 1973). See also Dept. of Defense Dir. 1355.1 (July 21, 1981). See generally Green I, supra at 27–35; H. Moyer, supra at 377–380. The rule recognizes, however, that the authority under the code of a general court-martial convening authority to grant immunity does not extend to federal prosecutions. Id. Consequently, the rule directs military authorities to 18 U.S.C. §§ 6001–6005 as a means by which such immunity can be granted when necessary. The discussion under subsection (1) offers additional guidance on this mat-
The power to grant immunity and the power to enter into a pretrial agreement, while related, should be distinguished. R.C.M. 704 does not disturb the power of the convening authority, including a special or summary court-martial convening authority, to make a pretrial agreement with an accused under which the accused promises to testify in another court-martial, as long as the agreement does not purport to be a grant of immunity. Note that the accused-witness in such a case could not be ordered to testify pursuant to the pretrial agreement; instead, such an accused would lose the benefit of the bargained-for relief upon refusal to carry out the bargain. See also R.C.M. 705.

The first paragraph in the initial discussion under subsection (c) is based on Cooke v. Orser and United States v. Caliendo, both supra. As to the second paragraph in the discussion, see United States v. Newman, 14 M.J. 474 (C.M.A. 1983). The discussion under subsection (c)(1) is based on Grants of Immunity, The Army Lawyer 22 (Dec. 1973). See also Dept. of Defense Dir. 1355.1 (July 21, 1981); Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction (1955).

As to whether the threat of a foreign prosecution is a sufficient basis to refuse to testify in a court-martial notwithstanding a grant of immunity, see United States v. Murphy, 7 U.S.C.M.A. 32, 21 C.M.R. 158 (1956). See also United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977); In re Parker, 411 F.2d 1067 (10th Cir. 1969), vacated as moot, 397 U.S. 96 (1970); Green II, supra at 12–14. But see In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972); McCormick's Handbook of the Law of Evidence 262–63 (E. Cleary ed. 1972). The Supreme Court has not decided the issue. See Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 742 (1974). (d) Procedure. This subsection is new. It is intended to protect the parties to a grant of immunity by reducing the possibility of misunderstanding or disagreement over its existence or terms. Cf. Cooke v. Orser, supra.

The first paragraph in the discussion is based on United States v. Kirsch, supra.

Rule 705. Pretrial agreements


(b) *Nature of agreement.* This subsection recognizes the matters contained in pretrial agreements. See United States v. Cooke, 12 M.J. 448 (C.M.A. 1982); United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982); United States v. Brown, 12 M.J. 420 (C.M.A. 1982); United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977); United States v. Allen, supra. As to prohibited and permitted terms and conditions, see subsection (c) of this rule. This discussion under subsection (2)(C) is based on United States v. Cook, supra.

(c) *Terms and conditions.* This subsection is intended to ensure that certain fundamental rights of the accused cannot be bargained away while permitting the accused substantial latitude to enter into terms or conditions as long as the accused does so freely and voluntarily. Subsection (1)(B) lists certain matters which cannot be bargained away. This is because to give up these matters would leave no substantial means to ensure judicially that the accused’s plea was provident, that the accused entered the pretrial agreement, and voluntarily. Subsection (2)(C) of this rule recognizes the matters listed in subsection (2) have been judicially sanctioned. As to subsection (2)(A), see United States v. Thomas, 6 M.J. 573 (A.C.M.R. 1978). Cf. United States v. Bertelson, supra. Subsection (2)(B) is based on United States v. Reynolds, 2 M.J. 887 (A.C.M.R. 1976); United States v. Tyson, 2 M.J. 583 (N.C.M.R. 1976). See also United States v. Chavez-Roy, 1 M.J. 34 (C.M.A. 1975); United States v. Stoltz, 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964).

Subsection (2)(C) is based on United States v. Callahan, 8 M.J. 804 (N.C.M.R. 1980); United States v. Brown, 4 M.J. 654 (A.C.M.R. 1977). Enforcement of a restitution clause may raise problems if the accused, despite good faith efforts, is unable to comply. See United States v. Brown, supra.

Subsection (2)(D) is based on United States v. Dawson, 10 M.J. 142 (C.M.A. 1982). Although the post-trial misconduct provision in Dawson was rejected, a majority of the court was apparently willing to permit such provisions if adequate protections against arbitrary revocation of the agreement are provided. However, see United States v. Connell, 13 M.J. 156 (C.M.A. 1982) in which a post-trial misconduct provision was held unenforceable without detailed analysis. Subsection (D) provides the same protections as revocation of a suspended sentence requires. See R.C.M. 1109 and Analysis. Given such protections, there is no reason why an accused who has bargained for sentence relief such as a suspended sentence should enjoy immunity from revocation of the agreement before action but not afterward. Other decisions have suggested the validity of post-trial misconduct provisions. See United States v. Goode, 1 M.J. 3 (C.M.A. 1975); United States v. Thomas, supra; United States v. French, 5 M.J. 655 (N.C.M.R. 1978). Cf. United States v. Lallande, 22 U.S.C.M.A. 170, 46 C.M.R. 170 (1973).

Subsection (2)(E) is based on United States v. Schaffer, supra; United States v. Mills, supra; United States v. Schmelz, 1 M.J. 8 (C.M.A. 1975). Note that the list is not exhaustive. The right to enlisted members may be waived, for example.

1991 Amendment: Subsection (2) was amended to clarify that either side can propose the inclusion of the listed terms in a pretrial agreement. This conforms to the amendment to R.C.M. 705(d).

(d) *Procedure.* This subsection ensures that an offer to plead guilty pursuant to a pretrial agreement originates with the accused, and that the accused freely and voluntarily enters a pretrial agreement. At the same time it recognizes that a pretrial agreement is the product of negotiation and discussion on both sides, each of which is free to refuse to enter an agreement and go to trial. Subsection (1) is based on United States v. Schaffer, supra. This subsection, together with the prohibition against terms not freely and voluntarily agreed to by the accused and the requirement in R.C.M. 910 for an inquiry into the agreement, should prevent prosecutorial pressure or improper inducements to the
accused to plead guilty or to waive rights against the accused’s wishes or interest. See United States v. Schaffer, supra at 428-429.

Subsection (2) provides that once plea discussions are initiated by the defense the convening authority or a representative may negotiate with the defense. This recognizes that, while the offer must originate with the defense, the specific provisions in an agreement may be the product of discussions with the Government. Schaffer, Mills, and Schmeltz suggest that each term must originate with the defense. R.C.M. 705 is consistent with this insofar as it requires that the offer to plead guilty originate with the accused (subsection (d)(1)), that the written proposal be prepared by the defense (subsection (d)(3)), and that the accused enter or agree to each term freely and voluntarily (subsection (c)(1)(A)). It is of no legal consequence whether the accused’s counsel or someone else conceived the idea for a specific provision so long as the accused, after thorough consultation with qualified counsel, can freely choose whether to submit a proposed agreement and what it will contain. See United States v. Munt, 3 M.J. 1082 (A.C.M.R. 1977), pet. denied, 4 M.J. 198 (C.M.A. 1978).

Subsection (3) ensures that all understandings be included in the agreement. This is in the interest of both parties. See United States v. Cooke, 11 M.J. 257 (C.M.A. 1981); United States v. Lanzer, 3 M.J. 60 (C.M.A. 1977); United States v. Cox, 22 U.S.C.M.A. 69, 46 C.M.R. 69 (1972). The last sentence is based on United States v. Green, supra. Note that the rule does not require the convening authority to sign the agreement. Although the convening authority must personally approve the agreement, (see subsection (a)) and has sole discretion whether to do so under subsection (4), the convening authority need not personally sign the agreement. In some circumstances, it may not be practicable or even physically possible to present the written agreement to the convening authority for approval. The rule allows flexibility in this regard. The staff judge advocate, trial counsel, or other person authorized by the convening authority to sign may do so. Authority to sign may be granted orally. Subsection (3) is not intended to preclude oral modifications in the agreement from being made on the record at trial with the consent of the parties.

Subsection (5) makes clear that neither party is bound by a pretrial agreement until performance begins. See United States v. Kazena, 11 M.J. 28 (C.M.A. 1981). In Shepardson v. Roberts, 14 M.J. 354 (C.M.A. 1983), the Court stated that the convening authority may be bound by a pretrial agreement before entry of a plea of guilty if the accused has detrimentally relied on the agreement. The Court indicated, however, that not all forms of reliance by the accused rise to the level of detrimental reliance as it used that term. Thus the Court held in Shepardson that exclusion of statements allegedly made by the accused as a result of the agreement (but not necessarily pursuant to it) was an adequate remedy, and enforcement of the agreement was not required when the convening authority withdrew from it before trial. Similarly, the Court opined that the fact that an accused made arrangements to secure employment or took similar actions in reliance on an agreement would not require enforcement of a pretrial agreement. Subsection (5) is consistent with this approach, but uses beginning of performance by the accused to provide a clearer point at which the right of the convening authority to withdraw terminates. Note that the beginning of performance is not limited to entry of a plea. It would also include testifying in a companion case, providing information to Government agents, or other actions pursuant to the terms of an agreement.

Note that the accused may withdraw from a pretrial agreement even after entering a guilty plea or a confessional stipulation, but, once the plea is accepted or the stipulation admitted, could not withdraw the plea or the stipulation except as provided under R.C.M. 910(h) or 811(d). The fact that the accused may withdraw at any time affords the accused an additional measure of protection against prosecutorial abuse. It also reflects the fact that the convening authority can retrieve any relief granted the accused. See Article 63; United States v. Cook, supra.

1991 Amendment: R.C.M. 705(d) was amended to authorize either party to initiate pretrial agreement negotiations and propose terms and conditions. The amendment does not change the general rule that all terms and conditions of a pretrial agreement proposed pursuant to this rule must not violate law, public policy or regulation. Subparagraph (1) was eliminated and subparagraphs (2)-(5), as amended, were renumbered (1)-(4), respectively. This amendment is patterned after federal civilian practice [see Fed. R. Crim. P. 11(e)] where there is no requirement that negotiations for plea agreements originate with the defense. In courts-martial the military judge is required to conduct an exhaustive inquiry into the providence of an accused’s guilty plea and the voluntariness of the pretrial agreement. R.C.M. 705(c) ensures that certain fundamental rights of the accused cannot be bargained away. Furthermore it can be difficult to determine which side originated negotiations or proposed a particular clause. Cf. United States v. Jones, 23 M.J. 305, 308-309 (C.M.A. 1987) (Cox, J., concurring).

(e) Nondisclosure of existence of agreement. This subsection is based on United States v. Green, supra; United States v. Wood, 23 U.S.C.M.A. 57, 48 C.M.R. 528 (1974). See also R.C.M. 910(f); Mil. R. Evid. 410.

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused

This rule is taken from paragraph 121 of MCM, 1969 (Rev.). Minor changes were made in order to conform with the format and style of the Rules for Courts-Martial. See also United States v. Cortes-Crespo, 13 M.J. 420 (1982); United States v. Frederick, 3 M.J. 230 (C.M.A. 1977); Mil. R. Evid. 302 and Analysis. The rule is generally consistent with 18 U.S.C. § 4244. The penultimate paragraph in paragraph 121 is deleted as an unnecessary statement.

Rule 707. Speedy trial

Introduction. This rule applies the accused's speedy trial rights under the 6th Amendment and Article 10, UCMJ, and protects the command and societal interest in the prompt administration of justice. See generally Barker v. Wingo, 407 U.S. 514 (1972); United States v. Walls, 9 M.J. 88 (C.M.A. 1980). The purpose of this rule is to provide guidance for granting pretrial delays and to eliminate after-the-fact determinations as to whether certain periods of delay are excludable. This rule amends the former rule, which excluded from accountable time periods covered by certain exceptions.

(a) In general. This subsection is based on ABA Standards for Criminal Justice, Speedy Trial, 12–2.1, 12–2.2 (1986). The ABA Standards set no time limit but leave the matter open depending on local conditions. The basic period from arrest or summons to trial under The Federal Speedy Trial Act, 18 U.S.C. § 3161, is 100 days. The period of 120 days was selected for courts-martial as a reasonable outside limit given the varied nature of locations in which courts-martial occur. The dates of the events which begin government accountability are easily ascertainable and will avoid the uncertainty involved in Thomas v. Edington, 26 M.J. 95 (C.M.A. 1988).

The 90-day rule previously established in R.C.M. 707(d) has been eliminated. As such, the 120-day rule established in subsection (a) of this rule applies to all cases, not just cases where the accused is in pretrial confinement. Judicial decisions have held, however, that when an accused has been held in pretrial confinement for more than 90 days, a presumption arises that the accused's right to a speedy trial under Article 10, UCMJ has been violated. In such cases, the government must demonstrate due diligence in bringing the case to trial. United States v. Burton, 44 C.M.R. 166 (C.M.A. 1971). Unless Burton and its progeny are reexamined, it would be possible to have a Burton violation despite compliance with this rule.


(b) Accountability. Subsection (1) is based on United States v. Manalo, 1 M.J. 452 (C.M.A. 1976). The reference to R.C.M. 304(a)(2)–(4) conforms to the language of R.C.M. 707(a)(2).

Subsection (2) is based on ABA Standards, supra at 12–2.2(a) (1986). See also United States v. Talavera, 8 M.J. 14 (C.M.A. 1979).

Subsection (3)(A) establishes that a mistrial or dismissal by any proper authority begins a new trial period. This subsection clarifies the date from which to begin measuring new time periods in cases involving re Trial, 8 U.S.C. § 3162. The Federal Rule provides dismissal as the sanction for speedy trial violations but permits the judge to dismiss with or without prejudice. Accordingly, this subsection permits the judge to dismiss charges without prejudice for nonconstitutional violations of this rule. If, however, the accused has been denied his or her constitutional right to a speedy trial, the only available remedy is dismissal with prejudice. Strunk v. United States, 412 U.S. 434 (1973).

Subsection (3)(B) clarifies the intent of this portion of the rule. The harm to be avoided is continuous pretrial restraint. See United States v. Gray, 21 M.J. 1020 (N.M.C.M.R. 1986). Where an accused is released from pretrial restraint for a substantial period, he will be treated the same as an accused who was not restrained. Therefore, unless the restraint is reimposed, the 120-day time period will run from the date of preferral or entry on active duty regardless of whether that event occurs before or after the accused was released from restraint.

Subsection (3)(C) clarifies the effect of government appeals on this rule. This subsection treats all government appeals the same. Once the parties are given notice of either the government's decision not to appeal under R.C.M. 908(b)(8) or the decision of the Court of Military Review under R.C.M. 908(c)(3), a new 120-day period begins.

This subsection clarifies how time should be counted for those charges not affected by the ruling that is subject to appeal. Under R.C.M. 908(b)(4), trial on such charges may in some circumstances proceed notwithstanding the appeal, or trial may await resolution of the appeal. Since the traditional policy of resolving all known charges at a single trial has not changed (See R.C.M. 906(b)(10), Discussion), charges not the subject of the appeal may be properly delayed without violating this rule. Accordingly where the trial is interrupted by a government appeal, all charges may be treated the same and proceeded upon at the same time once the appeal is resolved.

(c) Excludable delays. This subsection, based on ABA Standards for Criminal Justice, Speedy Trial, 12–1.3 (1986), follows the principle that the government is accountable for all time prior to trial unless a competent authority grants a delay. See United States v. Longhofer, 29 M.J. 22 (C.M.A. 1989). The rule of procedure established in subsection (1) is based on United States v. Maresca, 28 M.J. 328 (C.M.A. 1989). See also United States v. Carlisle, 25 M.J. 426, 428 (C.M.A. 1988).

The discussion to subsection (1) provides guidance for judges and convening authorities to ensure the full development of speedy trial issues at trial. See United States v. Maresca, supra. This amendment follows ABA guidance and places responsibility on a military judge or the convening authority to grant reasonable pretrial delays. Military judges and convening authorities are required, under this subsection, to make an independent determination as to whether there is in fact good cause for a pretrial delay, and to grant such delays for only so long as is necessary under the circumstances. ABA Standards, supra at 12–1.3; United States v. Longhofer, supra. Decisions granting or denying pretrial delays will be subject to review for both abuse of discretion and the reasonableness of the period of delay granted. Id.; United States v. Maresca, supra.

(d) Remedy. This subsection is based on The Federal Speedy Trial Act, 18 U.S.C. § 3162. The Federal Rule provides dismissal as the sanction for speedy trial violations but permits the judge to dismiss with or without prejudice. According to this subsection, the judge is permitted to dismiss charges without prejudice for nonconstitutional violations of this rule. If, however, the accused has been denied his or her constitutional right to a speedy trial, the only available remedy is dismissal with prejudice. Strunk v. United States, 412 U.S. 434 (1973).

(e) Waiver. A lack of a demand for immediate trial will not constitute waiver and will not preclude an accused from raising speedy trial issues at trial. See Barker v. Wingo, supra.
CHAPTER VIII. TRIAL PROCEDURE GENERALLY
Rule 801. Military judge's responsibility; other matters

(a) Responsibilities of military judge. This subsection is based on paragraphs 59b and 40b(2) and the first sentence of paragraph 57a of MCM, 1969 (Rev.). It is intended to provide the military judge or president of a special court-martial without a military judge broad authority to regulate the conduct of courts-martial within the framework of the code and the Manual, and to establish the outlines of their responsibilities. Much of the discussion is also derived from paragraphs 59b, 40b(2), and 53g of MCM, 1969 (Rev.). A few minor changes have been made. For instance, the military judge, not the president, determines the uniform to be worn, and the military judge is not required to consult with the president, nor is the president of a special court-martial without a military judge required to consult with trial counsel, concerning scheduling. As a practical matter, consultation or coordination among the participants concerning scheduling or uniform may be appropriate, but the authority for these decisions should rest with the presiding officer of the court, either military judge or president of a special court-martial without a military judge, without being required to consult with others.

(b) Obtaining evidence. This subsection is taken from paragraph 54b of the MCM, 1969 (Rev.). Some of the language in paragraph 54b has been placed in the discussion.

(c) Uncharged offenses. This subsection is taken from paragraph 55a of MCM, 1969 (Rev.). The discussion is designed to accomplish the same purpose as paragraph 55b of MCM, 1969 (Rev.), although the language is no longer in terms which could be construed as jurisdictional.

(d) Interlocutory questions and questions of law. This subsection is similar in substance to paragraph 57 of MCM, 1969 (Rev.) and is based on Articles 51(b) and 52(c).

Subsections (1) and (2) are based on Articles 51(b) and 52(c). The provisions (R.C.M. 801(e)(1)(C); 801(e)(2)(C)) permitting a military judge or president of a special court-martial without a military judge to change a ruling previously made (Article 51(b)) have been modified to preclude changing a previously granted motion for finding of not guilty. United States v. Hitchcock, 6 M.J. 188 (c.M.A. 1979). Under R.C.M. 916(k) the military judge does not rule on the question of mental responsibility as an interlocutory matter. See Analysis, R.C.M. 916(k). Thus there are no rulings by the military judge which are subject to objection by a member.

Subsection (2)(D) makes clear that all members must be present at all times during special courts-martial without a military judge. The president of a special court-martial lacks authority to conduct the equivalent of an Article 39(a) session. Cf. United States v. Muns, 26 C.M.R. 835 (G.C.B.R. 1958).

Subsection (3) is based on Articles 151(b) and 52(c) and is derived from paragraph 57c, d, f, and g of MCM, 1969 (Rev.). Some language from paragraph 57g has been placed in the discussion.

Subsection (4) is taken from paragraph 57g(1) of MCM, 1969 (Rev.). The rule recognizes, however, that a different standard of proof may apply to some interlocutory questions. See, e.g., Mil. R. Evid. 314(e)(5). The assignments of the burden of persuasion are determined by specific rules or, in the absence of a rule, by the source of the motion. This represents a minor change from the language in paragraph 67e of MCM, 1969 (Rev.), which placed the burden on the accused for most questions. This assignment was rejected by the Court of Military Appeals in several cases, see, e.g., United States v. Graham, 22 U.S.C.M.A. 75, 46 C.M.R. 75 (1972). Assignments of burdens of persuasion and, where appropriate, going forward are made in specific rules. "Burden of persuasion" is used instead of the more general "burden of proof" to distinguish the risk of nonpersuasion once an issue is raised from the burden of production necessary to raise it. See McCormick's Handbook of the Law of Evidence § 336 (E. Cleary ed. 1972). For example, although the defense may have the burden of raising an issue (e.g., statute of limitations), once it has done so the prosecution may bear the burden of persuasion.

The discussion under subsection (5) describes the differences between interlocutory questions and ultimate questions, and between questions of fact and questions of law. It is taken, substantially, from paragraph 57b of MCM, 1969 (Rev.) As to the distinction between questions of fact and questions of law, see United States v. Bailey, 6 M.J. 956 (N.C.M.R. 1979); United States v. Jessie, 5 M.J. 573 (A.C.M.R.), pet, denied, 5 M.J. 300 (1978). It is similar to language in the third paragraph of paragraph 57b of MCM, 1969 (Rev.), which was based on United States v. Ornelas, 2 U.S.C.M.A. 96, 6 C.M.R. 96 (1952). See Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition, DA PAM 27-2, 10–5 (July 1970). That example, and the decision in United States v. Ornelas, supra were questioned in United States v. Laws, 11 M.J. 475 (C.M.A. 1981). The discussion clarifies that when a military offense (i.e., one which requires that the accused be a "member of the armed forces," see Articles 85, 86, 99; see also Articles 88–91, 133) is charged and the defense contends that the accused is not a member of the armed forces, two separate questions are raised by that contention: first, whether the accused is subject to court-martial jurisdiction (see R.C.M. 202); and, second, whether, as an element of the offense, the accused had a military duty which the accused violated (e.g., was absent from the armed forces or a unit thereof without authority). The first question is decided by the military judge by a preponderance of the evidence. The second question, to the extent it involves a question of fact, must be decided by the fact-finder applying a reasonable doubt standard. United States v. Bailey, supra. See also United States v. McGinnis, 15 M.J. 345 (C.M.A. 1983); United States v. Marsh, 15 M.J. 252 (C.M.A. 1983); United States v. McDonough, 14 M.J. 415 (C.M.A. 1983). Thus it would be possible, in a case where larceny and desertion are charged, for the military judge to find by a preponderance of the evidence that the accused is subject to military jurisdiction and for the members to convict of larceny but acquit of desertion because they were not satisfied beyond reasonable doubt that the accused was a member of the armed forces. Ornelas does not require a different result. The holding in Ornelas was that the law officer (military judge) erred in failing to permit the members to resolve a contested issue of the accused's status as a servicemember on a desertion charge. Language in the opinion to the effect that the "jurisdictional" issue should have been submitted to the members is attributable to language in paragraph 67e of MCM, 1951, which suggested that "defenses," including "jurisdiction," were to be resolved by the members. Such a procedure for resolving motions to dismiss has been abolished.
Rule 802. Conferences

Introduction. This rule is new. It is based on Fed. R. Crim. P. 17.1, but is somewhat broader and more detailed. Fed. R. Crim. P. 17.1 apparently authorizes, by its title, only pretrial conferences. Conferences other than pretrial conferences are also authorized in federal practice. See Fed. R. Crim. P. 43(c)(3); Cox v. United States, 309 F.2d 614 (8th Cir. 1962). R.C.M. 802 applies to all conferences. Nothing in this rule is intended to prohibit the military judge from communicating, even ex parte, with counsel concerning routine and undisputed administrative matters such as scheduling, uniform, and travel arrangements. Such authority was recognized in the fourth sentence of paragraph 39c of MCM, 1969 (Rev.).

Like Fed. R. Crim. P. 17.1, this rule provides express authority for what is already common practice in many courts-martial, and regularizes the procedure for them. Fed. R. Crim. P. 17.1 is designed to be used in unusual cases, such as complicated trials. Conferences are needed more frequently in courts-martial because in many instances the situs of the trial and the home bases of the military judge, counsel, and the accused may be different. Even when all the participants are located at the same base, conferences may be necessary. See ABA Standards, Discovery and Procedural Before Trial § 11–5.4 (1978). After the trial has begun, there is often a need to discuss matters in chambers. Cf. Fed. R. Crim. P. 43(c); United States v. Gregorio, 497 F.2d 1253 (4th Cir.), cert. denied, 419 U.S. 1024 (1974).

(a) In general. This subsection is taken directly from the first sentence of Fed. R. Crim. P. 17.1, with modifications to accommodate military terminology. Subsection (c) provides that a conference may not proceed over the objection of a party and that, in effect, matters may be resolved at a conference only by agreement of the parties. Thus, the military judge can bring the parties together under subsection (a), but a conference could not proceed further without the voluntary participation of the parties. Nothing in this rule is intended to prohibit the military judge from communicating to counsel, orally or in writing, matters which may properly be the subject of rules of court. See R.C.M. 108; 801. This is also true under the federal rule. See Committee on Pretrial Procedure of the Judicial Conference of the United States, Recommended Procedures in Criminal Trials, 37 F.R.D. 95, 98 (1965); C. Wright, Federal Practice and Procedure § 292 (1969). Cf. United States v. Westmoreland, 41 F.R.D. 419 (S.D. Ind. 1967).

The discussion provides some examples of the potential uses of conferences. As noted, issues may be resolved only by agreement of the parties; they may not be litigated or decided at a conference. To do so would exceed, and hence be contrary to, the authority established under Article 39(a). The prohibition against judicial participation in plea bargaining is based on United States v. Caruth, 6 M.J. 184, 186 (C.M.A. 1979). Cf. United States v. Allen, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957). But, cf. ABA Standards, Pleas of Guilt § 14–3(c)(2) (1979).

(b) Matters on record. This subsection is based on the second sentence in Fed. R. Crim. P. 17.1. The federal rule requirement for a written memorandum was rejected as too inflexible and unwieldy for military practice. The interests of the parties can be adequately protected by placing matters on the record orally. If any party fears that such an oral statement will be inadequate, that party may insist on reducing agreed-upon matters to writing as a condition of consent. In any event, a party is not prohibited from raising the matters again at trial. See subsection (c) below.

The waiver provision has been added because the conference is not part of the record of trial under Article 54. The purpose of the requirement for inclusion in the record is to protect the parties, and therefore it may be waived. United States v. Stapleton, 600 F.2d 780 (9th Cir. 1979).

(c) Rights of parties. This subsection does not appear in the federal rule. It is intended to ensure that conferences do not become a substitute for Article 39(a) sessions. In this respect Fed. R. Crim. P. 17.1 is broader than R.C.M. 802, since the federal rule apparently includes “conferences” held on the record and permits the parties to be bound by matters resolved at the conference. See C. Wright, supra at § 292.

1991 Amendment: The prohibition against conferences proceeding over the objection of any party was eliminated as it conflicted with the military judge’s specific authority to order conferences under section (a) of this rule and general authority to control the conduct of court-martial proceedings. While the military judge may compel the attendance of the parties, neither party may be compelled to resolve any issue or be pressured to make any concessions.

deal with at conferences will not be substantive. The participation of the defense in conferences and whether the accused should attend are matters to be resolved between defense counsel and the accused.

Fed. R. Crim. P. 43(c)(2) authorizes conferences concerning questions of law to be held without the presence of the accused. The proceedings described in Fed. R. Crim. P. 43(c)(2) are analogous to those described in Article 39(a)(2), since the judge may make rulings at a 43(c)(2) conference and such a conference is "on the record." Article 39(a) expressly gives the accused the right to be present at similar proceedings in courts-martial. Because of this inconsistency, Fed. R. Crim. P. 43(c)(2) is not adopted. Questions of law may be discussed at a conference under R.C.M. 802, but the military judge may not decide them at such conferences.

(e) Admission. This subsection is taken from the third sentence of Fed. R. Crim. P. 17.1.

(f) Limitations. This subsection is based on the last sentence in Fed. R. Crim. P. 17.1, with the addition of the prohibition against conferences in special courts-martial without a military judge.

Rule 803. Court-martial sessions without members under Article 39(a)

Article 39(a) authorizes the military judge to call and conduct sessions outside the presence of members. The discussion contains a general description, based on paragraph 53d(1) of MCM, 1969 (Rev.), of the types of matters which may be dealt with at Article 39(a) sessions. The quoted language in the first paragraph of the discussion is found in the legislative history of Article 39(a). See S. Rep. No. 1601, 90th Cong., 2nd Sess. 9-10 (1968).

The rule modifies the language concerning Article 39(a) sessions after sentence is announced. The former provision permitted such sessions only "when directed by the appropriate reviewing authority." Yet paragraphs 80b and c of MCM, 1969 (Rev.) implied that a military judge could call such a session on the judge's own motion. R.C.M. 1102 also authorizes such action.

The first two paragraphs of the discussion are based on the second and third paragraphs of paragraph 53d(1) of MCM, 1969 (Rev.), except that the present language omits "defenses" from the matters a military judge may hear at an Article 39(a) session. Clearly a military judge does not rule on the merits of a defense at an Article 39(a) session, and matters collateral to a defense which might be heard at an Article 39(a) session are adequately described elsewhere in the discussion.

As to the third paragraph of the discussion, see Articles 35 and 39. See also United States v. Pergande, 49 C.M.R. 28 (A.C.M.R. 1974).

Rule 804. Presence of the accused at trial proceedings

Introduction. Subsections (a) and (b) of this rule are very similar to Fed. R. Crim. P. 43(a) and (b). Subsection (c) is derived from paragraph 60 of MCM, 1969 (Rev.). Fed. R. Crim. P. 43(c) was not adopted since it is not compatible with military practice, as it concerns corporate defendants, misdemeanor proceedings, conferences or arguments upon questions of law, and sentence reduction proceedings. Of these, only presence of the accused at conferences or arguments upon questions of law has relation to military procedure. Article 39(b) would preclude absence by the accused from arguments, except as provided in subsection (b). Conferences are treated in R.C.M. 802.

Other differences between this rule and Fed. R. Crim. P. 43 and paragraphs 11 and 60 of the MCM, 1969 (Rev.) are discussed below.

(a) Presence required. Article 39 establishes the right of the accused to be present at all trial proceedings and Article 39(a) sessions. The right is grounded in the due process clause of the Fifth Amendment and the right to confrontation clause of the Sixth Amendment of the Constitution. This subsection is basically the same as Fed. R. Crim. P. 43(a) with modifications in language to conform to military procedures.

The requirement that the accused be present is not jurisdictional. While proceeding in the absence of the accused, without the express or implied consent of the accused, will normally require reversal, the harmless error rule may apply in some instances. See United States v. Walls, 577 F.2d 690 (9th Cir.) cert. denied, 439 U.S. 893 (1978); United States v. Nelson, 570 F.2d 258 (8th Cir. 1978); United States v. Taylor, 562 F.2d 1345 (2d Cir.), cert. denied, 434 U.S. 853 (1977).

(b) Continued presence not required. This subsection is similar to Fed. R. Crim. P. 43(b). Aside from modifications in terminology, two minor substantive changes have been made. First, this subsection specifies that sentencing, as well as trial on the merits, may take place when the accused is absent under this rule. Such a construction is necessary in the military because delaying a sentence determination increases the expense and inconvenience of reassembling the court-martial and the risk that such reassembly will be impossible. Federal courts do not face a similar problem. See United States v. Houghaling, 2 U.S.C.M.A. 230, 225, 8 C.M.R. 30, 35 (1953).

The second change substitutes the word "arraignment" for "the trial has commenced." This is a clearer demarcation of the point after which the accused's voluntary absence will not preclude continuation of the proceedings. Since there are several procedural steps, such as service of charges, which, while associated with the trial process, do not involve a session, the arraignment is a more appropriate point of reference. This is consistent with the previous military rule.

The discussion points out that, although not explicitly stated in this subsection (or Fed. R. Crim. P. 43(b)), the accused may expressly waive the right to be present at trial. Federal courts have so construed Rule 43. See 8 J. Moore, Moore's Federal Practice, § 43.02[2] (1982 rev. ed.).

[Rule 43] does not refer to express waiver of presence on the part of felony defendants, although it includes such a provision for misdemeanants. This omission was not intended to negate the right of felony defendants expressly to waive presence at the trial, for the Diaz case (Diaz v. United States, 223 U.S. 442 (1912)) cited as authority for the "voluntary absence" provision itself involved an express waiver. [Footnote omitted.]

See also Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (dicta); In re United States, 597 F.2d 27 (2d Cir. 1979); United States v. Jones, 514 F.2d 1331 (D.C. Cir. 1975); United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969); Pearson v. United States, 325 F.2d 625 (D.C. Cir. 1963); Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963). Such waiver should be made expressly by the accused in open court. Compare
Cross v. United States, supra, with Pearson v. United States, supra. Federal cases also establish that there is no right to waive presence, see, e.g., United States v. Durham, 587 F.2d 799 (5th Cir. 1979); United States v. Fitzpatrick, 437 F.2d 19 (2d Cir. 1970). In In re United States, supra, the court stated that there is a duty on the part of a defendant in a felony trial to be present. 597 F.2d at 28.


Subsection (1) is similar to paragraph 11c of MCM, 1969 (Rev.). The language in MCM, 1969 (Rev.), which indicated that an absence had to be unauthorized, has been omitted. The language now conforms to the federal rule in this respect. The term “unauthorized” has never been treated as significant. See United States v. Peebles, 3 M.J. 177 (C.M.A. 1977). As the discussion notes in the fourth paragraph, a person who is in custody or otherwise subject to military control cannot, while in such a status, voluntarily be absent from trial without expressly waiving the right on the record and receiving the permission of the military judge to be absent. Cf. United States v. Crutcher, supra. This appears to be the treatment that the term “unauthorized” was designed to effect. See United States v. Peebles, supra at 179 (Cook, J.).

Trial in absentia, when an accused voluntarily fails to appear at trial following arraignment, has long been permitted in the military. United States v. Houghtaling, supra. Authority for the third and fourth paragraphs of the discussion under Voluntary absence is found in United States v. Peebles, supra. United States v. Cook, supra requires that the voluntariness of an absence be established on the record before trial in absentia may proceed. Because the prosecution will be the party moving for trial in absentia, the discussion notes that the prosecution has the burden to prove voluntariness as well as absence. The example of an inference is taken from Judge Perry's separate opinion in United States v. Peebles, supra. Compare United States v. Partlow, 428 F.2d 814 (2d. Cir. 1970) with Phillips v. United States, 334 F.2d 589 (9th Cir. 1964), cert. denied, 379 U.S. 1002 (1965).


(c) Appearance and security of accused. This subsection is similar to paragraph 60 of MCM, 1969 (Rev.).

In subsection (1), the last sentence represents a modification of previous practice by making the accused and defense counsel primarily responsible for the personal appearance of the accused. Because of difficulties the defense may face in meeting these responsibilities, the rule requires the commander to give reasonable assistance to the defense when needed. The discussion emphasizes the right (see United States v. West, 12 U.S.C.M.A. 670, 31 C.M.R. 256 (1962)) and the duty (see United States v. Gentile, supra) of the accused to appear in proper military uniform.

Subsection (2) reflects the changes since 1969 in rules governing pretrial restraint. These rules are now found in the sections referred to by R.C.M. 804(c)(2). Insofar as paragraph 60 of MCM, 1969 (Rev.) was a means of allocating responsibility for maintaining (as opposed to authorizing) custody over an accused until completion of trial, and insofar as this allocation is not mandated by other rules in this Manual, the service secretaries are authorized to prescribe rules to accomplish such allocation.

Subsection (3) is taken verbatim from paragraph 60 of MCM, 1969 (Rev.).

Rule 805. Presence of military judge, members, and counsel

(a) Military judge. This subsection is based on paragraph 39d of MCM, 1969 (Rev.).

(b) Members. This subsection is based on paragraphs 41c and 41d(1) and (2) and the first sentence of the second paragraph 62b of MCM, 1969 (Rev.) and on Article 29(c). See also United States v. Colon, 6 M.J. 73 (C.M.A. 1978).

1986 Amendment: References to R.C.M. “911” were changed to R.C.M. “912” to correct an error in MCM, 1984.


(d) Effect of replacement of member or military judge. This subsection is based on Article 29(b), (c), and (d) and on paragraphs 39e and 41e of MCM, 1969 (Rev.). MCM, 1969 (Rev.) also provided a similar procedure when a member of a court-martial was temporarily excused from the trial. This rule does not authorize such a procedure. If a member must be temporarily absent, a continuance should be granted or the member should be permanently excused and the trial proceed as long as a quorum remains. Trial may not proceed with less than a quorum present in any event. This subsection provides a means to proceed with a case in the rare circumstance in which a court-martial is reduced below a quorum after trial on the merits has begun and a mistrial is inappropriate.

Rule 806. Public trial

Introduction. This rule recognizes and codifies the basic principle that, with limited exceptions, court-martial proceedings will
be open to the public. The thrust of the rule is similar to paragraph 53e of MCM. 1969 (Rev.), but the right to a public trial is more clearly expressed, and exceptions to it are more specifically and more narrowly drawn. This construction is necessary in light of recent decisions, particularly United States v. Grunden, 2 M.J. 116 (C.M.A. 1977).

(a) In general. This subsection reflects the holding in United States v. Grunden, supra, that the accused has a right to a public trial under the Sixth Amendment. See also United States v. Brown, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956); United States v. Zimmerman, 19 C.M.R. 806 (A.F.B.R. 1955).

Although the Sixth Amendment right to a public trial is personal to the accused (see Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979)), the public has a right under the First Amendment to attend criminal trials. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). The applicability of these cases to courts-martial is not certain (cf. Greer v. Spock, 424 U.S. 828 (1976), In re Oliver, 333 U.S. 257, 26 n. 12 (1948); but see United States v. Cunnie, 10 M.J. 570 (A.F.C.M.R. 1980) (dicta)), especially in view of the practical differences between civilian courts and courts-martial (i.e., courts-martial do not necessarily sit at a permanent or fixed site; they may sit overseas or at sea; and at remote or dangerous locations). Nevertheless the rule and the discussion are based on recognition of the value to the public of normally having courts-martial open to the public. This is particularly true since the public includes members of the military community.

(b) Control of spectators. Neither the accused nor the public has an absolute right to a public trial. This subsection recognizes the power of a military judge to regulate attendance at courts-martial to strike a balance between the requirement for a public trial and other important interests.

As the discussion notes, the right to public trial may be violated by less than total exclusion of the public. See United States v. Brown, supra. Whether exclusion of a segment of the public is proper depends on a number of factors including the breadth of the exclusion, the reasons for it, and the interest of the accused, as well as the spectators involved, in the presence of the excluded individuals. See United States ex rel. Latimore v. Stieff, 561 F.2d 691 (7th Cir. 1977), cert. denied, 434 U.S. 1076 (1978); United States ex rel. Lloyd v. Vincent, 520 F.2d 1272 (3d Cir.), cert. denied, 423 U.S. 937 (1975). See also Stamicarbon v. American Cyanamid Co., 506 F.2d 532 (2d Cir. 1974).

The third paragraph in the discussion of Rule 805(b) is based on United States v. Grunden, supra.

Judicial authority to regulate access to the courtroom to prevent overcrowding or other disturbances is clearly established and does not conflict with the right to a public trial. See Richmond Newspapers, Inc. v. Virginia, supra at 581 n. 18 Cf. Illinois v. Allen, 397 U.S. 337 (1970). In addition, there is substantial authority to support the example in the discussion concerning restricting access to protect certain witnesses. See, e.g., United States v. Eisner, 533 F.2d 987 (6th Cir.), cert. denied, 429 U.S. 919 (1976) (proper to exclude all spectators except press to avoid embarrassment of extremely timid witness); United States ex rel. Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965), cert. denied, 384 U.S. 1008 (1966) (proper to exclude all spectators except press and bar to avoid intimidation of witnesses); United States ex rel. Latimore v. Stieff, supra (proper to exclude all spectators except press, clergy, and others with specific interest in presence during testimony of alleged rape victim); United States ex rel. Lloyd v. Vincent, supra (proper to exclude spectators in order to preserve confidentiality of undercover agents’ identity). See also Gannett Co., Inc. v. DePasquale, supra at 401—500 (Powell J., concurring); United States v. Brown, supra; United States v. Kobli, 172 F.2d 919 (3rd Cir. 1949).

Subsection (b) authorizes closure of court-martial proceedings over the accused’s objection only when otherwise authorized in this Manual. Effectively, this means that the only time trial proceedings may be closed without the consent of the accused is when classified information is to be introduced. See Mil. R. Evid. 505(f). Article 39a sessions may also be closed under Mil. R. Evid. 505(i); 506(i); and 412(c). Some federal cases seem to suggest that criminal proceedings may be closed for other purposes. See, e.g., United States ex rel. Lloyd v. Vincent, supra. Selective exclusion of certain individuals or groups for good cause, under the first clause of this subsection, is a more appropriate and less constitutionally questionable method for dealing with the problems treated in such cases.

Court-martial proceedings may be closed when the accused does not object. As noted in the discussion, however, such closure should not automatically be granted merely because the defense requests or acquiesces in it. See Richmond Newspapers, Inc. v. Virginia, supra. See also Gannett Co., Inc. v. DePasquale, supra.


(c) Photography and broadcasting prohibited. This subsection is based on Fed. R. Crim. P. 53, and is consistent with paragraph 53e of MCM, 1969 (Rev.) and practice thereunder. See C. Wright, Wright’s Federal Practice and Procedure § 861 (1969); 8B J. Moore, Moore’s Federal Practice § 53.02 (1982 rev. ed.). The exception which authorizes contemporaneous transmission of the proceedings to another room (e.g., by closed circuit television) has been added to the language of the federal rule. Many military courthouses have limited space, and such methods have been used to accommodate the accused’s and the public’s interest in attendance at courts-martial, as in the case of United States v. Garwood, NMC 81—1982 (1981). The Working Group considered the constitutional alternatives identified in Chandler v. Florida, 449 U.S. 560 (1981), but determined that Article 36 requires adherence to the federal rule except to the extent described. As to the matters in the discussion, see Amsler v. United States, 381 F.2d 37 (9th Cir. 1967).

Rule 807. Oaths

(a) Definition. This rule and the discussion are taken from paragraph 112a of MCM, 1969 (Rev.). See also Fed. R. Crim. P. 54(c).

(b) Oaths in courts-martial. Subsection (1) including the discussion is based on Article 42 and is based on paragraph 112b and c of MCM, 1969 (Rev.). Subsection (2) is taken from paragraph 112d of MCM, 1969 (Rev.). The discussion is taken in part from
Rule 808. Record of trial


Rule 809. Contempt proceedings

(a) In general. This section restates codal authority. The discussion is based on paragraph 118a of MCM 1969 (Rev.). The language of Article 48 applies only to “direct” contempts. See W. Winthrop, Military Law and Precedents 301–302 (2d ed. 1920 reprint); paragraph 101 of MCM, 1928; paragraph 109 of MCM (Army), 1949; paragraph 118a of MCM, 1951; paragraph 118a of MCM, 1969 (Rev.). The definition of a “direct” contempt is also based on these sources. See also 8B J. Moore, Moore’s Federal Practice f 42.02[3] (1982 rev. ed.); 18 U.S. § 401; cf. Ex parte Savin, 131 U.S. 267, witnessed by the court and other direct contempts is based on Cooke v. United States, 267 U.S. 517 (1925), and is important for procedural purposes. See subsection (b) below.

(b) Method of disposition. The subsection is based on Fed. R. Crim. P. 42. By its terms, Article 48 makes punishable contemptuous behavior which, while not directly witnessed by the court-martial, disturbs its proceedings (e.g., a disturbance in the waiting room). As Fed. R. Crim. P. 42(b) recognizes, this type of contempt may not be punished summarily. See Johnson v. Mississippi, 403 U.S. 212 (1971); Cooke v. United States, supra. Paragraph 118 of MCM, 1969 (Rev.) did not adequately distinguish these types of contempt. There may be technical and practical problems associated with proceeding under subsection (b)(2) but the power to do so appears to exist under Article 48.

(c) Procedure; who may punish for contempt. This subsection prescribes different procedures for punishment for contempt when members are or are not present. The Working Group examined the possibility of vesting contempt power solely in the military judge; but Article 48 provides that “court[s]-martial” may punish for contempt. When members are present, the military judge is not the court-martial. See Article 16. When trial by military judge alone is requested and approved, the military judge is the court-martial. Under Article 39(a) the military judge may “call the court into session without the presence of the members,” and the military judge therefore acts as the court-martial within the meaning of Article 16 and 48. Since Article 48 authorizes summary punishment for contempt committed in the presence of the court-martial (see Hearings of H. R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 1060 (1949)), its purpose would be destroyed by requiring members who were not present and did not observe the behavior to decide the matter. The second sentence in subsection (c)(1) parallels Fed. R. Crim. P. 42(a).

The procedure for contempt proceedings before members has been simplified to the extent possible consistent with the requirement for the members to decide the issue. The procedure for a preliminary ruling by the military judge to decide as a matter of law that no contempt has occurred is expressly recognized for the first time. See Article 51(b). The requirement for a two-thirds vote on findings and punishment is based on Article 52(a) and (b)(3).

(d) Record; review. This subsection is based on the eighth paragraph of paragraph 118b of MCM, 1969 (Rev.) concerning the record and post-trial action. The requirement for approval and execution of the sentence by the convening authority is based on previous practice. See W. Winthrop, supra at 301–312; paragraph 101 of MCM, 1928, paragraph 109 of MCM (Army) and MCM (AF), 1949; paragraph 118 of MCM, 1951; paragraph 118b of MCM, 1969 (Rev.). This requirement also reflects the need of the command to control its assets. The last sentence is based also on Hearings of H. R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 1060 (1949).

(e) Sentence. This subsection is based on Article 57 and paragraph 118b of MCM, 1969 (Rev.). It clarifies that the military judge may delay announcement of a sentence to permit participation of the contemnor when necessary. Paragraph 118b of MCM, 1969 (Rev.) was ambiguous in this regard.

(f) Informing person held in contempt. This subsection and the discussion are based on paragraph 118b of MCM, 1969 (Rev.); it has been modified for clarity.

Rule 810. Procedures for rehearings, new trials, and other trials

Introduction. This rule is based on Articles 63 and 73. It concerns only the procedures for rehearings, new trials, and other trials. Matters relating to ordering rehearings or new trials are covered in R.C.M. 1107 and 1210.

(a) In general. This subsection is based on paragraph 81b of MCM, 1969 (Rev.).

(b) Composition. This subsection is based on Article 63(b) and the seventh paragraph of paragraph 92a of MCM, 1969 (Rev.). As to subsection (3), see also United States v. Staten, 21 U.S.C.M.A. 493, 45 C.M.R. 267 (1972).

(c) Examination of record of former proceedings. This subsection is based on paragraph 81c of MCM, 1969 (Rev.).


(e) Definition. This definition is taken from paragraph 81d(2) of MCM, 1969 (Rev.). See also paragraph 92b of MCM, 1969 (Rev.).

Rule 811. Stipulations

(a) In general. This subsection restates the first sentence of paragraph 54f(1) of MCM, 1969 (Rev.).

(b) Authority to reject. This subsection affirms the authority of the military judge to decline to accept a stipulation, as an exercise of discretion and in the interest of justice. This authority was implicit in paragraph 54f(1) of MCM, 1969 (Rev.) which suggested that stipulations should not be accepted in certain circumstances. These examples are now included in the discussion. See also United States v. Cambridge, 3 U.S.C.M.A. 377, 12 C.M.R. 133 (1953); United States v. Field, 27 C.M.R. 863 (N.B.R. 1958).

(c) Requirements. This subsection makes clear that a stipulation can be received only with the consent of the parties. This consent must be manifested in some manner before the military judge may receive the stipulation, although the rule does not specify any particular form for the manifestation, as this rests within the discretion of the trial judge. United States v. Cambridge, supra. Although it is normally preferable to obtain it, the express consent of the accused on the record is not always necessary for admission of a stipulation. In the absence of circumstances indicating lack of consent by the accused (see e.g., United States v. Williams, 30 C.M.R. 650 (N.B.R. 1960)), the defense counsel’s concurrence in the stipulation will bind the accused. United States v. Cambridge, supra. If there is any doubt, the accused should be personally questioned. See United States v. Barbeau, 9 M.J. 569 (A.F.C.M.R. 1980).

The last three paragraphs of the discussion deal with stipulation “which practically amount to a confession.” Paragraph 54f(1) of MCM, 1969 (Rev.), states that such a confession “should not be received in evidence.” Despite this admonition, such stipulations were occasionally received in order to allow the defense to avoid waiving certain issues by pleading guilty while saving the parties the time and expense of a full trial when the accused’s guilt, as a practical if not legal matter, was conceded. See, e.g., United States v. Rempe, 49 C.M.R. 367 (A.F.C.M.R. 1974). The Court of Military Appeals has approved this procedure, but only if an inquiry of the sort described in the discussion is conducted. United States v. Bertelson, 3 M.J. 314 (C.M.A. 1977). The definition of a stipulation which practically amounts to a confession in the discussion is based on Bertelson, along with United States v. Schaffer, 12 M.J. 425, 427–428 nn. 4.6 (C.M.A. 1982); United States v. Reagan, 7 M.J. 490 (C.M.A. 1979); United States v. Aiello, 7 M.J. 99 (C.M.A. 1979); and United States v. Long, 3 M.J. 400 (C.M.A. 1977). These cases indicate that a stipulation practically amounts to a confession when it amounts to a “de facto” plea of guilty, rather than simply one which makes out a prima facie case. The example in the discussion is taken from United States v. Long, supra.

(d) Withdrawal. This subsection is taken, substantially verbatim, from paragraph 54f(1) of MCM, 1969 (Rev.), and restates current law. See also United States v. Daniels, 11 U.S.C.M.A. 52, 28 C.M.R. 276 (1959).

(e) Effect of stipulations. This subsection modifies previous Manual rules in two respects. First, it states that a stipulation of fact is binding on the court-martial. This is consistent with federal practice, see e.g., Jackson v. United States, 330 F.2d 679 (8th Cir.), cert. denied, 379 U.S. 855 (1964), as well as the prevailing view in the vast majority of states. See J. Wigmore, Wigmore on Evidence § 2590 (3d ed. 1940); 73 Am. Jur. 2d. Stipulations, § 8 (1974); 83 C.J.S. Stipulations, §§ 12–13 (1953). See also H. Hackfield & Co. v. United States, 197 U.S. 442 (1905). Paragraph 154b of MCM, 1951, contained the following provision: “The court is not bound by a stipulation even if received. For instance its own inquiry may convince the court that the stipulated fact is not true.” The provision was drawn verbatim from paragraph 140b of MCM (Army), 1949, and of MCM(AF), 1949 and can be traced to paragraph 126b of MCM, 1928. The Court of Military Appeals questioned the validity of this provision in United States v. Gerlach, 16 U.S.C.M.A. 383, 37 C.M.R. 3 (1966), but did not have to resolve whether the court-martial was bound by a stipulation of fact, since it held that the parties were. The above quoted language was omitted from MCM, 1969 (Rev.). The analysis to the Manual does not explain why. See Analysis of Contents, Manual for Courts-Martial, 1969, Revised Edition, DAP PAM 27–2 at 27–49 (1970). Despite this omission, some courts-martial have apparently continued to apply the earlier rule. See Military Criminal Law, Evidence DA PAM 27–22, AFP 111–8 at paragraph 6–2 (1975). There is no reason not to follow federal practice on this matter. If the court-martial’s “own inquiry” indicates that the stipulated facts may not be true, the parties should be afforded the opportunity to withdraw from the stipulation and to present evidence on the matter in question.

The second change is in the treatment of stipulations of a document’s contents. MCM, 1969 (Rev.), applied the same “observations” it made concerning stipulations of facts to stipulations of documents’ contents thus implying that, by stipulating to a document’s contents, the parties agreed that the contents are true. This may have been due to the treatment of admissions concerning documents’ contents as a matter of civil procedure in Federal courts, see Fed. R. Civ. P. 36 (1948) (since replaced by Fed. R. Civ. P. 36 (1970)); see also Wigmore supra, § 2596, and the fact that stipulations of a documents’ contents, like stipulations of fact, are handed to the members of the court. Yet, it is clear that the parties may stipulate that a document contains certain text or other information, or that a given document is genuine, without
necessarily agreeing that the text or other information in the document is true. In this sense, a stipulation as to a document's contents is like a stipulation of expected testimony, and the rule so treats it.


(f) Procedure. This subsection is based on the second paragraph in paragraph 54(f)2 of MCM, 1969 (Rev.).

Rule 812. Joint and common trials

This rule is taken from paragraph 53c of MCM, 1969 (Rev.). The rule itself substantially repeats the first sentence in paragraph 53c. The discussion refers to other rules dealing with joint or common trials, and includes the examples discussed in paragraph 53c of MCM, 1969 (Rev.). It also incorporates a statement on stipulations which appeared at paragraph 54(f)(3) of MCM, 1969 (Rev.), and a statement concerning severances from paragraph 61h of MCM, 1969 (Rev.). The rule does not change current law.

Rule 813. Announcing personnel of the court-martial and accused

This rule is based on paragraph 61c of MCM, 1969 (Rev.) and is placed in Chapter 8 since the requirement for announcing the presence or absence of parties usually recurs several times during the trial. The rule has been rephrased to acknowledge the responsibility of the military judge to ensure that the matters covered are reflected in the record. Paragraph 61c of MCM, 1969 (Rev.) required the trial counsel to make these announcements. This rule leaves to the discretion of the military judge who will make the announcements. The importance of requiring such announcements to be made on the record is emphasized in United States v. Nicholson, 18 U.S.C.M.A. 69, 39 C.M.R. 69 (1968).

CHAPTER IX. TRIAL PROCEDURE THROUGH FINDINGS

Rule 901. Opening session

Introduction. R.C.M. 901 through 903 set out in chronological order the procedures to be followed before arraignment. The order need not be followed rigidly.

(a) Call to order. This subsection is based on the first sentence in paragraph 61b of MCM, 1969 (Rev.). The purpose of the subsection is to establish a definite point to indicate when a court-martial is in session. The first paragraph in the discussion is taken from paragraph 61a of MCM, 1969 (Rev.), but the present provision has been expanded to include comparing the record of the referral on the charge sheet with the convening orders to ensure that they are consistent. The other matters in paragraphs 61a and b of MCM, 1969 (Rev.), are omitted here as unnecessary.

The second paragraph in the discussion is based on paragraph 58c of MCM, 1969 (Rev.) and serves as a reminder of the Article 35 requirements. See United States v. Pergande, 49 C.M.R. 28 (A.C.M.R. 1974). The failure to object is normally a waiver of the statutory right. United States v. Lumbus, 48 C.M.R. 613 (A.C.M.R. 1974). Because of the importance of the right, however, the military judge should secure an affirmative waiver. See United States v. Perna, 1 U.S.C.M.A. 438, 4 C.M.R. 30 (1952); United States v. Pergande, supra.

(b) Announcement of parties. This subsection is based on paragraph 61c of MCM, 1969 (Rev.). Requiring an announcement is intended to guard against inadvertently proceeding in the absence of necessary personnel and to ensure that the record reflects the presence of required personnel. Failure to make the announcement is not error if it otherwise appears that no essential personnel were absent.

(c) Swearing reporter and interpreter. This subsection and its discussion are taken directly from paragraph 61d of MCM, 1969 (Rev.).

(d) Counsel. This subsection, except for subsection (4)(A) and (D), is based on paragraphs 61e and f of MCM, 1969 (Rev.). The qualifications of counsel and matters which disqualify counsel are treated at R.C.M. 502(d) and are not repeated here. The subsection makes clear that at trial the military judge is responsible for determining whether counsel is disqualified, Soriano v. Hosken, 9 M.J. 221 (C.M.A. 1980), and for seeing that appropriate action is taken. Of course, if a detailed counsel is disqualified the responsibility will fall upon the convening authority to rectify the problem. The discussion points out that defects in the qualification of counsel are not jurisdictional. Wright v. United States, 2 M.J. 9 (C.M.A. 1976). Subsection (4)(A) has been added to conform to the requirements of United States v. Donohew, 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969). Cf. Fed. R. Crim. P. 5(c). Subsection (4)(D) is based on Fed. R. Crim. P. 44(c) and United States v. Breese, 11 M.J. 17 (C.M.A. 1981). See also United States v. Davis, 3 M.J. 430 (C.M.A. 1977); United States v. Blakey, 1 M.J. 247 (C.M.A. 1976); United States v. Evans, 1 M.J. 206 (C.M.A. 1975).

(e) Presence of members. This subsection is new. Its purpose is to eliminate unnecessary attendance by members. Accord Article 39(a).

Rule 902. Disqualification of military judge

Introduction. This rule is based on 28 U.S.C. § 455, which is itself based on Canon III of the ABA Code of Judicial Conduct, and on paragraph 62 of MCM, 1969 (Rev.).

The procedures prescribed by 28 U.S.C. § 144 were not adopted. That statute provides that whenever a party "files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein." This section does not establish a different test from 28 U.S.C. § 455 for disqualification for prejudice or bias. Instead, 28 U.S.C. § 144 provides a procedure mechanism by which the disqualification determination may be made. United States v. Sible, 624 F.2d 864 (9th Cir. 1980); see also Parrish v. Board of Commissioners of Alabama State Bar, 524 F.2d 98 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976).

This procedure is not practicable for courts-martial because of the different structure of the military judiciary and the limited number of military judges.

(a) In general. This subsection is, except for changes in terminology, identical to 28 U.S.C. § 455(a). See also paragraph 62(f)(1) of

(b) Specific grounds. The stem and subsection (1) are, with changes in terminology, identical to the stem and subsection (1) of 28 U.S.C. § 455(b). See also paragraph 62(13) of MCM, 1969 (Rev.). Note that any interest or bias to be disqualifying must be personal, not judicial, in nature. Berger v. United States, 255 U.S. 22 (1921); Ashcor v. United States, 581 F.2d 735 (9th Cir. 1978), cert. denied, 440 U.S. 907 (1979); United States v. Lewis, 6 M.J. 43 (C.M.A. 1978); United States v. Grance, 2 M.J. 846 (A.C.M.R. 1976); United States v. Stewart, 2 M.J. 423 (A.C.M.R. 1975). See also United States v. Lynch, 13 M.J. 394, 398, n. 3 (C.M.A. 1982) (Everett, C.J. concurring).

Subsection (2) is based on paragraphs 62(5), (6), and (11) of MCM, 1969 (Rev.). See United States v. Goodman, 3 M.J. 1 (C.M.A. 1977). These grounds are analogous to the disqualifying activities in 28 U.S.C. § 455(b)(2).

Subsection (3) is based on paragraphs 62(3), (4), (9), (10), and (13) of MCM, 1969 (Rev.). See also Mil. R. Evid. 605; United States v. Cooper, 8 M.J. 5 (C.M.A 1979); United States v. Bradley, 7 M.J. 332 (C.M.A. 1979). The purpose of this section is analogous to that of 28 U.S.C. § 455(b)(3).

Subsection (4) is based on Article 26 and paragraph 62(1) and (2) and 62g of MCM, 1969 (Rev.). The matters in 28 U.S.C. § 455(b)(4) regarding financial interest in the proceedings are not of significance in courts-martial. The remote possibility that a judge or a member of the family might have a financial interest in the outcome of a court-martial is adequately covered in subsection (5) of this rule.

Subsection (5) is taken directly from 28 U.S.C. § 455(b)(5), with the added clarification that the interest in subsection (C) may be financial or otherwise.

The discussion is based on 28 U.S.C. § 455(c).

(c) Definitions. Subsections (1) and (2) are, with changes in terminology, identical to 28 U.S.C. § 455(d)(1) and (2). Subsection (3) has been added to clarify that the president of a special court-martial without a military judge is treated as any other member for purposes of qualifications and challenges. See R.C.M. 912.

Subsection (3) of 28 U.S.C. § 455(d) is unnecessary.

(d) Procedure. This section including the discussion is based on Article 41 and paragraph 62g, d, and h of MCM, 1969 (Rev.).

(e) Waiver. This section is, with changes in terminology, identical to 28 U.S.C. § 455(e).

Rule 903. Accused's elections on composition of court-martial

(a) Time of elections. This subsection is based on Articles 16, 18, 19, and 25. It is similar to paragraphs 53d(2)(c) and 61g and h of MCM, 1969 (Rev.) insofar as it concerns the timing of requests for enlisted members of trial by military judge alone. It parallels Fed. R. Crim. P. 23(a). Section (b) of Fed. R. Crim. P. 23 is inapplicable in the military, and the matters covered in Fed. R. Crim. P. 23(c) are covered in R.C.M. 918(b).

Article 25 states that a request for enlisted members must be made before the end of an Article 39(a) session, if any. The first Article 39(a) session is appropriate to consider these matters. Although the Court of Military Appeals has not decided the issue (United States v. Morris, 23 U.S.C.M.A. 319, 321, 49 C.M.R. 653, 655 n.2 (1975)), the Working Group concluded that this does not establish a jurisdictional deadline. Cf. United States v. Bryant, 23 U.S.C.M.A. 326, 49 C.M.R. 660 (1975); United States v. Morris, supra (Article 16 requirement that request be submitted before assembly is not jurisdictional). To permit greater flexibility, the military judge is authorized to permit the defense to defer a request for enlisted members until a later time. Such a request should be granted for good cause only, bearing in mind the burden which it may impose on the Government.

A request for trial by military judge alone should be made at the initial Article 39(a) session to simplify procedure and facilitate scheduling and preparation. However, since Article 16 gives the accused a statutory right to wait until assembly to request trial by military judge alone, subsection (2) allows automatic deferral of this request.

The discussion points out the statutory limits on requesting enlisted members or trial by military judge alone. See Articles 16, 18, and 25.

(b) Form of election. This subsection is based on Articles 16 and 25. The amendment of Article 16 permits a request for trial by military judge alone to be made orally on the record. Military Justice Act of 1983, Pub. L. No. 98–209, § 3(a), 97 Stat. 1393 (1983).

(c) Action on request. This subsection is based on Articles 16 and 25. Subsection (2) is based on Article 16(1)(B) and on paragraph 53d(2)(C) of MCM, 1969 (Rev.). It does not require an inquiry of the accused by the military judge, although, as the discussion points out, it is good practice to do so, and failure to do so could be error if the record otherwise left the accused's understanding of the rights in doubt. See S. Rep. No. 53, 98th Cong., 1st Sess. 12 (1983); United States v. Parkes, 5 M.J. 489 (C.M.A. 1978); United States v. Turner, 20 U.S.C.M.A. 167, 43 C.M.R. 7 (1970); United States v. Jenkins, 20 U.S.C.M.A. 112, 42 C.M.R. 304 (1970). This is consistent with prevailing federal civilian practice. See, e.g., Estrada v. United States, 457 F.2d 255 (7th Cir.), cert. denied, 409 U.S. 858 (1972); United States v. Mitchell, 427 F.2d 1280 (3d Cir. 1970); United States v. Strate, 425 F.2d 594 (D.C. Cir. 1970); United States v. Hunt, 413 F.2d 983 (4th Cir. 1969); but see United States v. Scott, 583 F.2d 362 (7th Cir. 1978) (establishing requirement for personal inquiry into jury waiver in Seventh Circuit). See generally SAJ. Moore, Moore's Federal Practice § 23.03[2] (1982 rev. ed.).

Subsection (2)(B) is based on Article 16(1)(B) which makes trial by military judge alone contingent on approval by the military judge. See United States v. Morris, supra at 324, 49 C.M.R. at 660. The discussion is based on United States v. Butler, 14 M.J. 72 (C.M.A. 1982); United States v. Ward, 3 M.J. 365 (C.M.A. 1977); United States v. Bryant, supra.

1986 Amendment: Subsection (3) was amended to reflect clearly that requests for trial by military judge alone need not be in writing.


Subsection (2) is based on the fifth sentence of paragraph 39(e) and on paragraph 53d(2)(b) of MCM, 1969 (Rev.), and current practice.

(e) Untimely requests. This subsection is based on Articles 16 and 25, and United States v. Jeanbaptiste, 5 M.J. 374 (C.M.A. 1978); United States v. Thorne, 5 M.J. 186 (C.M.A. 1978); United States v. Wright, 5 M.J. 106 (C.M.A. 1978); United States v. Bryant.
supra. See also United States v. Holmen, 586 F.2d 322 (4th Cir. 1978).


Rule 904. Arraignment

This rule is based on Fed. R. Crim. P. 10 and paragraph 65a of MCM, 1969 (Rev.). The second sentence of Fed. R. Crim. P. 10 has been deleted as unnecessary since in military practice the accused will have been served with charges before arraignment. Article 35; R.C.M. 602. the discussion is based on paragraph 65 of MCM, 1969 (Rev.).

Rule 905. Motions generally

Introduction. This rule is based generally on Fed. R. Crim. P. 12 and 47 and paragraphs 66 and 67 of MCM, 1969 (Rev.). Specific similarities and differences are discussed below.

(a) Definitions and form. The first sentence of this subsection is taken from the first sentence of paragraph 66b of MCM, 1969 (Rev.). It is consistent with the first sentence of Fed. R. Crim. P. 47 and the second sentence of Fed. R. Crim. P. 12(a). The second sentence is based on the second sentence of paragraph 67c of MCM, 1969 (Rev.), although to be consistent with Federal practice (see Fed. R. Crim. P. 12(b) (second sentence) and 47 (second sentence)) express authority for the military judge to exercise discretion over the form of motions has been added. The third sentence is based on the third sentence of Fed. R. Crim. P. 47 and is consistent with the first sentence of paragraph 67c and the fourth sentence of paragraph 69a of MCM, 1969 (Rev.). The last sentence in this subsection is based on the third sentence of paragraph 67c of MCM, 1969 (Rev.). Although no parallel provision appears in the Federal Rules of Criminal Procedure, this standard is similar to federal practice. See Marteney v. United States, 216 F.2d 760 (10th Cir. 1954); United States v. Rosenson, 291 F. Supp. 867 (E.D. La. 1968), affd, 417 F.2d 629 (5th Cir. 1969); cert. denied, 397 U.S. 962 (1970). The last sentence in Fed. R. Crim. P. 47, allowing a motion to be supported by affidavit, is not included here. See subsection (b) of this rule and Mil. R. Evid. 104(a). See generally Fed. R. Crim. P. 47 Notes Of Advisory Committee on Rules n. 3.

(b) Pretrial motions. This subsection, except for subsection (6), is based on Fed. R. Crim. P. 12(b). Subsections (1) and (2) have been modified to conform to military practice and are consistent with the first two sentences of paragraph 67b of MCM, 1969 (Rev.). Subsection (3) is consistent with Mil. R. Evid. 304(d)(2)(A); 311(d)(2)(A); 321(e)(2)(A). The discussion is based on paragraph 69a of MCM, 1969 (Rev.). Subsection (4) is new. See R.C.M. 701; 703; 1001(e). Subsection (5) is also new. Subsection (6) is based on paragraphs 46d and 48b(4) of MCM, 1969 (Rev.) and United States v. Redding, 11 M.J. 100 (C.M.A. 1981).

(c) Burden of proof. This subsection is based on paragraphs 57g(1) and 67e of MCM, 1969 (Rev.). The assignment of the burden of persuasion to the moving party is a minor change from the language in paragraph 67e of MCM, 1969 (Rev.), which placed the burden on the accused “generally.” The effect is basically the same, however, since the former rule probably was intended to apply to motions made by the accused. See also United States v. Graham, 22 U.S.C.M.A. 75, 46 C.M.R. 75 (1972). The exceptions to this general rule in subsection (B) are based on paragraphs 68b(1), 68c, and 215e of MCM, 1969 (Rev.). See also United States v. McCarthy, 2 M.J. 26, 28 n. 1 (C.M.A. 1976); United States v. Graham, supra; United States v. Garcia, 5 U.S.C.M.A. 88, 17 C.M.R. 88 (1954). The Federal Rules of Criminal Procedure are silent on burdens of proof.

Fed. R. Crim. P. 12(c) is not adopted. This is because in courts-martial, unlike civilian practice, arraignment does not necessarily, or even ordinarily, occur early in the criminal process. In courts-martial, arraignment usually occurs only a short time before trial and in many cases it occurs the same day as trial. Because of this, requiring a motions date after arraignment but before trial is not appropriate, at least as a routine matter. Instead, entry of pleas operates, in the absence of good cause, as the deadline for certain motions. A military judge could, subject to subsections (d) and (e), schedule an Article 39(a) session (see R.C.M. 803) for the period after pleas are entered but before trial to hear motions.

(d) Ruling on motions. This subsection is based on Fed. R. Crim. P. 12(e). It is consistent with the first sentence in paragraph 67f of MCM, 1969 (Rev.). The admonition in the second sentence of that paragraph has been deleted as unnecessary. The discussion is based on the third paragraph of paragraph 67f of MCM, 1969 (Rev.).

1991 Amendment: The discussion was amended to reflect the change to R.C.M. 908(b)(4).

(e) Effect of failure to raise defenses or objections. The first two sentences in the subsection are taken from Fed. R. Crim. P. 12(f) and are consistent with paragraph 67b of MCM, 1969 (Rev.). The third sentence is based on paragraph 67a of MCM, 1969 (Rev.). The Federal Rules of Criminal Procedure do not expressly provide for waiver of motions other than those listed in Fed. R. Crim. P. 12(b). (But see 18 U.S.C. § 3162(a)(2) which provides that failure by the accused to move for dismissal on grounds of denial of speedy trial before trial or plea of guilty constitutes waiver of the right to dismiss under that section.) Nevertheless, it has been contended that because Fed. R. Crim. P. 12(b)(2) provides that lack of jurisdiction or failure to allege an offense “shall be noticed by the court at any time during the pendency of the proceedings,” “it may, by negative implications be interpreted as foreseeing the other defense if not raised during the trial itself.” 8A J. Moore, Moore’s Federal Practice ¶ 12.03[1] (1982 rev. ed.). “Pendency of the proceedings” has been held to include the appellate process. See United States v. Thomas, 444 F.2d 919 (D.C. Cir. 1971). Fed. R. Crim. P. 34 tends to support this construction insofar as it permits a posttrial motion in arrest of judgment only for lack of jurisdiction over the offense or failure to charge an offense. There is no reason why other motions should not be waived if not raised at trial. Moore’s, supra at ¶ 12.03[1]; accord C. Wright, Federal Practice and Procedure §193 (1969). See also United States v. Scott, 464 F.2d 832 (D.C. Cir. 1972); United States v. Friedland,

1990 Amendment: Subsection (e) was amended to clarify that "requests" and "objections" include "motions".

(f) Reconsideration. This subsection is new and makes clear that the military judge may reconsider rulings except as noted above. The amendment of Article 62 (see Military Justice Act of 1983, Pub. L. No. 98–209, § 5(c), 97 Stat. 1393 (1983)), which deleted the requirement for reconsideration when directed by the convening authority does not preclude this. See S. Rep. No. 53, 98th Cong., 1st Sess. 24 (1983).


Subsection (g) differs from paragraph 71b in two significant respects. First, the term, "res judicata" is not used in R.C.M. 905(g) because the term is legalistic and potentially confusing. "Res judicata" generally includes several distinct but related concepts: merger, bar, direct estoppel, and collateral estoppel. Restatement of Judgments, Chapter 3 Introductory Note at 160 (1942). But see 1B J. Moore, Moore's Federal Practice ¶ 0.44[1] (1980 rev. ed.) which distinguishes collateral estoppel from res judicata generally. Second, unique aspects of the doctrine of collateral estoppel are recognized in the "except" clause of the first sentence in the rule. Earlier Manuals included the concept of collateral estoppel within the general discussion of res judicata (see paragraph 72b of MCM (Army), 1949; paragraph 71b of MCM, 1951, paragraph 71b of MCM, 1969 (Rev.); see also United States v. Smith, supra) without discussing its distinguishing characteristics. Unlike other forms of res judicata, collateral estoppel applies to determinations made in actions in which the causes of action were different. 1B J. Moore, supra, ¶ 0.44[1]. Because of this, its application is somewhat narrower. Specifically, parties are not bound by determinations of law when the causes of action in the two suits arose out of different transactions. Restatement of Judgments, supra, §§ 68, 70. See also Commissioner v. Sunnen, supra. This distinction is now recognized in the rule.

The absence of such a clarifying provision in earlier Manuals apparently caused the majority, despite its misgivings and over the dissent of Judge Brosman, to reach the result it did in United States v. Smith, supra. When paragraph 71b was rewritten in MCM, 1969 (Rev.), the result in Smith was incorporated into that paragraph, but neither the concerns of the Court of Military Appeals nor the distinguishing characteristics of collateral estoppel were addressed. See Analysis of Contents of the Manual for Courts-Martial, United States, 1969, Revised Edition, DA Pam 27–2 at 12–5 (July 1970). To the extent that Smith relied on the Manual, its result is no longer required. But see United States v. Martin, 8 U.S.C.M.A. 346, 352, 24 C.M.R. 156, 162 (1957) (Quinn, C.J., joined by Ferguson, J. concurring in the result).

The discussion is based on the sources indicated above. See also Restatement of Judgments, supra § 49; United States v. Guzman, 4 M.J. 115 (C.M.A. 1977). As to the effect of pretrial determinations by a convening authority, see Analysis, R.C.M. 306(a).

(h) Written motions. This subsection is based on Fed. R. Crim. P. 47.

(i) Service. This subsection is based on Fed. R. Crim. P. 49(a) and (b), insofar as those provisions apply to motions.

(j) Application to convening authority. This subsection is taken from paragraph 66b of MCM, 1969 (Rev.) although certain exceptions provided elsewhere in these rules (e.g., R.C.M. 906(b)(1)) have been established for the first time. It is consistent with the judicial functions of the convening authority under Article 64. It also provides a forum for resolution of disputes before referral and in the absence of the military judge after referral. It has no counterpart in the Federal Rules of Criminal Procedure.

Fed. R. Crim. P. 12(g) and (h) are not included. Fed. R. Crim. P. 12(g) is covered at R.C.M. 803 and 808. The matters in Fed. R. Crim. P. 12(h) would fall under the procedures in R.C.M. 304 and 305.

(k) Production of statements on motion to suppress. This subsection is based on Fed. R. Crim. P. 12(i).

906. Motions for appropriate relief

(a) In general. This subsection is based on the first sentence of paragraph 69a of MCM, 1969 (Rev.). The phrase concerning deprivation of rights is new; it applies to such pretrial matters as defects in the pretrial advice and the legality of pretrial confinement. Paragraph 69a of MCM, 1969 (Rev.) provided only for the accused to make motions for appropriate relief. This rule is not so restricted because the prosecution may also request appropriate relief. See e.g., United States v. Nivens, 21 U.S.C.M.A. 420, 45 C.M.R. 194 (1972). This change is not intended to modify or restrict the power of the convening authority or other officials to direct that action be taken notwithstanding the fact that such action might also be sought by the trial counsel by motion for appropriate relief before the military judge. Specific modifications of the powers of such officials are noted expressly in the rules or analysis.

(b) Grounds for appropriate relief. This subsection has the same general purpose as paragraph 69a of MCM, 1969 (Rev.). It identifies most of the grounds for motions for appropriate relief commonly raised in courts-martial, and provides certain rules for litigating and deciding such motions where these rules are not provided elsewhere in the Manual. Specific sources for the rules and discussion are described below.

Subsection (l) and the accompanying discussion are based on Article 40 and paragraphs 58b and c of MCM, 1969 (Rev.). The rule provides that only a military judge may grant a continuance. Paragraph 58a of MCM, 1969 (Rev.) which provided for "postponement" has been deleted. Reposing power to postpone proceedings in the convening authority is inconsistent with the authority of the military judge to schedule proceedings and control the docket. See generally United States v. Wolkowski, 1 M.J. 125

ANALYSIS

App. 21, R.C.M. (b)
(C.M.A. 1975). To the extent that paragraph 58a extended to the military judge the power to direct postponement, it was duplicative of the power to grant a continuance and unnecessary.

Subsection (2) is based on paragraph 48(b)(4) of MCM, 1969 (Rev.). See also United States v. Redding, 11 M.J. 100 (C.M.A. 1981).


Subsection (8) is new to the Manual although not to military practice. See Analysis, R.C.M. 305(j).

Subsection (9) is based on paragraph 69d of MCM, 1969 (Rev.) and Fed. R. Crim. P. 14 to the extent that the latter applies to severance of codefendants. Note that the Government may also accomplish a severance by proper withdrawal of charges against one or more codefendants and referrals of these charges to another court-martial. See R.C.M. 604. The discussion is based on paragraph 69d of MCM, 1969 (Rev.).

Subsection (10) is new. It wholly parallels Fed. R. Crim. P. 14, but is much narrower because of the general policy in the military conditioning trial of all known charges at a single court-martial. See R.C.M. 601(e) and discussion; United States v. Keith, 1 U.S.C.M.A. 442, 4 C.M.R. 34 (1952). Motions to sever charges have, in effect, existed through the policy in paragraph 26c of MCM, 1969 (Rev.), against joining minor and major offenses. See, e.g., United States v. Grant, 16 U.S.C.M.A. 167, 48 C.M.R. 448 (1966). Although that provision has been eliminated, severance of offenses may still be appropriate in unusual cases. See generally United States v. Gettis, 49 C.M.R. 79 (N.C.M.R. 1974).

Subsection (11) is based generally on paragraph 69e of MCM, 1969 (Rev.) and on Fed. R. Crim. P. 21. See United States v. Nivens, supra; United States v. Gravitt, 5 U.S.C.M.A. 249, 17 C.M.R. 249 (1954). The constitutional requirement that the trial of a crime occur in the district in which the crime was committed (U.S. Const. Art. II, sec. 2, cl. 3; amend VI) does not apply in the military. Chenoweth v. Van Arsdall, 22 U.S.C.M.A. 183, 46 C.M.R. 183 (1973). Therefore Fed. R. Crim. P. 21(b) is inapplicable. In recognition of this, and of the fact that the convening authority has an interest, both financial and operational, in fixing the place of the trial, the rule allows the situs of the trial to be set and changed for the convenience of the Government, subject to judicial protection of the accused's rights as they may be affected by that situs. See United States v. Nivens, supra.

Subsection (12) is based on paragraph 76a(5) of MCM, 1969 (Rev.). See also Analysis, R.C.M. 907(b)(3)(B) and Analysis, R.C.M. 1003(c)(1)(C).

Subsection (13) is new to the Manual, although motions in limine have been recognized previously. See Mil. R. Evid. 104(c); United States v. Cofield, 11 M.J. 422 (C.M.A. 1981); Siano, Motions in Limine, The Army Lawyer, 17 (Jan. 1976).

Subsection (14) is based on paragraph 69f of MCM, 1969 (Rev.). See Analysis, R.C.M. 706, R.C.M. 909, and Analysis, R.C.M. 916(k).

907. Motions to dismiss

(a) In general. This subsection is based on paragraphs 68 and 214 of MCM, 1969 (Rev.).

Fed. R. Crim. P. 48(a) is inapposite because the trial counsel may not independently request dismissal of charges, and unnecessary because the convening authority already has authority to withdraw and to dismiss charges. See R.C.M. 306(c)(1); 401(c)(1); 604. The matters contained in Fed. R. Crim. P. 48(b) are addressed by R.C.M. 707 and 907(b)(2)(A).

(b) Grounds for dismissal. This subsection lists common grounds for motions to dismiss. It is not intended to be exclusive. It is divided into three subsections. These correspond to nonwaiveable (subsection (1)) and waivable (subsection (2) and (3)) motions to dismiss (see R.C.M. 905(e) and analysis), and to circumstances which require dismissal (subsections (1) and (2)) and those in which dismissal is only permissible (subsection (3)).

Subsection (1) is based on paragraph 68(b) of MCM, 1969 (Rev.). See also Fed. R. Crim. P. 12(b)(2) and 34.

Subsection (2)(A) is based on paragraph 68(b) of MCM, 1969 (Rev.). See also 18 U.S.C. § 3162(a)(2). The rules for speedy trial are covered in R.C.M. 707.

Subsection (2)(B) is based on the first two paragraphs in paragraph 68 of MCM, 1969 (Rev.); United States v. Troxell, 12


1990 Amendment: The fourth paragraph of the discussion under subsection (b)(2)(B) was amended to reflect the holding in United States v. Tunnell, 23 M.J. 110 (C.M.A. 1986).


Subsection (2)(C)(i) is based on Article 44(c). The applicability of Crist v. Bretz, 437 U.S. 28 (1978) was considered. Crist held that, in jury cases, jeopardy attaches when the jury is empanelled and sworn. For reasons stated below, the Working Group concluded that the beginning of the presentation of evidence on the merits, which is the constitutional standard for nonjury trial (Crist v. Bretz, supra at 37 n. 15; Serfass v. United States, 420 U.S. 377 (1975)) is and is prescribed by Article 44(c), is the proper cutoff point.


Members are an essential jurisdictional element of a court-martial. United States v. Ryan, 5 M.J. 97 (C.M.A. 1978). Historically, the members, as an entity, served as jury and judge, or, in other words, as the “court.” W. Winthrop, Military Law and Precedents 54–55, 173 (2d. ed., 1920 reprint). Assembling the court-martial has not been the last step before trial on the merits. See paragraph 61j and appendix 8b of MCM, 1969 (Rev.); paragraph 61h and i and appendix 8a of MCM, 1951; paragraph 61 of MCM, 1949 (Army); paragraph 61 of MCM, 1928; W. Winthrop, supra at 205–80. Congress clearly contemplated that the members may be sworn at an early point in the proceedings. See Article 42(a); H. Rep. No. 491, 81st Cong. 1st Sess. 22 (1949).

The role of members has become somewhat more analogous to that of a jury. See, e.g., Article 39(a). Nevertheless, significant differences remain. When they are present, the members with the military judge constitute the court-martial and participate in the exercise of contempt power. Article 48. See R.C.M. 809 and analysis. Moreover members may sit as a special court-martial without a military judge, in which case they exercise all judicial functions. Articles 19; 26; 40; 41; 51; 52.

The holding in Crist would have adverse practical effect if applied in the military. In addition to being unworkable in special court-martial without a military judge, it would negate the utility of Article 29, which provides that the assembly of the court-martial does not wholly preclude later substitution of members. This provision recognizes that military exigencies or other unusual circumstances may cause a member to be unavailable at any stage in the court-martial. It also recognizes that the special need of the military to dispose of offenses swiftly, without necessary diversion of personnel and other resources, may justify continuing the trial with substituted members, rather that requiring a mistrial. This provision is squarely at odds with civilian practice with respect to juries and, therefore, with the rationale in Crist.

Subsection (2)(C)(i) is based on paragraph 56 of MCM, 1969 (Rev). See also Wade v. Hunter, supra: United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). “Manifest necessity” is the traditional justification for a mistrial. Id. See United States v. Richardson, supra. Cf. Article 44(c), which does not prohibit retrial of a proceeding terminated on motion of the accused. See also Analysis, R.C.M. 915.

Subsection (2)(C)(ii) is taken from Article 44(b). See United States v. Richardson, supra. See also Article 63. But see R.C.M. 810(d).

Subsection (2)(C)(iv) is new. It is axiomatic that jeopardy does not attach in a proceeding which lacks jurisdiction. Ball v. United States, 163 U.S. 662 (1973). Therefore, if proceedings are terminated before findings because the court-martial lacks jurisdiction, retrial is not barred if the jurisdictional defect is corrected. For example, if during the course of trial it is discovered that the charges were not referred to the court-martial by a person empowered to do so, those proceedings would be terminated. This would not bar later referral of those charges by a proper official to a court-martial. Cf. Lee v. United States, 432 U.S. 23 (1977); Illinois v. Somerville, 410 U.S. 458 (1973). See also United States v. Newcomb, 5 M.J. 4 (C.M.A. 1977); United States v. Hardy, 4 M.J. 20 (C.M.A. 1977) authorizing re-referral of charges where earlier proceedings lacked jurisdiction because of defects in referral and composition. Res judicata would bar retrial by a court-martial for a jurisdictional defect which is not “correctable.” See, e.g., R.C.M. 202 and 203. See also R.C.M. 905(g).

By its terms, the rule permits a retrial of a person acquitted by a court-martial which lacks jurisdiction. The Court of Military Appeals decision in United States v. Culver, 22 U.S.C.M.A. 141, 46 C.M.R. 141 (1973) does not preclude this, although that decision raises questions concerning this result. There was no majority opinion in Culver. Judge Quinn held that the defect (absence of a written judge alone request) was not jurisdictional. In the alternative, Judge Quinn construed paragraph 81d of MCM, 1969 (Rev.) and the automatic review structure in courts-martial as precluding retrial on an offense of which the accused had been acquitted. (Note that R.C.M. 810(d), using slightly different language, continues the same policy of limiting the maximum sentence for offenses tried at an “other trial” to that adjudged at the earlier defective trial.) Judge Duncan, concurring in the result in Culver, found that although the original trial was jurisdictionally defective, the defect was not so fundamental as to render the proceedings void. In Judge Duncan’s view, the original court-martial had jurisdiction when it began, but “lost” it when the request for military judge alone was not reduced to writing. Therefore, the double jeopardy clause of the Fifth Amendment and Article 44 barred the second trial for an offense of which the accused had been acquitted at the first. Chief Judge Darden dissented. He held
that because the earlier court-martial lacked jurisdiction, the proceedings were void and did not bar the second trial. Thus in Culver, two judges divided over whether the double jeopardy clause bars a second trial for an offense of which the accused was acquitted at a court-martial which lacked jurisdiction because of improper composition. The third judge held retrial was barred on nonconstitutional grounds.

Subsection (2)(D) is based on paragraph 68e, f, g, and h of MCM, 1969 (Rev.). As to subsection (v) see United States v. Williams, 10 U.S.C.M.A. 615, 28 C.M.R. 181 (1959).

Subsection (3) sets out grounds which, unlike those in subsection (1) and (2), do not require dismissal when they exist. The military judge has discretion whether to dismiss or to apply another remedy (such as a continuance in the case of subsection (3)(A), or sentencing instructions in the case of subsection (3)(B)). But see United States v. Sturdivant, 13 M.J. 323 (C.M.A. 1982). See also United States v. Baker, 14 M.J. 361 (C.M.A. 1983).

Subsection (3)(A) and the discussion are based on 69b(3) of MCM, 1969 (Rev.).


Rule 908. Appeal by the United States

Introduction. This rule is based on Article 62, as amended, Military Justice Act of 1983, Pub. L. No. 98-209, § 8(o)(1), 97 Stat 1393 (1983). See also S. Rep. No. 53, 98th Cong., 1st. Sess. 23 (1983); 18 U.S.C. § 3731. Article 62 now provides the Government with a means to seek review of certain rulings or orders of the military judge. The need for such procedure has been recognized previously. See Military Justice Act of 1963, Pub. L. No. 88-366, § 104, 78 Stat 268 (1964). See also United States v. Rowell, 1 M.J. 289, 291 (C.M.A. 1976) (Fletcher, C.J., concurring). See also Dettinger v. United States, 7 M.J. 216 (C.M.A. 1978). It is not expected that any ruling or order which might be appealed by the Government will be appealed. Frequent appeals by the Government would disrupt trial dockets and could interfere with military operations and other activities, and would impose a heavy burden on appellate courts and counsel. Therefore this rule includes procedures to ensure that the Government’s right to appeal is exercised carefully. See S. Rep. No. 53 supra at 23. (a) In general. This subsection repeats the first sentence of Article 62(a).

(b) Procedure. Subsection (1) provides the trial counsel with a mechanism to ensure that further proceedings do not make an issue moot before the Government can file notice of appeal.

The first sentence in subsection (2) is based on the second sentence of Article 62(a). The second sentence in subsection(2) authorizes an initial measure to ensure that a decision to file notice of appeal is carefully considered. The Secretary concerned may require trial counsel to secure authorization from another person, such as the convening authority, the convening authority’s designee, or the staff judge advocate. Because the decision whether to file the notice must be made within 72 hours, it probably will not be practicable in many cases to secure authorization from a more distant authority (see subsection (b)(5) and Analysis, below), but nothing in this subsection prohibits requiring this authorization to be secured from, for example, the chief of appellate Government counsel or a similar official in the office of the Judge Advocate General. Note that the Secretary concerned is not required to require authorization by anyone before notice of appeal is filed. The provision is intended solely for the benefit of the Government, to avoid disrupting trial dockets and the consequences this has on command activities, and to prevent overburdening appellate courts and counsel. The accused has no right to have the Government forego an appeal which it might take. But see R.C.M. 707(c)(1)(D). The authorization may be oral and no reason need be given.

Subsection (3) is based on the second and third sentences of Article 62(a). The second sentence is added to permit decisions by defense counsel and the military judge on how to proceed as to any unaffected charges and specifications under subsection (4).

Subsection (4) is necessary because, unlike in Federal civilian trials (see Fed. R. Crim. P. 8(a)), unrelated offenses may be and are tried together in courts-martial. Consequently, a ruling or order which is appealable by the Government may affect only some charges and specifications. As to those offenses, the pendency of an appeal under this rule necessarily bars further proceedings. It does not necessarily have the same effect on other charges and specifications unaffected by the appeal. Subsection (4) provides several alternatives to halting the court-martial entirely, even as to charges and specifications unaffected by the appeal. Subsection (4)(A) permits motions to be litigated as to unaffected charges and specifications, regardless of the stage of the proceedings. Subsection (4)(B) permits unaffected charges and specifications to be served, but only before trial on the merits has begun, that is, before jeopardy has attached. See R.C.M. 907(b)(2)(C) and Analysis. Once jeopardy has attached, the accused is entitled to have all the charges and specification resolved by the same court-martial. Cf. United States v. Brett, 437 U.S. 28 (1978). It is expected that in most cases, rulings or orders subject to appeal by the Government will be made before trial on the merits has begun. See R.C.M. 905(b) and (c); Mil. R. Evid. 304(d), 311(d), and 321(c). Subsection (4)(C) provides a mechanism to alleviate the adverse effect an appeal by the Government may have on unaffected charges and specifications. Thus witnesses who are present but whom it may be difficult and expensive to recall at a later time may, at the request of the proponent party and in the discretion of the military judge, be called to testify during the pendency of any appeal. Such witnesses may be called out of order. See also R.C.M. 801(a); 914; Mil. R. Evid. 611. Note, however, that a party cannot be compelled to call such witnesses or present evidence until the appeal is resolved. This is because a party’s tactics may be affected by the resolution of the appeal. Note also that if similar problems arise as to witnesses whose testimony relates to an affected specification, a deposition could be taken, but it could not be used at any later proceedings unless the witness was unavailable or the parties did not object.

Subsection (5) ensures that a record will be prepared promptly. Because the appeal ordinarily will involve only specific issues, the record need be complete only as to relevant matters. Defense counsel will ordinarily have the opportunity to object to any omissions. See R.C.M. 1103(g)(1)(B). Furthermore, the military judge and the Court of Military Review may direct preparation of additional portions of the record.

Subsection (6) provides for the matter to be forwarded promptly. No specific time limit is established, but ordinarily the
matters specified should be forwarded within one working day. Note that the record need not be forwarded at this point as that might delay disposition. If the record is not ready, a summary may be forwarded for preliminary consideration before completion of the record. An appropriate authority will then decide whether to file the appeal, in accordance with procedures established by the Judge Advocate General. See S.Rep. No. 53, supra at 23. This is an administrative determination; a decision not to file the appeal has no effect as precedent. Again, no specific time limit is set for this decision, but it should be made promptly under the circumstances.

Subsection (7) is based on Article 62(b).

Subsection (8) ensures that trial participants are notified in the event no appeal is filed.

1991 Amendment: Subsection (4) was amended to state explicitly that, upon timely notice of appeal, the legal effect of an appealable ruling or order is stayed pending appellate resolution. Although most military practitioners understood this necessary effect of an appeal under the rule, some civilian practitioners were confused by the absence of an explicit statement in the rule.

New subsection (9) is based on 18 U.S.C. 3143(c) governing the release of an accused pending appeal by the United States of an order of dismissal of an indictment or information, or an order suppressing evidence. Since appeals by the United States under Article 62, U.C.M.J., contemplate a situation in which the accused has not been convicted, a commander's decision whether to subject the individual to continued confinement after an appeal has been taken should be based on the same considerations which would authorize the imposition of pretrial confinement.

(c) Appellate proceedings. Subsection (1) is based on Article 70(b) and (c).

Subsection (2) is based on Article 62(b).

Subsection (3) is based on Article 67(b) and (h) and on 28 U.S.C. section 1259. Note that if the decision of the Court of Military Review permits it (i.e., is favorable to the Government) the court-martial may proceed as to the affected charges and specifications notwithstanding the possibility or pendency of review by the Court of Military Appeals or the Supreme Court. Those courts could stay the proceedings. The penultimate sentence is similar in purpose to Article 66(e) and 67(f).

(d) Military judge. This subsection is necessary because Article 62 authorizes appeals by the Government only when a military judge is detailed.

Rule 906. Capacity of the accused to stand trial by court-martial

This rule is based on paragraphs 120a and d, and 122 of MCM, 1969 (Rev.). It has been reorganized and minor changes were made in some language in order to conform to the format and style of the Rules for Courts-Martial. The procedures for examining the mental capacity of the accused are covered in R.C.M. 706. Matters referring solely to the accused's sanity at the time of the offense are treated at R.C.M. 916(k). The rule is generally consistent with 18 U.S.C. §4244. The standard of proof has been changed from beyond reasonable doubt to a preponderance of the evidence. This is consistent with the holdings of those federal courts which have addressed the issue. United States v. Gilio, 538 F.2d 899 (3d. Cir. 1976), cert. denied, 429 U.S. 1038 (1977);


Rule 910. Pleas


(a) In general. Subsection (1) is based on Article 45 and paragraph 70a of MCM, 1969 (Rev.). The first sentence parallels the first sentence in Fed. R. Crim. P. 11(a)(1), except that no provision is made for pleas of nolo contendere. Such a plea is unnecessary in courts-martial. Hearings on H. R. 4080 Before A Subcomm. of the Comm. on Armed Services of the House of Representatives. 81st Cong., 1st Sess. 1054 (1949). See 8A.J. Moore, Moore's Federal Practice § 1.107(1) (1980 rev. ed) concerning the purpose of nolo pleas in civilian practice, and a discussion of the controversy about them. Furthermore, the practice connected with nolo pleas (see Fed. R. Crim. P. 11(f)) which does not require that a factual basis be established in order to accept a plea of nolo contendere; see also Moore's supra at § 11.07(1) is inconsistent with Article 45. The second sentence on Fed. R. Crim. P. 11(a) is covered under subsection (b) of this rule insofar as it pertains to military practice.

1993 Amendment: The amendment to R.C.M. 910(a)(1) removed the necessity of pleading guilty to a lesser included offense by exceptions and substitutions. This parallels the amendment to R.C.M. 918(a)(1), allowing a finding of guilty to a named lesser included offense without mandating the use of exceptions and substitutions, made to correspond more closely to verdict practice in federal district courts. See Analysis comments for R.C.M. 918(a)(1).

Subsection (2) is based on Fed. R. Crim. P. 11(a)(2). Conditional guilty pleas can conserve judicial and governmental resources by dispensing with a full trial when the only real issue is determined in a pretrial motion. As in the federal courts, the absence of clear authority in courts-martial for such a procedure has resulted in some uncertainty as to whether an accused could preserve some issues for appellate review despite a plea of guilty. See e.g., United States v. Saffner, 12 M.J. 425 (C.M.A. 1982); United States v. Mallett, 14 M.J. 631 (A.C.M.R. 1982). Now such issues may be preserved, but only in accordance with this subsection. See also subsection (j) of this rule.

There is no right to enter a conditional guilty plea. The military judge and the Government each have complete discretion whether to permit or consent to a conditional guilty plea. Because the purpose of a conditional guilty plea is to conserve judicial and government resources, this discretion is not subject to challenge by the accused. The rationale for this discretion is further explained in Fed. R. Crim. P. 11 advisory committee note:

The requirement of approval by the court is most appropriate, as it ensures, for example, that the defendant is not allowed to take an appeal on the matter which can only be

A21-55
fully developed by proceeding to trial (citation omitted). As for consent by the government, it will ensure that conditional pleas will be allowed only when the decision of the court of appeals will dispose of the case either by allowing the pleas to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence. Absent such circumstances, the conditional plea might only serve to postpone the trial and require the government to try the case after substantial delay, during which time witnesses may be lost, memories dimmed, and the offense grown so stale as to lose jury appeal. The government is in a unique position to determine whether the matter at issue would be case-dispositive, and, as a party to the litigation, should have an absolute right to refuse to consent to potentially prejudicial delay.

The last sentence of subsection (a)(2) has been added to the language of Fed. R. Crim. P. 11(a)(2). This permits the Secretary concerned to require that consent of the Government be obtained at higher echelons or at a centralized point. The consequences of overuse of conditional guilty pleas will be visited upon appellate courts and activities and the consequences of inappropriate use of them will typically fall on a command or installation different from the one where the original court-martial sat. Thus, it may be deemed appropriate to establish procedures to guard against such problems.

(b) Refusal to plead, irregular plea. The subsection is based on Article 45(a) and paragraph 70a of MCM, 1969 (Rev.). It parallels the second sentence of Fed. R. Crim. P. 11(a), but is broadened to conform to Article 45(a). The portion of Fed. R. Crim. P. 11(a) concerning corporate defendants does not apply in courts-martial. The discussion is based on the last sentence of the first paragraph of paragraph 70a of MCM, 1969 (Rev.).


As to subsection (1), the requirement that the accused understand the elements of the offense is of constitutional dimensions. Henderson v. Morgan, 426 U.S. 637 (1976); see also United States v. Care, supra. The elements need not be listed as such, seriatim, if it clearly appears that the accused was apprised of them in some manner and understood them and admits (see subsection (e) of this rule) that each element is true. See Henderson v. Morgan, supra; United States v. Greco, 5 M.J. 1018 (C.M.A. 1976); United States v. Kilgore, 21 U.S.C.M.A. 35, 44 C.M.R. 89 (1971). But see United States v. Pretlow, 13 M.J. 85 (C.M.A. 1982).

Advice concerning a mandatory minimum punishment would be required only when the accused pleads guilty to murder under clause (1) or (4) of Article 118. The accused could only do so if the case had been referred as not capital. As to advice concerning the maximum penalty, the adoption of the language of the federal rule is not intended to eliminate the requirement that the advice state the maximum including any applicable escalation provisions. As to misadvice concerning the maximum penalty see United States v. Walls, 9 M.J. 88 (C.M.A. 1981).

Subsection (2) of Fed. R. Crim. P. 11(c) has been modified because of the absence of a right to counsel in summary courts-martial. See R.C.M.1301(c) and Analysis. In other courts-martial, full advice concerning counsel would ordinarily have been given previously (see R.C.M.901(d)(4)) and need not be repeated here. The discussion is based on paragraph 70b(1) of MCM, 1969 (Rev.) and H.Rep. 491, supra at 23–24, S.Rep. 486, supra at 20–21.

Subsections (3), (4), and (5) have been taken without substantial change from Fed. R. Crim. P. 11(c). Subsections (3) and (4) are consistent with the last paragraph and paragraph 70b (2) of MCM, 1969 (Rev.). Subsection (5) corresponds to Mil. R. Evid. 410. As to the effect of failure to give the advice in subsection (5) see United States v. Conrad, 598 F.2d 506 (9th Cir. 1979).

(d) Ensuring that the plea is voluntary. This subsection is based on Fed. R. Crim. P. 11(d) and is consistent with paragraph 70b(3) of MCM, 1969 (Rev.). As to the requirement to inquire concerning the existence of a plea agreement, see United States v. Green, 1 M.J. 453 (C.M.A. 1976).

(e) Determining accuracy of plea. This subsection is based on Fed. R. Crim. P. 11(f), except that "shall" replaces "should" and it is specified that the military judge must inquire of the accused concerning the factual basis of the plea. This is required under Article 45(b) and is consistent with paragraph 70b(3) of MCM, 1969 (Rev.). See also H.R. Rep. 491, supra at 23–24; S.Rep. 486, supra at 20–21; United States v. Davenport, 9 M.J. 364 (C.M.A. 1980); United States v. Johnson, 1 M.J. 36 (C.M.A. 1975); United States v. Logan, 22 U.S.C.M.A. 349, 47 C.M.R. 1 (1973). Notwithstanding the precatory term "should," the factual basis inquiry in Fed. R. Crim. P. 11(f) is, in practice, mandatory, although the means for establishing it are broader. See J. Moore, supra at §11.02(2). See also ABA Standards, Pleas of Guilty §1.6 (1978). The last sentence requiring that the accused be placed under oath is designed to ensure compliance with Article 45 and to reduce the likelihood of later attacks on the providence of the plea. This is consistent with federal civilian practice. See Fed.R.Evid. 410.

The first paragraph in the discussion is also based on United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976); United States v. Kilgore, supra; United States v. Care, supra. See also United States v. Crouch, 11 M.J. 128 (C.M.A. 1981).


(6) Plea agreement inquiry. This subsection is based on Fed. R. Crim. P. 1(e), with substantial modifications to conform to plea agreement procedures in the military. See R.C.M. 705 and Analysis. The procedures here conform to those prescribed in United States v. Green, supra. See also United States v. Passini, 10 M.J. 109 (C.M.A. 1980).

It is not intended that failure to comply with this subsection will necessarily result in a improvement plea. See United States v. Passini, supra; cf. United States v. Davenport, supra. Contra United States v. King, 3 M.J. 458 (C.M.A. 1977). Proceedings in revision may be appropriate to correct a defect discovered after final adjournment. United States v. Steck, 10 M.J. 412 (C.M.A. 1981). Even if a prejudicial defect in the agreement is found, as a result of an inadequate inquiry or otherwise, allowing withdrawal of the plea is not necessarily the appropriate remedy. See Santobello v. New York, 404 U.S. 257 (1971); United States v.
Kraffa, 11 M.J. 453 (C.M.A. 1981); United States v. Cifuentes, 11 M.J. 385 (C.M.A. 1981). If an adequate inquiry is conducted, however, the parties are normally bound by the terms described on the record. Id.; United States v. Cooke, 11 M.J. 257 (C.M.A. 1981). But see United States v. Partin, 7 M.J. 409 (C.M.A. 1979) (the parties were not bound by military judge's interpretation which had the effect of adding illegal terms to the agreement; the plea was held provident).

(g) Findings. This subsection is based on the last paragraph of paragraph 70B of MCM, 1969 (Rev.). See also Articles 39(a)(3) and 52(a)(2). The discussion is new and recognizes that it may be unnecessary and inappropriate to bring to the member's attention the fact that the accused has pleaded guilty to some offenses before trial on the merits of others. See United States v. Nixon, 15 M.J. 1028 (A.C.M.R. 1983). See also United States v. Wahnon, 1 M.J. 144 (C.M.A. 1975).

1990 Amendment: The discussion to the subsection was changed in light of the decision in United States v. Rivera, 23 M.J. 89 (C.M.A.), cert. denied, 479 U.S. 1091 (1986).

(h) Later action. Subsection (1) is based on the fourth and fifth sentences of the penultimate paragraph of paragraph 70B of MCM, 1969 (Rev.). Note that once a plea of guilty is accepted the accused may withdraw it only within the discretion of the military judge. Before the plea is accepted, the accused may withdraw it as a matter of right. See United States v. Leonard, 16 M.J. 984 (A.C.M.R. 1983); United States v. Hayes, 9 M.J. 825 (N.C.M.R. 1980).

Subsection (2) is based on the first two sentences in the penultimate paragraph of paragraph 70B of MCM, 1969 (Rev.) and on Article 45(a). See also Fed. R. Crim. P. 32(d). The discussion is based on United States v. Cooper, 8 M.J. 5 (C.M.A. 1979); United States v. Bradley, 7 M.J. 332 (C.M.A. 1979). Subsection (3) is based on United States v. Green, supra. See also United States v. Kraffa, supra.

(i) Record of proceedings. This subsection is based on subparagraph (4) of the first paragraph of paragraph 70B of MCM, 1969. See also Article 54; H.R. Rep. No. 491, supra at 24; S. Rep. No. 486, supra at 21; ABA Standards, Pleas of Guilty supra at §1.7. This subsection parallels Fed. R. Crim. P. 11(g), except insofar as the former allows for nonverbatim records in inferior courts-martial.

(j) Waiver. This subsection replaces the third paragraph in paragraph 70A of MCM, 1969 (Rev.) which listed some things a guilty plea did not waive, and which was somewhat misleading in the graph 70A of MCM, 1969 (Rev.). This subsection is based on subparagraph 1 of paragraph 70A of MCM, 1969 (Rev.). See also subparagraph 2 of this rule and its analysis.

Rule 911. Assembly of the court-martial

The code fixes no specific point in the court-martial for assembly although, as noted in the discussion, it establishes assembly as a point after which the opportunities to change the composition and membership of the court-martial are substantially circum-


The purpose of this rule is simply to require an overt manifestation of assembly in order to mark clearly for all participants the point at which the opportunities to elect freely as to composition or to substitute personnel has ended. Failure to make the announcement described in the rule has no substantive effect other than to leave open a dispute as to whether a change in composition or membership was timely.

The rule prescribes no specific point for assembly. The points noted in the discussion are based on paragraph 61J of MCM, 1969 (Rev.). It is normally appropriate to assemble the court-martial at these points to protect the parties from untimely changes in membership or composition. In some circumstances flexibility is desirable, as when the military judge approves a request for trial by military judge alone, but recognizes that it may be necessary to substitute another judge because of impending delays. The discussion is also based on paragraphs 53d(2)(c) and 61b of MCM, 1969 (Rev.).

Rule 912. Challenge of selection of members; examination and challenges of members

(a) Pretrial matters. Subsection (1) recognizes the usefulness of questionnaires to expedite voir dire. Questionnaires are already used in some military jurisdictions. This procedure is analogous to the use of juror qualification forms under 28 U.S.C. § 1864(a). See also ABA Standards, Trial by Jury supra at § 3-5.3(b) (1979); The Defense Function § 4-7.2(b) (1979).

Subsection (2) recognizes that in order to challenge the selection of the membership of the court-martial (see subsection (b) of this rule) discovery of the materials used to select them is necessary. Such discovery is already common. See, e.g., United States v. Greene, 20 U.S.C.M.A. 232, 43 C.M.R. 72 (1970); United States v. Herndon, 50 C.M.R. 166 (A.C.M.R. 1975); United States v. Perry, 47 C.M.R. 89 (A.C.M.R. 1973). The purpose of this procedure is analogous to that of 18 U.S.C. §§ 1867(f) and 1868. The rule is a discovery device; it is not intended to limit the types of evidence which may be admissible concerning the selection process.

(b) Challenge of selection of members. This subsection is based on 28 U.S.C. § 1867(a), (b) and (d). Other subsections in that section are inapposite to the military. No similar provision appeared in MCM, 1969 (Rev.). Nevertheless, a motion for appropriate relief challenging the selection of members and requesting a new one was recognized. See United States v. Daigle, 1 M.J. 139 (C.M.A. 1975); United States v. Young, 49 C.M.R. 133 (A.F.C.M.R. 1974). Except for matters affecting the composition of the court-martial (see Article 16 and 25(a), (b) and (c)), improper selection of members is not a jurisdictional defect. United States v. Daigle, supra. See also S. Rep. No. 53, 98th Cong., 18th Sess. 12 (1983). Cf. United States v. Blaylock, 15 M.J. 190 (C.M.A. 1983). The issue may be waived if not raised in a timely manner.

(c) Stating of grounds for challenge. This subsection is based on the second sentence of paragraph 62b of MCM, 1969 (Rev.).

(d) Examination of members. This subsection is based on Fed. R. Crim. P. 24(a). Paragraph 62b and h of MCM, 1969 (Rev.) dis-
Appendix 21

Paragraph 62b provided that "...the trial or defense counsel may question the court, or individual members thereof." United States v. Slubowski, 7 M.J. 461 (C.M.A. 1979), reconsideration not granted by equally divided court, 9 M.J. 264 (C.M.A. 1980), held that this provision did not establish a right of the parties to personally question members. Instead, the court recognized that the procedures in Fed. R. Crim. P. 24(a) are applicable to the military. See also United States v. Parker, 6 U.S.C.M.A. 274, 19 C.M.R. 400 (1955). Therefore, subsection (d) does not change current practice.

The discussion is based generally on paragraph 62b of MCM, 1969 (Rev.) and encourages permitting counsel to question personally the members. See United States v. Slubowski, supra at 463 n.4; ABA Standards, Trial by Jury § 2.4 (1979). As to the scope of voir dire generally, see Ristaino v. Ross, 424 U.S. 589 (1977); United States v. Baldwin, 607 F.2d 1295 (9th Cir. 1979); United States v. Barnes, 604 F.2d 121 (2d Cir. 1979); United States v. Slubowski, supra; United States v. Parker, supra. The second paragraph of the discussion is based on ABA Standards, The Prosecution Function § 3-5.3(c). (1979); The Defense Function § 4-7.2(c) (1979).

(e) Evidence. This subsection is based on the first sentence of paragraph 62h(2) of MCM, 1969 (Rev.).

(f) Challenges and removal for cause. See generally Article 41(a). Subsection (1) is based on Article 25 and paragraph 62f of MCM, 1969 (Rev.). The examples in the last paragraph of paragraph 62f have been placed in the discussion.

Subsection (2) is based on paragraphs 62d and h(1) of MCM, 1969 (Rev.).

Subsection (3) is based on Article 41(a) and paragraph 62b of MCM, 1969 (Rev.). The first sentence is new. MCM, 1969 (Rev.) was silent on this matter. The procedure is intended to protect the parties from prejudicial disclosures before the members, and is in accord with practice in many courts-martial. Paragraph 62h(2) of MCM, 1969 (Rev.) advised that the military judge should be liberal in passing on challenges, but need not sustain a challenge upon the mere assertion of the challenger. The precatory language has been deleted from the rule as an unnecessary statement. This deletion is not intended to change the policy expressed in each party is entitled to one peremptory challenge. Article 41(b).

(g) Peremptory challenges. Subsection (1) is based on Article 41(b). The second sentence is new. Paragraph 62c of MCM, 1969 (Rev.) stated that a peremptory challenge “may be used before, during, or after challenges for cause.” Subsection (1) does not prevent a party from exercising a peremptory challenge before challenges for cause, but it protects a party against being compelled to use a peremptory challenge before challenges for cause are made. Each party is entitled to one peremptory challenge. Article 41(b); United States v. Nancy, 66 C.M.R. 246 (1976); United States v. Nancy, supra at 294 n.3 (C.M.A. 1978) (Everett, C.J., dissenting). Fed. R. Crim. P. 24(b) is inapplicable.


(h) Special courts-martial without a military judge. This subsection is based on Articles 41, 51(a) and 52(c) and on paragraph 62h(3) of MCM, 1969 (Rev.).

(i) Definitions. Subsection (2) is based on paragraph 63 of MCM, 1969 (Rev.). See also United States v. Griffin, 8 M.J. 66 (C.M.A. 1979); United States v. Wilson, 7 U.S.C.M.A. 656, 23 C.M.R. 120 (1957); United States v. Moore, 4 U.S.C.M.A. 675, 16 C.M.R. 249 (1954). The distinction between witnesses for the prosecution and witnesses for the defense has been eliminated for purpose of chal-
ANALYSIS

Rule 913. Presentation of the case on the merits

(a) Preliminary instructions. This subsection is based on Appendix 8 at 10-11 of MCM, 1969 (Rev.). See also United States v. Waggner, 6 M.J. 77 (C.M.A. 1978).

1990 Amendment: The second sentence to the rule and the discussion which follows are based on the decision in United States v. Rivera, 23 M.J. 89 (C.M.A. 1986). See also United States v. Wahnin, 1 M.J. 144 (C.M.A. 1975).

(b) Opening statement. This subsection is based on the first of paragraph 44g(2) and the first paragraph of paragraph 48i of MCM, 1969 (Rev.). The discussion is taken from ABA Standards, The Prosecution Function § 3-5.5 (1979); The Defense Function § 4-7.4 (1979).

(c) Presentation of evidence. Subsection (1) is based on paragraph 54a of MCM, 1969 (Rev.), except that (E), Additional rebuttal evidence, has been added to expressly note the occasional need for further rebuttal.

Subsection (2) is based on the first sentence of Fed. R. Crim. P. 26. The first paragraph of the discussion of subsection (2) is based on paragraphs 44g(2), 48i, and 54a of MCM, 1969 (Rev.) and Mil.R.Evid. 611 and 614. The second paragraph of the discussion is based on paragraphs 54d and g of MCM, 1969 (Rev.).

Subsection (3) and the discussion are based on paragraph 54e of MCM, 1969 (Rev.).

Subsection (4) is based on paragraph 54c of MCM, 1969 (Rev.).

Subsection (5) is based on the fourth sentence of the second paragraph of paragraph 71a of MCM, 1969 (Rev.) and is consistent with current practice.

Rule 914. Production of statements of witnesses


This rule, like Fed. R. Crim. P. 26.2, applies at trial. It is not a discovery rule (United States v. Ciesielski, 39 C.M.R. 839 (N.M.C.R. 1968)), and it does not apply to Article 32 hearings (contra, United States v. Jackson, 33 C.M.R. 884, 890 nn.3, 4 (A.F.B.R. 1963)). It is a distinct rule from the rule requiring production for inspection by an opponent of memoranda used by a witness to refresh recollection. United States v. Ellison, 46 C.M.R. 839 (A.F.C.M.R. 1972); cf. Mil. R. Evid. 612 and accompanying Analysis. The rule is not intended to discourage voluntary disclosure before trial, even where R.C.M. 701 does not require disclosure, so as to avoid delays at trial. Further, this rule does not foreclose other avenues of discovery.

(a) Motion for production. This subsection is based on Fed. R. Crim. P. 26.2(a). It has been reworded to clarify what statements must be produced. "(D) the possession of the United States," and "in the possession of the accused or defense counsel" are substituted for "in their possession" to make clear that the rule is not limited to statements in the personal possession of counsel. See 18 U.S.C. § 3500(a). As to the meaning of "in the possession of the United States," see United States v. Calley, supra (testimony at congressional hearing); see also United States v. All, 12 M.J. 1018 (A.C.M.R. 1982) (statements in possession of commander); United States v. Boiser, 12 M.J. 1010 (A.C.M.R. 1982) (notes of undercover informant); United States v. Fountain, 2 M.J. 1202 (N.C.R. 1976); United States v. Brakefield, 43 C.M.R. 828 (A.C.M.R. 1971) (notes taken by government psychiatrist).

(b) Production of entire statement. This subsection is taken from Fed. R. Crim. P. 26.2(b).

(c) Production of excised statement. This subsection is taken from Fed. R. Crim. P. 26.2(c). Failure of a judge to make the required examination on request is error. United States v. White, 37 C.M.R. 391 (A.F.B.R. 1966) (decision under Jencks Act). Failure to preserve the statement after denial or excision frustrates appellate review and is also error under decisions interpreting 18 U.S.C. § 3500. United States v. Dixon, 8 M.J. 149 (C.M.A. 1979); United States v. Jarrie, supra. However, the statement need not be appended to the record (where it would become public) because it is not error to consider the statement when forwarded separately as this rule provides. United States v. Dixon, supra.

(d) Recess for examination of the statement. This subsection is taken from Fed. R. Crim. P. 26.2(d).

(e) Remedy for failure to produce statement. This subsection is based on Fed. R. Crim. P. 26.2(e). Although not expressly mentioned there, the good faith loss and harmless error doctrines under the Jencks Act would apparently apply. See United States v. Patterson, 10 M.J. 589 (A.F.C.M.R. 1980); United States v. Kilmon, 10 M.J. 543 (N.C.R. 1980); United States v. Dixon, United States v. Scott, United States v. Jarrie, and United States v. White, all supra. Note, however, that under the Jencks Act decisions the accused need not demonstrate prejudice on appeal (United States v. Albo, supra; but see United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); United States v. All, and United States v. Boiser, both supra) and that the military judge may not substi-
Rule 915. Mistrial


(b) Procedure. This subsection is based on paragraph 56e(2) of MCM, 1969 (Rev.). Because consent or lack thereof by the defense to a mistrial may be determinative of a former jeopardy motion at a second trial, the views of the defense must be sought.

(c) Effect of a declaration of mistrial. Subsection (1) is based on the first sentence of paragraph 56e(1) of MCM, 1969 (Rev.). Note that dismissal of charges may have the same effect as declaring a former jeopardy motion that the discussion is based on the second sentence of paragraph 56e(1) of MCM, 1969 (Rev.).


Rule 916. Defenses

(a) In general. This subsection and the discussion are based on the third paragraph of paragraph 214 of MCM, 1969 (Rev.).

Motions in bar of trial, which were also covered in paragraph 214, are now covered in R.C.M. 907 since they are procedurally and conceptually different from the defenses treated in R.C.M. 916.

(b) Burden of proof. This subsection is based on the fourth paragraph of paragraph 214 of MCM, 1969 (Rev.). See also paragraph 112a of MCM, 1969 (Rev.). See, e.g., United States v. Cuffee, 10 M.J. 381 (C.M.A. 1981). The first paragraph in the discussion is based on the fifth paragraph of paragraph 214 of MCM, 1969 (Rev.). The second paragraph in the discussion is based on United States v. Garcia, 1 M.J. 26 (C.M.A. 1975); United States v. Walker, 21 U.S.C.M.A. 376, 45 C.M.R. 150 (1972); United States v. Ducksworth, 13 U.S.C.M.A. 515, 33 C.M.R. 47 (1963); United States v. Bellamy, 47 C.M.R. 319 (A.C.M.R. 1973). It is unclear whether, under some circumstances, an accused's testimony may negate a defense which might otherwise have been raised by the evidence. See United States v. Garcia, supra.


Subsection (2) is new and is based on United States v. Acosta-Vergas, 13 U.S.C.M.A. 388, 32 C.M.R. 388 (1962).


1986 Amendment: References to subsections "(c)(1) or (2)" was changed to "(e)(1) or (2)" to correct an error in MCM, 1984.


Subsection (5) is based on paragraph 216c of MCM, 1969 (Rev.) which described self-defense in terms which also apply to defense of another. It is also based on United States v. Styron, 21 C.M.R. 579 (C.G.B.R. 1956); United States v. Hernandez, 19


(g) Entrapment. This subsection and the discussions are based on paragraphs 216e of MCM, 1969 (Rev.). See also United States v. Vanzandt, 14 M.J. 332 (C.M.A. 1982).

(h) Coercion or duress. This subsection is based on paragraph 216f of MCM, 1969 (Rev.). Paragraph 216f required that the fear of the accused be that the accused would be harmed. This test was too narrow, as the fear of injury to relatives or others may be a basis for this defense. United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976); United States v. Pinkston, 18 U.S.C.M.A. 261, 39 C.M.R. 261 (1969). The discussion is based on United States v. Jemmings, supra.


(k) Lack of mental responsibility. Subsection (1) is taken from paragraph 120b of MCM, 1969 (Rev.). See also United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

1986 Amendment: The test for lack of mental responsibility in subsection (1) was changed to implement Article 50a, which was added to the UCMJ in the “Military Justice Amendments of 1986,” tit. VIII, 802, National Defense Authorization Act for fiscal year 1987, Pub. L. 99-661, 100 Stat. 3905, (1986). Article 50a(a) was adopted from 18 U.S.C. 20(a). Congress wrote the last sentence of 18 U.S.C. 20(a) (now also the last sentence of Article 50(a)) “to insure that the insanity defense is not improperly resurrected in the guise of showing some other affirmative defense, such as that the defendant had has a ‘diminished responsibility’ on some similarly asserted state of mind which would serve to excuse the offense and open the door, once again, to needlessly confusing psychiatric testimony.” S.Rep. No. 225, 98th Cong. 1st Sess. 229 (1983), reprinted in 1984 U.S.Code Cong. & Ad. News 1. 231. See Meuw v. Israel, 715 F.2d 1124 (7th Cir. 1983), cert. denied, 104 S.Ct. 2682 (1984); State v. Wilcox, 436 N.E. 2d 523 (Ohio 1982).

Because the language of section 20(a) and its legislative history have been contended to be somewhat ambiguous regarding “diminished capacity” or “diminished responsibility,” this aspect of the legislation has been litigated in Article III courts. United States v. Pohlot, Crim. No. 85-00354-01 (E.D. Pa. March 31, 1986) held that section 20(a) eliminated the defense of diminished capacity. See also United States v. White, 766 F.2d 22, 24-25 (1st Cir. 1985); U.S. DEPARTMENT OF JUSTICE, HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 AND OTHER CRIMINAL STATUTES ENacted BY THE 98TH CONGRESS 58, 60 (December 1984). Contra United States v. Frisbee, 623 F. Supp. 1217 (N.D. Cal. 1985) (holding that Congress did not intend to eliminate the defense of diminished capacity). See also Carroll, Insanity Defense Reform, 114 Mil. L. Rev. 183, 196 (1986). The drafters concluded that Congress intended to eliminate this defense in section 20(a).

Subsection (3)(A) and the discussion are based on paragraph 122a of MCM, 1969 (Rev.). Several matters in paragraph 122a are covered in other parts of this subsection or in R.C.M. 909, 1986 Amendment: Subsection (3)(A) was amended to conform to article 50a(b) and R.C.M. 916(b).

Subsection (3)(B) and the discussion are based on paragraph 122(b)(2) of MCM, 1969 (Rev.). The procedures for an inquiry into the mental responsibility of the accused are covered in R.C.M. 706.

Subsection (3)(C) is new. Article 51(b) prohibits a military judge from ruling finally on the factual question of mental responsibility. It does not, however, require that the question be treated as an interlocutory one, and there is no apparent reason for doing so. The import of Article 51(b) is that the issue of mental responsibility may not be removed from the factfinder. Moreover, to permit mental responsibility to be treated separately from other issues relating to the general issue could work to the detriment of the accused. Cf. United States v. Laws, 11 M.J. 475 (C.M.A. 1981).

(1) Not defenses generally.


Rule 917. Motion for a finding of not guilty

(a) In general. This subsection is based on Fed. R. Crim. P. 29(a) and on the first two sentences of paragraph 71a of MCM, 1969 (Rev.). Paragraph 71a did not expressly provide for a motion for a finding of not guilty to be made sua sponte, as does Fed. R. Crim. P. 29(a). Unlike Fed. R. Crim. P. 29, this rule requires the motion to be resolved before findings are entered. If the evidence is insufficient to support a rational finding of guilty, there is no reason to submit the issue to the members. That would be inefficient. Moreover, if a military judge set aside some but not all of the findings as "irrational," it would be awkward to proceed to sentencing before the same members. However, nothing in this rule is intended to limit the authority of a military judge to dismiss charges after findings on other grounds, such as multiplicity or improper findings (e.g., conviction for both larceny as perpetrator and receiving stolen property, see United States v. Cartwright, 13 M.J. 174 (C.M.A. 1982); United States v. Ford, 12 U.S.C.M.A. 3, 30 C.M.R. 3 (1960); cf. United States v. Clark, 20 U.S.C.M.A. 140, 42 C.M.R. 332 (1970)).

(b) Form of motion. This subsection is based on the first sentence in the second paragraph of paragraph 71a of MCM, 1969 (Rev.), except that now a statement of the deficiencies of proof is required. This will enable the trial counsel to respond to the motion.

(c) Procedure. This subsection is new, although it conforms to current practice. By ensuring that counsel may be heard on the motion, a precipitant ruling will be avoided. This is important since a ruling granting the motion may not be reconsidered. See United States v. Hitchcock, 6 M.J. 188 (C.M.A. 1979). The first paragraph in the discussion is based on the fifth sentence of the second paragraph of paragraph 71a of MCM, 1969 (Rev.).

(d) Standard. This subsection is based on the fourth sentence of the second paragraph of paragraph 71a of MCM, 1969 (Rev.). See also Jackson v. Virginia, 443 U.S. 307 (1979); United States v. Varkeyoan, 645 F.2d 453 (5th Cir. 1981); United States v. Beck, 615 F.2d 441 (7th Cir. 1980).


(f) Effect of ruling. This subsection is based on the third sentence of Article 51(a) and on United States v. Hitchcock, supra.

(g) Effect of denial on review. This subsection is based on the last sentence of the first paragraph of paragraph 71a of MCM, 1969 (Rev.). See also United States v. Bland, 653 F.2d 989 (5th Cir.), cert. denied, 454 U.S. 1055 (1981).

Rule 918. Findings

(a) General findings. This subsection and the discussion are based on paragraphs 74b and c of MCM, 1969 (Rev.). The discussion of lesser included offenses is also based on Article 80. See also United States v. Scott, 50 C.M.R. 630 (C.G.C.M.R. 1975).

Failure to reach findings as to the charge or the designation of a wrong article is not necessarily prejudicial. United States v. Dilday, 471C.M.R. 172 (A.C.M.R. 1973).

1986 Amendment: The provisions allowing for findings of not guilty only by reason of lack of mental responsibility were added to subsections (a)(1) and (2) to implement Article 50a(c), which was added to the UCMJ in the “Military Justice Amendments of 1986,” Tit. VIII, 802, National Defense Authorization Act for Fiscal Year 1987, Pub.L. No. 99-661, 100 Stat. 3905 (1986). This finding is modeled after 18 U.S.C. 4242(b)(3), section 403 of the Insanity Defense Reform Act, ch. IV, Pub.L. No. 98-473, 98 Stat. 2057, 2059. The drafters intended that adoption of the finding of “not guilty only by reason of lack of mental responsibility” does not require conformance to the procedures that follow an insanity acquittal in federal courts (see U.S.C. 4243 et. seq.). The Services are free to use available medical and administrative procedures which address disposition of servicemembers having psychiatric illnesses. The drafters further intended that, for purposes of subsequent appellate and other legal reviews under this Manual, a finding of “not guilty only by reason of lack of mental responsibility” shall be treated as any other acquittal.

1993 Amendment: The amendment to R.C.M. 918(a)(1) allows for a finding of guilty of a named lesser included offense of the charged offense, and eliminates the necessity of making findings by exceptions and substitutions. This serves to conform military practice to that used in criminal trials before federal district courts. See Fed. R. Crim. P. 31(c); E. Devitt and C. Blackman, Federal Jury Practice and Instructions, 18.07 (1977). The practice of using exceptions and substitutions is retained for those cases in which the military judge or court members must conform the findings to the evidence actually presented, e.g., a larceny case in which the finding is that the accused stole several of the items alleged in the specification but not others.


The requirement that a request for special findings be made before general findings are announced is based on the fifth sentence of paragraph 74i of MCM, 1969 (Rev.), and on Fed. R. Crim. P. 23(c). Article 51(d) is patterned after Fed. R. Crim. P. 23(c). United States v. Gerard, supra. The language in Article 51(d) is virtually identical to that in Fed. R. Crim. P. 23(c) as it existed when Article 51(d) was adopted in 1968. Fed. R. Crim. P. 23(c) was amended in 1977 to provide specifically that a request for special findings be made before general findings are entered. Pub. L. No. 95-78 § 2(b), 91 Stat. 320. This was done "to make clear that deadline for making a request for findings of fact and to provide that findings may be oral." Id., Advisory Committee Note (Supp. v. 1981). Subsection (b), therefore, continues conformity with federal practice.

(c) Basis of findings. This subsection and the discussion are based on paragraph 74a of MCM, 1969 (Rev.). The discussion of reasonable doubt has been modified based on United States v. Cotten, 10 M.J. 260 (C.M.A. 1981); United States v. Sailey, 9 M.J. 189 (C.M.A. 1980). See also Holland v. United States, 348 U.S. 121,
Rule 919. Argument by counsel on findings

(a) In general. This subsection is based on Fed. R. Crim. P. 29.1. It has been reworded slightly to make clear that trial counsel may waive the opening and the closing argument. The rule is consistent with the first paragraph of paragraph 72a of MCM, 1969 (Rev.).


Rule 920. Instructions on findings


(b) When given. This subsection is based on the first sentence of paragraph 73a and on paragraph 74e of MCM, 1969 (Rev.), and is consistent with Fed. R. Crim. P. 30. This subsection expressly provides that additional instructions may be given after deliberations have begun without a request from the members. MCM, 1969 (Rev.) was silent on this point. The discussion is based on United States v. Rickets, 1 M.J. 78 (C.M.A. 1975).

1993 Amendment: The amendment to R.C.M. 920(b) is based on the 1987 amendments to Federal Rule of Criminal Procedure 30. Federal Rule of Criminal Procedure 30 was amended to permit instructions either before or after arguments by counsel. The previous version of R.C.M. 920 was based on the now superseded version of the federal rule.

The purpose of this amendment is to give the court discretion to instruct the members before or after closing arguments or at both times. The amendment will permit courts to continue instructing the members after arguments as Rule 30 and R.C.M. 920(b) had previously required. It will also permit courts to instruct before arguments in order to give the parties an opportunity to argue to the jury in light of the exact language used by the court. See United States v. Slobowski, 7 M.J. 461 (C.M.A. 1979); United States v. Pendry, 29 M.J. 694 (A.C.M.R. 1989).

(c) Requests for instructions. This subsection is based on the first three sentences in Fed. R. Crim. P. 30 and on the second and fourth sentences of paragraph 73d of MCM, 1969 (Rev.). The discussion is based on the remainder of paragraph 73d.

(d) How given. The first sentence of this subsection is based on the last paragraph of paragraph 73a of MCM, 1969 (Rev.). The second sentence of this subsection permits the use of written copies of instructions without stating a preference for or against them. See United States v. Slobowski, 7 M.J. 461 (C.M.A. 1979); United States v. Muir, 20 U.S.C.M.A. 188, 43 C.M.R. 28 (1970); United States v. Sampson, 7 M.J. 513 (A.C.M.R. 1979); United States v. Sanders, 30 C.M.R. 521 (A.C.M.R. 1961). Only copies of instructions given orally may be provided, and delivery of only a portion of the oral instructions to the members in writing is prohibited when a party objects. This should eliminate the potential problems associated with written instructions. See United States v. Slobowski, supra; United States v. Caldwell, 11 U.S.C.M.A. 257, 29 C.M.R. 73 (1960); United States v. Helm, 21 C.M.R. 357 (A.B.R. 1956). Giving written instructions is never required. The discussion is based on the last paragraph of paragraph 73a of MCM, 1969 (Rev.) and United States v. Caldwell, supra. As to the use of written instructions in federal district courts, see generally United States v. Reed, 658 F.2d 1225 (7th Cir. 1981); United States v. Calabrese, 645 F.2d 1379 (10th Cir.), cert. denied, 454 U.S. 831 (1981).

(e) Required instructions. This subsection is based on Article 51(c) and on the first paragraph of paragraph 73a of MCM, 1969.
Rule 921. Deliberations and voting on findings

(a) In general. This subsection is based on Article 39(b) and on the second, third, and fifth sentences of paragraph 74d(1) of MCM, 1969 (Rev.). The first sentence of that paragraph is unnecessary and the fourth is covered in subsection (b) of this rule.

(b) Deliberations. This first sentence of this subsection is based on the fourth sentence of paragraph 74d(1) of MCM, 1969 (Rev.).


(c) Voting. Subsection (1) is based on the first sentence of Article 51(a) and on the first sentence of paragraph 73d(2) of MCM, 1969 (Rev.).

Subsection (2) is based on Article 52(a) and on the first two sentences of paragraph 74d(3) of MCM, 1969 (Rev.). See also United States v. Guildford, 8 M.J. 598 (A.C.M.R. 1979), pet. denied, 8 M.J. 242 (1980) (holding Burch v. Louisiana, 441 U.S. 130 (1979), does not apply to courts-martial.) The discussion is based on the third sentence of paragraph 74d(3) of MCM, 1969 (Rev.).

Subsection (3) is based on the fourth sentence of paragraph 74d(3) of MCM, 1969 (Rev.).

1986 Amendment: Subsections (4) and (5) were redesignated as subsections (5) and (6) and a new subsection (4) was inserted. New subsection (4) is based on Article 50a(e) and provides for bifurcated voting on the elements of the offense and on mental responsibility, and defines the procedures for arriving at a finding of not guilty only by reason of lack on mental responsibility. When the prosecution had the burden of proving mental responsibility beyond a reasonable doubt, the same as the burden regarding the elements of the offense, the members were unlikely to confuse the two general issues. Without any procedure for bifurcated voting under the 1984 amendment, substantial confusion might result if the members were required to vote simultaneously on whether the defense has proven lack of mental responsibility by clear and convincing evidence, and whether the prosecution has proven the elements of the offense beyond a reasonable doubt. Each issue might result in a different number of votes. Bifurcated voting is also necessary to provide the finding of "not guilty only by reason of lack of mental responsibility" provided for in R.C.M. 918(a). But see Carroll, Insanity Defense Reform, 114 Mil. L. Rev. 183, 216 (1986).

Subsection (4) is new to the Manual but it conforms to practice generally followed in courts-martial. Paragraph 74d(2) of MCM, 1969 (Rev.) suggested that findings as to a specification and all lesser offenses included therein would be resolved by a single ballot. Such an approach is awkward, however, especially when there are multiple lesser included offenses. It is more appropriate to allow separate consideration of each included offense until a finding of guilty has been reached. See Military Judges Benchbook, DA Pam 27-9, para. 2.28 (May 1982).

Subsection (5) is based on the second sentence of Article 51(b) and on paragraph 74d(2) of MCM, 1969 (Rev.). See also United States v. Dilday, 47 C.M.R. 172 (A.C.M.R. 1973).

Rule 922. Announcement of findings
(a) In general. This subsection is based on Article 53 and on the first sentence of paragraph 74g of MCM, 1969 (Rev.). See also United States v. Dilday, 47 C.M.R. 172 (A.C.M.R. 1973). The discussion is based on United States v. Ricketts, 1 M.J. 78 (C.M.A. 1975); United States v. Stewart, 48 C.M.R. 877 (A.C.M.R. 1974). The requirement for the announcement to include a statement of the percentage of members concurring in each finding of guilty and that the vote was by secret written ballot has been deleted. Article 53 does not require such an announcement and when instructions on such matters are given (see R.C.M. 920(e)(6)), the members are presumed to have complied with the instructions given them by the judge, United States v. Ricketts, supra at 82. See United States v. Jenkins, 12 M.J. 222 (C.M.A. 1982). Cf. United States v. Hendon, 6 M.J. 171, 173-174 (C.M.A. 1979).

(b) Findings by members. This subsection is based on the second sentence of paragraph 74g of MCM, 1969 (Rev.). The last sentence is based on the last sentence of paragraph 70b of MCM, 1969 (Rev.).

1986 Amendment: R.C.M. 922(b) was amended by adding a new paragraph (2) as a conforming change to the amendment in R.C.M. 1004(a) making unanimity on findings a precondition to a capital sentencing proceeding. The Rule and the Discussion also preclude use of the reconsideration procedure in R.C.M. 924 to change a nonunanimous finding of guilty to a unanimous verdict for purposes of authorizing a capital sentencing proceeding. Thus, if a nonunanimous finding of guilty is reaffirmed on reconsideration and the vote happens to be unanimous, the president of the court-martial does not make a statement as to unanimity.

(c) Findings by military judge. This subsection is based on the second sentence of the last paragraph of paragraph 70b and on the second paragraph of paragraph 74g of MCM, 1969 (Rev.). See also Article 39(a).

(d) Erroneous announcement. This subsection is based on the third and fourth sentences of paragraph 74g of MCM, 1969 (Rev.).


The rule is not intended to prevent a military judge from setting aside improper findings. This would include improper findings of guilty of "mutually exclusive" offenses, for example, larceny (as a perpetrator) of certain property and receiving the same stolen property. In such a case, the members should be instructed before they deliberate that they may convict of no more than one of the two offenses. See Milanovich v. United States, 365 U.S. 551 (1961); United States v. Cartwright, 13 M.J. 174 (C.M.A. 1982); United States v. Clark, U.S.C.M.A. 140, 42 C.M.R. 332 (1970); United States v. Forst, 12 U.S.C.M.A. 3, 30 C.M.R. 3 (1960).

Rule 924. Reconsideration of findings
(a) Time for reconsideration. This subsection is based on Article 52(c) and on the fourth and fifth sentences of paragraph 74d(3) of MCM, 1969 (Rev.).

(b) Procedure. This subsection is based on Articles 52(a) and 53(c) and on the last three sentences of paragraph 74d(3) of MCM, 1969 (Rev.). See also United States v. Boland, 20 U.S.C.M.A. 83, 42 C.M.R. 275 (1970).

1987 Amendment: R.C.M. 924(b) was amended in conjunction with the adoption in R.C.M. 921(c)(4) of bifurcated voting on the lack of mental responsibility. It is also necessary to bifurcate the vote on reconsideration to retain the relative burdens for reconsideration and to prevent prejudice to the accused.

(c) Military judge sitting alone. This subsection is new to the Manual, although the power of the military judge to reconsider findings of guilty has been recognized. United States v. Chatman, 49 C.M.R. 319 (N.C.M.R. 1974). It is also implicit in Article 16 which empowers the military judge sitting alone to perform the functions of the members. See Article 52(c).

Rule 1001. Presenting procedure
Introduction. This rule is based on paragraph 75 of MCM, 1969 (Rev.). Additions, deletions, or modifications, other than format or style changes, are noted in specific subsections infra.

Sentencing procedures in Federal civilian courts can be followed in courts-martial only to a limited degree. Sentencing in courts-martial may be by the military judge or members. See Article 16 and 52(b). The military does not have—and it is not feasible to create—an independent, judicially supervised probation service to prepare presentence reports. See Fed. R. Crim. P. 32(c). This rule allows the presentation of much of the same information to the court-martial as would be contained in a presentence re-
port, but it does so within the protections of an adversarial proceeding, to which rules of evidence apply (but cf. Williams v. New York, 337 U.S. 241 (1949)), although they may be relaxed for some purposes. See subsections (b)(4) and (5), (c)(3), (d), and (e) of this rule. The presentation of matters in the accused's service records (see subsection (b)(2) of this rule) provides much of the information which would be in a presentence report. Such records are not prepared for purposes of prosecution (cf. United States v. Boles, 11 M.J. 195 (C.M.A. 1981)) and are therefore impartial, like presentence reports. In addition, the clarification of the types of cases in which aggravation evidence may be introduced (see subsection (b)(4) of this rule) and authorization for the trial counsel to present opinion evidence about the accused's rehabilitative potential (see subsection (b)(3) of this rule) provide additional avenues for presenting relevant information to the court-martial. The accused retains the right to present matters in extenuation and mitigation (see subsection (c) of this rule).

In addition to Fed. R. Crim. P. 32(c), several other subsections in Fed. R. Crim. P. 32 are inapplicable to courts-martial or are covered in other rules. Fed. R. Crim. P. 32(a)(2) is covered in R.C.M. 1010. Fed. R. Crim. P. 32(b)(1) is inapposite; parallel matters are covered in R.C.M. 1114, Fed. R. Crim. P. 32(b)(2) is inapplicable as courts-martial lack power to adjudge criminal forfeiture of property. Fed. R. Crim. P. 32(d) is covered in R.C.M. 910(h). See also Article 45(a). As to Fed. R. Crim. P. 32(e), see R.C.M. 1108.

(a) In general. Subsection (a)(3) is based on the third sentence of paragraph 53h of MCM, 1969 (Rev.) and on the second sentence of Fed. R. Crim. P. 32(a). See also Hill v. United States, 368 U.S. 424 (1962); Green v. United States, 365 U.S. 301 (1961). Subsection (a)(3) of paragraph 75 of MCM, 1969 (Rev.) is deleted as the convening authority is no longer required to examine the findings for factual sufficiency. Subsection (a)(2) is consistent with the first sentence of Fed. R. Crim. P. 32(a). See Article 53. As to the last sentence of Fed. R. Crim. P. 32(a), see subsection (g) of this rule.

(b) Matter to be presented by the prosecution. Subsections (3) and (4) are modifications of paragraph 75(b)(3) and (4) of MCM, 1969 (Rev.), and subsection (5) is new.

1986 Amendment: The word "age" in subsection (1) was deleted to correct an error in MCM, 1984.

The fourth sentence of subsection (2) is modified by substituting "a particular document" for "the information." This is intended to avoid the result reached in United States v. Morgan, 15 M.J. 128 (C.M.A. 1983). For reasons discussed above, sentencing proceedings in courts-martial are adversarial. Within the limits prescribed in the Manual, each side should have the opportunity to present, or not present, evidence. Morgan encourages gamesmanship and may result in less information being presented in some case because of the lack of opportunity to rebut.

1987 Amendment: The words "all those records" were changed to "any records" to implement more clearly the drafters' original intent. According to the paragraph just above, the drafters "intended to avoid the result reached in United States v. Morgan," supra, by allowing the trial counsel to offer only such records as he or she desired to offer. In Morgan, the court held that, when the trial counsel offered adverse documents from the accused's service record, the "rule of completeness" under Mil.R.Evid. 106 required that all documents from that record be offered.

Subsection (3) deletes the exclusion of convictions more than 6 years old. No similar restriction applies to consideration of prior convictions at sentencing proceedings in Federal civilian courts. There is no reason to forbid their consideration by courts-martial, subject to Mil.R.Evid. 403.

Subsection (3) also eliminates the requirement that a conviction be final before it may be considered by the court-martial on sentencing. No similar restriction applies in Federal civilian courts. This subsection parallels Mil.R.Evid. 609. An exception is provided for summary courts-martial and special courts-martial without a military judge. See Analysis, Mil.R.Evid. 609. Whether the adjudication of guilt in a civilian forum is a conviction will depend on the law in that jurisdiction.

1986 Amendment: The reference to "Article 65(c)" was changed to "Article 64" to correct an error in MCM, 1984.

Subsection (4) makes clear that evidence in aggravation may be introduced whether the accused pleaded guilty or not guilty, and whether or not it would be admissible on the merits. This is consistent with the interpretation of paragraph 75(b)(3) (later amended to be paragraph 75(b)(4)) of MCM, 1969 (Rev.) by Exec. Order No. 12315 (July 29, 1981) in United States v. Vickers, 13 M.J. 403 (C.M.A. 1982). See also U.S. Dept of Justice, Attorney General's Task Force on Violent Crime, Final Report Recommendation 14 (1981); Fed. R. Crim. P. 32(c)(2)(B) and (C). This subsection does not authorize introduction in general of evidence of bad character or uncharged misconduct. The evidence must be of circumstances directly relating to or resulting from an offense of which the accused has been found guilty. See United States v. Rose, 6 M.J. 754 (N.C.M.R. 1978), pet. denied, 7 M.J. 56 (C.M.A. 1979); United States v. Tariaferrro, 2 M.J. 397 (A.C.M.R. 1975); United States v. Peace, 49 C.M.R. 172 (A.C.M.R. 1974).

Subsection (5) is new. (Paragraph 75(b)(5) of MCM, 1969 (Rev.) is deleted here, as it is now covered in R.C.M. 701(a)(5). Cf. Fed. R. Crim. P. 32(c)(3) ). Subsection (5) authorizes the trial counsel to present, in the form of opinion testimony (see Mil.R.Evid., Section VII), evidence of the accused's character as a servicemember and rehabilitative potential. Note that inquiry into specific instances of conduct is not permitted on direct examination, but may be made on cross-examination. Subsection (5) will allow a more complete presentation of information about the accused to the court-martial. The accused's character is in issue as part of the sentencing decision, since the sentence must be tailored to the offender. Cf. United States v. Lania, 9 M.J. 100 (C.M.A. 1980). Therefore, introduction of evidence of this nature should not be contingent solely upon the election of the defense. Information of a similar nature, from the accused's employer or neighbors, is often included in civilian presentencing reports. See, e.g., Fed. R. Crim. P. 32(c)(2). Subsection (5) guards against unreliable information by guaranteeing that the accused will have the right to confront and cross-examine such witnesses.

(e) Production of witnesses. The language of subsection (2)(C) has been modified to clarify that only a stipulation of fact permits nonproduction. See United States v. Gonzalez, 16 M.J. 58 (C.M.A. 1983).

(f) Additional matters to be considered. This subsection is based on the third and fourth sentences of paragraph 76a(2) of MCM, 1969 (Rev.) and on the first sentence of paragraph 123 of MCM 1969 (Rev.). The discussion is based on the last two sentences of paragraph 123 of MCM, 1969 (Rev.).
(g) **Argument.** The last paragraph is new. See *Analysis*, R.C.M. 919(c). As to the second sentence, see *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983).

### Rule 1002. Sentence determination

This rule is based on the first sentence in paragraph 76a(1) of MCM, 1969 (Rev.).

### Rule 1003. Punishments

**Introduction.** This rule lists the punishments a court-martial is authorized to impose, and presents general limitations on punishments not provided in specific rules elsewhere. Limitations based on jurisdiction (see R.C.M. 201(f); rehearings, other and new trials (see R.C.M. 810(d))); and on referral instructions (see R.C.M. 601(e)(1)) are contained elsewhere, but are referred to this rule.

See subsection (c)(3) and discussion. The maximum punishments for each offense are listed in Part IV. The automatic suspension of limitations at paragraph of paragraph 127c(5) of MCM, 1969 (Rev.) is deleted since the maximum punishments now include appropriate adjustments in the maximum authorized punishment in time of war or under other circumstances.

(a) **In general.** This subsection provides express authority for adjudging any authorized punishment in the case of any person tried by court-martial, subject only to specific limitations prescribed elsewhere. It does not change current law.

(b) **Authorized punishments.** This subsection lists those punishments which are authorized, rather than which some are prohibited. This approach is simpler and should eliminate questions about what punishments a court-martial may adjudge. Subsection (1) is based on paragraph 126f of MCM, 1969 (Rev.). Admonition has been deleted as unnecessary.

Subsection (2) is based on paragraphs 126h(1) and (2) of MCM, 1969 (Rev.).


Subsection (3) is based on paragraph 126h(3) of MCM, 1969 (Rev.). See R.C.M. 1113(d)(4) and Analysis concerning possible issues raised by enforcing a fine through confinement.

Detention of pay (paragraph 126h(4) of MCM, 1969 (Rev.)) has been deleted. This punishment has been used very seldom and is administratively cumbersome.

Subsection (4) is based on paragraph 126h of MCM, 1969 (Rev.).

Subsection (5) is based on the second paragraph of paragraph 126e of MCM, 1969 (Rev.). The first sentence in the discussion is based on the same paragraph. The second sentence in the discussion is based on the last sentence in the first paragraph of paragraph 126e of MCM, 1969 (Rev.).

Subsection (6) is based on paragraph 126d and on the ninth sentence of the second paragraph 127c(2) of MCM, 1969 (Rev.). The equivalency of restriction and confinement has been incorporated here and is based on the table of equivalencies at paragraph 127c(2) of MCM, 1969 (Rev.). See also Article 20.

Subsection (7) and the discussion are based on paragraph 126k of MCM, 1969 (Rev.). The last sentence in the rule is new and is based on the table of equivalent punishments at paragraph 127c(2) of MCM, 1969 (Rev.). See also Article 20.

Subsection (8) is based on paragraph 126j of MCM, 1969 (Rev.). Matters in the second paragraph of paragraph 126j of MCM, 1969 (Rev.) are now covered in R.C.M. 1113(d)(2)(A).

Subsection (9) is based on the last paragraph of paragraph 125 of MCM, 1969 (Rev.). The last sentence is new and is based on the table of equivalent punishments at paragraph 127c(2) of MCM, 1969 (Rev.).

Subsection (10)(A) is based on the second paragraph of paragraph 126d of MCM, 1969 (Rev.). Subsections (10)(B) and (C) are based on paragraphs 76a(3) and (4) and 127c(4) of MCM, 1969 (Rev.).

1986 Amendment: Under R.C.M. 1003(c)(2)(A)(iv), a warrant officer who is not commissioned can be punished by a dishonorable discharge when convicted at general court-martial of any offense. This continued the rule of paragraph 126d of MCM, 1969 (Rev.). The second sentence of subsection (10)(B), added in 1985, does not make any substantive change, but merely restates the provision in subsection (10)(B) to maintain the parallelism with subsection (10)(A), which governs dismissal of commissioned officers, commissioned warrant officers, cadets, and midshipmen.

As to subsection (11), see R.C.M. 1004.

Subsection (12) is based on Article 18.

Subsections (6), (7), and (9) incorporate equivalencies for restriction, hard labor without confinement, confinement, and confinement on bread and water or diminished rations. This makes the table of equivalent punishments at paragraph 127c(2) of MCM, 1969 (Rev.) unnecessary and it had been deleted. That table was confusing and subject to different interpretations. For example, the table and the accompanying discussion suggested that if the maximum punishment for an offense was confinement for 3 months and forfeiture of two-thirds pay per month, for 3 months, a court-martial could elect to adjudge confinement for 6 months and no forfeitures. The deletion of the table and inclusion of specific equivalencies where they apply eliminates the possibility of such a result.


Subsection (2)(A) is based on paragraph 126d of MCM, 1969 (Rev.). Paragraph 127a of MCM, 1969 (Rev.) provided that the maximum punishments were “not binding” in cases of officers, but could “be used as a guide.” Read in conjunction with paragraph 126d of MCM, 1969 (Rev.) these provisions had the practical effect of prescribing no limits on forfeitures when the accused
is an officer. This distinction has now been deleted. The maximum limits on forfeitures are the same for officers and enlisted persons.

Subsection (3) is based on paragraph 127b of MCM, 1969 (Rev.). It serves as a reminder that the limits on punishments may be affected by other rules, which are referred to in the discussion.

The last sentence in subsections (1) and (2) is new. Under R.C.M. 1001(b)(3), a court-martial conviction may now be considered by the sentencing body whether or not it is final. Allowing such a conviction to affect the maximum punishment may cause later problems, however. The subsequent reversal of a conviction would seldom affect a sentence of another court-martial where that conviction was merely a factor which was considered, especially when the pendency of an appeal may also have been considered. However, reversal would always affect the validity of any later discharge or confinement for which it provided the basis.

1986 Amendment: Subsection (c)(3) was redesignated as subsection (c)(4) and new subsection (c)(3) was added to reflect the legislative restrictions placed upon punishment of reserve component personnel in certain circumstances in the amendment to Article 2, UCMJ, contained in the "Military Justice Amendments of 1986," tit. VIII, § 804, National Defense Authorization Act for Fiscal Year 1987, Pub.L. No. 99-661, 100 Stat. 3905 (1986).


Rule 1004. Capital cases

Introduction. This rule is new. It provides additional standards and procedures governing determination of a sentence in capital cases. It is based on the President's authority under Articles 18, 36, and 56. See also U.S. Const. Art. II, sec. 2, cl. 1.

This rule and the analysis were drafted before the Court of Military Appeals issued its decision in United States v. Matthews, 16 M.J. 354 (C.M.A. 1983) on October 11, 1983. There the court reversed the sentence of death because of the absence of a requirement for the members to specifically find aggravating circumstances on which the sentence was based. When this rule was drafted, the procedures for capital cases were the subject of litigation in Matthews and other cases. See e.g., United States v. Matthews, 13 M.J. 501 (A.C.M.R. 1982), rev'd, United States v. Matthews, supra; United States v. Rojas, 15 M.J. 902 (N.M.C.M.R. 1983). See also United States v. Gay, 16 M.J. 586 (A.F.C.M.R. 1982), afd 18 MJ 104 (1984) (decided after draft MCM was circulated for comment). The rule was drafted in recognition that, as a matter of policy, procedures for the sentence determination in capital cases should be revised, regardless of the outcome of such litigation, in order to better protect the rights of servicemembers.

While the draft Manual was under review following public comment on it (see 48 Fed. Reg. 23688 (1983)), the Matthews decision was issued. The holding in Matthews generated a necessity to revise procedures in capital cases. However, Matthews did not require substantive revision of the proposed R.C.M. 1004. The several modifications made in the rule since it was circulated for comment were based on suggestions from other sources. They are unrelated to any of the issues involved in Matthews.

Capital punishment is not unconstitutional per se. Gregg v. Georgia, 428 U.S. 153 (1976); United States v. Matthews, supra. Capital punishment does not violate Article 55. Compare Article 55 with Articles 85, 90, 94, 99-102, 104, 106, 110, 113, 118, and 120. See United States v. Matthews, supra. But cf. id. at 382 (Fletcher, J., concurring in result) (absent additional procedural requirements, sentence of death violated Article 55). The Supreme Court has established that capital punishment does not violate the Eighth Amendment (U.S. Const. amend. VIII) unless it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than a purposeless and needless imposition of pain and suffering"; "is grossly out of proportion to the crime" (Coker v. Georgia, 433 U.S. 584, 592 (1977)); or is adjudged under procedures which do not adequately protect against the arbitrary or capricious exercise of discretion in determining a sentence. Furman v. Georgia, 408 U.S. 238 (1972). See Barclay v. Florida, 463 U.S. 939 (1983); Zant v. Stephens, 462 U.S. 862 (1983); Godfrey v. Georgia, 446 U.S. 420 (1980); Jurek v. Texas, 428 U.S. 262 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, supra. See United States v. Matthews, supra. Furthermore, while the procedures under which death may be adjudged must adequately protect against the unrestrained exercise of discretion, they may not completely foreclose discretion (at least in most cases, see subsection (e), infra) or the consideration of extenuating or mitigating circumstances. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). In Matthews the Court of Military Appeals suggested that similar considerations apply with respect to Article 55's prohibitions against cruel and unusual punishment. United States v. Matthews, supra at 368-69, 379-80.

The Court of Military Appeals listed several requirements for adjudication of the death penalty, based on Supreme Court decisions: (1) a separate sentencing procedure must follow the finding of guilt of a potential capital offense; (2) specific aggravating circumstances must be identified to the sentencing authority; (3) the sentencing authority must select and make findings on the particular aggravating circumstances used as a basis for imposing the death sentence; (4) the defendant must have an unrestricted opportunity to present mitigating and extenuating evidence; and (5) mandatory appellate review must be required to consider the propriety of the sentence as to the individual offense and individual defendant and to compare the sentence to similar cases within the jurisdiction. See United States v. Matthews, supra at 369-77 and cases cited therein.

The Court of Military Appeals held in United States v. Matthews, supra, that the requirements established by the Supreme Court for civilian cases apply in courts-martial, at least in the absence of circumstances calling for different rules, such as combat conditions or wartime spying. United States v. Matthews, supra at 368. The court added that current military capital sentencing procedures are constitutionally adequate in the following respects: (1) there is a separate sentencing process in which the members are instructed by the military judge as to their duties; (2) certain aggravating factors (e.g., premeditation) must be found by the members during findings, and evidence of other aggravating circumstances may be submitted during sentencing; (3) the accused has an unlimited opportunity to present relevant evidence in extenuation and mitigation; and (4) mandatory review is required by a Court of Military Review, and the Court of Military Appeals, with further consideration by the President. United States v. Matthews, supra at 377-78. The court held, that the procedure is defective, however, in that the members are not required to “specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty,” id. at 379, at least with respect to a peacetime murder case. See id. at 368.

The Court of Military Appeals stated in Matthews that constitutionally adequate procedures for capital cases may be promulgated by the President. Id. at 380-81. The President’s unique authority over military justice, particularly its procedure and punishments is well established. See U.S. Const. Art. II, § 2, cl. 1; Articles 18, 36, and 56. Congress recently reaffirmed the broad scope of this Presidential authority. See Pub.L. No. 96-107, Title VIII, § 801(b), 93 Stat. 811 (Nov. 9, 1979); S.Rep. No. 107, 96th Cong., 1st Sess. 123-125 (1979); Hearings on S.428 Before the Military Personnel Subcommittee of the House Committee on Armed Services, 96th Cong., 1st Sess. 5-6, 14, 17-18, 20-21, 52, 106 (1979). See also United States v. Ezell, 6 M.J. 307, 316-17 (C.M.A. 1978); W. Winthrop, Military Law and Precedents 27-33 (2d ed. 1920 reprint). Cf. Jurek v. Texas, supra (judicial construction may save an otherwise defective death penalty provision). The changes made in this rule are procedural. See Dobberi v. Florida, 432 U.S. 282 (1977).

R.C.M. 1004 is based on the recognition that, in courts-martial, as in civilian prosecution, death should be adjudged only under carefully tailored procedures designed to ensure that all relevant matters are thoroughly considered and that such punishment is appropriate.

At the same time, R.C.M. 1004 rests on the conclusion that the death penalty remains a necessary sanction in courts-martial and that it is an appropriate punishment under a broader range of circumstances than may be the case in civilian jurisdictions. This is because of the unique purpose and organization of the military, and its composition and the circumstances in which it operates. Cf. Parker v. Levy, 417 U.S. 733 (1974). See also United States v. Matthews, supra at 368.

1986 Amendment: The Rule was amended to substitute the word “factor” for the word “circumstance” with respect to the aggravating factors under R.C.M. 1004(c). This will more clearly distinguish such factors from the aggravating circumstances applicable to any sentencing proceeding under R.C.M. 1001(b)(4), which may be considered in the balancing process in capital cases under R.C.M. 1004(b)(4)(B).

(a) In general. Subsection (1) is based on the code and reflects the first of two “thresholds” before death may be adjudged; the accused must have been found guilty of an offense for which death is authorized.

1986 Amendment: Subsection (2), referred to below in the original Analysis, was redesignated as subsection (3), and a new subsection (2) was added. The new subsection requires a unanimous verdict on findings before the death penalty may be considered. Nothing in this provision changes existing law under which a finding of guilty may be based upon a vote of two-thirds of the members, and a finding based upon a two-thirds vote will continue to provide the basis for sentencing proceedings in which any sentence other than death may be imposed. This is an exercise of the President’s powers as commander-in-chief, and is not intended to cast doubt upon the validity of the sentence in any capital case tried before the effective date of the amendments.

Subsection (2) refers to the remaining tests in subsections (b) and (c) of the rule; the prosecution must prove, beyond a reasonable doubt, the existence of one or more aggravating circumstances listed in subsection (c) of the rule. Only if this second threshold is passed may the members consider death. If the members reach this point, their sentencing deliberations and procedures would be like those in any other case, except that the members must apply an additional specific standard before they may adjudge death. See subsection (b)(3) of this rule.

This rule thus combines two preliminary tests which must be met before death may be adjudged with a standard which must be applied before death may be adjudged. Cf. Barclay v. Florida and Zant v. Stephens, both supra. The Working Group considered the capital punishment provisions of those states which now authorize capital punishment, as well as the ALI Model Penal Code § 201.6(3), (4) (Tent. Draft No. 9, 1959) (quoted at Gregg v. Georgia, supra at 193 n.44). The ABA Standards do not include specific provisions for capital punishment. See ABA Standards, Sentencing Alternatives and Procedures § 18-1.1 (1979). This rule is not based on any specific state statute. It should be noted, however, that this rule provides a greater measure of guidance for members than does the Georgia procedure which has been upheld by the Supreme Court. In Georgia, once a statutory aggravating factor has been proved, the statute leaves the decision whether to adjudge death entirely to the jury. See Ga. Code Ann. §§ 17-10-30, 17-10-31 (1982). (In Georgia, once an aggravating factor has been proved, the burden may effectively be on the defendant to show why death should not be adjudged. See Coker v. Georgia, supra at 590-91.) Subsection (b)(4)(B) of this rule supplies a standard for that decision. Many state statutes adopt a similar balancing test, although the specific standard to be applied varies. See e.g., Ark. Stat. Ann. § 41-1302 (1977). Cf. Barclay v. Florida, supra. See also Analysis, subsection (b)(4)(B), infra.

(b) Procedure. Subsection (1) is intended to avoid surprise and trial delays. Cf. Ga. Code Ann. § 17-10 2(a)(1982). Consistent with R.C.M. 701, its purpose is to put the defense on notice of issues in the case. This permits thorough preparation, and makes possible early submission of requests to produce witnesses or evidence. At the same time, this subsection affords some latitude to the prosecution to provide later notice, recognizing that the exigencies of proof may prevent early notice in some cases. This is permissible as long as the defense is not harmed; ordinarily a continuance or recess will prevent such prejudice.
There is no requirement to plead the aggravating circumstances under subsection (c). (Statutory aggravating circumstances are elements of the offense, and must be pleaded and proved; see e.g., Article 85 (time of war); Article 118(1) (premeditation)). Notice of the aggravating circumstances under this subsection may be accomplished like any other notice in these rules. Note that under R.C.M. 701(a)(5) trial counsel is required to inform the defense of evidence the prosecution intends to introduce at sentencing.

Subsection (2) makes clear that the prosecution may introduce evidence in aggravation under R.C.M. 1001(b)(4). Note that depositional admissibility is not available for this purpose. See Article 49(d).

Subsection (3) is based on Eddings v. Oklahoma and Lockett v. Ohio, both supra, C.f. Jurek v. Texas, supra. The accused in courts-martial generally has broad latitude to introduce matters in extenuation and mitigation (see R.C.M. 1001(c)) although the form in which they are introduced may depend on several circumstances (see R.C.M. 1001(e)). This subsection reemphasizes that latitude. The rule is not intended to strip the military judge of authority to control the proceedings. Eddings and Lockett should not be read so broadly as to divest the military judge of the power to determine what is relevant (see Mil.R.Evid. 401, 403) or so decide when a witness must be produced (see R.C.M. 1001(e)). Those cases, and this subsection, stand for the proposition that the defense may not be prevented from presenting any relevant circumstances in extenuation or mitigation.


Subsection (4)(B) establishes guidance for the members in determining whether to adjudge death, once one or more aggravating factors have been found.

Note that under this subsection any aggravating matter may be considered in determining whether death or some other punishment is appropriate. Thus, while some factors may alone not be sufficient to authorize death they may be relevant considerations to weigh against extenuating or mitigating evidence. See Barclay v. Florida and Zant v. Stephens, both supra. See generally R.C.M. 1001(b)(4).

The rule does not list extenuating or mitigating circumstances as do some states. Some mitigating circumstances are listed in R.C.M. 1001(c)(1) and (f)(1). See also R.C.M. 1001(f)(2)(B). No list of extenuating or mitigating circumstances can safely be considered exhaustive. See Eddings v. Oklahoma and Lockett v. Ohio, both supra; cf. Jurek v. Texas, supra. Moreover, in many cases, whether a matter is either extenuating or mitigating depends on other factors. For example, the fact that the accused was under the influence of alcohol or drugs at the time of the offense could be viewed as an aggravating or an extenuating circumstance. Whether a matter is extenuating or mitigating is to be determined by each member, unless the military judge finds that a matter is extenuating or mitigating as a matter of law (see e.g., R.C.M. 1001(c)(1) and (f)(1)) and so instructs the members. In contrast to subsection (b)(4)(A) there is no requirement that the members agree on all aggravating, extenuating, and mitigating circumstances under subsection (4)(B) in order to adjudge death. Each member must be satisfied that any aggravating circumstances, including those found under subsection (4)(A) substantially outweigh any extenuating or mitigating circumstances, before voting to adjudge death.

The test is not a mechanical one. Cf. Zant v. Stephens, supra. The latitude to introduce evidence in extenuation and mitigation, the requirement that the military judge direct the members’ attention to evidence in extenuating and mitigating and instruct them that they must consider it, and the freedom of each member to independently find and weigh extenuating and mitigating circumstances all ensure that the members treat the accused “with that degree of uniqueness of the individual” necessary in a capital case. See Lockett v. Ohio, supra at 605. Thus each member may place on the scales any circumstance “‘which in fairness and mercy, may be considered as extenuating or reducing the degree’ of moral culpability or punishment.” Coker v. Georgia, supra at 591 (1977) (quoting instructions by the trial judge). See also Witherspoon v. Illinois, 391 U.S. 510 (1968) (concerning disqualifications of jurors in capital cases based on attitude toward the death penalty).

1986 Amendment: The following stylistic changes were made in R.C.M. 1004(b)(4): first, subparagraph (a) was rewritten to provide that the members must find “at least” one factor under subsection (c); second, a new subparagraph (b) was added to underscore the notice and unanimity requirements with respect to the aggravating factors and to clarify that all members concur in the same factor or factors; and third, former subparagraph (B) was redesignated as subparagraph (C), with an express cross-reference to R.C.M. 1001(b)(4), the general rule governing aggravating circumstances in sentencing proceedings.

Subsection (5) makes clear the evidence introduced on the merits, as well as during sentencing proceedings, may be considered in determining the sentence.

Subsection (6) requires additional instructions in capital cases. See also R.C.M. 1005. In determining which aggravating circumstances on which to instruct, the military judge would refer to those of which the trial counsel provided notice. Even if such notice had been given, a failure to introduce some evidence from which the members could find an aggravating circumstance would result in no instruction being given on that circumstance. Cf. R.C.M. 917 The last sentence in this subsection is based on Eddings v. Oklahoma and Lockett v. Ohio, both supra.

Subsection (7) is based on Article 52(b)(1). The requirement for a separate specific finding of one or more aggravating circumstances is new, and is designed to help ensure that death will not be adjudged in an inappropriate case. Subsection (8) operates as a check on this procedure.

(c) Aggravating circumstances. The lists of aggravating circumstances under the laws of the states retaining capital punishment were examined and used as guidance for formulating the aggravating circumstances listed here. Those jurisdictions do not include certain military capital offenses, of course, such as desertion, mutiny, misbehavior as a guard, nor do they address some of the unique concerns or problems of military life. Therefore, several circumstances here are unique to the military. These circum-
staces, which apply to rape and murder, except as specifically noted, are based on the determination that death is not grossly disproportionate for a capital offense under the code when such circumstances exist, and that the death penalty contributes to accepted goals of punishment in such cases. As to proportionality, the aggravating circumstances together ensure that death will not be adjudged except in the most serious capital offenses against other individuals or against the nation or the military order which protects it. As to goals of punishment, in addition to specifically preventing the most dangerous offenders from posing a continuing danger to society, the aggravating circumstances recognize the role of general deterrence, especially in combat setting. See United States v. Matthews, supra at 368; United States v. Gay, supra at 605-06 (Hodgson, C.J., concurring).

In a combat setting, the potentiality of the death penalty may be the only effective deterrent to offenses such as disobedience, desertion, or misbehavior. The threat of even very lengthy confinement may be insufficient to induce some persons to undergo the substantial risk of death in combat. At the same time, the rule ensures that even a servicemember convicted of such very serious offenses in wartime will not be sentenced to death in the absence of one or more of the aggravating circumstances.

In some cases proof of the offense will also prove an aggravating circumstance. See e.g., Article 99 and subsection(c)(1) of this rule. Note, however, that the members would have to return a specific finding under this rule of such an aggravating circumstance before a sentence of death could be based on it. This ensures a unanimous finding as to that circumstance. A finding of not guilty does not ensure such unanimity. See Article 52(a)(2); United States v. Matthews, supra at 379-80; United States v. Gay, supra at 600. The prosecution is not precluded from presenting evidence of additional aggravating circumstances.

Subsection (1) reflects the serious effect of a capital offense committed before or in the presence of the enemy. "Before or in the presence of the enemy" is defined in paragraph 23, Part IV. Note that one may be "before or in the presence of the enemy" even when in friendly territory. This distinguishes this subsection from subsection (6).

Subsection (2) and (3) are based on the military's purpose: protection of national security. That this interest may be basis for the death penalty is well established. See e.g., United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952), cert. denied, 344 U.S. 838 (1952). The definition of national security, which appears at the end of subsection (c), is based on Exec. Order No. 12065 § 6-104 (June 28, 1978), 43 Fed.Reg. 28949, as amended by Exec. Order No. 12148 (July 19, 1979), 44 Fed.Reg. 43239, and Exec. Order No. 12163 (Sept. 29, 1979), 44 Fed.Reg. 56673, reprinted at 50 U.S.C.A. § 401 (West Supp. 1982). The second ("includes") phrase is based on Joint Chiefs of Staff Publication 1. Dictionary of Military and Associated Terms 228 (1 July 79). Note that not all harm to national security will authorize death. Virtually all military activities affect national security in some way. Cf. Cole v. Young, 351 U.S. 536 (1956); United States v. Trotter, 9 M.J. 337 (C.M.A. 1980). Substantial damage is required to authorize death. The discussion provides examples of substantial damage. Rape and murder may be aggravated under subsection (2) because the offender intended to harm national security or a mission, system, or function affecting national security, by the capital offense. Intent to harm the mission, system, or function will suffice. It must be shown, however, that regardless of whether the accused intended to affect national security, the mission, system, or function must have been such that had the intended damage been effected, substantial damage to national security would have resulted.

1986 Amendment: R.C.M. 2004(c)(2) was changed in conjunction with the enactment of the new Article 106a.


1986 Amendment: R.C.M. 1004(c)(4) was amended by adding a reference to Article 106a to distinguish this factor from the new aggravating factor in R.C.M. 1004(c)(12). It was also considered appropriate to exclude 104 from this aggravating factor. See R.C.M. 1004(c)(11).

Subsection (5) reflects the special need to deter the offender who would desert or commit any other capital offense to avoid hazardous duty. Moreover, the effect such conduct has on the safety of others (including the offender's replacement) and the success of the mission justified authorizing death. Note that this circumstance applies to all capital offenses, including rape and murder. The person who murders or rapes in order to avoid hazardous duty is hardly less culpable than one who "only" runs away.

Subsection (6) is based on the special needs and unique difficulties for maintaining discipline in combat zones and occupied territories. History has demonstrated that in such an environment rape and murder become more tempting. At the same time the need for order in the force, in order not to encourage resistance by the enemy and to pacify the populace, dictates that the sanctions for such offenses be severe. Once again, in a combat environment, confinement, even of a prolonged nature, may be an inadequate deterrent.

Subsections (7) and (8) are based generally on examination of the aggravating circumstances for murder in various states. Subsection (7)(A) is intended to apply whether the sentence is adjudged, approved, or ordered executed, as long as, at the time of the offense, the term of confinement is at least 30 years or for life. The possibility of parole or early release because of "good time" or similar reasons does not affect the determination. Subsection (7)(F) is based on 18 U.S.C. §§ 351, 1114, and 11751. Subsection (7)(G) is modified to include certain categories of military persons. Subsection (7)(I) uses a more objective standard that the Georgia provision found wanting in Godfrey v. Georgia, supra.

1986 Amendment: Three changes were made in R.C.M. 1004(c)(7)(F); first, the provision involving Members of Congress was expanded to include Delegates and Resident commissioners; second, the word "justice" was added to ensure that justices of the Supreme Court were covered; and third, the provision was extended to include foreign leaders in specified circumstances. These changes are similar to legislation approved by the Senate in 1765, 98th Cong., 1st Sess. (1983).

1991 Amendment: Subsection (c)(8) was based on the Supreme Court's decision in Enmund v. Florida, 458 U.S. 782, 797 (1982), that the cruel and unusual punishment clause of the Eighth Amendment prohibits imposition of the death penalty on a defen-
APPENDIX 21

Rule 1005. Instructions on sentence

Introduction. Except as noted below, this rule and the discussion are taken from paragraph 76b(1) of MCM, 1969 (Rev.).


(b) When given. See Fed. R. Crim. P. 30 and paragraph 74e of MCM, 1969 (Rev.).


(d) How given. See Analysis, R.C.M. 921(d).

(e) Required instructions. The reference in the fourth sentence of the discussion of subsection (1) to rehearing or new or other trial is based on paragraph 81d(1) of MCM, 1969 (Rev.). The second sentence of the first paragraph and the second paragraph of the discussion to (1) are based on United States v. Henderson, 11 M.J. 395 (C.M.A. 1981). The last clause of subsection (3) is based on United States v. Given, 11 M.J. 694, 696 (N.M.C.M.R. 1981). The discussion under subsection (4) is based on the third sentence of paragraph 76b(1) of MCM, 1969 (Rev.) and on United States v. Davidson, 14 M.J. 81 (C.M.A. 1982).

(f) Waived. This subsection is based on Fed. R. Crim. P. 30.

Rule 1006. Deliberations and voting on sentence

Introduction. Except as noted below, this rule and the discussion are based on Articles 51 and 52 and on paragraphs 76b(2) and (3) of MCM, 1969 (Rev.).

(a) In general. The first sentence is based on the first sentence of paragraph 76b(1) of MCM, 1969 (Rev.).

(b) Deliberations. See Analysis, R.C.M. 921(b) concerning the second, third, and fourth sentences of this subsection. See also United States v. Lampangi, 14 M.J. 22 (C.M.A. 1982).


As to subsection (d)(5), the second sentence of the third paragraph of paragraph 76b(2) of MCM, 1969 (Rev.) has been limited to Article 118 offenses because, unlike Article 106, findings on an Article 118 offense do not automatically determine the sentence and do not require a unanimous vote. See Articles 52(a)(1) and (2). Thus a separate vote on sentence for an Article 105 offense is unnecessary.

As to subsection (d)(6) see United States v. Jones, 14 U.S.C.M.A. 177, 33 C.M.R. 389 (1963). The reference to no punishment was added to recognize this added alternative.

(e) Action after sentence is reached. See United States v. Justice, 3 M.J. 451, 453 (C.M.A. 1977). The second paragraph of the discussion is based on the second sentence of paragraph 76c.
Rule 1007. Announcement of sentence

Introduction. Except as noted below, this rule and the discussion are based on paragraph 76c of MCM, 1969 (Rev.).


The requirement that the sentence announcement include a reference to the percentage of agreement or an affirmation that voting was by secret written ballot has been deleted. Article 53 does not require such an announcement, and when instructions incorporating such matters are given, the court-martial “is presumed to have complied with the instructions given them by the judge.” United States v. Ricketts, 1 M.J., 78, 82 (C.M.A. 1975). See United States v. Jenkins, 12 M.J. 222 (C.M.A. 1982). Cf. United States v. Hendon, 6 M.J. 171, 173–74 (C.M.A. 1979).

(c) Polling prohibited. See Analysis, Rule 923(c).

Rule 1008. Impeachment of sentence


Rule 1009. Reconsideration of sentence

Introduction. Except as noted below, this rule and discussion are based on Articles 52(c) and 62 and paragraphs 76c and d of MCM, 1969 (Rev.).

(c) Initiation of reconsideration. Subsection (2)(A) was added to remedy the situation addressed in United States v. Taylor, 9 M.J. 848 (N.C.M.R. 1980). It is intended that the military judge have the authority to reduce a sentence imposed by that judge based on changed circumstances, as long as the case remained under that judge’s jurisdiction. Since this action “undercuts the review powers” (Id. at 850) only to the extent that it reduces the upper limits available to reviewing authorities, there is no reason to prevent the military judge from considering additional matters before finalizing the sentence with authentication. Furthermore, granting the military judge power to reconsider an announced sentence recognizes that when sitting without members, the judge performs the same functions as the members. See Article 16.

The procedures in subsection (2)(B) are necessary corollaries of those set out in the fifth and sixth sentences of paragraph 76c, MCM, 1969 (Rev.) adapted to the rules for reconsideration. This clarifies that a formal vote to reconsider is necessary when reconsideration is initiated by the military judge. MCM, 1969 (Rev.) was unclear in this regard. See United States v. King, 13 M.J. 838 (A.C.M.R.), pet. denied, 14 M.J. 232 (1982).

Subsection (3) is based on Article 62(b) and United States v. Jones, 3 M.J. 348 (C.M.A. 1977).

(d) Procedure with members. Subsection (1) is based on the general requirement for instructions on voting procedure. See United States v. Johnson, 18 U.S.C.M.A. 436, 40 C.M.R. 148 (1969). It applies whether reconsideration is initiated by the military judge or a member, since R.C.M. 1006(d)(3)(A) does not permit further voting after a sentence is adopted and there is no authority for the military judge to suspend that provision.

Rule 1010. Advice concerning post-trial and appellate rights

This rule is based on S.Rep. No. 53, 98th Cong., 1st Sess. 18 (1983). See also Articles 60, 61, 64, 66, 67, and 69. It is similar to Fed.R.Crim. P. 32(a)(2), but is broader in that it applies whether or not the accused pleaded guilty. This is because the accused’s post-trial and appellate rights are the same, regardless of the plea, and because the powers of the convening authority and the Court of Military Review to reduce the sentence are important even if the accused has pleaded guilty.

1986 Amendment: This rule was changed to delete subsection(b) which required an inquiry by the military judge. The Senate Report addresses only advice; inquiry to determine the accused’s understanding is deemed unnecessary in view of the defense counsel’s responsibility in this area.

1991 Amendment: This rule was changed to place the responsibility for informing the accused of post-trial and appellate rights on the defense counsel rather than the military judge. Counsel is better suited to give this advisement in an atmosphere in which the accused is more likely to comprehend the complexities of the rights.

Rule 1011. Adjournment

This rule is based on paragraph 77b of MCM, 1969 (Rev.).

CHAPTER XI. POST-TRIAL PROCEDURE

Rule 1101. Report of result of trial; post-trial restraint; deferment of confinement

(A) Report of the result of trial. This subsection is based on the first two sentences of paragraph 44e of MCM, 1969 (Rev.).

(B) Post-trial confinement. Subsection (1) is based on Article 57(b) and on the last sentence of paragraph 44e of MCM, 1969 (Rev.). Subsection (1) makes clear that confinement is authorized when death is adjudged, even if confinement is not also adjudged. See United States v. Matthews, 13 M.J. 501 (A.C.M.R.), rev’d on other grounds, 16 M.J. 354 (C.M.A. 1983). See also R.C.M. 1004(e) and Analysis.

Subsection (2) is based on Article 57 and on paragraph 21d of MCM, 1969 (Rev.). The person who orders the accused into confinement need not be the convening authority. See Reed v. Omaha, 19 U.S.C.M.A. 110 (1969); Levy v. Resor, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967). The convening authority may withhold such authority from subordinates.

Article 57(b) provides that a sentence to confinement begins to run as soon as the sentence is adjudged. The mechanism for an accused to seek release from confinement pending appellate review is to request deferment of confinement under Article 57(d). See S.Rep. No. 1601, 90th Cong., 2d Sess. 13-14 (1968); Pearson v. Cox, 10 M.J. 317 (C.M.A. 1981). See subsection (c) of this rule.

The purpose of subsection (2) is to provide a prompt, convenient means for the command to exercise its prerogative whether to confine an accused when the sentence of the court-martial authorizes it. The commander may decide that, despite the sentence of the court-martial, the accused should not be immediately confined because of operational requirements or other reasons. A decision not to confine is for the convenience of the command and does not constitute deferment of confinement. See Article 57(d).
An accused dissatisfied with the decision of the commander may request deferment in accordance with subsection (c) of this rule.

The first sentence of the second paragraph of paragraph 20d(1) of MCM, 1969 (Rev.) has been deleted. That sentence provided for post-trial "arrest, restriction, or confinement to insure the presence of an accused for impending execution of a punitive discharge." The authority for such restraint was based on Article 13 which authorized arrest or confinement for persons awaiting the result of trial. See Reed v. Ohman, supra; United States v. Teague, 3 U.S.C.M.A. 317, 12 C.M.R. 73 (1953). The Military Justice Amendments of 1981 Pub. L. No. 97–81, § 3, 95 Stat. 1087 (1981), deleted the language concerning such detention pending the result of trial.

(c) Deferral of confinement. Subsection (1) is based on the first sentence of paragraph 88f of MCM, 1969 (Rev.). Subsection (2) is based on the first sentence in Article 57(d) and the third sentence of paragraph 88f of MCM, 1969 (Rev.). Subsection (3) is based on Article 57(d) and United States v. Brownd, 6 M.J. 338 (C.M.A. 1978). See also ABA Standards, Criminal Appeals, § 21–2.5 (1978); Trotman v. Haelst, 12 M.J. 27 (C.M.A. 1981); Pearson v. Cox, supra; Stokes v. United States, 8 M.J. 819 (A.F.C.M.R. 1979), pet. denied, 9 M.J. 33 (1980). See also the first paragraph of paragraph 88f of MCM, 1969 (Rev.).

The penultimate sentence recognized the standard of review executed in the convening authority's initial action in all cases. Subsection (4) is based on the fourth paragraph of paragraph 88f of MCM, 1969 (Rev.). Subsection (5) is based on the fifth paragraph of paragraph 88f of MCM, 1969 (Rev.) and on Pearson v. Cox, supra.

Subsection (6) modifies the last two paragraphs of paragraph 88f of MCM, 1969 (Rev.) to conform to the amendment of Article 71(c), see Pub. L. No. 97–81, § 5(e), 95 Stat. 1393 (1983). The amendment of Article 71(c) permits confinement to be ordered executed in the convening authority's initial action in all cases. Article 57(d) is intended to permit deferment after this point, however. See S. Rep. No. 1601, 90th Cong., 2d Sess. 13–14 (1968). Therefore subsection (6) specifically describes four ways in which deferment may be terminated. The result is consistent with paragraph 88f of MCM, 1969 (Rev.) and with Collier v. United States, 19 U.S.C.M.A. 511, 42 C.M.R. 113 (1970). Under subsection (A) the convening authority must specify in the initial action whether approved confinement is ordered executed, suspended, or deferred. See R.C.M. 1107(f)(4)(B), (E). Under subsection (B), deferment may be terminated at any time by suspending the confinement. This is because suspension is more favorable to the accused than deferment. Subsections (C) and (D) provide other specific points at which deferment may be terminated. Deferment may be granted for a specified period (e.g., to permit the accused to take care of personal matters), or for an indefinite period (e.g., completion of appellate review). Even if confinement is deferred for an indefinite period, it may be rescinded under subsection (D). When deferment is terminated after the initial action, it will be either suspended or executed. See subsection (7). The first sentence in the discussion is based on Article 57(d). The second, third, and fourth sentences are based on the last two paragraphs of paragraph 88f of MCM, 1969 (Rev.).

Subsection (7) is based on the last sentence of Article 57(d) and on Collier v. United States, supra. Note that the information on which the rescission is based need not be new information, but only information which was not earlier presented to the authority granting deferment. Cf. Collier v. United States, supra. Note also that the deferment may be rescinded and the accused confined before the accused has an opportunity to submit matters to the rescinding authority. See United States v. Daniels, 19 U.S.C.M.A. 518, 42 C.M.R. 120 (1970).

Subsection (7)(C) is added based on the amendment of Article 71(c). Confinement after the initial action is not “served.” It is deferred, suspended, or executed. Therefore, after deferment is rescinded, it is ordered executed (if not suspended). Subsection (7)(C) permits the accused an opportunity to submit matters before the order of execution, which precludes deferment under Article 57(d), is issued.

1991 Amendment: The Discussion accompanying this subsection was amended to provide for the inclusion of the written basis for any denial of deferment in the record of trial. Although written reasons for denials are not mandatory, and their absence from the record of trial will not per se invalidate a denial decision, their use is strongly encouraged. See Longhofer v. Hilbert, 23 M.J. 755 (A.C.M.R. 1986).

Rule 1102.

Introduction. This rule is based on Article 60(e) and on paragraphs 80c and 86d of MCM, 1969 (Rev.), all of which concern proceedings in revision. This rule also expressly authorizes post-trial Article 39(a) sessions to address matters not subject to proceedings in revision which may affect legality of findings of guilt or the sentence. See United States v. Mead, 16 M.J. 270 (C.M.A. 1983); United States v. Brickey, 16 M.J. 258 (C.M.A. 1983); United States v. Witherspoon, 16 M.J. 252 (C.M.A. 1983). Cf. United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

(a) In general. This subsection is based on Article 60(e), on the first sentence of paragraph 80c of MCM, 1969 (Rev.), which indicated that a court-martial could conduct proceedings in revision on its own motion, and on paragraph 86d of MCM, 1969 (Rev.).


(c) Matters not subject to post-trial sessions. This subsection is taken from Article 60(e)(2).

(d) When directed. This subsection is based on paragraph 86d of MCM, 1969 (Rev.). See also Article 60(e); United States v. Williamson, 4 M.J. 708 (N.C.M.R. 1977), pet. denied, 5 M.J. 219 (1978). Paragraph 86d indicated that a proceeding in revision
could be used to “make the record show the true proceedings.” A certificate of correction is the appropriate mechanism for this, so the former provision is deleted. Note that a trial session may be directed, when authorized by an appropriate reviewing authority (e.g., the supervisory authority, or the Judge Advocate General), even if some or all of the sentence has been executed.

(c) Procedure. Subsection (1) is based on paragraph 80b of MCM, 1969 (Rev.). See also R.C.M. 505 and 805 and Analysis. Good cause for detailing a different military judge includes unavailability due to physical disability or transfer, and circumstances in which inquiry into misconduct by a military judge is necessary.

Subsection (2) is based on paragraph 80c of MCM, 1969 (Rev.). Subsection (2) is more concise than its predecessor; it leaves to the military judge responsibility to determine what specific action to take.

Subsection (3) is based on paragraph 80d of MCM, 1969 (Rev.).

Rule 1103. Preparation of record of trial

(a) In general. This subsection is based on Article 54(c) and on the first sentence of paragraph 82a of MCM, 1969 (Rev.).

(b) General courts-martial. Subsection (1)(A) is based on Article 38(a). In Federal civilian courts the reporter is responsible for preparing the record of trial. 28 U.S.C. § 753; Fed. R. App. P. 11 (b). The responsibility of the trial counsel for preparation of the record is established by Article 38(a), however. Subsection (1)(B) is based on the second paragraph of paragraph 82a of MCM, 1969 (Rev.). See also United States v. Anderson, 12 M.J. 195 (C.M.A. 1982).

Subsection (2)(A) is based on Article 54(a) and the first sentence of paragraph 82b(1) of MCM, 1969 (Rev.). Cf. Article 19.


The first paragraph of the discussion under subsection (2)(B) is based on the third sentence of paragraph 82b(1), and paragraphs 82b(2) and (3) of MCM, 1969 (Rev.). See Analysis, R.C.M. 802 concerning the second paragraph in the discussion. The last paragraph in the discussion is based on the sixth sentence of paragraph 82b(1) of MCM, 1969 (Rev.).

Subsection (2)(C) is based on the fourth sentence of paragraph 82b(1) of MCM, 1969 (Rev.). See Article 54(c)(2). In Federal civilian courts a verbatim record is generally required in all cases (although not all portions of the record are necessarily transcribed). See 28 U.S.C. § 753(b); Fed. R. Crim. P. 11(g) and 12(g); and Fed. R. App. P. 10. See also Fed. R. Crim. P. 5.1(c). The Constitution requires a record of sufficient completeness to allow consideration of what occurred at trial, but not necessarily a verbatim transcript. Mayer v. Chicago, 404 U.S. 189 (1971); Draper v. Washington, 372 U.S. 487 (1963); Coppedge v. United States, 369 U.S. 438 (1962); United States v. Thompson, supra. A summarized record is adequate for the less severe sentences for which it is authorized.

Subsection (2)(D) is new. It lists items which are, in addition to a transcript of the proceedings, required for a complete record. See United States v. McCullah, 11 M.J. 234 (C.M.A. 1981).


1991 Amendment: Subsection (b)(2)(D)(iv) was redesignated as subsection (b)(2)(D)(v), and new subsection (b)(2)(D)(iv) was added. The 1984 rules omitted any requirement that the convening authority’s action be included in the record of trial. This amendment corrects that omission.

Subsection (3) is based on paragraph 82b(5), the last sentence of paragraph 84c, paragraph 85d, the third sentence of the third paragraph of paragraph 88f, the penultimate sentence of paragraph 88g, and the last sentence of paragraph 91c of MCM, 1969 (Rev.). See also R. No. 53, 80th Cong., 1st Sess. 26 (1983); R.C.M. 1106(f) and Analysis; and United States v. Lott, 9 M.J. 70 (C.M.A. 1980).

(c) Special courts-martial. This subsection is based on Articles 19 and 54(c) and paragraph 83 of MCM, 1969 (Rev.).

(e) Acquittal; termination prior to findings. This subsection is based on the fifth sentence of paragraph 82b(1) and the third sentence of paragraph 83b of MCM, 1969 (Rev.). The language of paragraph 82b(1) which referred to termination “with prejudice to the Government” has been modified. If the court-martial terminates by reason of mistrial, withdrawal, or dismissal of charges, a limited record is authorized, whether or not the proceedings could be reinstituted at another court-martial.

(f) Loss of notes or recordings of the proceedings. This subsection is based on paragraph 82i of MCM, 1969 (Rev.). See also United States v. Lashley, 14 M.J. 7 (C.M.A. 1982); United States v. Boxdale, supra.

(g) Copies of the record of trial. Subsection (1) is based on the first paragraph of paragraph 49b(2) of MCM, 1969 (Rev.). The trial counsel is responsible for preparation of the record (see Article 38(a)), although, as paragraph 49b(2) of MCM, 1969 (Rev.) indicated, ordinarily the court reporter actually prepares the record. In subsection (A), the number of copies required has been increased from two to four to conform to current practice.

1993 Amendment: Subsection (g)(1)(A) was amended by adding the phrase “and are subject to review by a Court of Military Review under Article 66” to eliminate the need to make four copies of verbatim records of trial for courts-martial which are not subject to review by a Court of Military Review. These cases are
reviewed in the Office of the Judge Advocate General under Article 69 and four copies are not ordinarily necessary.

(h) Security classification. This subsection is based on the first sentence of paragraph 82d of MCM, 1969 (Rev.). The remainder of that paragraph is deleted as unnecessary.

(i) Examination of the record. Subsection (1)(A) and the first paragraph of the discussion are based on the first paragraph of paragraph 82e of MCM, 1969 (Rev.).

Subsection (1)(B) is based on the first sentence of the second paragraph of paragraph 82e of MCM, 1969 (Rev.). The first paragraph of the discussion is based on United States v. Anderson, supra at 197. Examination before authentication will improve the accuracy of the record, reduce the possibility of the necessity for a certificate of correction, and obviate the problems discussed in Anderson. The first paragraph of the discussion is based on the fourth and fifth sentences of the second paragraph of paragraph 82e of MCM, 1969 (rev.). See also United States v. Anderson, supra at 197. The second paragraph of the discussion is based on United v. Anderson, supra. See also United States v. Everett, 3 M.J. 201, 202 (C.M.A. 1977). The third paragraph of the discussion is based on the second sentence of the second paragraph of paragraph 82e of MCM, 1969 (Rev.).

(j) Videotape and similar records. This subsection is new and is based on Article 1(14), which is also new. See Military Justice Act of 1983, Pub.L. No. 98-209, § 6(a), 97 Stat. 1393 (1983). This subsection implements Article 1(14) in accordance with guidance in S.Rep. No. 53, 98th Cong., 1st Sess. 25, 26 (1983). The concerns expressed in United States v. Barton, 6 M.J. 16 (C.M.A. 1978) were also considered.

Subsection (1) provides for recording courts-martial by videotape, audiotape, or similar means, if authorized by regulation of the Secretary concerned. Such Secretarial authorization is necessary to ensure that this procedure will be used only when appropriate equipment is available to permit its effective use, in accordance with the requirements for this rule. Such equipment includes not only devices capable of recording the proceedings accurately, but playback equipment adequate to permit transcription by trained personnel or examination by counsel and reviewing authorities. In addition, if transcription is not contemplated, the recording method used must be subject to production of duplicates for compliance with subsection (j)(5) of this rule.

Subsection (2) requires that, ordinarily, the record will be reduced to writing, even if recorded as described in subsection (1). This preference for a written record is based on the fact that such a record is easier to use by counsel, reviewing authorities, and the accused, and is often easier to produce in multiple copies. Cf. United States v. Barton, supra. Note, however, that the rule permits recording proceedings and transcribing them later without using a court reporter. This adds a measure of flexibility in the face of a possible shortage of court reporters. This subsection is consistent with the already common practice of using “back-up” recordings to prepare a record when the court reporter’s equipment has failed.

Subsection (3) recognizes that military exigencies may prevent transcription of the record, especially at or near the situs of the trial. In such instances, where an accurate record already exists, the convening authority’s action should not be postponed for lack of transcription, subject to the provisions in subsection (3). Thus, the convening authority may take action, and transcription for appellate or other reviewing authorities may occur later. See subsection (4). Note that additional copies of the record need not be prepared in such case, except as required in subsection (j)(5)(A). Note also, however, that facilities must be reasonably available for use by the defense counsel (and when appropriate the staff judge advocate or legal officer, see R.C.M. 1106) to listen to or view and listen to the recordings to use this subsection.

Subsection (4)(A) is based on the recognition that it is impracticable for appellate courts and counsel not to have a written record. See S.Rep. No. 53, supra at 26; United States v. Barton, supra. Note that the transcript need not be authenticated under R.C.M. 1104. Instead, under regulations of the Secretary concerned the accuracy of the transcript can be certified by a person who has viewed and/or heard the authenticated recording.

Subsection (4)(B) provides flexibility in cases not reviewed by the Court of Military Review. Depending on regulations of the Secretary, a written record may never be prepared in some cases. Many cases not reviewed by a Court of Military Review will be reviewed only locally. See R.C.M. 1112. The same exigencies which weigh against preparation of a written record may also exist before such review. If a written record in not prepared, the review will have to be conducted by listening to or viewing and listening to the authenticated recording.

Subsection (5) provides alternative means for the government to comply with the requirement to serve a copy of the record of trial on the accused. Article 54(d). Note that if a recording is used, the Government must ensure that it can provide the accused reasonable opportunity to listen to or view and listen to the recording.

Rule 1104. Records of trial: authentication; service; correction; forwarding

(a) Authentication. Subsection (1) is new and is self-explanatory.

Subsection (2) is based on Article 54(a) and (b) and paragraph 82f of MCM, 1969 (Rev.). The former rule has been changed to require that the record, or even a portion of it, may be authenticated only by a person who was present at the proceedings the record of which that person is authenticating. This means that in some cases (e.g., when more than one military judge presided in a case) the record may be authenticated by more than one person. See United States v. Credit, 4 M.J. 118 (C.M.A. 1977); S.Rep. No. 1601, 90th Cong., 2d Sess. 12-13 (1968); H.R. Rep. No. 1481, 90th Cong., 2d Sess. 10 (1968). See also United States v. Galloway, 2 U.S.C.M.A. 433, 9 C.M.R. 63 (1953). This subsection also changes the former rule in that it authorizes the Secretary concerned to prescribe who will authenticate the record in special courts-martial at which no bad-conduct discharge is adjudged. See Article 54(b). In some services, the travel schedules of military judges often result in delays in authenticating the record. Such delays are substantial, considering the relatively less severe nature of the sentences involved in such cases. This subsection allows greater flexibility to achieve prompt authentication and action in such cases. The second paragraph of the discussion is based on United States v. Credit, supra; United States v. Cruijks, 1 M.J. 429 (C.M.A. 1976). See also United States v. Lott, 9 M.J. 70 (C.M.A. 1980); United States v. Green, 7 M.J. 687 (N.C.M.R. 1979); United States v. Lowery, 1 M.J. 1165 (N.C.M.R. 1977). The third paragraph of the discussion is based on United States v. Lott, supra; United States v. Credit, supra.
Rule 1105. Matters submitted by the accused

(a) In general. This subsection is based on Articles 38(c) and 60(b). See also paragraphs 48(b) and 77a of MCM, 1969 (Rev.).

(b) Matters which may be submitted. This subsection is based on Articles 38(c) and 60(b). The post-trial procedure as revised by the Military Justice Act of 1983, Pub.L. No. 98-209, 97 Stat. 1393 (1983) places a heavier responsibility on the defense to take steps to ensure that matters it wants considered are presented to the convening authority. Therefore this subsection provides guidance as to the types of matters which may be submitted. See Article 38(c). See also paragraph 48(b) and 77a of MCM, 1969 (Rev.). Note that the matters the accused submits must be forwarded to the convening authority. See United States v. Siders, 15 M.J. 272 (C.M.A. 1983). As to the last paragraph in the discussion, see also Mil.R.Evid. 606(b) and Analysis; United States Bishop, 11 M.J. 7 (C.M.A. 1981); United States v. West, 23 U.S.C.M.A. 77, 48 C.M.R. 458 (1974); United States v. Bourchier, 5 U.S.C.M.A. 15, 17 C.M.R. 15 (1954).

(c) Time periods. This subsection is based on Article 60(b). Subsection (4) clarifies the effect of post-trial sessions. A re-anouncement of the same sentence would not start the time period anew. Subsection (5) is based on H.R. Rep. No. 549, 98th Cong., 1st Sess. 15 (1983).


(d) Waiver. Subsection (1) is based on Article 60(c)(2). Subsection (2) is based on Article 60(c)(2). This subsection clarifies that the defense may submit matters in increments by reserving in writing its right to submit additional matters within the time period. In certain cases this may be advantageous to the defense as well as the Government, by permitting early consideration of such matters. Otherwise, if the defense contemplated presenting additional matters, it would have to withhold all matters until the end of the period. Subsection (3) is based on Article 60(b)(4). Subsection (4) ensures that the accused cannot, by an unauthorized absence, prevent further disposition of the case. Cf. United States v. Schreck, 10 M.J. 226 (C.M.A. 1983). Note that if the accused has counsel, counsel must be served a copy of the record (see R.C.M. 1104(b)(1)(C)) and that the defense will have at least 7 days from such service to submit matters. Note also that the unauthorized absence of the accused has no effect on the 30, 20, or 7 day period from announcement of the sentence within which the accused may submit matters (except insofar as it may weigh against any request to extend such a period). The discussion notes that the accused is not required to raise matters, such as allegations of legal error, in order to preserve them for consideration on appellate review.

Rule 1106. Recommendation of the staff judge advocate or legal officer

(a) In general. This subsection is based on Article 60(d), as amended, see Military Justice Act of 1983, Pub.L. No. 98-209, § 5(a)(1), 97 Stat. 1393 (1983). The first paragraph of paragraph 85a of MCM, 1969 (Rev.) was similar.

(b) Disqualification. This subsection is based on Article 6(c) and on the second paragraph of paragraph 85a of MCM, 1969 (Rev.). Legal officers have been included in its application based on Article 54(d) and the second paragraph of paragraph 85a of MCM, 1969 (Rev.). See also United States v. Anderson, 12 M.J. 195 (C.M.A. 1982). See also ABA Standards, Special Functions of the Trial Judge § 6-1.6 (1978). The discussion is consistent with the first two sentences of paragraph 84a of MCM, 1969 (Rev.).
APPENDIX 21

States v. Reed, 2 M.J. 64 (C.M.A. 1976). The third example is based on United States v. Conn and United States v. Choice, both supra. Cf. Articles 1(9); 6(c); 22(b); 23(b). The fourth example is based on United States v. Collins, 6 M.J. 256 (C.M.A. 1979); United States v. Engle, 1 M.J. 387 (C.M.A. 1976). See also United States v. Newman, 14 M.J. 474 (C.M.A. 1983) as to the disqualification of a staff judge advocate or convening authority when immunity has been granted to a witness in the case.

1986 Amendment: The phrase “or any reviewing officer” was changed to “to any reviewing officer” to correct an error in MCM, 1984.

(c) When the convening authority does not have a staff judge advocate or legal officer or that person is disqualified. Subsection (1) is based on the third paragraph of paragraph 85a of MCM, 1969 (Rev.). Legal officers have been included in its application based on Article 60(d). Subsection (2) is new. It recognizes the advantages of having the recommendation prepared by a staff judge advocate. This flexibility should also permit more prompt disposition in some cases as well.

(d) Form and content of recommendation. This subsection is based on Article 60(d) and on S.Rep. No. 53, 98th Cong., 1st Sess. 20 (1983). As to the subsection (1), see also Article 60(c). Subsections (3), (4), and (5) conform to the specific guidance in S.Rep. No. 53, supra. Subsection (6) is based on S.Rep. No. 53, 98th Cong., 1st Sess. 21 (1983). The recommendation should be a concise statement of required and other matters. Summarization of the evidence and review for legal error is not required. Therefore paragraph 85b of MCM, 1969 (Rev.) is deleted.

Paragraph 85c of MCM, 1969 (Rev.) is also deleted. That paragraph stated that the convening authority should explain any decision not to follow the staff judge advocate’s recommendation. See also United States v. Harris, 10 M.J. 276 (C.M.A. 1981); United States v. Dixon, 9 M.J. 72 (C.M.A. 1980); United States v. Keller, 1 M.J. 159 (C.M.A. 1976). The convening authority is no longer required to examine the record for legal or factual sufficiency. The convening authority’s action is solely a matter of command prerogative. Article 60(c). Therefore the convening authority is not obligated to explain a decision not to follow the recommendation of the staff judge advocate or legal officer.

(e) No findings of guilt. This subsection is based on Article 60 and 63. When no findings of guilt are reached, no action by the convening authority is required. Consequently, no recommendation by the staff judge advocate or legal officer is necessary. The last paragraph of paragraph 85b of MCM, 1969 (Rev.), which was based on Article 61 (before it was amended), was similar.

1990 Amendment: Subsection (e) was amended in conjunction with the implementation of findings of not guilty only by reason of lack of mental responsibility provided for in Article 50a, UCMJ (Military Justice Amendments of 1986, tit. VIII, § 802, National Defense Authorization Act for Fiscal Year 1987, Pub.L. No. 99-661, 100 Stat. 3905 (1986)).

(f) Service of recommendation on defense counsel; defense response. This subsection is based on Article 60(d). See also United States v. Goode, 1 M.J. 3 (C.M.A. 1975). Subsection (1) is based on Article 60(d). See also United States v. Hill, M.J. 295 (C.M.A. 1977); United States v. Goode, supra.

1990 Amendment: Subsection (f)(1) was added to make clear that the accused should be provided with a personal copy of the recommendation.


Subsection (3) is based on United States v. Babcock, supra; United States v. Cruz, 5 M.J. 286 (C.M.A. 1978); United States v. Cruz-Rojas, 1 M.J. 429 (C.M.A. 1976). Ordinarily the record will have been provided to the accused under R.C.M. 1104(b).

Subsections (4) and (5) are based on Article 60(d). See also United States v. Goode, supra. See United States v. McAdoo, 14 M.J. 60 (C.M.A. 1982).


Subsection (7) is based on United States v. Narine, 14 M.J. 55 (C.M.A. 1982).

Rule 1107. Action by convening authority

(a) Who may take action. This subsection is based on Article 60(c). It is similar to the first sentence of paragraph 84d and the first sentence of paragraph 84c of MCM, 1969 (Rev.) except insofar as the amendment of Article 60 provides otherwise. See Military Justice Act of 1983, Pub.L. No. 98-209, § 5(a)(1), 97 Stat. 1393 (1983). The first paragraph in the discussion is based on the last two sentences of paragraph 84a of MCM, 1969 (Rev.). The second paragraph of the discussion is based on the second and third paragraphs of paragraph 84c of MCM, 1969 (Rev.).

(b) Disqualification of a convening authority because the convening authority granted immunity to a witness has been deleted. See United States v. Newman, 14 M.J. 474 (C.M.A. 1983). Note that although Newman held that a convening authority is not automatically disqualified from taking action by reason of having granted immunity, the Court indicated that a convening authority may be disqualified by granting immunity under some circumstances.
(b) **General considerations.** Subsection (1) and the discussion are based on Article 60(c). See also S.Rep. No. 53, 98th Cong., 1st Sess. 19 (1983).

Subsection (2) is based on Article 60(b) and (c).


Subsection (4) is based on Article 60(c)(3). See also Article 60(e)(3). This subsection is consistent with paragraph 862(2) of MCM, 1969 (Rev.) except that it does not refer to examining the record for jurisdictional error.

**1990 Amendment:** Subsection (b)(4) was amended in conjunction with the implementation of findings of not guilty only by reason of lack of mental responsibility provided for in Article 50a, UCJ (Military Justice Amendments of 1986, tit. VIII, § 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99–661, 100 Stat. 3905 (1986)).


**1986 Amendment:** The fourth sentence of subsection (b)(5) was amended to shift to the defense the burden of showing the accused’s lack of mental capacity to cooperate in post-trial proceedings. This is consistent with amendments to R.C.M. 909(c)(2) and R.C.M. 916(k)(3)(A) which also shifted to the defense the burden of showing lack of mental capacity to stand trial and lack of mental responsibility. The second sentence was added to establish a presumption of capacity and the third sentence was amended to allow limitation of the scope of the sanity board’s examination. The word “substantial” is used in the second and third sentences to indicate that considerable more credible evidence than merely an allegation of lack of capacity is required before further inquiry need be made. Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 2610 (1986) (Powell, J., concurring).

(c) **Action of findings.** This subsection is based on Article 60(c)(2). Subsection (2)(B) is also based on Article 60(c)(1) and (3). The first sentence in the discussion is based on Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 1128–85 (1949). The second sentence in the discussion is based on Article 60(e)(3). The remainder of the discussion is based on S.Rep. No. 53, 98th Cong., 1st Sess. 21 (1983).


Subsection (2) is based on Article 60(c) and S.Rep. No. 53, 98th Cong., 1st Sess. 19 (1983). The second sentence is also based on United States v. Russo, 11 U.S.C.M.A. 352, 29 C.M.R. 168 (1960). The second paragraph of the discussion is based on the third paragraph of paragraph 880 of MCM, 1969 (Rev.).

Subsection (3) is based on Articles 19 and 54(e)(1) and on the third sentence of paragraph 82b(1) of MCM, 1969 (Rev.).

(e) **Ordering rehearing or other trial.** Subsection (1)(A) is based on Article 60(e), and on paragraph 92a of MCM, 1969 (Rev.). Note that the decision of the convening authority to order a rehearing is discretionary. The convening authority is not required to review the record for legal errors. Authority to order a rehearing is, therefore, designed solely to provide an expeditious means to correct errors that are identified in the course of exercising discretion under Article 60(e).” See also United States v. Wilcox, 8 U.S.C.M.A. 371, 20 C.M.R. 87 (1955). See also United States v. McKnight, 20 C.M.R. 520 (N.B.R. 1955). Subsection (1) is based on Article 60(c). See also S.Rep. No. 53, supra at 22. Subsection (1)(B)(ii) is based on the second sentence of the second paragraph of paragraph 92a of MCM, 1969 (Rev.).

The discussion is based on the second sentence of the fourth paragraph of paragraph 92a of MCM, 1969 (Rev.). Subsection (1)(C)(i) is based on Article 62(e)(3) and on the first sentence of the third paragraph of paragraph 92a of MCM, 1969 (Rev.). Subsection (1)(C)(ii) is also based on the first sentence of the tenth paragraph of paragraph 92a of MCM, 1969 (Rev.). Subsection (1)(D) is based on the sixth paragraph of paragraph 92a of MCM, 1969 (Rev.).

Subsection (1)(E) is based on the eighth paragraph of paragraph 92a of MCM, 1969 (rev.). Because of the modification of Article 71 (see R.C.M. 1113) and because the convening authority may direct a rehearing after action in some circumstances (see subsection (e)(1)(B)(ii) of this rule), the language is modified. The remaining parts of paragraph 92a, concerning procedures for a rehearing, are now covered in R.C.M. 810.

Subsection (2) is based on paragraph 92b of MCM, 1969 (Rev.). See also paragraph 89(1) of MCM, 1969 (Rev.). If the accused was acquitted of a specification which is later determined to have failed to state an offense, another trial for the same offense would be barred. United States v. Ball, 163 U.S. 662 (1896). It is unclear whether an acquittal by a jurisdictionally defective court-martial bars retrial. See United States v. Culver, 22 U.S.C.M.A. 141, 46 C.M.R. 141 (1973).

(f) **Contents of action and related matters.** Subsection (1) is based on paragraph 89a of MCM, 1969 (Rev.).

**1991 Amendment:** The 1984 rules omitted any requirement that the convening authority’s action be included in the record of trial. This amendment corrects that omission.

Subsection (2) is based on paragraph 89b of MCM, 1969 (Rev.). The second sentence is new. It is intended to simplify the procedure when a defect in the action is discovered in Article 60(a) and to correct an omission. The accused cannot be harmed by such action. A convening authority may still be directed to take corrective action when necessary, under the third sentence. “Erroneous” means clerical er-
or only. See subsection (g) of this rule. This new sentence is not intended to allow a convening authority to change a proper action because of a change of mind.

Subsection (3) is based on paragraph 89c(2) of MCM, 1969 (Rev.). The provision in paragraph 89c(2) of MCM, 1969 (Rev.) that disapproval of the sentence also constitutes disapproval of the findings unless otherwise stated is deleted. The convening authority must expressly indicate which findings, if any, are disapproved in any case. See Article 60(c)(3). The discussion is based on paragraph 89c(2) of MCM, 1969 (Rev.). Subsection (4)(A) is based on paragraph 89c(3) of MCM, 1969 (Rev.). The first sentence of paragraph 89c(2) is no longer accurate. Since no action on the findings is required, any disapproval of findings must be expressed. Subsection (4)(B) is taken from paragraph 89c(4) of MCM, 1969 (Rev.). Subsection (4)(D) is based on paragraph 89c(6) of MCM, 1969 (Rev.). However, because that portion of the sentence which extends to confinement may now be ordered executed when the convening authority takes action (see Article 71(c)(2); R.C.M. 1113(b)), temporary custody is unnecessary in such cases. Therefore, this subsection applies only when death has been adjudged and approved. Subsection (4)(E) is taken from paragraph 89c(7) of MCM, 1969 (Rev.). Subsection (4)(F) is new. See Analysis, R.C.M. 305(k). See also United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983). Subsection (4)(G) is taken from paragraph 89c(9) of MCM, 1969 (Rev.). Subsection (4)(H) is modified based on the amendment of Article 71 which permits a reprimand to be ordered executed from action, regardless of the other components of the sentence. Admonition has been deleted. See R.C.M. 1003(b)(1).

Subsection (5) is based on paragraph 89c(8) of MCM, 1969 (Rev.). See also R.C.M. 810(k) and Analysis. The provision in paragraph 89c(8) requiring that the accused be credited with time in confinement while awaiting a rehearing is deleted. Given the procedures for imposition and continuation of restraint while awaiting trial (see R.C.M. 304 and 305), there should not be a credit simply because the trial is a rehearing.

(g) Incomplete, ambiguous, or erroneous action. This subsection is based on paragraph 95 of MCM, 1969 (Rev.). See generally United States v. Loft, 10 J.M.J. 266 (C.M.A. 1981); United States v. Lower, 10 J.M.J. 263 (C.M.A. 1981).


Rule 1108. Suspension of execution of sentence

This rule is based on Articles 71(d) and 74, and paragraphs 88e and 97a of MCM, 1969 (Rev.). See also Fed.R.Crim. P. 32(e). The second paragraph of the discussion to subsection (b) is based on United States v. Stonestifer, 2 M.J. 212 (C.M.A. 1977); United States v. Williams, 2 M.J. 74 (C.M.A. 1976); United States v. Occhi, 2 M.J. 60 (C.M.A. 1976). Subsection (c) is new and based on Article 71; United States v. Lallande, 22 U.S.C.M.A. 170, 46 C.M.R. 170 (1973); United States v. May, 10 U.S.C.M.A. 258, 27 C.M.R. 432 (1959). Cf. 18 U.S.C. § 3651 (“upon such terms and conditions as the court deems best”). The notice provisions are designed to facilitate vacation when that becomes necessary. See the Analysis, R.C.M. 1109. The language limiting the period of suspension to the accused’s current enlistment has been deleted. See United States v. Thomas, 45 C.M.R. 908 (N.C.M.R. 1972).

Cf. United States v. Claridy, 13 M.J. 308 (C.M.A. 1982). See also subsection (e) of this rule.

1990 Amendment: The third sentence was amended to delete the limitation of Secretarial designation to an “officer exercising general court-martial jurisdiction over the command to which the accused is assigned” and to permit such designation to any “commanding officer.” This comports with the language of Article 74(a), UCMJ and paragraphs 97a of MCM, 1951 and MCM, 1969. The specific designation of inferior courts-martial convening authorities to remit or suspend unexecuted portions was not intended to limit in any other respects the Secretarial designation power. Except for a sentence which has been approved by the President, remission or suspension authority is otherwise left entirely to departmental regulations.

The last sentence was added to clarify the authority of the officials named in section (b) to grant clemency or mitigating action on those parts of the sentence that have been approved and ordered executed but that have not actually been carried out. In the case of forfeiture the “carrying out” involves the actual collection after pay accrues on a daily basis. Thus, even when a sentence to total forfeiture has been approved and ordered executed, the named officials can still grant clemency or mitigating action. Although a prisoner may be administratively placed in a nonpay status when total forfeiture has been ordered executed, the total forfeiture is collected as it would otherwise accrue during the period that the prisoner is in a nonpay status. If clemency were granted, the prisoner could be returned administratively to a pay status, pay would accrue, and any resulting partial forfeiture would be collected as it accrues. Likewise, that portion of confinement which has not been served is “unexecuted”.

Rule 1109. Vacation of suspension of sentence

(a) In general. This subsection is based on Article 72 and paragraph 97b of MCM, 1969 (Rev.).

(b) Timeliness. This subsection is based on the fourth paragraph of paragraph 97b of MCM, 1969 (Rev.); United States v. Pells, 5 M.J. 380 (C.M.A. 1978); United States v. Rozynski, 3 M.J. 127, 129 (C.M.A. 1977).

(c) Confinement of probationer pending vacation proceedings. This subsection is new and based on Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); United States v. Bingham, 3 M.J. 119 (C.M.A. 1977). It is consistent with Fed.R.Crim. P. 32.1(a)(1). Note that if the actual hearing on vacation under subsection (d)(1) or (e)(3) and (4) is completed within the specified time period, a separate probable cause hearing need not be held.

(d) Violation of suspended general court-martial sentence or of a suspended court-martial sentence including a bad-conduct discharge. This subsection is based on Article 72(a) and (b); the first two paragraphs of paragraph 97b of MCM, 1969 (Rev.); United States v. Bingham, supra; United States v. Rozynski, supra. See also Fed.R.Crim. P. 32.1(a)(2).

(e) Vacation of suspended special court-martial sentence not including a bad-conduct discharge or of a suspended summary court-martial sentence. This subsection is based on Article 72(c); United States v. Bingham, supra; United States v. Rozynski, supra. Fed.R.Crim. P. 32.1(b) is not adopted. That rule requires a hearing before conditions of probation may be modified. Modification is seldom used in the military. Because a probationer may
be transferred or change duty assignments as a normal incident of military life, a commander should have the flexibility to make appropriate changes in conditions of probation without having to conduct a hearing. This is no intended to permit conditions of probation to be made substantially more severe without due process. At a minimum, the probationer must be notified of the changes.

1986 Amendment: Several amendments were made to R.C.M. 1109 to specify that the notice to the probationer concerning the vacation proceedings must be in writing, and to specify that the recommendations concerning vacation of the suspension provided by the hearing officer must also be in writing. Black v. Romano, 471 U.S. 606, 105 S.Ct. 2254 (1985). Several references to "conditions of probation" were changed to "conditions of suspension" for consistency of terminology.

Rule 1110. Waiver or withdrawal of appellate review

Introduction. This rule is new and is based on Article 61, as amended, see Military Justice Act of 1983, Pub.L. No. 98-209, § 5(b)(1), 97 Stat. 1393 (1983). The rule provides procedures to ensure that a waiver or withdrawal of appellate review is a voluntary and informed choice. See also Appendices 19 and 20 for forms. See S. Rep. No. 53, 98th Cong., 1st Sess. 22-23 (1983).

(a) In general. This subsection is based on Article 61. The discussion is also based on Articles 64 and 69(b).

(b) Right to counsel. This subsection is based on Article 61(a).

Rule 1111. Disposition of the record of trial after action

This rule is based generally on paragraph 91 of MCM, 1969 (Rev.), but is modified to conform to the accused's right to waive or withdraw appellate review and to the elimination of supervisory review and of automatic review of cases affecting general and flag officers. See Articles 61, 64, 65(b). Some matters in paragraph 91 of MCM, 1969 (Rev.) are covered in other rules. See R.C.M. 1103(b)(3)(F), 1104(b)(1)(B).

Rule 1112. Review by a judge advocate

This rule is based on Articles 64 and 65(b), as amended, see Military Justice Act of 1983, Pub.L. No. 98-209, §§ 6(d)(1), 7(a)(1), 97 Stat. 1393 (1983).
cated to reflect this change. The subsection was not intended to serve no useful purpose.

Military duty, an additional staff judge advocate's advice would be required only when the service member wishes to request clemency entitlement. See S.Rep. No. 53, 98th Cong., 1st Sess. 25 (1983).

Rule 1113. Execution of sentences

Introduction. Fed.R.Crim. P. 38 is inapplicable. The execution of sentence in the military is governed by the code. See Articles 57 and 71. See also Articles 60, 61, 64, 65, 66, and 67.

(a) In general. This subsection is based on Article 71(c)(2) and the first paragraph of paragraph 98 of MCM, 1969 (Rev.). See also Articles 60, 61, 64, 65, 66, and 67.

1991 Amendment: This subsection was amended by adding a reference to subsection (5) of R.C.M. 1113(d). This brings the discussion into accord with the general rule of R.C.M. 1113(d)(2)(A) that any court-martial sentence to confinement begins to run from the date it is adjudged.

(b) Punishments which the convening authority may order executed in the initial action. This subsection is based on Article 71(d). See also the first paragraph of paragraph 88d(1) of MCM, 1969 (Rev.). Note that under the amendment of Article 71 (see Pub. L. No. 98-209, § 5(e), 97 Stat. 1393 (1983)), the convening authority may order parts of a sentence executed in the initial action, even if the sentence includes other parts (e.g., a punitive discharge) which cannot be ordered executed until the conviction is final.

(c) Punishments which the convening authority may not order executed in the initial action. This subsection is based on the sources noted below. The structure has been revised to provide clearer guidance as to who may order the various types of punishments executed. Applicable service regulations should be consulted, because the Secretary concerned may supplement this rule, and may under Article 74(a) designate certain officials who may remit unexecuted portions of sentences. See also R.C.M. 1206.

Subsection (1) is based on Article 71(c). See also Article 64(c)(3). The last two sentences of this subsection are based on S.Rep. No. 53, 98th Cong., 1st Sess. 25 (1983).

1991 Amendment: Language was added to the second sentence of the paragraph following subsection (c)(1)(B) to specify that a staff judge advocate's advice is required only when the servicemember is not on appellate leave on the date of final judgment and more than six months have elapsed since the convening authority's approval of the sentence. The third sentence was modified to reflect this change. The subsection was not intended to grant an additional clemency entitlement to a servicemember. Significant duty performance since the initial approval is relevant to the convening authority's determination of the best interest of the service. Since a member on appellate leave is performing no military duty, an additional staff judge advocate's advice would serve no useful purpose.

Subsection (2) is based on Article 71(b).

Subsection (3) is based on Articles 66(b), 67(b)(1), and 71(a).

(d) Other considerations concerning execution of sentences. Subsection (1) is based on the third paragraph of paragraph 126a of MCM, 1969 (Rev.). The second paragraph of paragraph 88d(1) of MCM, 1969 (Rev.) is deleted as unnecessary.

1986 Amendment: Subsection (d)(1)(B) was added to incorporate the holding in Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986). The plurality in Ford held that the Constitution precludes executing a person who lacks the mental capacity to understand either that he will be executed or why he will be executed. See also United States v. Washington, 6 U.S.C.M.A. 114, 119, 9 C.M.R. 240, 245 (1955). The Court also criticized the procedures specified by Florida law used to determine whether a person lacks such capacity because the accused was provided no opportunity to submit matters on the issue of capacity, but the case is unclear as to what procedures would suffice.

Because of this ambiguity, the drafter's elected to provide for a judicial hearing, with representation for the government and the accused. This is more desirable, if not more difficult, to achieve than merely to determine whether the accused's lack of capacity is on the defense when the issue is before the court for adjudication. This is consistent with amendments to R.C.M. 909(c)(2) and R.C.M. 916(k)(3)(A) which shifted to the defense the burden of showing lack of mental capacity to stand trial and lack of mental responsibility. The rule also establishes a presumption of capacity and allows limits on the scope of the sanity board's examination.
Subsection (5) is based on the last paragraph of paragraph 125 MCM, 1969 (Rev.).

Paragraph 88d(3) of MCM, 1969 (Rev.) is deleted based on the amendment of Articles 57(a) and 71(c)(2) which eliminated the necessity for application or deferment of forfeitures. Forfeitures always may be ordered executed in the initial action.

**Rule 1114. Promulgating orders**

(a) In general. Subsections (1) and (2) are based on the first paragraph of paragraph 90a of MCM, 1969 (Rev.). Subsection (3) is based on paragraph 90a of MCM, 1969 (Rev.). This rule is consistent in purpose with Fed.R.Crim. P. 32(b)(1).

(b) By whom issued. Subsection (1) is based on paragraph 90b(1) of MCM, 1969 (Rev.) except that the requirement that the supervisory authority, rather than the convening authority, issue the promulgating order in certain special courts-martial has been deleted, since action by the supervisory authority is no longer required. See Article 65. The convening authority now issues the promulgating order in all cases. See generally United States v. Schultikte, 14 U.S.C.M.A. 31, 33 C.M.R. 243 (1963) (actions equivalent to publication). Subsection (2) is based on paragraphs 90b(2) and 107 of MCM, 1969 (Rev.).

(c) Contents. Subsection (1) is based on Appendix 15 of MCM, 1969 (Rev.) but modifies it insofar as the only item which must be recited verbatim in the order is the convening authority's action. The charges and specifications should be summarized to adequately describe each offense, including allegations which affect the maximum authorized punishments. Cf. Fed. R. Crim. P. 32(b)(1). See also Form 25, Appendix of Forms, Fed.R.Crim. P. 32(b)(1). Subsection (2) is based on the third, fourth, and fifth paragraph of paragraph 90a of MCM, 1969 (Rev.) except that reference is no longer made to action by the supervisory authority. See Article 65. See United States v. Veilleux, 1 M.J. 811, 815 (A.F.C.M.R. 1976); United States v. Hurlburt, 1 M.J. 742, 744 (A.F.C.M.R. 1975), rev'd on other grounds, 3 M.J. 387 (C.M.A. 1977).

Subsection (3) is based on the first sentence of the second paragraph of paragraph 90a of MCM, 1969 (Rev.).

1986 Amendment: Reference to “subsequent actions” was changed to to “subsequent orders” to correct an error in MCM, 1984.

1990 Amendment: Subsection (c)(2) was amended in conjunction with the implementation of findings of not guilty only by reason of lack of mental responsibility provided for in Article 50a, UCMJ (Military Justice Amendments of 1986, tit. VIII, 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, 100 Stat. 3905 (1986)).

(d) Orders containing classified information. This subsection is based on the first two paragraphs of paragraph 90c of MCM, 1969 (Rev.). The second sentence of the first paragraph of paragraph 90c is deleted as unnecessary.

(e) Authentication. This subsection is based on forms at Appendix 15 of MCM, 1969 (Rev.) and clarifies the authentication of promulgating orders. See Mil.R.Evid. 902(10). Note that this subsection addresses authentication of the order, not authentication of copies.

(f) Distribution. This subsection is based on paragraph 90d of MCM, 1969 (Rev.). The matters in paragraph 96 of MCM, 1969 (Rev.) are deleted. These are administrative matters better left to service regulations.

**CHAPTER XII. APPEALS AND REVIEW**

**Rule 1201. Action by the Judge Advocate General**

(a) Cases required to be referred to a Court of Military Review. This subsection is based on Article 66(b).

(b) Cases reviewed by the Judge Advocate General. Subsection (1) is based on Article 69(a). Subsection (2) is based on Article 64(b)(3) and Article 69(b). Subsection (3) is based on Article 69(b). Subsection (4) is based on Article 69(c). Subsection (b) is similar to paragraph 103 and the first two paragraphs of paragraph 110A of MCM, 1969 (Rev.) except insofar as the amendments of Articles 61, 64, and 69 dictate otherwise. See Military Justice Act of 1983, Pub.L. No. 98-209, §§ 4(b), 7(a), (e), 97 Stat. 1393 (1983). The last paragraph of paragraph 110A of MCM, 1969 (Rev.) was deleted as unnecessary.

1986 Amendment: Subsection (b)(3)(A) was changed to conform to the language of Article 69(b), as enacted by the Military Justice Act of 1983, which precludes review of cases previously reviewed under Article 69(a).

1990 Amendment: The discussion to subsection (b)(3)(A) was amended in conjunction with the implementation of Article 50a, UCMJ (Military Justice Amendments of 1986, tit. VIII, § 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, 100 Stat. 3905 (1986)). To find an accused not guilty only by reason of lack of mental responsibility, the fact-finder made a determination that the accused was guilty of the elements of the offense charged or of a lesser included offense but also determined that, because he lacked mental responsibility at the time of the offense, he could not be punished for his actions. See R.C.M. 921(c)(4). Although the finding does not subject the accused to punishment by court-martial, the underlying finding of guilt is reviewable under this rule. Review, however, does not extend to the determination of lack of mental responsibility. Since the accused voluntarily raised the issue and has the burden of proving lack of mental responsibility by clear and convincing evidence, he has waived any later review of the propriety of that determination.

1990 Amendment: The date from which the two year period to file an application under R.C.M. 1201(b)(3) begins to run was amended to account for cases resulting in a finding of not guilty only by reason of lack of mental responsibility. Such cases would not proceed to sentencing but could be the subject of an application under this rule. As amended, the accused would have two years from the date findings were announced in which to file an application for review.


**Rule 1202. Appellate counsel**

(a) In general. This subsection is based on Article 70(a) and paragraph 102a of MCM, 1969 (Rev.).
APPENDIX 21

(b) Duties. This subsection is based on Article 70(b) and (c). See also the first two paragraphs of paragraph 102b of MCM, 1969 (Rev.). The penultimate sentence in the rule is based on the penultimate sentence in the fourth paragraph of paragraph 102b of MCM, 1969 (Rev.). The last sentence in the fourth paragraph of paragraph 102b of MCM, 1969 (Rev.) is deleted as unnecessary. The last sentence in the rule is new. It is based on practice in Federal civilian courts. See Rapp v. Van Dusen, 350 F. 2d 806 (3d Cir. 1965); Fed.R.App. P.21(b). See also Rule 27, Revised Rules of the Supreme Court of the United States (Supp. IV 1980); United States v. Haldeman, 599 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977). See generally J. Moore, B. Ward, and J. Lucas, Moore’s Federal Practice Para. 221.03 (2d ed. 1982).

The first two paragraphs in the discussion modify the third and fourth paragraphs of paragraph 102b of MCM, 1969 (Rev.). The Court of Military Appeals has held that appellate defense counsel is obligated to assign as error before the Court of Military Review all arguable issues unless such issues are, in counsel’s professional opinion, clearly frivolous. In addition, appellate defense counsel must invite the attention of the court to issues specified by the accused, unless the accused expressly withdraws such issues, if these are not otherwise assigned as errors. Also, in a petition for review by the Court of Military Appeals, counsel must, in addition to errrors counsel believes have merit, identify issues which the accused wants raised. See United States v. Hullum, 15 M.J. 261 (C.M.A. 1983); United States v. Knight, 15 M.J. 195 (C.M.A. 1982); United States v. Grosteofon, 12 M.J. 431 (C.M.A. 1982). See also United States v. Dupas, 14 M.J. 28 (C.M.A. 1982); United States v. Rainey, 13 M.J. 462, 463 n. 1 (C.M.A. 1982) (Everett, C.J., dissenting). But see Jones v. Barnes, 463 U.S. 745 (1983) (no constitutional requirement for appointed counsel to raise every nonfrivolous issue requested by client). The third paragraph in the discussion is based on Article 70(d) and paragraph 102 of MCM, 1969 (Rev.). The fourth paragraph in the discussion is based on the establishment of review by the Supreme Court of certain decisions of the Court of Military Appeals. See Article 67(b) and 28 U.S.C. § 1259; Military Justice Act of 1983, Pub.L. No. 98-209, § 10, 97 Stat. 1393 (1983). The fifth paragraph in the discussion is based on United States v. Patterson, 22 U.S.C.M.A. 157, 46 C.M.R. 157 (1973). See also United States v. Kelker, 4 M.J. 323 (C.M.A. 1978); United States v. Bell, 11 U.S.C.M.A. 306, 29 C.M.R. 122 (1960).

Rule 1203. Review by a Court of Military Review
(a) In general. This subsection is based on Article 66(a). The discussion is based on Article 66(a), (f), (g) and (h). See also the first paragraph of paragraph 100a and paragraph 100d of MCM, 1969 (Rev.).

(b) Cases reviewed by a Court of Military Review. This subsection is based on Article 66(b) and the third sentence of Article 69(a). Interlocutory appeals by the Government are treated in R.C.M. 908. The third through the fifth paragraphs in the discussion are based on Articles 59 and 66(c) and (d) and are taken from the second and third paragraphs of paragraph 100a and the first paragraph of paragraph 100b of MCM, 1969 (Rev.). See also United States v. Darville, 5 M.J. 1 (C.M.A. 1978). The last sentence in the first paragraph is based on United States v. Brownd, 6 M.J. 338 (C.M.A. 1979); United States v. Yoakum, 8 M.J. 763 (A.C.M.R.), aff’d, 9 M.J. 417 (C.M.A. 1980). See also Corley v. Thurman, 3 M.J. 192 (C.M.A. 1977). The sixth paragraph in the discussion is based on Dettlinger v. United States, 7 M.J. 216 (C.M.A. 1979); 28 U.S.C. § 1651(a). See also United States v. LaBella, 15 M.J. 228 (C.M.A. 1983); United States v. Caprio, 12 M.J. 30 (C.M.A. 1981); United States v. Redding, 11 M.J. 100 (C.M.A. 1981); United States v. Bogan, 13 M.J. 768 (A.C.M.R. 1982). The establishment of a statutory right of the Government to appeal certain rulings at trial might affect some of these precedents. See United States v. Weinstein, 411 F.2d 622 (2d Cir. 1975), cert. denied, 422 U.S. 1042 (1976).

(c) Action on cases reviewed by a Court of Military Review. Subsection (1) is based on Article 67(b)(2). See also paragraph 100(b) and the first sentence of paragraph 100c(1)(a) of MCM, 1969 (Rev.). See also United States v. Leslie, 11 M.J. 131 (C.M.A. 1981); United States v. Clay, 10 M.J. 269 (C.M.A. 1981).

Subsection (2) is based on Article 66(e). See also United States v. Best, 4 U.S.C.M.A. 581, 16 C.M.R. 155 (1954). The discussion is consistent with paragraph 100b(3) of MCM, 1969 (Rev.).

Subsection (3) modifies paragraph 100c(1)(a) of MCM, 1969 (Rev.). It allows each service to prescribe specific procedures for service of Court of Military Review decisions appropriate to its own organization and needs, in accordance with the increased flexibility allowed under the amendment of Article 67(c). See Military Justice Amendments of 1981, Pub.L. No. 97-81; 95 Stat. 1090.

Subsection (4) is based on the first paragraph of paragraph 105b of MCM, 1969 (Rev.). See also Article 74.

Because R.C.M. 1203 is organized somewhat differently than paragraph 100 of MCM, 1969 (Rev.), the actions described in subsection (c) of this rule apply to cases referred by the Judge Advocate General to the Court of Military Review under Article 69 as well as Article 66. The actions described are appropriate for both types of cases, to the extent that they are applicable.

1986 Amendment: Subsection 5 is based on the second paragraph of paragraph 124 of MCM, 1969 (Rev.). The fourth sentence is based, in part, on United States v. Williams, 18 M.J. 533 (A.F.C.M.R. 1984). See also United States v. Korzeniewski, 7 U.S.C.M.A. 314, 22 C.M.R. 104 (1956); United States v. Bledsoe, 16 M.J. 977 (A.F.C.M.R. 1983). The provision assigning the burden of proof is consistent with amendments to R.C.M. 909(c)(2) and R.C.M. 916(k)(3)(A) which shifted to the defense the burden of showing lack of mental capacity to stand trial and lack of mental responsibility.

(d) Notification to accused. This subsection is based on Article 67(c) as amended, see Military Justice Amendments of 1981, Pub.L. 97–81, § 5, 95 Stat. 1088–89 and on the first paragraph of paragraph 100c(1)(a) of MCM, 1969 (Rev.) (see Exec. Order No. 12340 (Jan. 20, 1982)). The discussion is based on Article 67(b) and on the second paragraph of paragraph 100c(1)(a) of MCM, 1969 (Rev.).

(e) Cases not reviewed by the Court of Military Appeals. Subsection (1) is based on the first sentence of paragraph 100c(1)(b) of MCM, 1969 (Rev.). See Article 71(b). Subsection (2) is based on the last sentence of paragraph 100c(1)(a) of MCM, 1969 (Rev.). See Article 66(e).

(f) Scope. This subsection clarifies that the procedures for Government appeals of interlocutory rulings at trial are governed by R.C.M. 908.
Rule 1204. Review by the Court of Military Appeals
(b) Petition by the accused for review by the Court of Military Appeals. Subsection (1) is based on the last paragraph of paragraph 102b of MCM, 1969 (Rev.). Note that if the case reached the Court of Military Review by an appeal by the Government under R.C.M. 908, the accused would already have detailed defense counsel. Subsection (2) is based on C.M.A.R. 19(a)(3).
(c) Action on decision by the Court of Military Appeals. Subsection (1) substantially repeats Article 67(f) as did its predecessor, the fourth paragraph of paragraph 101 of MCM, 1969 (Rev.) except that paragraph did not address possible review by the Supreme Court. See Article 67(h); 28 U.S.C. § 1259. Subsections (2) and (3) are based on Article 71(a) and (b) and on the last paragraph of paragraph 101 of MCM, 1969 (Rev.). Subsection (4) is new and reflects the possibility of review by the Supreme Court. See Article 67(h); 28 U.S.C. § 1259. See also Article 71.

Rule 1205. Review by the Supreme Court

Rule 1206. Powers and responsibilities of the Secretary
(a) Sentences requiring approval by the Secretary. This subsection is based on the first sentence of Article 71(b).
(b) Remission and suspension. Subsection (1) is based on Article 74(a). Subsection (2) is based on Article 74(b). Subsection (3) is based on the second paragraph of paragraph 105b of MCM, 1969 (Rev.). See Exec. Order No. 10498 (Nov. 4, 1953), 18 Fed.Reg. 7003. The reference in paragraph 105a of MCM, 1969 (Rev.) to Secretarial authority to commute sentences in deleted here as unnecessary. See Article 71(b).

Rule 1207. Sentences requiring approval by the President
This rule is based on the first sentence of Article 71(a). Paragraph 105a of MCM, 1969 (Rev.), which stated the President's power to commute sentences, is deleted. Such a statement is unnecessary. See also U.S. Const. art. II, § 2, cl. 1; Schick v. Reed, 419 U.S. 256 (1974).

Rule 1208. Restoration
Introduction. This rule is based on Article 75.
(a) New trial. This subsection is based on paragraph 110d of MCM, 1969 (Rev.). It has been modified based on the modification of the procedure for executing sentences in new trials. See Analysis, R.C.M. 1209. The last two paragraphs in paragraph 110d are omitted here. They repeated Article 75(b) and (c), which are referred to in the discussion.
(b) Other cases. This subsection is based on paragraph 106 of MCM, 1969 (Rev.).

Rule 1209. Finality of courts-martial
(a) When a conviction is final. This subsection is based on Article 71(c), as amended, see Military Justice Act of 1983, Pub.L. No. 98–209, § 5(e)(1), 97 Stat. 1393 (1983). See also Article 64. Note that subsection (2)(B) qualifies (2)(A) even if the officer exercising general court-martial jurisdiction over the accused (or that officer's successor) approves the findings and sentence, the conviction is not final if review by the Judge Advocate General is required. See Article 64(c)(3); R.C.M. 1201(b)(2). As to the finality of an acquittal or disposition not amounting to findings of guilty, see Articles 44; R.C.M. 905(g). See also Grafton v. United States, 206 U.S. 333 (1907).
(b) Effect of finality. This subsection is taken from Article 76 and paragraph 108 of MCM, 1969 (Rev.). See also Article 69(b).

Rule 1210. New trial
This rule is based on Article 73 and is based on paragraphs 109 and 110 of MCM, 1969 (Rev.). Some matters in those paragraphs (e.g., paragraphs 110e(2) and 109d) are covered in other rules. See R.C.M. 810; 1209. The second sentence of paragraph 109d(1) has been deleted as unnecessary and potentially confusing. Subsections (f)(2) and (3) adequately describe the standards for a new trial. The rule is generally consistent with Fed.R.Crim. P. 33, except insofar as Article 73 provides otherwise. As to subsection (f), see also United States v. Bacon, 12 M.J. 489 (C.M.A. 1982); United States v. Thomas, 11 M.J. 135 (C.M.A. 1981). With respect to the second example under subsection (f)(3) of this rule, it should be noted that if the information concealed by the prosecution was specifically requested by the defense, a different standard may apply. See United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963). See also United States v. Horsey, 6 M.J. 112 (C.M.A. 1979). The second sentence of paragraph
110f of MCM, 1969 (Rev.) has been deleted. See Analysis, R.C.M. 1107(f)(3)(D)(i).

Subsections (h)(3), (4), and (5) have been modified to permit the convening authority of a new trial to take action in the same way as in a rehearing; i.e., the convening authority may, when otherwise authorized to do so (see R.C.M. 1113), order the sentence executed. Forwarding a new trial to the Judge Advocate General is not required just because the case was a new trial. The special circumstances of a new trial do no necessitate such different treatment in post-trial action.

CHAPTER XIII. SUMMARY COURTS-MARTIAL

Rule 1301. Summary courts-martial generally

(a) Composition. The first sentence is based on Article 16(3). In the second sentence the express authority for the Secretary concerned to provide for the summary court-martial to be from a different service than the accused is new. Paragraph 4g(2) of MCM, 1969 (Rev.) included this statement: "However, a summary court-martial will be a member of the same armed force as the accused." The fact that this statement was included in a subparagraph entitled "Joint command or joint task force" left unclear what rule applied in other commands. The Working Group elected to clarify the situation by stating a general prohibition against detailing a summary court-martial from a service different from that of the accused, but allowing the service Secretaries to provide exceptions. This is based on the desirability of having the summary court-martial be from the same service as the accused, but recognizes that under some circumstances, as where a small unit of one service is colocated with another service, greater flexibility is needed, especially in order to comply with the policy in the third sentence of this subsection. The expression of policy in the third sentence is based on paragraph 4c of MCM, 1969 (Rev.). The fourth sentence is based on Article 24(b) and the fifth sentence of the first paragraph of paragraph 5c of MCM, 1969 (Rev.). The last sentence is based on the last sentence of the first paragraph of paragraph 5c of MCM, 1969 (Rev.), but has been modified to clarify that the summary court-martial may be from outside the command of the summary court-martial convening authority.

(b) Function. This subsection is based on paragraph 79a of MCM, 1969 (Rev.). The rule does not restrict other lawful functions which a summary court-martial may perform under the Code. See, e.g., Article 136. A summary court-martial appointed to dispose of decendent's effects under 10 U.S.C. 5107(f) has been deleted. See Analysis, R.C.M. 1107(f)(3)(D)(i).

(c) Jurisdiction. This subsection is based on the first sentence of Article 20 and the first sentence of paragraph 16a of MCM, 1969 (Rev.). The reference to Chapter II was added to bring attention to other jurisdictional standards which may apply to summary courts-martial.

(d) Punishments. This subsection is based on paragraph 16b of MCM, 1969 (Rev.), and Article 20.

(e) Counsel. The code does not provide a right to counsel at a summary court-martial (Articles 27 and 38). The Supreme Court of the United States held in Middendorf v. Henry, 425 U.S. 25 (1976), that an accused is not entitled to counsel in summary courts-martial, and that confinement may be adjudged notwithstanding the failure to provide the accused with counsel. In so holding, the Court distinguished summary courts-martial from civilian criminal proceedings at which counsel is required. See Argersinger v. Hamlin, 407 U.S. 25 (1972). Although the issue in Middendorf v. Henry, supra, was whether counsel must be provided to an accused at a summary court-martial, the Court's opinion clearly indicates that there is no right to any counsel (including retained counsel) at summary courts-martial. It is within the discretion of the convening authority to detail, or otherwise make available, a military attorney to represent the accused at a summary court-martial.

This rule does not provide a right to consult with counsel prior to a summary court-martial. There is no constitutional or statutory basis for such a right. United States v. Mack, 9 M.J. 300, 320-21 (C.M.A. 1980). A requirement for such consultation, although desirable under some circumstances, is unfeasible under others wherein it impedes the purposes of summary courts-martial by significantly delaying the proceedings. At present, the admissibility of a summary court-martial without a prior opportunity to consult with counsel in subsequent courts-martial has not been fully resolved. United States v. Mack, supra; United States v. Booker, 5 M.J. 238 (C.M.A. 1977). See United States v. Kuehl, 11 M.J. 126 (C.M.A. 1981).

(f) Power to obtain witnesses and evidence. This subsection is based on Article 46 and 47 and paragraphs 79b and 115 of the MCM, 1969 (Rev.).

(g) Secretarial limitations. This subsection is new and recognizes the implicit authority of the service secretaries to provide additional rules, such as those governing the exercise of summary court-martial jurisdiction.

Rule 1302. Convening a summary court-martial

(a) Who may convene summary courts-martial. This subsection is based on Article 24(a) and paragraph 5c of MCM, 1969 (Rev.).

(b) When convening authority is the accuser. This subsection is based on the second paragraph of paragraph 5c of MCM, 1969 (Rev.).

(c) Procedure. This subsection clarifies that a separate written order is not necessary to convene a summary court-martial; this may be done directly on the charge sheet. Because there is little difference between summary, special, and general courts-martial with respect to the initiation and forwarding of charges, these procedures are simply referred to in the rule.

Rule 1303. Right to object to trial by summary court-martial

This rule is based on Article 20 and the second and third sentences of paragraph 16a of MCM, 1969 (Rev.). Arraignment ends the right to object because arraignment is the point at which the accused is "brought to trial" within the meaning of Article 20.

Rule 1304. Trial procedure

(a) Pretrial duties. This subsection is based on paragraphs 79c and 33d of MCM, 1969 (Rev.).

(b) Summary court-martial procedure. Paragraph 79a of MCM, 1969 (Rev.), suggested that the summary court-martial use the general court-martial trial guide. However, the general court-martial trial guide is inadequate for the person who ordinarily conducts the summary court-martial. The trial guide in Appendix 9 of this Manual was drafted to assist the lay presiding officer at
summary courts-martial and incorporate the rules prescribed in this chapter.

Subsection (1) is based on paragraph 79d(1) of MCM, 1969 (Rev.). The requirement to inform the accused of the date of referral was added to subsection (1)(B) to assist the accused in making motions to dismiss or for other relief. Subsection (1)(E) is intended to more fully inform the accused of the scope of the evidence (testimonial, documentary, and physical) expected to be introduced. Subsection (1)(F) is new and is designed to assist the accused in making motions and presenting evidence in defense and in extenuation and mitigation. Subsection (1)(G) is new and is designed to assure the accused that no evidence, including statements previously made to the officer detailed to conduct the summary court-martial, will be considered unless admitted in accordance with the Military Rules of Evidence. Subsection (1)(H) is new. Subsection (1)(L) is expanded to assure the accused that the exercise of rights guaranteed under the Fifth Amendment and Article 31 will not be held against the accused.

Subsection (2)(A) is based on Article 20 and the second paragraph of paragraph 79d(1) of MCM, 1969 (Rev.).

Subsection (2)(B) is based on paragraph 79d(2) of MCM, 1969 (Rev.).

Subsection (2)(C) is new. MCM, 1969 (Rev.) did not clarify the timing of motions in summary courts-martial.

Subsection (2)(D)(i) is new and designed to standardize the guilty plea inquiry by referring the summary court-martial to R.C.M. 909 which prescribed the inquiry for summary, special, and general courts-martial. Subsections (2)(D)(ii) and (iii) through (v) are based on paragraph 79d(2) of MCM, 1969 (Rev.). The provision in paragraph 79d(2) which provided for hearing evidence on the offense(s) in a guilty plea case is omitted here because this procedure is covered in R.C.M. 1001(b)(4).

Subsection (2)(E)(i) is based on Mil.R.Evid. 101 and 1101. Subsections (2)(E)(ii) through (iv) are based on paragraph 79d(3) of MCM, 1969 (Rev.).

Subsections (2)(F)(i) through (iii) are based on paragraph 79d(4) of MCM, 1969 (Rev.). Note that the summary court-martial may consider otherwise admissible records from the accused's personnel file under R.C.M. 1001(b)(2). This was not permitted under MCM, 1969 (Rev.) before the amendment of paragraph 75 on 1 August 1981. See Exec. Order No. 12315 (July 29, 1981).

Subsection (2)(F)(iv) is new and fulfills the summary court-martial's post-trial responsibility to protect the interests of the accused by informing the accused of post-trial rights.

Subsection (2)(F)(v) is new and designed to inform the convening authority of any suspension recommendation and deferment request before receipt of the record of trial. Subsection (2)(F)(vi) modifies paragraph 79d(4) of MCM, 1969 (Rev.). It recognizes the custodial responsibility of the summary court-martial over an accused sentenced to confinement until the accused is delivered to the commander or the commander's designee. It does not address the subsequent disposition of the accused, as this is a prerogative of the commander.

**Rule 1305. Record of trial**

(a) In general. This rule is based on paragraphs 79e and 91c of MCM, 1969 (Rev.) insofar as they prescribed that the record of trial of a summary court-martial will consist of a notation of key events at trial and insofar as they permitted the convening or higher authority to require additional matters in the record. Additional requirements may be established by the Secretary concerned, the convening authority, or other competent authority. The modification of the format of the charge sheet (see Appendix 4) eliminated it as the form for the record of trial of a summary court-martial. A separate format is now provided at Appendix 15.

(b) Contents. This subsection is based on paragraphs 79e and 91c of MCM, 1969 (Rev.).

1986 Amendment: R.C.M. 1305(b)(2) was amended to delete the requirement that the record of trial in summary courts-martial reflect the number of previous convictions considered. The Committee concluded that this requirement had only slight utility and also noted that DD Form 2329, which serves as the record of trial in summary courts-martial, has no entry for this information. The Committee also noted that the Services each have requirements for retaining documents introduced at summary courts-martial with the record of trial.

(c) Authentication. This subsection is based on paragraph 79e of MCM, 1969 (Rev.).

(d) Medical Certificate. This subsection is based on paragraphs 91c and 125 of MCM, 1969 (Rev.).

(e) Forwarding copies of the record. Subsection (1) is based on Article 60(b)(1). Subsection (2) is based on the third paragraph of paragraph 91c of MCM, 1969 (Rev.). Subsection (3) is self-explanatory.

**Rule 1306. Post-trial procedure**

(a) Accused's post-trial petition. This subsection is based on Article 60(b). Cf. Article 38(c).

(b) Convening authority's action. Subsection (1) refers to the detailed provisions concerning the convening authority's initial review and action in R.C.M. 1107. The time period is based on Article 60(b)(1). Subsections (2) through (4) are based on paragraph 90e of the MCM, 1969 (Rev.). Subsection (2) is modified to reflect that the accused ordinarily will receive a copy of the record before action is taken. See Article 60(b)(2).

(c) Review by a judge advocate. This subsection is based on Article 64.

(d) Review by the Judge Advocate General. This subsection is based on Article 69 and refers to the detailed provisions governing such requests for review in R.C.M. 1201.

**PART IV. PUNITIVE ARTICLES**

Introduction. Unless otherwise indicated, the elements, maximum punishments and sample specifications in paragraphs 3 through 113 are based on paragraphs 157 through 213, paragraph 127c (Table of Maximum Punishments), and Appendix 6c of MCM, 1969 (Rev.).

1986 Amendment: The next to last paragraph of the introduction to Part IV was added to define the term "elements," as used in Part IV. In MCM, 1969 (Rev.), the equivalent term used was "proof." Both "proof" and "elements" referred to the statutory elements of the offense and to any additional aggravating factors prescribed by the President under Article 56, UCMJ, to increase the maximum permissible punishment above that allowed for the basic offense. These additional factors are commonly referred to as "elements," and judicial construction has approved this usage, as long as these "elements" are pled, proven, and instructed upon. United States v. Flucas, 23 U.S.C.M.A. 274, 49 C.M.R. 449

1. Article 77—Principals

The common law definitions in the second paragraph of subparagraph b(1) are based on R. Perkins, Criminal Law 643-666 (2d ed. 1969); and I. C. Torcia, Wharton's Criminal Law and Procedure §§ 29–38 (1978). Several common law terms such as "aider and abettor" are now used rather loosely and do not always retain their literal common law meanings, See United States v. Burroughs, 12 M.J. 380, 384 n.4. (C.M.A. 1982); United States v. Molina, 581 F.2d 56, 61 n.8 (2d Cir. 1978). To eliminate confusion, this subparagraph avoids the use of such terms wherever possible.

See United States v. Burroughs, supra at 382 n.3.

(2) Who may be liable for an offense. Subparagraph (2)(a) is based on paragraph 156 of MCM, 1969 (Rev.). See 18 U.S.C.A. § 2 Historical and Revision Notes (West 1969). See also United States v. Giles, 300 U.S. 41 (1937), Wharton's, supra at §§ 30, 31, 35.

Subparagraph (2)(b) sets forth the basic formulation of the requirements for liability as a principal. An act (which may be passive, as discussed in this subparagraph) and intent are necessary to make one liable as a principal. See United States v. Burroughs, supra; United States v. Jackson, 6 U.S.C.M.A. 193, 19 C.M.R. 319 (1955); United States v. Wooten, 1 U.S.C.M.A. 358, 3 C.M.R. 92 (1952); United States v. Jacobs, 1 U.S.C.M.A. 209, 2 C.M.R. 115 (1952). See also United States v. Walker, 621 F.2d 163 (5th Cir. 1980), cert. denied, 450 U.S. 1000 (1981); Moret v. United States, 127 F.2d 827 (6th Cir. 1942); United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938). The terms "assisting" and "encouraging, advising, and instigating" have been substituted for "aiding" and "abetting" respectively, since the latter terms are technical and may not be clear to the lay reader. See Black's Law Dictionary 5, 63 (5th ed., 1979).

See also Nye and Nissen v. United States, 336 U.S. 613, 620 (1949); Wharton's, supra at 246-47.


(4) Parties whose intent differs from the perpetrators. This subparagraph is based on the first paragraph in paragraph 156 of MCM, 1969 (Rev.). See United States v. Jackson, 6 U.S.C.M.A. 193, 19 C.M.R. 319 (1955); Wharton's, supra at § 35.


Principals independently liable. This subparagraph is new and is based on Federal decisions. See Standefer v. United States, supra; United States v. Chenaur, 552 F.2d 294 (9th Cir. 1977); United States v. Frye, 548 F.2d 765 (8th Cir. 1977).


2. Article 78—Accessory after the fact

(2) Failure to report offense. This subparagraph is based on paragraph 157 of MCM, 1969 (Rev.). United States v. Smith, 5 M.J. 129 (C.M.A. 1978).

(3) Offense punishable by the code. This subparagraph is based on Article 78; United States v. Michaels, 3 M.J. 846 (A.C.M.R. 1977); United States v. Blevins, 34 C.M.R. 967 (A.F.B.R. 1964).


(6) Accessory after the fact not a lesser included offense. This subparagraph is based on United States v. McFarland, 8 U.S.C.M.A. 42, 23 C.M.R. 266 (1957).


3. Article 79—Lesser included offenses

(2) Multiple lesser included offenses. This subparagraph is based on paragraph 158 of MCM, 1969 (Rev.). See also United States v. Calhoun, 5 U.S.C.M.A. 428, 18 C.M.R. 52 (1955).
4. Article 80—Attempts
c. Explanation. (1) In general. This subparagraph is based on paragraph 159 of MCM, 1969 (Rev.).
(4) Solicitation. This subparagraph is based on paragraph 159 of MCM, 1969 (Rev.).
(5) Attempts not under Article 80. This subparagraph is based on paragraph 159 of MCM, 1969 (Rev.).

1986 Amendment: In 4c(5), subparagraph (e) was redesignated as subparagraph (f), and a new subparagraph (e) was added to reflect the offense of attempted espionage as established by the Department of Defense Authorization Act, 1986, Pub.L. No. 99-145, § 534, 99 Stat. 583, 634-35 (1985) (art. 106a).
(6) Regulations. This subparagraph is new and is based on United States v. Davis, 16 M.J. 225 (C.M.A. 1983); United States v. Foster, 14 M.J. 246 (C.M.A. 1983).

e. Maximum punishment 1991 Amendment: This paragraph was revised to allow for the imposition of confinement in excess of 20 years for the offense of attempted murder. There are cases in which the aggravating factors surrounding commission of an attempted murder are so egregious that a 20 year limitation may be inappropriate. Although life imprisonment may be imposed by the sentencing authority, mandatory minimum punishment provisions do not apply in the case of convictions under Article 80.

5. Article 81—Conspiracy
(2) Agreement. This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.).
(7) Factual impossibility. This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.).
(8) Conspiracy as a separate offense. This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.). See also United States v. Washington, 1 M.J. 473 (C.M.A. 1976).

6. Article 82—Solicitation


7. Article 83—Fraudulent enlistment, appointment, or separation

e. Maximum Punishment. The reference to membership in, association with, or activities in connection with organizations, associations etc., found in the Table of Maximum Punishments, paragraph 127c of MCM, 1969 (Rev.), for Article 83, was deleted as unnecessary. The maximum punishment for all fraudulent enlistment cases was then standardized.

8. Article 84—Effecting unlawful enlistment, appointment, or separation

e. Maximum punishment. The reference to membership in, with, or activities in connection with organizations, associations, etc., found in the Table of Maximum Punishments, paragraph 127c of MCM, 1969 (Rev.), or Article 84, was deleted as unnecessary. The maximum punishment for all cases was then standardized.
9. Article 85—Desertion

c. Explanation. (1) Desertion with intent to remain away permanently.

2. (a) In general. This subparagraph is taken from paragraph 164a of MCM, 1969 (Rev.).

(b) Absence without authority-inception, duration, termination. See the Analysis, paragraph 10.

c. Intent to remain away permanently. This subparagraph is taken from paragraph 164a of MCM, 1969 (Rev.). The last sentence is based on United States v. Cothern, 8 U.S.C.M.A. 158, 23 C.M.R. 382 (1957).

(d) Effect of enlistment or appointment in the same or a different armed force. This subparagraph is based on paragraph 164a of MCM, 1969 (Rev.); United States v. Huff, 7 U.S.C.M.A. 247, 22 C.M.R. 37 (1956).

2. (2) Quitting unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service.


(b) Quits. This subparagraph is based on United States v. Bondar, 2 U.S.C.M.A. 357, 8 C.M.R. 157 (1953).

(c) Actual Knowledge. This subparagraph is based on United States v. Stabler, 4 U.S.C.M.A. 125, 15 C.M.R. 125 (1954) and rejects the view of paragraph 164a of MCM, 1969 (Rev.) that constructive knowledge would suffice. To avoid confusion, the "constructive knowledge" language has been replaced with the statement that actual knowledge may be proved by circumstantial evidence. See United States v. Curtin, 9 U.S.C.M.A. 427, 26 C.M.R. 207 (1958).

3. Attempting to desert. This subparagraph is taken from paragraph 164b of MCM, 1969 (Rev.).

4. Prisoner with executed punitive discharge. This subparagraph is taken from paragraphs 164a and 165 of MCM, 1969 (Rev.).

c. Maximum punishment. As indicated in the Analysis, paragraph 4, attempts the punishment for attempted desertion was made uniform. As a result, attempted desertion—"other cases of"—now conforms with the punishment for "desertion—other cases of." This amounts to an increase in the maximum punishment for confinement for one year to either two or three years, depending on the nature of termination.

10. Article 86—Absence without leave

c. Explanation. (1) In general. This subparagraph is taken from paragraph 165 of MCM, 1969 (Rev.).


(3) Intent. This subparagraph is based on paragraph 165 of MCM, 1969 (Rev.).

(4) Aggravated forms of unauthorized absence. This subparagraph is based on paragraphs 127c and 165 of MCM, 1969 (Rev.).


(6) Inability to return. This subparagraph is taken from paragraph 165 of MCM, 1969 (Rev.).


(9) Computation of duration. This subsection is based on paragraph 127c(3) of MCM, 1969 (Rev.).


See also United States v. Zammit, 14 M.J. 554 (N.M.C.M.R. 1982).

(11) Findings of more than one absence under one specification. This subsection is based on United States v. Francis, 15 M.J. 424 (C.M.A. 1983).

(e) Maximum punishment. The increased maximum punishment for unauthorized absence for more than 30 days terminated by apprehension has been added to parallel the effect of termination of desertion by apprehension and to encourage absent servicemembers to voluntarily return. A bad-conduct discharge was added to the permissible maximum punishment for unauthorized absence with intent to avoid maneuvers of field duty, because with sensitive, high value equipment used in exercises currently, the effect of such absence is more costly and, because of limited available training time, seriously disrupts training and combat readiness.

1990 Amendment: The Note in subsection f(4) was inserted as a conforming change due to the clarification of the distinction between "unauthorized absence from a guard, watch, or duty section" and "unauthorized absence from guard, watch, or duty section with the intent to abandon it." See subsections c(4)(c) and c(4)(d).

11. Article 87—Missing movement


(3) Design. This subparagraph is based on United States v. Clifton, 5 C.M.R. 342 (N.B.R. 1952).

(4) Neglect. This subparagraph is taken from paragraph 166 of MCM, 1969 (Rev.).

(5) Actual knowledge. This subparagraph is based on United States v. Chandler, 23 U.S.C.M.A. 193, 48 C.M.R. 945 (1974), United States v. Thompson, 2 U.S.C.M.A. 460, 9 C.M.R. 90 (1953), and in part on paragraph 166 of MCM, 1969 (Rev.). This paragraph rejects the language of paragraph 166 of MCM, 1969 (Rev.), which has provided for “constructive knowledge,” and adopts the “actual knowledge” requirement set forth in Chandler.

(6) Proof of absence. This subparagraph is taken from paragraph 166 of MCM, 1969 (Rev.).

e. Maximum punishment. The maximum punishment for missing movement was increased to make these punishments more equivalent to aggravated offenses of unauthorized absences and violations of orders. The real incentive of the armed forces on rapid deployment and expeditious movement of personnel and equipment to deter or prevent the escalation of hostilities dictates that these offenses be viewed more seriously.

12. Article 88—Contempt toward officials

e. Maximum punishment. This limitation is new and is based on the authority given the President in Article 56. Paragraph 127c of MCM, 1969 (Rev.) does not mention Article 88. The maximum punishment is based on the maximum punishment for Article of War 62, which was analogous to Article 88, as prescribed in paragraph 117c of MCM (Army), 1949 and MCM (AF), 1949.

13. Article 89—Disrespect toward a superior commissioned officer

e. Maximum punishment. The maximum punishment was increased from confinement for 6 months to confinement for 1 year to more accurately reflect the serious nature of the offense and to distinguish it from disrespect toward warrant officers under Article 91. See paragraph 15c.

14. Article 90—Assaulting or willfully disobeying superior commissioned officer
c. Explanation. (1) Striking or assaulting superior commissioned officer. This subparagraph is based on paragraph 169a of MCM, 1969 (Rev.) and other authorities as noted below.

(a) Definitions. “Stikes” is clarified to include any intentional offensive touching. Other batteries, such as by culpable negligence, are included in “offers violence.” As to “superior commissioned officer,” see Analysis, paragraph 13.

(d) Defenses. This subparagraph modifies the former discussion of self-defense since technically, because unlawfulness is not an element expressly, the officer must be acting illegally or otherwise outside the role of an officer before self-defense may be in issue. See United States v. Struckman, 20 U.S.C.M.A. 493, 43 C.M.R. 333 (1971).

(2) Disobeying superior commissioned officer. This subparagraph is based on paragraph 169b of MCM, 1969 (Rev.) and other authorities as noted below.

(a) Lawfulness of the order.


15. Article 91—Insolubnate conduct toward warrant officer, noncommissioned officer, or petty officer
by The Judge Advocate General of the Army (see Hearings on S.857 and H.R. 4080 Before a Subcommittee of the Senate Armed Service Committee, 81st Cong., 1st Sess. 274 (1949)) to conform Article 91 to Articles 89 and 90, which explicitly require superior-ity, and was later offered, but it was not acted on. See Congres-sional Floor Debate on the Uniform Code of Military Justice (amendment M. p. 170). See also Hearings Before a Subcommittee of the House Armed Services Committee on H.R. 2498, 81st Cong. 1st Sess. 772, 814, 823 (1949); This present interpretation is consist-ent with the unambiguous language of Article 91 and its pre-decessors. See Articles of War 65 and 1(b) (1920); and paragraph 135, MCM, 1928; paragraph 153, MCM, (Army), 1949 and MCM (AF), 1949. See also Act of Aug. 10, 1956, Pub.L. No. 84-1028, §49(e), 70A Stat. 640 (catchlines in U.C.M.J. not rele-vant to congressional intent).

The following subparagraphs are all taken from paragraph 170 of MCM, 1969 (Rev.) and the discussion paragraphs of other arti-cles.

e. Maximum punishment. Subparagraphs (2) and (7) are based on the aggravating circumstances that the victim is also superior to the accused. When this factor exists in a given case, the superi-ority of the victim must be alleged in the specification. The penalties for disobedience of noncommissioned and petty officers and for assault on and disrespect toward superior noncommissioned and petty officers were increased. In the case of the latter two of-fenses, this is done in part to distinguish assault on or disrespect toward a superior noncommissioned or petty officer from other assaults or disrespectful behavior, in light of the expansive cover-age of the article. Moreover, increasing responsibility for training, complex and expensive equipment, and leadership in combat is placed on noncommissioned and petty officers in today's armed forces. The law should reinforce the respect and obedience which is due them with meaningful sanctions. The maximum punish-ment for disrespect toward warrant officers was adjusted to con-form to these changes.

16. Article 92 — Failure to obey order or regulation

As to publication under subparagraph c(1)(a), see United States v. Tolkien, 14 M.J. 239 (C.M.A. 1982).


e. Maximum punishment. The maximum punishment for willful dereliction of duty was increased from 3 months to 6 months con-fine ment and to include a bad-conduct discharge because such of-fenses involve a flaunting of authority and are more closely analo-gous to disobedience offenses.

February 1986 Amendment: The rule was revised to add con-structive knowledge as an alternative to the actual knowledge re-quirement in paragraph (b)(3)(b) and the related explanation in subparagraph c(3)(b). In reviewing these provisions, it was con-cluded that the reliance of the drafters of the 1984 revision on the Curtin case was misplaced because the portion of that case dealt with failure to obey under Article 92(2), not dereliction under Ar-ticle 92(3). As revised, the elements and the explanation add an objective standard appropriate for military personnel.

17. Article 93 — Cruelty and maltreatment
c. Explanation. This paragraph is based on paragraph 172 of MCM, 1969 (Rev.). Subparagraph (1) is also based on United States v. Woolbright, 12 U.S.C.M.A. 450, 31 C.M.R. 36 (1961); United States v. Duggan, 4 U.S.C.M.A. 396 15 C.M.R. 396 (1954). The reference in paragraph 173 of MCM, 1969 (Rev.) to charging failure to report an impending mutiny or sedition under Article 134 has been deleted in subparagraph (4). This is because such an offense was not listed in the Table of Maximum Punish-ments or elsewhere under Article 134 in that Manual. Article of War 67 included this offense, but Article 94 excludes it. The draft-ers of paragraph 173 of MCM, 1951 noted the change. To fill the gap they referred to Article 134. Instead, they should have re-ferred to Article 92(3) because dereliction is the gravamen of the offense.

18. Mutiny and sedition
c. Explanation. This paragraph is taken from paragraph 173 of MCM, 1969 (Rev.). Subparagraph (1) is also based on United States v. Woolbright, 12 U.S.C.M.A. 450, 31 C.M.R. 36 (1961); United States v. Duggan, 4 U.S.C.M.A. 396 15 C.M.R. 396 (1954). The reference in paragraph 173 of MCM, 1969 (Rev.) to charging failure to report an impending mutiny or sedition under Article 134 has been deleted in subparagraph (4). This is because such an offense was not listed in the Table of Maximum Punish-ments or elsewhere under Article 134 in that Manual. Article of War 67 included this offense, but Article 94 excludes it. The draft-ers of paragraph 173 of MCM, 1951 noted the change. To fill the gap they referred to Article 134. Instead, they should have re-ferred to Article 92(3) because dereliction is the gravamen of the offense.

19. Article 95 — Resistance, breach of arrest, and escape
b. Elements. The elements listed for breaking arrest and escape from custody or confinement have been modified. Paragraph 174b, c, and d of MCM, 1969 (Rev.) provided that the accused by “duly” placed in arrest, custody, or confinement. “Duly” was de-leted from the elements of these offenses. Instead, the elements specify that the restraint be imposed by one with authority to im-pose it. This was done to clarify the meaning of the word “duly” and the burden of going forward on the issues of authority to or-der restraint and the legal basis for the decision to order restraint.

“Duly” means “in due or proper form or manner, according to legal requirements.” Black’s Law Dictionary 450(5th ed. 1979).

See also United States v. Carson, 15 U.S.C.M.A. 407, 35 C.M.R. 379 (1965). Thus the term includes a requirement that restraint be
imposed by one with authority to do so, and a requirement that such authority be exercised lawfully. Until 1969, the Manual also provided that arrest, confinement, or custody which is "officially imposed is presumed to be legal." Paragraph 174 of MCM, 1951. See also paragraph 157 of MCM, (Army), 1949, MCM (AF), 1949; paragraph 139 of MCM, 1928. In practical effect, therefore, the prosecution had only to present some evidence of the authority of the official imposing restraint to meet its burden of proof, unless the presumption of legality was rebutted by some evidence. See United States v. Delagado, 12 C.M.R. 651 (C.G.B.R. 1953). Cf. United States v. Clansey, 7 U.S.C.M.A. 230, 22 C.M.R. 20 (1956); United States v. Gray, 6 U.S.C.M.A. 615, 20 C.M.R. 331 (1956).

The drafters of MCM, 1969 (Rev.), deleted the presumption of legality. In their view the holding in United States v. Carson, supra, that this is a question of law to be decided by the military judge made such a presumption meaningless. Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised edition), DA PAM 27–2, at 28–8. The drafters considered deleting "du1y" as an element but did not because the prosecution must show that restraint was "du1y" imposed. Id. The result left the implication that the prosecution must produce evidence of both the authority of the person imposing or ordering restraint, and the legality of that official's decision in every case, whether or not the latter is contested. Given the dual meaning of the word "du1y" and the reason for deleting the presumption of legality, it is unclear whether the drafters intended this result. Cf. United States v. Stinson, 43 C.M.R. 595 (A.C.M.R. 1970).

"Duty" is replaced with the requirement that the person ordering restraint be proved to have authority to do so. This clarifies that proof of arrest, custody, or confinement ordered by a person with authority to do so is sufficient without proof of the underlying basis for the restraint (e.g., probable cause, legally sufficient nonjudicial punishment, risk of flight), unless the latter is put in issue by the defense. This is consistent with Article 95 which on its face does not require the restraint to be lawful (compare Article 95 with Articles 90–92 which prohibit violations of "lawful orders"—which orders are presumed lawful in the absence of evidence to the contrary. United States v. Smith, 21 U.S.C.M.A. 231, 45 C.M.R. 5 (1972)). This construction is also supported by judicial decisions. See United States v. Wilson, 6 M.J. 214 (C.M.A. 1979); United States v. Clansey, 7 U.S.C.M.A. 615, 20 C.M.R. 331 (1956); United States v. Delagado, 12 C.M.R. 651 (C.G.B.R. 1953). Cf. United States v. Clansey, 7 U.S.C.M.A. 230, 22 C.M.R. 20 (1956); United States v. Gray, 6 U.S.C.M.A. 615, 20 C.M.R. 331 (1956).

1991 Amendment: Subparagraph b(4) was amended by adding an aggravating element of post-trial confinement to invoke increased punishment for escapes from post-trial confinement.

(c) Nature of the resistance. This subparagraph is taken from paragraph 174a of MCM, 1969 (Rev.).


(e) Illegal apprehension. The first sentence of this subparagraph is taken from paragraph 174a of MCM, 1969 (Rev.). Although such a rule is not without criticism, see United States v. Lewis, 7 M.J. 348 (C.M.A. 1979); United States v. Moore, 483 F.2d 1361, 1364 (9th Cir.1973), it has long been recognized in military and civilian courts. John Bad Elk v. United States, 177 U.S. 529 (1900); paragraph 174a of MCM, 1951. Cf. paragraph 157 of MCM (Army), 1949; MCM (AF), 1949; paragraph 139 of MCM, 1928; W. Winthrop, Military Law and Precedents 122 (2d ed. 1920 reprint). (Before 1951 resisting apprehension was not specifically prohibited by the Articles of War. Earlier references are to breaking arrest or escape from confinement.)

The second sentence has been added to make clear that the issue of legality of an apprehension (e.g., whether based on probable cause or otherwise in accordance with requirements for legal sufficiency; see R.C.M. 302(e)) is not in issue until raised by the defense. United States v. Wilson, and United States v. Clansey, both supra. Cf. United States v. Smith, 21 U.S.C.M.A. 231, 45 C.M.R. 5 (1972). See also Analysis, paragraph 19b. The presumption is a burden assigning device; it has no evidentiary weight once the issue is raised. Because the issue of legality is not an element, and because the prosecution bears the burden of establishing legality when the issue is raised, the problems of Mullaney v. Wilbur, 421 U.S. 684 (1975) and Turner v. United States, 396 U.S. 398 (1970) are not encountered. Cf. Patterson v. New York, 432 U.S. 197 (1977).

The third sentence is based on United States v. Carson, supra.

(2) Breaking arrest.

(a) Arrest. This subparagraph has been added for clarity.

(b) Authority to order arrest. See Analysis, R.C.M. 304(b); R.C.M. 1101; and paragraph 2, Part V.

(c) Nature of restraint imposed by arrest. This subparagraph is based on paragraph 174b of MCM, 1969 (Rev.). See also Analysis, paragraph 19b.

(d) Breaking. This subparagraph is based on paragraph 174b of MCM, 1969 (Rev.).

(e) Illegal arrest. The first sentence in this subparagraph is based on paragraph 174e of MCM, 1969 (Rev.). The second sentence has been added to clarify that legality of an arrest (e.g., whether based on probable cause or based on legally sufficient nonjudicial punishment or court-martial sentence) is not in issue until raised by the defense. See Analysis, paragraphs 19b and 19c(1)(e). The third sentence is based on United States v. Carson, supra.

(3) Escape from custody.


(b) Authority to apprehend. See Analysis, paragraph 19c(1)(b).

(c) Escape. This cross-reference is based on paragraph 174c of MCM, 1969 (rev.).

ANALYSIS

App. 21, R.C.M. c(c)
(d) **Illegal custody.** The first sentence in this subparagraph is based on paragraph 174b of MCM, 1969 (Rev.). The second sentence has been added to clarify that legality of custody (e.g., whether based on probable cause) is not in issue until raised by the defense. See Analysis, paragraphs 19b and 19c(1)(e). The third sentence is based on United States v. Carson, *supra*.

(4) **Escape from confinement.**

(a) **Confinement.** See Article 9(a). See also Analysis, R.C.M. 305; R.C.M. 1101; and paragraph 5c, Part V.

1991 Amendment: Subparagraph c(4)(a) was amended to specify that escape from post-trial confinement is subject to increased punishment.

(b) **Authority to order confinement.** See Analysis, R.C.M. 304(b); R.C.M. 1101; and paragraph 2, Part V.

(c) **Escape.** This subparagraph is based on paragraph 174c of MCM, 1969 (Rev.). See also United States v. Maslanich, 13 M.J. 611 (A.F.C.M.R. 1982).

(d) **Status when temporarily outside confinement facility.** This subparagraph is based on United States v. Silk, 37 C.M.R. 523 (A.B.R. 1966); United States v. Sines, 34 C.M.R. 716 (N.B.R. 1964).

(e) **Legality of confinement.** This subparagraph is based on 174a of MCM, 1969 (Rev.). The second sentence has been added to clarify that legality of confinement (e.g., whether based on probable cause or otherwise in accordance with requirements for legal sufficiency) is not in issue until raised by the defense. See Analysis, paragraphs 19b and 19c(1)(e). The third sentence is based on United States v. Carson, *supra*.

1991 Amendment: Subparagraphs e and f were amended to provide increased punishment for escape from post-trial confinement. The increased punishment reflects the seriousness of the offense and is consistent with other federal law. See 18 U.S.C. 751(a).

20. **Article 96—Releasing prisoner without proper authority**

(c) **Explaination.** This paragraph is based on paragraph 175 of MCM, 1969 (Rev.); United States v. Johnpier, 12 U.S.C.M.A. 90, 30 C.M.R. 90 91961). Subparagraphs (1)(c) and (d) have been modified to conform to rules elsewhere in this Manual and re-stated for clarity.

21. **Article 97—Unlawful detention**

(c) **Explaination.** This paragraph is based on paragraph 176 of MCM, 1969 (Rev.); United States v. Johnson, 3 M.J. 361 (C.M.A. 1977). The explanation of the scope of Article 97 is new and results from Johnson and the legislative history of Article 97 cited therein. Id. at 363 n.6.

22. **Article 98—Noncompliance with procedural rules**

(c) **Explaination.** This paragraph is taken from paragraph 177 of MCM, 1969 (Rev.).

e. **Maximum punishment.** The maximum punishment for intentional failure to enforce or comply with provisions of the Code has been increased from that specified in paragraph 127c of MCM, 1969 (Rev.) to more accurately reflect the seriousness of this offense. See generally 18 U.S.C. §1505, the second paragraph of which prohibits acts analogous to those prohibited in Article 98(2).

23. **Article 99—Misbehavior before the enemy**


24. **Article 100—Subordinate compelling surrender**

(c) **Explaination.** This paragraph is taken from paragraph 179 of MCM, 1969 (Rev.).

25. **Article 101—Improper use of countersign**

(c) **Explaination.** This paragraph is based on paragraph 180 of MCM, 1969 (Rev.).

26. **Article 102—Forcing a safeguard**

(c) **Explaination.** This paragraph is taken from paragraph 181 of MCM, 1969 (Rev.). Note that a “time of war” need not exist for the commission of this offense. See Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 1229 (1949). See also United States v. Anderson, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968) (concerning a state of belligerency short of formal war).

27. **Article 103—Captured or abandoned property**

(c) **Explaination.** This paragraph is taken from paragraph 182 of MCM, 1969 (Rev.).

e. **Maximum punishment.** The maximum punishments based on value have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100), only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdictions.

28. **Article 104—Aiding the enemy**

29. Article 105—Misconduct as a prisoner

30. Article 106—Spies

30a. Article 106a—Espionage

31. Article 107—False official statements
   (2) Status of victim. The first sentence of this subparagraph is based on United States v. Cummings, supra. The second sentence is based on United States v. Ragins, 11 M.J. 42 (C.M.A. 1981).
   4) Material gain. This subparagraph is based on paragraph 186 of MCM, 1969 (Rev.).
   d. Maximum punishment. The maximum penalty for all offenses under Article 107 has been increased to include confinement for 5 years to correspond to 18 U.S.C. §1001, the Federal civilian counterpart of Article 107. See United States v. DeAngelo, 15 U.S.C.M.A. 423, 35 C.M.R. 395 (1965).

32. Article 108—Military property of the United States—sale, loss, damage, destruction, or wrongful disposition

1986 Amendment: Subparagraph (c)(1) was amended to correct ambiguities in the definition of military property. The previous language “military department” is specifically defined in 10 U.S.C. 101(7) as consisting of the Department of the Army, Navy and Air Force. Article 108, UCMJ, however, defines “military” when used in the Code as referring to all the armed forces. Use of the term “military department” inadvertently excluded property owned or used by the Coast Guard. The subparagraph has been changed to return to the state of the law prior to 1984, as including the property of all the armed forces. See United States v. Geisler, 37 C.M.R. 530 (A.B.R. 1966); United States v. Schelin, 15 M.J. 218, 220 n.6 (C.M.A. 1983).


1985 Amendment: Subparagraph (d)(1) was amended to include a lesser included offense previously omitted. See United States v. Rivers, 3 C.M.R. 564 (A.F.B.R. 1952) and 18 U.S.C. 641. Subparagraphs (d)(2) and (4) were amended to include lesser included offenses recognizing that destruction and damage of property which is not proved to be military may be a violation of Article 109. See United States v. Suthers, 22 C.M.R. 787 (A.F.B.R. 1956).

e. Maximum punishment. The maximum punishments have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100) only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdictions. The punishments are based on 18 U.S.C. § 1361. The maximum punishment for selling or wrongfully disposing of a firearm or explosive and for willfully damaging, destroying, or losing such property or suffering it to be lost, damaged, destroyed, sold, or wrongfully disposed of includes 10 years confinement regardless of the value of the item. The harm to the military in such cases is not simply the intrinsic value of the item. Because of their nature, special accountability and protective measures are employed to protect firearms or explosives against loss, damage, destruction, sale, and wrongful disposition. Such property may be a target of theft or other offenses without regard to its value. Therefore, to protect the Government's special interest in such property, and the community against improper disposition, such property is treated the same as property of a higher value.

33. Article 109—Property other than military property of the United States—waste, spoilage, or destruction

   d. Maximum punishment. The maximum punishments have been revised. Instead of three levels ($50 or less, $50 to $100, and over
36. Article 112—Drunken or reckless driving

b. Explanation. This paragraph is based on paragraph 191 of MCM, 1969 (Rev.). The discussion of defenses is based on United States v. Collins, 16 U.S.C.M.A. 167, 36 C.M.R. 323 (1966), concerning charging damage to different articles belonging to different owners, which occurred during a single transaction, as one offense.

c. Maximum Punishment. The maximum authorized confinement for driving resulting in injury was increased from 1 year to 18 months. This increase reflects the same concern for the importance of medical treatment.

1986 Amendment: Subparagraphs (b)(2), (c)(3), and (f) were amended to implement the amendment to Article 111 contained in the Anti-Drug Abuse Act of 1986, tit. III, § 3055, Pub.L. No. 99–570, Stat. 841 and 844 (1986), enacted 27 October 1986, proscribing driving while impaired by a substance described in Article 112a(b). This amendment codifies prior interpretation of the scope of Article 111, as previously implemented in paragraph 35c(3).
ANALYSIS

App. 21, R.C.M. (7)

triple the otherwise prescribed maximum penalty; and (2) the provision in 21 U.S.C. § 845(a) which doubles the maximum penalty for distribution of a controlled substance to a person under the age of 21. (The latter provision would probably apply to a high percentage of distribution offenses in the armed forces, given the high proportion of persons in this age group in the armed forces.) These special provisions were not adopted in favor of a simpler, more uniform punishment system. The overall result is an absence of the higher punishment extremes of the Federal system, while some of the offenses treated more leniently in the lower end of the scale in the Federal system are subject to potentially higher punishments in the military, for the reasons stated in the preceding paragraph. There are no mandatory minimum sentences for any drug offense. See Article 56.

The expungement procedure in 21 U.S.C. § 844(b) and (c) is unnecessary and inappropriate for military practice. Alternatives to prosecution for drug offenses already exist. See, e.g., Article 15. The use of such alternatives is properly a command prerogative.

Section 2 (now the last paragraph of subparagraph e) amends paragraph 127c Section B by adding an escalator clause to provide for certain special situations, unique to the military, in which drug involvement presents an even greater danger than normal. See 37 U.S.C. § 310 concerning hostile fire pay zones.

Section 3 (now subparagraphs b and c) amends paragraph 213, dealing with certain offenses under Article 134. Paragraph 213g replaces the discussion of offenses involving some contraband drugs which was found in the last paragraph of paragraph 213b of MCM, 1969 (Rev.). It was considered necessary to treat drug offenses more extensively in the Manual for Court-Martial because of the significant incidence of drug offenses in the military and because of the serious effect such offenses have in the military environment. It was also necessary to provide a comprehensive treatment of drugs, with a complete set of maximum punishments, in order to eliminate the confusion, disruption, and disparate treatment of some drug offenses among the services in the wake of United States v. Courtney, 1 M.J. 438 (C.M.A. 1976); United States v. Jackson, 3 M.J. 101 (C.M.A. 1977); United States v. Hoings, 5 M.J. 355 (C.M.A. 1978); United States v. Guilbault, 6 M.J. 20 (C.M.A. 1978); United States v. Thurman, 7 M.J. 26 (C.M.A. 1979). (1) Controlled substance. The list of drugs specifically punishable under Article 134 has been expanded to cover the substances which are, according to studies, most prevalent in the military community. See, e.g., M. Burt, et al. Highlights from the Worldwide Survey of Nonmedical Drug Use and Alcohol Use Among Military Personnel: 1980. In addition, the controlled substances which are listed in Schedules I through V of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (codified at 21 U.S.C. § 801 et seq.) as amended are incorporated. The most commonly abused drugs are listed separately so that it will be unnecessary to refer to the controlled substances list, as modified by the Attorney General in the Code of Federal Regulations, in most cases. Most commanders and some legal offices do not have ready access to such authorities.


(3) Distribute. This subparagraph is based on 21 U.S.C. § 802(8) and (11). See also E. Devitt and C. Blackmar, 2 Federal Jury Practice and Instructions, § 58.03 (3d ed. 1977).


38. Article 113—Misbehavior of sentinel or lookout

e. Maximum punishment. The maximum punishments were changed to reflect the greater seriousness of malingering in war or other combat situations and to add a greater measure of deterrence in such cases.

41. Article 116—Riot or breach of peace
c. Explanation. This paragraph is based on paragraph 195 of MCM, 1969 (Rev.) and United States v. Metcalf, 16 U.S.C.M.A. 153, 36 C.M.R. 309 (1966). The reference to “use of vile or abusive words to another in a public place” contained in paragraph 195 of MCM, 1969 (Rev.) has been replaced by the language contained in the fourth sentence of subparagraph (2) since the former language was subject to an overly broad application. See Gooding v. Wilson, 405 U.S. 518 (1972).

39. Article 114—Duelling
c. Explanation. This paragraph is based on paragraph 193 of MCM, 1969 (Rev.). The explanation of conniving at fighting a duel was modified to reflect the requirement for actual knowledge and to more correctly reflect the term connive.

f. Sample specification. The sample specification for conniving at fighting a duel was redrafted to more accurately reflect the nature of the offense.

40. Article 115—Malingering

e. Maximum punishment. The maximum punishments were changed to reflect the greater seriousness of malingering in war or other combat situations and to add a greater measure of deterrence in such cases.

42. Article 117—Provoking speeches or gestures

1986 Amendment: The listing of “Article 134—indecent language” as a lesser included offense of provoking speeches was deleted. United States v. Lineear, 3 M.J. 1027 (N.M.C.M.R. 1977), held that provoking speeches is actually a lesser included offense of indecent language. Also, indecent language carries a greater maximum punishment than provoking speeches, which would be unusual for a lesser offense.

e. Maximum punishment. The maximum punishment was increased from that set forth in paragraph 127c of MCM, 1969 (Rev.) to more accurately reflect the seriousness of the offense.

43. Article 118—Murder


d. Lesser included offenses. As to Article 118(3), see United States v. Roa, 12 M.J. 210 (C.M.A. 1982).

1993 Amendment. The listed lesser included offenses of murder under Article 118(3) were changed to conform to the rationale of United States v. Roa, 12 M.J. 210 (C.M.A. 1982). Inasmuch as Article 118(3) does not require specific intent, attempted murder, voluntary manslaughter, assault with intent to murder and as-
sault with intent to commit voluntary manslaughter are not lesser included offenses of murder under Article 118 (3).

44. Article 119—Manslaughter  

45. Article 120—Rape and carnal knowledge  
   c. Explanation. This paragraph is based on paragraph 199 of MCM, 1969 (Rev.). The third paragraph of paragraph 199(a) was deleted as unnecessary. The third paragraph of paragraph 199(b) was deleted based on the preemption doctrine. See United States v. Wright, 5 M.J. 106 (C.M.A. 1978); United States v. Norris, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953). Cf. Williams v. United States, 327 U.S. 711 (1946) (scope of preemption doctrine). The Military Rules of Evidence deleted the requirement for corroboration of the victim's testimony in rape and similar cases under former paragraph 153a of MCM, 1969. See Analysis, Mil.R.Evid. 412.

d. Lesser included offenses. Carnal knowledge was deleted as a lesser included offense of rape in view of the separate elements in each offense. Both should be separately pleaded in a proper case. See generally United States v. Smith, 7 M.J. 842 (A.C.M.R. 1979).


46. Article 121—Larceny and wrongful appropriation  

e. Maximum punishment. The maximum punishments have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100) only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdictions. The maximum punishment for larceny or wrongful appropriation of a firearm or explosive includes 5 or 2 years’ confinement respectively. This is because, regardless of the intrinsic value of such items, the threat to the community and disruption of military activities is substantial when such items are wrongfully taken. Special accountability and protective measures are taken with firearms and explosives, and they may be the target of theft regardless of value.

1986 Amendment: The maximum punishments for larceny were revised as they relate to larceny of military property to make them consistent with the punishments under Article 108 and paragraph 32e, Part IV, MCM, 1994. Before this amendment, a person who stole military property faced less punishment than a person who willfully damaged, destroyed, or disposed of military property. The revised punishments are also consistent with 18 U.S.C. 641.

47. Article 122—Robbery  


e. Maximum punishment. The aggravating factor of use of a firearm in the commission of a robbery, and a higher maximum punishment in such cases, have been added because of the increased danger when robbery is committed with a firearm whether or not loaded or operable. Cf. 18 U.S.C. §§2113 and 2114; United States v. Shelton, 465 F.2d 361 (4th Cir. 1972); United States v. Thomas, 455 F.2d 320 (6th Cir. 1972); Baker v. United States, 412 F.2d 1069 (5th Cir. 1969). See also U.S. Dep't of Justice, Attorney General's Task Force on Violent Crime, Final Report 29–33 (Aug. 17, 1981). The 15-year maximum is the same as that for robbery under 18 U.S.C. § 2111.

48. Article 123—Forgery  
   c. Explanation. This paragraph is based on paragraph 202 of MCM, 1969 (Rev.).

49. Article 123a—Making, drawing, or uttering check, draft, or order without sufficient funds  
APPENDIX 21

50. Article 124—Maiming

c. Explanation. This paragraph is based on paragraph 203 of MCM, 1969 (Rev.). Subparagraph c(3) is based on United States v. Hicks, 6 U.S.C.M.A. 621, 20 C.M.R. 337 (1956). The discussion of intent has been modified to reflect that some specific intent to injure is necessary. United States v. Hicks, supra. The third sentence of the third paragraph of paragraph 203 of MCM, 1969 (Rev.), which was based on Hicks (see Analysis of Contents, Manual for Courts-martial, United States, 1969 (Revised edition), DA PAM 27–2 at 28–15), was misleading in this regard. Contra United States v. Tua, 4 M.J. 761 (A.C.M.R. 1977), pet. denied, 5 M.J. 91 (1978).

e. Maximum punishment. The maximum punishment for forcible sodomy was raised in recognition of the severity of the offense which is similar to rape in its violation of personal privacy and dignity.

51. Article 125—Sodomy

c. Explanation. This paragraph is based on paragraph 204 of MCM, 1969 (Rev.). Fellatio and cunnilingus are within the scope of Article 125. See United States v. Harris, 8 M.J. 52 (C.M.A. 1979); United States v. Scoby, 5 M.J. 160 (C.M.A. 1978). For a discussion of the possible constitutional limitations on the application of Article 125 (for example, the sexual activity of a married couple), see United States v. Scoby, supra.

e. Maximum punishment. The maximum punishment for forcible sodomy was raised in recognition of the severity of the offense which is similar to rape in its violation of personal privacy and dignity.

52. Article 126—Arson


e. Maximum punishment. The maximum period of confinement for simple arson of property of a value of more than $100 has been reduced from 10 to 5 years. This parallels 18 U.S.C. § 1114. The maximum punishment for aggravated assaults committed with firearms has been increased based on 18 U.S.C. § 924(c). See also U.S. Dep't of Justice, Attorney General's Task Force on Violent Crime, Final Report 29–33 (Aug. 17, 1981). Note that the higher maximum for assault with a dangerous weapon when the weapon is a firearm applies even if the firearm is used as a bludgeon. This is because the danger injected is significantly greater when a loaded firearm is used, even as a bludgeon.

In certain situations, this punishment scheme may have the effect of making intentional infliction of grievous bodily harm a lesser included offense of assault with a dangerous weapon. For example, if in the course of an assault with a loaded firearm the accused or a coactor stabs the victim with a knife, the assault with a dangerous weapon (the firearm) would carry an 8 year maximum penalty, as opposed to 5 years for the assault intentionally inflicting grievous bodily harm. In such a case, the specification should be carefully tailored to describe each facet of the assault.

55. Article 129—Burglary


56. Article 130—Housebreaking


57. Article 131—Perjury

c. Explanation. Subparagraph (1) and (2) are based on paragraph 210 of MCM, 1969 (Rev.). In the last sentence of subparagraph

App. 21, ¶ c.
(2)(a), the phrase “unless the witness was forced to answer over a valid claim of privilege” which appeared at the end of the fourth paragraph of paragraph 210 of MCM, 1969 (Rev.) has been deleted based on United States v. Mandujano, 425 U.S. 564 (1976); Harris v. New York, 401 U.S. 222 (1971). See also United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980). Subparagraph (3) is new and is based on Public Law 94–550 of 1976 which amended Article 131 by adding a second clause based on section 1746 of title 28 United States Code, which was also enacted as part of Pub.L. No. 94–550.

Text of section 1746 of title 28, United States Code
§ 1746. Unsworn declarations under penalty of perjury.

Whenever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: “I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)”

(2) If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)”

If someone signs a statement under penalty of perjury outside a judicial proceeding or course of justice, and Article 107 (false official statement) is not applicable, it may be possible to use Article 134 (clause 3) (see paragraph 60) to charge a violation of 18 U.S.C. § 1621.

Text of section 1621 of title 18, United States Code
§ 1621. Perjury generally

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except or otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

d. Lesser included offenses.

1991 Amendment: Subparagraph d was amended by deleting false swearing as a lesser included offense of perjury. See United States v. Smith, 26 C.M.R. 16 (C.M.A. 1958); MCM 1984, Part IV, para. 79c(1). Although closely related to perjury, the offense of false swearing may be charged separately.

58. Article 132—Frauds against the United States

c. Explanation. This paragraph is based on paragraph 211 of MCM, 1969 (Rev.).

e. Maximum punishment. The maximum punishments have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100) only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdictions.

59. Article 133—Conduct unbecoming an officer and gentleman


e. Maximum punishment. A maximum punishment is established for the first time in order to provide guidance and uniformity for Article 133 offenses.

f. Sample specifications. Some sample specifications for Article 133 in MCM, 1969 (Rev.) were deleted solely to economize on space.

60. Article 134—General article


Except as otherwise noted in the Analyses of paragraphs 61–113, the offenses listed below are based on paragraph 127c (Table of Maximum Punishments), paragraph 213f, and Appendix 6 (sample specifications 126–187) of MCM, 1969 (Rev.). Eight offenses previously listed (allowing prisoner to do unauthorized acts, criminal libel, criminal nuisance, parole violation, statutory perjury, transporting stolen vehicle in interstate commerce, unclean accoutrements, and unclean uniform) are not listed here because they occur so infrequently or because the gravamen of the misconduct is such that it is more appropriately charged under another provision.

c. Explanation. Except as noted below, this paragraph is based on paragraph 213a through e of MCM, 1969 (Rev.).

(1) In general. See Secretary of the Navy v. Arech, 418 U.S. 676 (1974); Parker v. Levy, supra (constitutionality of Article 134 upheld).

Appendix 21


6. Article 134—(Abusing a public animal)

c. Explanation. This new paragraph defines "public animal."

62. Article 134—(Adultery)


63. Article 134—(Assault—indecent)


Gender-neutral language has been used in this paragraph, as well as throughout this Manual. This will eliminate any question about the intended scope of certain offenses, such as indecent assault such as may have been raised by the use of the masculine pronoun in MCM, 1969 (Rev.). It is, however, consistent with the construction given to the former Manual. See, e.g., United States v. Respass, 7 M.J. 566 (A.C.M.R. 1979) See generally 1 U.S.C. § 1 ("unless the context indicates otherwise...words importing the masculine gender include the feminine as well...").


64. Article 134—(Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking)

c. Explanation. This paragraph is based on paragraph 213(f)(1) of MCM, 1969 (Rev.).

65. Article 134—(Bigamy)


66. Article 134—(Bribery and graft)


d. Lesser included offenses. Graft is listed as a lesser included offense of bribery. See United States v. Raborn, 575 F.2d 688 (9th Cir. 1978); United States v. Crutchfield, 547 F.2d 496 (9th Cir. 1977).

67. Article 134—(Burning with intent to defraud)

c. Explanation. This paragraph is new and is self-explanatory. For a discussion of this offense see United States v. Fuller, 9 U.S.C.M.A. 143, 25 C.M.R. 405 (1958).

68. Article 134—(Check, worthless, making and uttering—by dishonorably failing to maintain funds)


69. Article 134—(Cohabitation, wrongful)


70. Article 134—(Correctional custody—offenses against)

Introduction. The elements and sample specifications have been modified by replacing "duly", with "by a person authorized to do so." See Analysis, paragraph 19.

c. Explanation. This paragraph is taken from paragraph 213(f)(13) of MCM, 1969 (Rev.). See also United States v. Mackie, 16

71. Article 134—(Debt, dishonorably failing to pay)

72. Article 134—(Disloyal statements)

73. Article 134—(Disorderly conduct, drunkenness)

74. Article 134—(Drinking liquor with prisoner)
   c. Explanation. This paragraph is new.

75. Article 134—(Drunk Prisoner)
   c. Explanation. See Analysis, paragraph 35.

76. Article 134—(Drunkenness—incapacitation for performance of duties through prior wrongful overindulgence in intoxicating liquor or drugs)

77. Article 134—(False or unauthorized pass offenses)

78. Article 134—(False pretenses, obtaining services under
   e. Maximum punishment. The maximum punishments have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100) only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in similar offenses in civilian jurisdictions.

79. Article 134—(False swearing)

80. Article 134—(Firearm, discharging—through negligence)
   c. Explanation. This paragraph is based on United States v. Darisse, 17 U.S.C.M.A. 29, 37 C.M.R. 293 (1967); United States v. Barrientes, 38 C.M.R. 612 (A.B.R. 1967). The term “carelessness” was changed to “negligence” because the latter is defined in paragraph 85c.(2).

81. Article 134—(Firearm, discharging—willfully, under such circumstances as to endanger human life)

82. Article 134—(Fleeing scene of accident)
   (2) Knowledge. This paragraph is based on United States v. Eagleson, 3 U.S.C.M.A. 685, 14 C.M.R. 103 (1954) (Latimer, J., concurring in the result). Actual knowledge is an essential element of the offense rather than an affirmative defense as is current practice. This is because actual knowledge that an accident has occurred is the point at which the driver’s or passenger’s responsibilities begin. See United States v. Waluski, 6 U.S.C.M.A. 724, 21 C.M.R. 46 (1956).
   (3) Passengers. See United States v. Waluski, supra.

83. Article 134—(Fraternization)
   Introduction. This paragraph is new to the Manual for Courts-Martial, although the offense of fraternization is based on long-standing custom of the services, as recognized in the sources below. Relationships between senior officers and junior officers and between noncommissioned or petty officers and their subordinates may, under some circumstances, be prejudicial to good order and discipline. This paragraph is not intended to preclude prosecution for such offenses.
   d. Maximum punishment. The maximum punishment for this offense is based on the maximum punishment for violation of gen-
eral orders and regulations, since some forms of fraternization have also been punished under Article 92. As to dismissal, see Nelson, supra at 129–130.

84. Article 134—(Gambling with subordinate)

Explanation. This paragraph is new and is based on United States v. Burgin, 30 C.M.R. 525 (A.B.R. 1961).

Maximum punishment. The maximum punishment was increased from that provided in paragraph 127c of MCM, 1969 (Rev.) to expressly authorize confinement. Cf. the second paragraph of paragraph 127c(2) of MCM, 1969 (Rev.).

Sample specification. Sample specification 153 in Appendix 6c of MCM, 1969 (Rev.) was revised to more correctly reflect the elements of the offense.

85. Article 134—(Homicide, negligent)

Explanation. This paragraph is based on paragraph 213(f)(12) of MCM, (Rev.); United States v. Kick, 7 M.J. 82 (C.M.A. 1979).

86. Article 134—(Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official)

b. Elements. The elements are based on United States v. Yum, 10 M.J. 1 (C.M.A. 1980).


87. Article 134—(Indecent acts or liberties with a child)


88. Article 134—(Indecent exposure)


Maximum punishment. The maximum punishment has been increased to include a bad-conduct discharge. Indecent exposure in some circumstances (e.g., in front of children, but without the intent to incite lust or gratify sexual desires necessary for indecent acts or liberties) is sufficiently serious to authorize a punitive discharge.

89. Article 134—(Indecent language)

Introduction. “Obscene” was removed from the title because it is synonymous with “indecent.” See paragraph 90c and Analysis. “Insulting” was removed from the title based on United States v. Prince, 14 M.J. 654 (A.C.M.R. 1982); United States v. Linsky, 3 M.J. 1027 (N.C.M.R. 1977).

Gender-neutral language has been used in this paragraph, as well as throughout this Manual. This will eliminate any question about the intended scope of certain offenses, such as indecent language, which may have been raised by the use of the masculine pronoun in MCM, 1969 (Rev.). It is, however, consistent with the construction given to the former Manual. See e.g., United States v. Respess, 7 M.J. 566 (A.C.M.R. 1979). See generally 1 U.S.C. §§ (“unless the context indicates otherwise . . . words importing the masculine gender include the feminine as well . . .”).


1986 Amendment: “Provoking speeches and gestures” was added as a lesser included offense. United States v. Linsky, 3 M.J. 1027 (N.M.C.M.R. 1977).

e. Maximum punishment. The maximum punishment in cases other than communication to a child under the age of 16 has been reduced. It now parallels that for indecent exposure.

90. Article 134—(Indecent acts with another)


91. Article 134—(Jumping from vessel into the water)

Introduction. This offense is new to the Manual for Courts-Martial. It was added to the list of Article 134 offenses based on United States v. Sadinsky, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964).

92. Article 134—(Kidnapping)


Kidnapping has been recognized as an offense under Article 134 under several different theories. Appellate courts in the military have affirmed convictions for kidnapping in violation of State law, as applied through the third clause of Article 134 and 18 U.S.C. § 13 (see paragraph 60), e.g., United States v. Picotte, 12 U.S.C.M.A. 196, 30 C.M.R. 196 (1961); in violation of Federal law (18 U.S.C. § 1201) as applied through the third clause of Article 134, e.g., United States v. Perkins, 6 M.J. 602 (A.C.M.R. 1978); and in violation of the first two clauses of Article 134, e.g., United States v. Jackson, 17 U.S.C.M.A. 580, 38 C.M.R. 378 (1968). As a result, there has been some confusion concerning pleading and proving kidnapping in courts-martial. See, e.g., United States v. Smith, 8 M.J. 522 (A.C.M.R. 1979); United
93. Article 134—(Mail: taking, opening, secreting, destroying, or stealing)

c. Explanation. This paragraph is new and is based on United States v. Gaudet, 11 U.S.C.M.A. 672, 29 C.M.R. 488 (1960); United States v. Manausa, 12 U.S.C.M.A. 37, 30 C.M.R. 37 (1960). This offense is not preempted by Article 121. See United States v. Gaudet, supra. See also paragraph 60.

94. Article 134—(Mails: depositing or causing to be deposited obscene matters in)


f. Sample specifications. "Lewd" and "lascivious" were eliminated because they are synonymous with "obscene." See Analysis, paragraph 90c.

95. Article 134—(Mispriison of serious offense)

c. Explanation. This paragraph is based on paragraph 213(6) of MCM, 1969 (Rev.). The term "serious offense" is substituted for "felony" to make clear that concealment of serious military offenses, as well as serious civilian offenses, is an offense. Subsection (1) is based on Black's Law Dictionary 902 (5th ed. 1979). See also United States v. Daddono, 432 F.2d 1119 (7th Cir. 1970); United States v. Perlstein, 126 F.2d 789 (3d Cir.), cert. denied, 316 U.S. 678 (1942); 18 U.S.C. § 4.

96. Article 134—(Obstructing justice)


f. Sample specification.

1991 Amendment: The form specification was amended by deleting the parentheticals encompassing "wrongfully" as this language is not optional, but is a required component of a legally sufficient specification.

96a. Article 134—(Wrongful interference with an adverse administrative proceeding)

1991 Amendment. Paragraph 96a is new and proscribes conduct that obstructs administrative proceedings. See generally 18 U.S.C. 1505, Obstruction of proceedings before departments, agencies, and committees. This paragraph, patterned after paragraph 96, covers obstruction of certain administrative proceedings not currently covered by the definition of criminal proceeding found in paragraph 96c. This paragraph is necessary given the increased number of administrative actions initiated in each service.

97. Article 134—(Pandering and prostitution)


e. Maximum punishment. The maximum punishment for prostitution is based on 18 U.S.C. § 1384.

98. Article 134—(Perjury: subornation of)

c. Explanation. This paragraph is new. It is based on 18 U.S.C. § 1622 which applies to any perjury. See 18 U.S.C. § 1621. See generally R. Perkins, Criminal Law 466-67 (2d ed. 1969). See also the Analysis, paragraph 57; United States v. Doughty, 14
99. Article 134—(Public record: altering, concealing, removing mutilating, obliterating, or destroying)

   b. Elements. The word “duly” has been deleted from the elements of this offense for the same reasons explained in Analysis, paragraph 19.

   c. Explanation. Putting a person “on quarters” or other otherwise excusing a person from duty because of illness does not of itself constitute a medical quarantine.

   f. Sample specification. The specification contained in Appendix 6c, no. 172, from MCM, 1969 (Rev.) was modified by deleting the word “steal” because this would be covered by “remove.”

100. Article 134—(Quarantine: medical, breaking)

   b. Elements. The word “duly” has been deleted from the elements of this offense for the same reasons explained in Analysis, paragraph 19.

   c. Explanation. This paragraph is new and is based on Mil.R.Evid. 803(8), but does not exclude certain types of records which are inadmissible under Mil.R.Evid. 803(8) for policy reasons. See United States v. Maze, 21 U.S.C.M.A. 260, 45 C.M.R. 34 (1972) for a discussion of one of these offenses in relation to the doctrine of preemption. See generally 18 U.S.C. § 2071.

   f. Sample specification. The specification contained in Appendix 6c, no. 173, Appendix 6c of MCM, 1969 (Rev.) was modified based on the deletion of the word “duly,” as explained in the analysis to paragraph 19. See subparagraph b, above.

101. Article 134—(Requesting commission of an offense)


   c. Explanation. This paragraph is based on United States v. Benton, supra. See also United States v. Oskley, 7 U.S.C.M.A. 733, 23 C.M.R. 197 (1957).

   e. Maximum punishment. The maximum punishment is based on United States v. Oskley, supra.

1990 Amendment: The offense of “requesting the commission of an offense” was deleted. Solicitation of another to commit an offense, whether prosecuted under Article 82 or 134, UCMJ, is a specific intent offense. See United States v. Mitchell, 15 M.J. 214 (C.M.A. 1983). The preemption doctrine precludes the creation of a lesser included offense of solicitation which does not require specific intent. See United States v. Taylor, 23 M.J. 314 (C.M.A. 1987).

102. Article 134—(Restriction; breaking)

   Elements. The word “duly” has been deleted from the elements of this offense, for the same reasons explained in Analysis, paragraph 19.

   c. Explanation. This paragraph is new and is based on paragraph 206, 126g, 131c, and 1746 of MCM, 1969 (Rev.). See also United States v. Haynes, 15 U.S.C.M.A. 122, 35 C.M.R. 94 (1964).

   f. Sample specification. Sample specification no. 175, appendix 6c of MCM, 1969 (Rev.) was modified based on the deletion of the word “duly,” as explained in the analysis of paragraph 19. See subparagraph b, above.

103. Article 134—(Seizure: destruction, removal, or disposal of property to prevent)


   e. Maximum punishment. The maximum punishment is based on 18 U.S.C. § 2232.

104. Article 134—(Sentinel or lookout: offenses against or by)


   e. Maximum punishment. The maximum punishment for loitering or wrongfully sitting on post by a sentinel or lookout was increased because of the potentially serious consequences of such misconduct. Cf. Article 113.

105. Article 134—(Soliciting another to commit an offense)


   c. Explanation. See the Analysis, paragraph 6.


1990 Amendment: Listing of “Article 134 — Requesting another to commit an offense, wrongful communication of language” as a lesser included offense of soliciting another to commit an offense was deleted in conjunction with the deletion of such a request as a substantive offense. See United States v. Taylor, 23 M.J. 314 (C.M.A. 1987); and, the Analysis, paragraph 101.


February 1986 Amendment: The Committee considered maximum imprisonment for 5 years inappropriate for the offense of solicitation to commit espionage under new Article 106a. A maximum punishment authorizing imprisonment for life is more consistent with the serious nature of the offense of espionage.

106. Article 134—(Stolen property: knowingly receiving, buying, concealing)


   e. Maximum punishment. The maximum punishments have been revised. Instead of three levels (less than $50, $50 to $100, and over $100) only two are used. This is simpler and conforms more
closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdictions.

107. Article 134—(Straggling)
c. Explanation. This paragraph is new and is based on Military Judges' Benchbook, DA PAM 27-9, paragraph 3-180 (May 1982).

108. Article 134—(Testify: wrongful refusal)

d. Sample specification. "Duly appointed" which appeared in front of the words "board of officers" in sample specification no. 174, Appendix 6 of MCM, 1969 (Rev.) was deleted. This is because all of the bodies under this paragraph must be properly convened or appointed. Summary courts-martial were expressly added to the sample specification to make clear that this offense may occur before a summary court-martial.

109. Article 134—( Threat or hoax: bomb)

Introduction. This offense is new to the Manual for Courts-Martial. It is based generally on 18 U.S.C. § 844(e) and on Military Judges' Benchbook, DA PAM 27-9, paragraph 3-189 (May 1982). Bomb hoax has been recognized as an offense under clause 1 of Article 134. United States v. Mayo, 12 M.J. 286 (C.M.R. 1982).

c. Explanation. This paragraph is based on Military Judges' Benchbook, supra at paragraph 3-189.

e. Maximum punishment. The maximum punishment is based on 18 U.S.C. § 844(e).

110. Article 134—(Threat, communicating)


111. Article 134—(Unlawful entry)

d. Limitations on nonjudicial punishment. (1) Double punishment prohibited. This subparagraph is taken from the first paragraph of paragraph 128d of MCM, 1969 (Rev.). Note that what is prohibited is the service of punishment twice. Where nonjudicial punishment is set aside, this does not necessarily prevent re- imposition of punishment and service of punishment not previously served.

(2) Increase in punishment prohibited. This paragraph is taken from the second paragraph of paragraph 128d of MCM, 1969 (Rev.).

(3) Multiple punishment prohibited. This paragraph is based on the guidance for court-martial offenses, found in paragraph 30g and 33h of MCM, 1969 (Rev.).

(4) Statute of limitations. This paragraph restates the requirements of Article 43(c) regarding nonjudicial punishment.

(5) Civilian courts. This paragraph is derived from service regulations (see, e.g., AR 27-10, chap. 4 (1 Sep 1982) and is intended to preclude the possibility of a servicemember being punished by separate jurisdictions for the same offense, except in unusual cases.

g. Relationship of nonjudicial punishment to administrative corrective measures. This paragraph is derived from paragraph 128c
of MCM, 1969 (Rev.) and service regulations. See e.g., AR 27–10, para. 3–4 (1 Sep. 1982).

h. Effect of errors. This paragraph is taken from paragraph 130 of MCM, 1969 (Rev.).

2. Who may impose nonjudicial punishment
   This paragraph is taken from paragraph 128a of MCM, 1969 (Rev.) and service regulations. See, e.g., AR 27–10, para. 3–7 (1 Sep. 1982); JAGMAN sec. 0101; AFR 111–9, para. 3 (31 Aug. 1979). Additional guidance in this area is left to Secretarial regulation, in accordance with the provisions of Article 15(a).

3. Right to demand trial.
   This paragraph is taken from Article 15(a) and paragraph 132 of MCM, 1969 (Rev.).

4. Procedure
   This paragraph is based on paragraph 133 of MCM, 1969 (Rev.) and service regulations. It provides a uniform basic procedure for nonjudicial punishment for all the services. Consistent with the purposes of nonjudicial punishment (see S.Rep. No. 191, 87th Cong., 1st Sess. 7 (1962)). It provides due process protections and is intended to meet the concerns expressed in the Memorandum of Secretary of Defense Laird, 11 January 1973. See also United States v. Mack, 9 M.J. 300, 320–21 (C.M.A. 1980). The Report of the Task Force on the Administration of Military Justice in the Armed Forces, 1972, and GAO Report to the Secretary of Defense, Better Administration of Military Article 15 Punishments for Minor Offenses is Needed, September 2, 1980, were also considered.

   Note that there is no right to consult with counsel before deciding whether to demand trial by court-martial. Unless otherwise prescribed by the Secretary concerned, the decision whether to permit a member to consult with counsel is left to the commander. In United States v. Mack, supra, records of punishments where such opportunity was not afforded (except when the member was attached to or embarked in a vessel) were held inadmissible in courts-martial.

   1986 Amendment: Subparagraph (c)(2) was amended to state clearly that a servicemember has no absolute right to refuse to appear personally before the person administering the nonjudicial punishment proceeding. In addition, Part V was amended throughout to use the term "nonjudicial punishment authority" in circumstances in which the proceeding could be administered by a commander, officer in charge, or a principal assistant to a general court-martial convening authority or general or flag officer.

5. Punishments.
   This paragraph is taken from paragraph 131 of MCM, 1969 (Rev.). Subparagraph b(2)(b) is also based on S.Rep. 191, 87th Cong., 1st Sess. 7 (1962). Subparagraph c(4) is also based on id. at 6–7 and Hearings Before a Subcomm. of the House Comm. on Armed Services, 87th Cong., 1st Sess. 33 (1962). Detention of pay was deleted as a punishment because under current centralized pay systems, detention of pay is cumbersome, ineffective, and seldom used. The concept of apportionment, authorized in Article 15(b) and set forth in paragraph 131d of MCM, 1969 (Rev.), was eliminated as unnecessary and confusing. Accordingly, the Table of Equivalent Punishments is no longer necessary.

   Subparagraph d, in concert with the elimination of the apportionment concept, will ease the commanders burden of determining an appropriate punishment and make the implementation of that punishment more efficient and understandable.


6. Suspension, mitigation, remission, and setting aside
   This paragraph is taken from Article 15, paragraph 134 of MCM 1969 (Rev.), and service regulations. See, e.g., AR 27–10, paras. 3–23 through 3–28 (1 Sep. 1982); JAGMAN sec. 0101; AFR 111–9, para 7 (31 Aug 1979). Subparagraph a dealing with suspension was expanded to require a violation of the code during the period of suspension as a basis for vacation action, and to explain that vacation action is not in itself nonjudicial punishment and does not preclude the imposition of nonjudicial punishment for the offenses upon which the vacation action was based. Subparagraph a(4) provides a procedure for vacation of suspended nonjudicial punishment. This procedure parallels the procedure found sufficient to make admissible in courts-martial records of vacation of suspended nonjudicial punishment. United States v. Covington, 10 M.J. 64 (C.M.A. 1980).

   1990 Amendment: A new subsection a(4) was added to permit vacation imposed under Article 15 to be suspended based on circumstances in addition to violations of the UCMJ. This affords the same flexibility given to authorities who suspend punishment adjudged at court-martial under R.C.M. 1106(c). Experience has demonstrated the necessity and utility of such flexibility in the nonjudicial punishment context.

7. Appeals
   This paragraph is taken from paragraph 135 of MCM, 1969 (Rev.) and service regulations dealing with appeals. See AR 27–10, paras. 3–29 through 3–35 (1 Sep. 1982); JAGMAN 0101; AFR 111–9, para. 8 (31 Aug. 1981). Subparagraph (d) requires an appeal to be filed within 5 days or the right to appeal will be waived, absent unusual circumstances. This is a reduction from the 15 days provided for in paragraph 135 and is intended to expedite the appeal process. Subparagraph f(2) is intended to promote sound practice, that is, the superior authority should consider many factors when reviewing an appeal, and not be limited to matters submitted by the appellant or the officer imposing the punishment. Subparagraph f(3) provides for "additional proceedings" should a punishment be set aside due to a procedural error. This is consistent with court-martial practice and intended to en-
sure that procedural errors do not prevent appropriate disposition of a disciplinary matter.

8. **Records of nonjudicial punishment**

This paragraph is taken from Article 15(g) and paragraph 133c of MCM, 1969 (Rev.).
APPENDIX 22

ANALYSIS OF THE MILITARY RULES OF EVIDENCE

The Military Rules of Evidence, promulgated in 1980 as Chapter XXVII of the Manual for Courts-Martial, United States, 1969 (Rev. ed.), were the product of a two year effort participated in by the General Counsel of the Department of Defense, the United States Court of Military Appeals, the Military Departments, and the Department of Transportation. The Rules were drafted by the Evidence Working Group of the Joint Service Committee on Military Justice, which consisted of Commander James Pinnell, JAGC, U.S. Navy, then Major John Bozeman, JAGC, U.S. Army (from April 1978 until July 1978), Major Fredric Lederer, JAGC, U.S. Army (from August 1978), Major James Potuk, U.S. Air Force, Lieutenant Commander Tom Snook, U.S. Coast Guard, and Mr. Robert Mueller and Ms. Carol Wild Scott of the United States Court of Military Appeals. Mr. Andrew Effron represented the Office of the General Counsel of the Department of Defense on the Committee. The draft rules were reviewed and, as modified, approved by the Joint Service Committee on Military Justice. Aspects of the Rules were reviewed by the Code Committee as well. See Article 67(g). The Rules were approved by the General Counsel of the Department of Defense and forwarded to the White House via the Office of Management and Budget which circulated the Rules to the Departments of Justice and Transportation.

The original Analysis was prepared primarily by Major Fredric Lederer, U.S. Army, of the Evidence Working Group of the Joint Service Committee on Military Justice and was approved by the Joint Service Committee on Military Justice and reviewed in the Office of the General Counsel of the Department of Defense. The Analysis presents the intent of the drafting committee; seeks to indicate the source of the various changes to the Manual, and generally notes when substantial changes to military law result from the amendments. This Analysis is not, however, part of the Executive Order modifying the present Manual nor does it constitute the official views of the Department of Defense, the Department of Transportation, the Military Departments, or of the United States Court of Military Appeals.

The Analysis does not identify technical changes made to adapt the Federal Rules of Evidence to military use. Accordingly, the Analysis does not identify changes made to make the Rules gender neutral or to adapt the Federal Rules to military terminology by substituting, for example, "court members" for "jury" and "military judge" for "court". References within the Analysis to "the 1969 Manual" and "MCM, 1969 (Rev.)" refer to the Manual for Courts-Martial, 1969 (Rev. ed.) (Executive Order 11,476, as amended by Executive Order 11,835 and Executive Order 12,018) as it existed prior to the effective date of the 1980 amendments. References to "the prior law" and "the prior rule" refer to the state of the law as it existed prior to the effective date of the 1980 amendments. References to the "Federal Rules of Evidence Advisory Committee" refer to the Advisory Committee on the Rules of Evidence appointed by the Supreme Court, which prepared the original draft of the Federal Rules of Evidence.

During the Manual revision project that culminated in promulgation of the Manual for Courts-Martial, 1984 (Executive Order 12473), several changes were made in the Military Rules of Evidence, and the analysis of those changes was placed in Appendix 21. Thus, it was intended that this Appendix would remain static. In 1985, however, it was decided that changes in the analysis of the Military Rules of Evidence would be incorporated into this Appendix as those changes were made so that the reader need consult only one document to determine the drafters' intent regarding the current rules. Changes are made to the Analysis only when a rule is amended. Changes to the Analysis are clearly marked, but the original Analysis is not changed. Consequently, the Analysis of some rules contains analysis of language subsequently deleted or amended.

In addition, because this Analysis expresses the intent of the drafters, certain legal doctrines stated in this Analysis may have been overturned by subsequent case law. This Analysis does not substitute for research about current legal rules.

Several changes were made for uniformity of style with the remainder of the Manual. Only the first word in the title of a rule is capitalized. The word "rule" when used in text to refer to another rule, was changed to "Mil.R.Evid." to avoid confusion with the Rules for Courts-Martial. "Code" is used in place of Uniform Code of Military Justice. "Commander" is substituted for "commanding officer" and "officer in charge." See R.C.M. 103(5). Citations to the United States Code were changed to conform to the style used elsewhere. "Government" is capitalized when used as a noun to refer to the United States Government. In addition, several cross-references to paragraphs in MCM, 1969 (Rev.) were changed to indicate appropriate provisions in this Manual.

With these exceptions, however, the Military Rules of Evidence were not redrafted. Consequently, there are minor variations in style or terminology between the Military Rules of Evidence and other parts of the Manual. Where the same subject is treated in similar but not identical terms in the Military Rules of Evidence and elsewhere, a different meaning or purpose should not be inferred in the absence of a clear indication in the text or the analysis that this was intended.

SECTION I

General Provisions

Rule 101. Scope

(a) Applicability. Rule 101(a) is taken generally from Federal Rule of Evidence 101. It emphasizes that these Rules are applicable to summary as well as special and general courts-martial. See "Rule of Construction." Rule 101(c), infra. Rule 1101 expressly indicates that the rules of evidence are inapplicable to investigatory hearings under Article 32, proceedings for pretrial advice, search authorization proceedings, vacation proceedings, and certain other proceedings. Although the Rules apply to sentencing, they may be "relaxed" under Rule 1101(c) and R.C.M. 1001(c)(3).

The limitation in subdivision (a) applying the Rules to courts-martial is intended expressly to recognize that these Rules are not applicable to military commissions, provost courts, and courts of inquiry unless otherwise required by competent authority. See
Part I, Para. 2 of the Manual. The Rules, however, serve as a "guide" for such tribunals. Id.

The Military Rules of Evidence are inapplicable to proceedings conducted pursuant to Article 15 of the Uniform Code of Military Justice.

The decisions of the United States Court of Military Appeals and of the Courts of Military Review must be utilized in interpreting these Rules. While specific decisions of the Article III courts involving rules which are common both to the Military Rules and the Federal Rules should be considered very persuasive, they are not binding; see Article 36 of the Uniform Code of Military Justice. It should be noted, however, that a significant policy consideration in adopting the Federal Rules of Evidence was to ensure, where possible, common evidentiary law.

(b) Secondary sources. Rule 101(b) is taken from Para. 137 of MCM, 1969 (Rev.) which had its origins in Article 36 of the Uniform Code of Military Justice. Rule 101(a) makes it clear that the Military Rules of Evidence are the primary source of evidentiary law for military practice. Notwithstanding their wide scope, however, Rule 101(b) recognizes that recourse to secondary sources may occasionally be necessary. Rule 101(b) prescribes the sequence in which such sources shall be utilized.

Rule 101(b)(1) requires that the first such source be the "rules of evidence generally recognized in the trial of criminal cases in the United States District courts." To the extent that a Military Rule of Evidence reflects an express modification of a Federal Rule of Evidence or a federal evidentiary procedure, the President has determined that the unmodified Federal Rule or procedure is, within the meaning of Article 36(a), either not "practicable" or is "contrary to or inconsistent with" the Uniform Code of Military Justice. Consequently, to the extent to which the Military Rules do not dispose of an issue, the Article III Federal practice when practicable and not inconsistent or contrary to the Military Rules shall be applied. In determining whether there is a rule of evidence "generally recognized", it is anticipated that ordinary legal research shall be involved with primary emphasis being placed upon the published decisions of the three levels of the Article III courts.

Under Rule 102, which concerns amendments to the Federal Rules of Evidence, no amendment to the Federal Rules shall be applicable to courts-martial until 180 days after the amendment's effective date unless the President shall direct its earlier adoption. Thus, such an amendment cannot be utilized as a secondary source until 180 days has passed since its effective date or until the President had directed its adoption, whichever occurs first. An amendment will not be applicable at any time if the President so directs.

It is the intent of the Committee that the expression, "common law" found within Rule 101(b)(2) be construed in its broadest possible sense. It should include the federal common law and what may be denominated military common law. Prior military cases may be cited as authority under Rule 101(b)(2) to the extent that they are based upon a present Manual provision which has been retained in the Military Rules of Evidence or to the extent that they are not inconsistent with the "rules of evidence generally recognized in the trial of criminal cases in the United States District courts," deal with matters "not otherwise prescribed in this Manual or these rules," and are "practicable and not inconsistent with or contrary to the Uniform Code of Military justice or this Manual."

(c) Rule of construction. Rule 101(c) is intended to avoid unnecessary repetition of the expressions, "president of a special court-martial without a military judge" and "summary court-martial officer." "Summary court-martial officer" is used instead of "summary court-martial" for purposes of clarity. A summary court-martial is considered to function in the same role as a military judge notwithstanding possible lack of legal training. As previously noted in Para. 137, MCM, 1969 (Rev.), "a summary court-martial has the same discretionary power as a military judge concerning the reception of evidence." Where the application of these Rules in a summary court-martial or a special court-martial without a military judge is different from the application of the Rules in a court-martial with a military judge, specific reference has been made.

Disposition of present Manual. That part of Para. 137, MCM, 1969 (Rev.), not reflected in Rule 101 is found in other rules, see, e.g., Rules 104, 401, 403. The reference in Para. 137 to privileges arising out of treaty or executive agreement was deleted as being unnecessary. See generally Rule 501.

Rule 102. Purpose and construction
Rule 102 is taken without change from Federal Rule of Evidence 102 and is without counterpart in MCM, 1969 (Rev.). It provides a set of general guidelines to be used in construing the Military Rules of Evidence. It is, however, only a rule of construction and not a license to disregard the Rules in order to reach a desired result.

Rule 103. Rulings on evidence
(a) Effect of erroneous ruling. Rule 103(a) is taken from the Federal Rule with a number of changes. The first, the use of the language, "the ruling materially prejudices a substantial right of party", is found in place of the Federal Rule's "a substantial right of party is affected" required by Article 59(a) of the Uniform Code of Military Justice. Rule 103(a) comports with present military practice.

The second significant change is the addition of material relating to constitutional requirements and explicitly states that errors of constitutional magnitude may require a higher standard than the general one required by Rule 103(a). For example, the harmless error rule, when applicable to an error of constitutional dimensions, requires a more advantageous to the accused which is a substantial right of party.

Rule 103(a)(1) requires that a timely motion or objection generally be made in order to preserve a claim of error. This is similar to but more specific than prior practice. In making such a motion or objection, the party has a right to state the specific grounds of the objection to the evidence. Failure to make a timely and sufficiently specific objection may waive the objection for purposes of both trial and appeal. In applying Federal Rule 103(a), the Article III courts have interpreted the Rule strictly and held the defense to an extremely high level of specificity. See, e.g., United States v. Rubin, 609 F.2d 51, 61-63 (2d Cir. 1979) (objection to
form of witness's testimony did not raise or preserve an appropriate hearsay objection); United States v. O'Brien, 601 F.2d 1067 (9th Cir. 1979) (objection that prosecution witness was testifying from material not in evidence held inadequate to raise or preserve an objection under Rule 1006). As indicated in the Analysis of Rule 802, Rule 103 significantly changed military law insofar as hearsay is concerned. Unlike present law under which hearsay is absolutely incompetent, the Military Rules of Evidence simply treat hearsay as being inadmissible upon adequate objection; see Rules 803, 103(a). Note in the context of Rule 103(a) that R.C.M. 801(a)(3) (Discussion) states: "The parties are entitled to reasonable opportunity to properly present and support their contentions on any relevant matter."

An "offer of proof" is a concise statement by counsel setting forth the substance of the expected testimony or other evidence.

Rule 103(a) prescribes a standard by which errors will be tested on appeal. Although counsel at trial need not indicate how an alleged error will "materially prejudice a substantial right" in order to preserve error, such a showing, during or after the objection or offer, may be advisable as a matter of trial practice to further illuminate the issue for both the trial and appellate bench.

(b) Record of offer. and (c) Hearing of members— Rule 103(b) and (c) are taken from the Federal Rules with minor changes in terminology to adapt them to military procedure.

(d) Plain error— Rule 103(d) is taken from the Federal Rule with a minor change of terminology to adapt it to military practice and the substitution of "materially prejudices" substantial rights of "affecting" substantial rights to conform it to Article 59(a) of the Uniform Code of Military Justice.

Rule 104. Preliminary questions

(a) Questions of admissibility generally. Rule 104(a) is taken generally from the Federal Rule. Language in the Federal Rule requiring that admissibility shall be determined by the "court, subject to the provisions of subdivision (b)" has been struck to ensure that, subject to Rule 1008, questions of admissibility are solely for the military judge and not for the court-members. The deletion of the language is not intended, however, to negate the general interrelationship between subdivisions (a) and (b). When relevancy is conditioned on the fulfillment of a condition of fact, the military judge shall "admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

Pursuant to language taken from Federal Rule of Evidence 104(a), the rules of evidence, other than those with respect to privileges, are inapplicable to "preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence..." These exceptions are new to military law and may substantially change military practice. The Federal Rule has been modified, however, by inserting language relating to applications for continuances and determinations of witness availability. The change, taken from MCM, 1969 (Rev.), Para. 137, is required by the worldwide disposition of the armed forces which makes matters relating to continuances and witness availability particularly difficult, if not impossible, to resolve under the normal rules of evidence— particularly the hearsay rule.

A significant and unresolved issue stemming from the language of Rule 104(a) is whether the rules of evidence shall be applicable to evidentiary questions involving constitutional or statutory issues such as those arising under Article 31. Thus it is unclear, for example, whether the rules of evidence are applicable to a determination of the voluntariness of an accused's statement. While the Rule strongly suggests that rules of evidence are not applicable to admissibility determinations involving constitutional issues, the issue is unresolved at present.

(b) Relevancy conditioned on fact. Rule 104(b) is taken from the Federal Rule except that the following language had been added: "A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge." This material was added in order to clarify the rule and to explicitly preserve contemporary military procedure. Para. 57, MCM, 1969 (Rev.). Under the Federal Rule, it is unclear whether and to what extent evidentiary questions are to be submitted to the jury as questions of admissibility. Rule 104(b) has thus been clarified to eliminate any possibility, except as required by Rule 1008, that the court members will make an admissibility determination. Failure to clarify the rule would produce unnecessary confusion in the minds of the court members and unnecessarily prolong trials. Accordingly, adoption of the language of the Federal Rules without modification is impracticable in the armed forces.

(c) Hearing of members. Rule 104(c) is taken generally from the Federal Rule. Introductory material has been added because of the impossibility of conducting a hearing out of the presence of the members in a special court-martial without a military judge. "Statements of an accused" has been used in lieu of "confessions" because of the phrasing of Article 31 of the Uniform Code of Military Justice, which has been followed in Rules 301–306.

(d) Testimony by accused. Rule 104(d) is taken without change from the Federal Rule. Application of this rule in specific circumstances is set forth in Rule 304(f), 311(f) and 321(e).

(e) Weight and credibility. Rule 104(e) is taken without change from the Federal Rule.

Rule 105. Limited admissibility

Rule 105 is taken without change from the Federal Rule. In view of its requirement that the military judge restrict evidence to its proper scope "upon request," it overrules United States v. Grunden, 2 M.J. 116 (C.M.A. 1977) (holding that the military judge must sua sponte instruct the members as to use of evidence of uncharged misconduct) and related cases insofar as they require the military judge to sua sponte instruct the members. See e.g., S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 50 (2d ed. 1977); United States v. Sangrey, 586 F.2d 1315 (9th Cir. 1978); United States v. Barnes, 586 F.2d 1052 (5th Cir. 1978); United States v. Bridwell, 583 F.2d 1135 (10th Cir. 1978); but see United States v. Ragghianti, 560 F.2d 1376 (9th Cir. 1977). This is compatible with the general intent of both the Federal and Military Rules in that they place primary if not full responsibility upon counsel for objecting to or limiting evidence. Note that the Rule 306, dealing with statements of co-accused, is more restrictive and protective than Rule 105. The military judge may, of course, choose to instruct sua sponte but need not do so. Failure to instruct sua sponte could potentially require a reversal only if such failure could be considered "plain error" within the meaning of Rule 103(d). Most failures to instruct sua
Rule 106. Remainder of or related writings or recorded statements
Rule 106 is taken from the Federal Rule without change. In view of the tendency of fact-finders to give considerable evidentiary weight to written matters, the Rule is intended to preclude the misleading situation that can occur if a party presents only part of a writing or recorded statement. In contrast to Para. 140a, MCM, 1969 (Rev.), which applies only to statements by an accused, the new Rule is far more expansive and permits a party to require the opposing party to introduce evidence. That aspect of Para. 140a(b) survives as Rule 304(h)(2) and allows the defense to complete an alleged confession or admission offered by the prosecution. When a confession or admission is involved, the defense may employ both Rules 106 and 304(h)(2), as appropriate.

SECTION II
Judicial Notice

Rule 201. Judicial notice of adjudicative facts
(a) Scope of Rule. Rule 201(a) provides that Rule 201 governs judicial notice of adjudicative facts. In so doing, the Rule replaced MCM, 1969 (Rev.), Para. 147a. The Federal Rules of Evidence Advisory Committee defined adjudicative facts as “simply the facts of the particular case” and distinguished them from legislative facts which it defined as “those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body,” reprinted in S. SALTBURG & K. REEDEN, FEDERAL RULES OF EVIDENCE MANUAL 63 (2d ed. 1977). The distinction between the two types of facts, originated by Professor Kenneth Davis, can on occasion be highly confusing in practice and resort to any of the usual treatises may be helpful.

(b) Kinds of facts. Rule 201(b) was taken generally from the Federal Rule. The limitation with FED. R. EVID. 201(b)(1) to facts known “within the territorial jurisdiction of the trial court” was replaced, however, by the expression, “generally known universally, locally, or in the area, pertinent to the event.” The worldwide disposition of the armed forces rendered the original language inapplicable and impracticable within the military environment. Notice of signatures, appropriate under Para. 147a, MCM, 1969 (Rev.), will normally be inappropriate under this Rule. Rule 902(4) & (10) will, however, usually yield the same result as under Para. 147a.

When they qualify as adjudicative facts under Rule 201, the following are examples of matters of which judicial notice may be taken:

The ordinary division of time into years, months, weeks and other periods; general facts and laws of nature, including their ordinary operations and effects; general facts of history; generally known geographical facts; such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute; such facts as are so generally known or are of such common notoriety in the area in which the trial is held that they cannot reasonably be the subject of dispute; and specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of reasonable indisputable accuracy.

(c) When discretionary. While the first sentence of the subdivision is taken from the Federal Rule, the second sentence is new and is included as a result of the clear implication of subdivision (e) and of the holding in Garner v. Louisiana, 368 U.S. 157, 173-74 (1961). In Garner, the Supreme Court rejected the contention of the State of Louisiana that the trial judge had taken judicial notice of certain evidence stating that:

There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice ... would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be to turn the doctrine into a pretext for dispensing with a trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon.

368 U.S. at 173

(d) When mandatory. Rule 201(d) provides that the military judge shall take notice when requested to do so by a party who supplies the military judge with the necessary information. The military judge must take judicial notice only when the evidence is properly within this Rule, is relevant under Rule 401, and is not inadmissible under these Rules.

(e) Opportunity to be heard; Time of taking notice; Instructing Members. Subdivisions (e), (f) and (g) of Rule 201 are taken from the Federal Rule without change.

Rule 201A. Judicial notice of law
In general. Rule 201A is new. Not addressed by the Federal Rules of Evidence, the subject matter of the Rule is treated as a procedural matter in the Article III courts; see e.g., FED. R. CRIM. P. 26.1. Adoption of a new evidentiary rule was thus required. Rule 201A is generally consistent in principle with Para. 147a, MCM, 1969 (Rev.).

Domestic law. Rule 201A(a) recognizes that law may constitute the adjudicative fact within the meaning of Rule 201(a) and requires that when that is the case, i.e., insofar as a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Rule 201 must be applied. When domestic law constitutes only a legislative fact, see the Analysis to Rule 201(a), the procedural requirements of Rule 201 may be utilized as a matter of discretion. For purposes of this Rule, it is intended that “domestic law” include: treaties of the United States; executive agreements between the United States and any State thereof, foreign country or international organization or agency; the laws and regulations pursuant thereto of the United States, of the District of Columbia, and of a State, Commonwealth, or possession; international law, including the laws of war, general maritime law and the law of air and space; and the common law. This definition is taken without change from Para. 147a except that references to the law of space have been added. “Regulations” of the United States include regulations of the armed forces.
When a party requests that domestic law be noticed, or when the military judge sua sponte takes such notice, a copy of the applicable law should be attached to the record of trial unless the law in question can reasonably be anticipated to be easily available to any possible reviewing authority.

1984 Amendment: Subsection (a) was modified in 1984 to clarify that the requirements of Mil.R.Evid. 201(g) do not apply when judicial notice of domestic law is taken. Without this clarification, Mil.R.Evid. 201A could be construed to require the military judge to instruct the members that they could disregard a law which had been judicially noticed. This problem was discussed in United States v. Mead, 16 M.J. 270 (C.M.A. 1983).

Foreign law. Rule 201A(b) is taken without significant change from FED R. CRIM. P 26.1 and recognizes that notice of foreign law may require recourse to additional evidence including testimony of witnesses. For purposes of this Rule, it is intended that “foreign law” include the laws and regulations of foreign countries and their political subdivisions and of international organizations and agencies. Any material or source received by the military judge for use in determining foreign law, or pertinent extracts therefrom, should be included in the record of trial as an exhibit.

SECTION III
Exclusionary Rules and Related Matters Concerning Self-Incrimination, Search and Seizure, and Eyewitness Identification

Military Rules of Evidence 301–306, 311–317, and 321 were new in 1980 and have no equivalent in the Federal Rules of Evidence. They represent a partial codification of the law relating to self-incrimination, confessions and admissions, search and seizure, and eyewitness identification. They are often rules of criminal procedure as well as evidence and have been located in this section due to their evidentiary significance. They replace Federal Rules of Evidence 301 and 302 which deal with civil matters exclusively.

The Committee believed it imperative to codify the material treated in Section III because of the large numbers of lay personnel who hold important roles within the military criminal legal system. Non-lawyer legal officers aboard ship, for example, do not have access to attorneys and law libraries. In all cases, the Rules represent a judgement that it would be impracticable to operate without them. See Article 36. The Rules represent a compromise between specificity, intended to ensure stability and uniformity with the armed forces, and generality, intended usually to allow change via case law. In some instances they significantly change present procedure. See, e.g., Rule 304(d) (procedure for suppression motions relating to confessions and admissions).

Rule 301. Privilege concerning compulsory self-incrimination

(a) General rule. Rule 301(a) is consistent with the rule expressed in the first paragraph, Para. 150b of MCM, 1969 (Rev.), but omits the phrasing of the privileges and explicitly states that, as both variations apply, the accused or witness receives the protection of whichever privilege may be the more beneficial. The fact that the privilege extends to a witness as well as an accused is inherent within the new phrasing which does not distinguish between the two.

The Rule states that the privileges are applicable only “to evidence of a testimonial or communicative nature,” Schmerber v. California, 384 U.S. 757, 761 (1966). The meaning of “testimonial or communicative” for the purpose of Article 31 of the Uniform Code of Military Justice is not fully settled. Past decisions of the Court of Military Appeals have extended the Article 31 privilege against self-incrimination to voice and handwriting exemplars and perhaps under certain conditions to bodily fluids. United States v. Ruiz, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974). Because of the unsettled law in the area of bodily fluids, it is not the intent of the Committee to adopt any particular definition of “testimonial or communicative.” It is believed, however, that the decisions of the United States Supreme Court construing the Fifth Amendment, e.g., Schmerber v. California, 384 U.S. 757 (1966), should be persuasive in this area. Although the right against self-incrimination has a number of varied justifications, its primary purposes are to shield the individual’s thought processes from Government inquiry and to permit an individual to refuse to create evidence to be used against him. Taking a bodily fluid sample from the person of an individual fails to involve either concern. The fluid in question already exists; the individual’s actions are irrelevant to its seizure except insofar as the health and privacy of the individual can be further protected through his or her cooperation. No persuasive reason exists for Article 31 to be extended to bodily fluids. To the extent that due process issues are involved in bodily fluid extractions, Rule 312 provides adequate protections.

The privilege against self-incrimination does not protect a person from being compelled by an order or forced to exhibit his or her body or other physical characteristics as evidence. Similarly, the privilege is not violated by taking the fingerprints of an individual, in exhibiting or requiring that a scar on the body be exhibited, in placing an individual’s feet in tracks, or by trying shoes or clothing on a person or in requiring the person to do so, or by compelling a person to place a hand, arm, or other part of the body under the ultra-violet light for identification or other purposes.

The privilege is not violated by the use of compulsion in requiring a person to produce a record or writing under his or her control containing or disclosing incriminating matter when the record or writing is under control in a representative rather than a personal capacity as, for example, when it is in his or her control as the custodian for a non-appropriated fund. See, e.g., Para. 150b of MCM, 1969 (Rev.); United States v. Sellers, 12 U.S.C.M.A. 262, 30 C.M.R. 262 (1961); United States v. Haskins, 11 U.S.C.M.A. 365, 29 C.M.R. 181 (1960).

(b) Standing.

(1) In general. Rule 301(b)(1) recites the first part of the third paragraph of Para. 150b, MCM, 1969 (Rev.) without change except that the present language indicating that neither counsel nor the court may object to a self-incriminating question put to the witness has been deleted as being unnecessary.

(2) Judicial advice. A clarified version of the military judge’s responsibility under Para. 150b of MCM, 1969 (Rev.) to warn an uninformed witness of the right against self-incrimination has been placed in Rule 301(b)(2). The revised procedure precludes counsel asking in open court that a witness be advised of his or her rights, a practice which the Committee deemed of doubtful propriety.
(c) Exercise of the privilege. The first sentence of Rule 301(c) restates generally the first sentence of the second paragraph of Para. 150b, MCM, 1969 (Rev.). The language "unless it clearly appears to the military judge" was deleted. The test involved is purely objective.

The second sentence of Rule 301(c) is similar to the second and third sentences of the second paragraph of Para. 150b but the language has been rephrased. The present Manual's language states that the witness can be required to answer if "any other reason, he can successfully object to being tried for any offense as to which the answer may supply information to incriminate him..." Rule 301(c) provides: "A witness may not assert the privilege if the witness is not subject to criminal penalty as a result of an answer by reason of immunity, running of the statute of limitations, or similar reason." It is believed that the new language is simpler and more accurate as the privilege is properly defined in terms of consequence rather than in terms of "being tried." In the absence of a possible criminal penalty, to include the mere fact of conviction, there is no risk of self-incrimination. It is not the intent of the Committee to adopt any particular definition of "criminal penalty." It should be noted, however, that the courts have occasionally found that certain consequences that are technically non-criminal are so similar in effect that the privilege should be construed to apply. See e.g., Spevack v. Klein, 385 U.S. 511 (1967); United States v. Ruiz, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974). Thus, the definition of "criminal penalty" may depend upon the facts of a given case as well as the applicable case law.

It should be emphasized that an accused, unlike a witness, need not take the stand to claim the privilege.

(1) Immunity generally. Rule 301(c)(1) recognizes that "testimonial" or "use plus fruits" immunity is sufficient to overcome the privilege against self-incrimination, cf., United States v. Rivera, 1 M.J. 107 (C.M.A. 1975), reversing on other grounds, 49 C.M.R. 259 (A.C.M.R. 1974), and declares that such immunity is adequate for purposes of the Manual. The Rule recognizes that immunity may be granted under federal statutes as well as under provisions of the Manual.

(2) Notification of immunity or leniency. The basic disclosure provision of Rule 301(c)(2) is taken from United States v. Webster, 1 M.J. 216 (C.M.A. 1975). Disclosure should take place prior to arraignment in order to conform with the timing requirements of Rule 304 and to ensure efficient trial procedure.

(d) Waiver by a witness. The first sentence of Rule 301(d) repeats without change the third sentence of the third paragraph of Para. 150b of MCM, 1969 (Rev.).

The second sentence of the Rule restates the second section of the present subparagraph but with a minor change of wording. The present text reads: "The witness may be considered to have waived the privilege to this extent by having made the answer, but such a waiver will not extend to a rehearing or new or other trial," while the new language is: "This limited waiver of the privilege applies only at the trial at which the answer is given, does not extend to a rehearing or new or other trial, and is subject to Rule 608(b)."

(e) Waiver by the accused. Except for the reference to Rule 608(b), Rule 301(e) generally restates the fourth sentence of the third subparagraph of Para. 149b(1), MCM, 1969 (Rev.). "Matters" was substituted for "issues" for purposes of clarity.

The mere act of taking the stand does not waive the privilege. If an accused testifies on direct examination only as to matters not bearing upon the issue of guilt or innocence of any offense for which the accused is being tried, as in Rule 304 (f), the accused may not be cross-examined on the issue of guilt or innocence at all. See Para. 149b(1), MCM, 1969 (Rev.) and Rule 608(b).

The last sentence of the third subparagraph of Para. 149b(1), MCM, 1969 (Rev.) has been deleted as unnecessary. The Analysis statement above, "The mere act of taking the stand does not waive the privilege," reinforces the fact that waiver depends upon the actual content of the accused's testimony.

The last sentence of Rule 301(f) restates without significant change the sixth sentence of the third subparagraph of Para. 149b(1), MCM, 1969 (Rev.).

(f) Effect of claiming the privilege.

(1) Generally. Rule 301(f)(1) is taken without change from the fourth subparagraph of Para. 150b, MCM, 1969 (Rev.). It should be noted that it is ethically improper to call a witness with the intent of having the witness claim a valid privilege against self-incrimination in open court, see, e.g., ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Prosecution Standard 3–5.7(c); Defense Standard 4–7.6(c) (Approved draft 1979).

Whether and to what extent a military judge may permit comment on the refusal of a witness to testify after his or her claimed reliance on the privilege against self-incrimination has been determined by the judge to be invalid is a question not dealt with by the Rule and one which is left to future decisions for resolution.

(2) On cross-examination. This provision is new and is intended to clarify the situation in which a witness who has testified fully on direct examination asserts the privilege against self-incrimination on cross-examination. It incorporates the prevailing civilian rule, which has also been discussed in military cases. See e.g., United States v. Colon-Atienza, 22 U.S.C.M.A. 399, 47 C.M.R. 336 (1973); United States v. Rivas, 3 M.J. 282 (C.M.A. 1977). Where the assertion shields only "collateral" matters—i.e., evidence of minimal importance (usually dealing with a rather distant fact solicited for impeachment purposes)—it is not appropriate to strike direct testimony. A matter is collateral when sheltering it would create little danger of prejudice to the accused. Where the privilege reaches the core of the direct testimony or prevents a full inquiry into the credibility of the witness, however, striking of the direct testimony would appear mandated. Cross-examination includes for the purpose of Rule 301 the testimony of a hostile witness called as if on cross-examination. See Rule 607. Depending upon the circumstances of the case, a refusal to strike the testimony of a Government witness who refuses to answer defense questions calculated to impeach the credibility of the witness may constitute prejudicial limitation of the accused's right to cross-examine the witness.

Manual provision has been expanded to include a request to terminate questioning.

(g) Instructions. Rule 301(g) has no counterpart in the 1969 Manual. It is designed to address the potential for prejudice that may occur when an accused exercises his or her right to remain silent. Traditionally, the court members have been instructed to disregard the accused's silence and not to draw any adverse inference from it. However, counsel for the accused may determine that this very instruction may emphasize the accused's silence, creating a prejudicial effect. Although the Supreme Court has held that it is not unconstitutional for a judge to instruct a jury over the objection of the accused to disregard the accused's silence, it has also stated: "It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection."

Lakeside v. Oregon, 435 U.S. 333, 340-41 (1978). Rule 301(g) recognizes that the decision to ask for a cautionary instruction is one of great tactical importance for the defense and generally leaves that decision solely within the hands of the defense. Although the military judge may give the instruction when it is necessary in the interests of justice, the intent of the Committee is to leave the decision in the hands of the defense in all but the most unusual cases. See also Rule 105. The military judge may determine the content of any instruction that is requested to be given.

(h) Miscellaneous. The last portion of paragraph 150b, MCM, 1969 (Rev.), dealing with exclusion of evidence obtained in violation of due process has been deleted and its content placed in the new Rules on search and seizure. See e.g., Rule 312, Bodily Views and Intrusions. The exclusionary rule previously found in the last subparagraph of Para. 150b was deleted as being unnecessary in view of the general exclusionary rule in Rule 304.

Rule 302. Privilege concerning mental examination of an accused

Introduction. The difficulty giving rise to Rule 302 and its conforming changes is a natural consequence of the tension between the right against self-incrimination and the favored position occupied by the insanity defense. If an accused could place a defense expert on the stand to testify to his lack of mental responsibility and yet refuse to cooperate with a Government expert, it would place the prosecution in a disadvantageous position. The courts have attempted to balance the competing needs and have arrived at what is usually, although not always, an adequate compromise; when an accused has raised a defense of insanity through expert testimony, the prosecution may compel the accused to submit to Government psychiatric examination on pain of being prevented from presenting any defense expert testimony (or of striking what expert testimony has already presented). However, at trial the expert may testify only as to his or her conclusions and their basis and not as to the contents of any statements made by the accused during the examination. See e.g., United States v. Albright, 388 F.2d 719 (4th Cir. 1968); United States v. Babidge, 18 U.S.C.M.A. 327, 40 C.M.R. 39 (1969). See generally, Lederer, Rights Warnings in the Armed Services, 72 Mil.L.Rev. 1 (1976); Holladay, Pretrial Mental Examinations Under Military Law: A Re-Examination, 16 A.F.L. Rev. 14 (1974). This compromise, which originally was a product of case law, is based on the premise that raising an insanity defense is an implied partial waiver of the privilege against self-incrimination and has since been codified in the Federal Rules of Criminal Procedure, FED. R. CRIM. P. 12-2, and MCM, 1969 (Rev.). Para. 140a, 122b, 150b. The compromise, however, does not fully deal with the problem in the military.

In contrast to the civilian accused who is more likely to have access to a civilian doctor as an expert witness for the defense—a witness with no governmental status—the military accused normally must rely upon the military doctors assigned to the local installation. In the absence of a doctor-patient privilege, anything said can be expected to enter usual Government medical channels. Once in those channels there is nothing in the present Manual that prevents the actual psychiatric report from reaching the prosecution and release of such information appears to be common in contemporary practice. As a result, even when the actual communications made by the accused are not revealed by the expert witness in open court, under the 1969 Manual they may be studied by the prosecution and could be used to discover other evidence later admitted against the accused. This raises significant derivative evidence problems, cf: United States v. Rivera, 23 U.S.C.M.A. 430, 50 C.M.R. 389 (1975). One military judge's attempt to deal with this problem by issuing a protective order was commended by the Court of Military Appeals in an opinion that contained a caveat from Judge Duncan that the trial judge may have exceeded his authority in issuing the order, United States v. Johnson, 22 U.S.C.M.A. 424, 47 C.M.R. 401 (1973).

Further complicating this picture is the literal language of Article 31(b) which states, in part, that "No person subject to this chapter may ... request a statement from, an accused or a person suspected of an offense without first informing him ..." [of his rights]. Accordingly, a psychiatrist who complies with the literal meaning of Article 31(b) may effectively and inappropriately destroy the very protections created by Babidge and related cases, while hindering the examination itself. At the same time, the validity of warnings and any consequent "waiver" under such circumstances is most questionable because Babidge never considered the case of an accused forced to choose between a waiver and a prohibited or limited insanity defense. Also left open by the present compromise is the question of what circumstances, if any, will permit a prosecutor to solicit the actual statements made by the suspect during the mental examination. In United States v. Frederick, 3 M.J. 230 (C.M.A. 1977), the Court of Military Appeals held that the defense counsel had opened the door via his questioning of the witness and thus allowed the prosecution a broader examination of the expert witness than would otherwise have been allowed. At present, what constitutes "opening the door" is unclear. An informed defense counsel must proceed with the greatest of caution being always concerned that what may be an innocent question may be considered to be an "open sesame."

Under the 1969 Manual interpretation of Babidge, supra, the accused could refuse to submit to a Government examination until after the actual presentation of defense expert testimony on the insanity issue. Thus, trial might have to be adjourned for a substantial period in the midst of the defense case. This was conducive to neither justice nor efficiency.

A twofold solution to these problems was developed. Rule 302 provides a form of testimonial immunity intended to protect an accused from use of anything he might say during a mental examination ordered pursuant to Para. 121, MCM, 1969 (Rev.) (now R.C.M. 706, MCM, 1984). Paragraph 121 was modified to sharply limit actual disclosure of information obtained from the
Pursuant to paragraph 121, that the military judge disclose the specific matter. In the event that the competency of an accused is at issue, the trial counsel could request, pursuant to paragraph 121, that the military judge disclose the sanity board report to the prosecution. In such a case, the trial counsel who had read the report would be disqualified from prosecuting the case in chief if Rule 302(a) were applicable.

As indicated above, paragraph 121 required that the sanity board report be kept within medical channels except insofar as it would be released to the defense and, upon request, to the commanding officer of the accused. The paragraph expressly prohibited anyone from supplying the trial counsel with information relating to the contents of the report. Care should be taken not to misconstrue the intent of the provision. The trial counsel is dealt with specifically because in the normal case it is only the trial counsel who is involved in the preparation of the case at the stage at which a sanity inquiry is likely to take place. Exclusion of evidence will result, however, even if the information is provided to persons other than trial counsel if such information is the source of derivative evidence. Rule 302 explicitly allows suppression of any evidence resulting from the accused's statement to the sanity board, and evidence derivative thereof, with limited exceptions as found in Rule 302. This is consistent with the theory behind the revisions which treats the accused's communication to the sanity board as a form of coerced statement required under a form of testimonial immunity. For example, a commander who has obtained the sanity board's report may obtain legal advice from a judge advocate, including the staff judge advocate, concerning the content of the sanity board's report. If the judge advocate uses the information in order to obtain evidence against the accused or provides it to another person who used it to obtain evidence to be used in the case, Rule 302 authorizes exclusion. Commanders must take great care when discussing the sanity board report with others, and judge advocates exposed to the report must also take great care to operate within the Rule.

(a) General Rule. Rule 302(a) provides that, absent defense offer, neither a statement made by the accused at a mental examination ordered under paragraph 121 nor derivative evidence thereof shall be received into evidence against the accused at trial on the merits or during sentencing when the Rule is applicable. This should be treated as a question of testimonial immunity for the purpose of determining the applicability of the exclusionary rule in the area. The Committee does not express an opinion as to whether statements made at such a mental examination or derivative evidence thereof may be used in making an adverse determination as to the disposition of the charges against the accused.

Subject to Rule 302(b), Rule 302(a) makes statements made by an accused at a paragraph 121 examination (now in R.C.M. 706(c), MCM 1984) inadmissible even if Article 31(b) and counsel warnings have been given. This is intended to resolve problems arising from the literal interpretation of Article 31 discussed above. It protects the accused and enhances the validity of the examination.

(b) Exceptions. Rule 301(b) is taken from prior law; see Para. 122b, MCM 1969 (Rev.). The waiver provision of Rule 302(b)(1) applies only when the defense makes explicit use of statements made by the accused to a sanity board or derivative evidence thereof. The use of lay testimony to present an insanity defense is not derivative evidence when the witness has not read the report.

(c) Release of evidence. Rule 302(c) is new and is intended to provide the trial counsel with sufficient information to reply to an insanity defense raised via expert testimony. The Rule is so structured as to permit the defense to choose how much information...
412 applies to Article 32 proceedings, and no person may be com-

constitutional scope of Rule 412 is inadmissible at trial, it is thus

not relevant let alone "materia1." Consequently that data within

tribunals" in Rule 303 includes Article 32 hearings.

Military Justice, Hearings on H.R.

303 (Article 31(c)) applies only to "military tribunals," it is ap-

ply to Article 32 hearings as it is only a rule of evidence;

privilege applicable to all persons, military or civilian, and are

fenses. Under prior law, the victims of such offenses were often

Rule 303 restates Article 31(c). The content of Para. 150a, MCM,

1969 (Rev.) has been omitted.

A specific application of Rule 303 is in the area of sexual of-

fenses. Under prior law, the victims of such offenses were often

subjected to a probing and degrading cross-examination related
to past sexual history — an examination usually of limited rele-

vance at best. Rule 412 of the Military Rules of Evidence now

prohibits such questioning, but Rule 412 is, however, not applica-
table to Article 32 hearings as it is only a rule of evidence; see Rule

1101. Rule 303 and Article 31(c) on the other hand, are rules of

privilege applicable to all persons, military or civilian, and are

thus fully applicable to Article 32 proceedings. Although Rule

303 (Article 31(c)) applies only to "military tribunals," it is ap-

parent that Article 31(c) was intended to apply to courts-of-in-

quiry, and implicitly to Article 32 hearings. The Uniform Code of

Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the

House Comm. on Armed Services, 81st Cong., 1st Sess. 975

(1949). The Committee intends that the expression "military tribunals" in Rule 303 includes Article 32 hearings.

Congress found the information now safeguarded by Rule 412 to be degrading. See e.g., Cong.Rec. H119944-45 (Daily ed. Oct.

10, 1978) (Remarks of Rep.Mann). As the material within the

constitutional scope of Rule 412 is inadmissible at trial, it is thus

not relevant let alone "material." Consequently that data within

the lawful coverage of Rule 412 is both immaterial and degrading

and thus is within the ambit of Rule 303 (Article 31(c)).

Rule 303 is therefore the means by which the substance of Rule

412 applies to Article 32 proceedings, and no person may be com-
pelled to answer a question that would be prohibited by Rule 412.

As Rule 412 permits a victim to refuse to supply irrelevant and

misleading sexual information at trial, so too does the substance

of Rule 412 through Rule 303 permit the victim to refuse to supply

such degrading information at an Article 32 for use by the de-
fense or the convening authority. See generally Rule 412 and the

Analysis thereto. It should also be noted that it would clearly be

unreasonable to suggest that Congress in protecting the victims of

sexual offenses from the degrading and irrelevant cross-examina-
tion formerly typical of sexual cases would have intended to per-
mit the identical examination at a military preliminary hearing

that is not even presided over by a legally trained individual. Thus

d public policy fully supports the application of Article 31(c) in this

case.

1993 Amendment: R.C.M. 40(i) and Mil. R. Evid. 1101(d)

were amended to make the provisions of Mil. R. Evid. 412 appli-
cable at pretrial investigations. These changes ensure that the

same protections afforded victims of nonconsensual sex offenses at

trial are available at pretrial hearings. See Criminal Justice

Subcommittee of House Judiciary Committee Report, 94th

Cong., 2d Session, July 29, 1976. Pursuant to these amendments,

Mil.R.Evid. 412 should be applied in conjunction with Mil. R.

Evid. 303. As such, no witness may be compelled to answer a

question calling for a personally degrading response prohibited by

Rule 303. Mil. R. Evid. 412, however, protects the victim even if

the victim does not testify. Accordingly, Rule 412 will prevent

questioning of the victim or other witness if the questions call for

responses prohibited by Rule 412.

Rule 304. Confessions and admissions

(a) General rule. The exclusionary rule found in Rule 304(a) is

applicable to Rules 301–305, and basically restates prior law

which appeared in paragraphs 140a(6) and 150b, MCM, 1969

(Rev.). Rule 304(b) does permit, however, limited impeachment

use of evidence that is excludable on the merits. A statement that

is not involuntary within the meaning of Rule 304(c)(3), Rule

305(a) or Rule 302(a) is voluntary and will not be excluded under

this Rule.

The seventh paragraph of Para. 150b of the 1969 Manual at-
ttempts to limit the derivative evidence rule to statements obtained

through compulsion that is "applied by, or at the instigation or

with the participation of, an official or agent of the United States,
or any State thereof or political subdivision of either, who was act-
ing in a governmental capacity ..." (emphasis added). Rule 304,

however, makes all derivative evidence inadmissible. Although

some support for the 1969 Manual limitations can be found in the

literal phrasing of Article 31(d), the intent of the Article as indi-
cated in the commentary presented during the House hearings,
The Uniform Code of Military Justice, Hearing on H.R. 2498

Before a Subcomm. of the House Comm. on Armed Services,81st

Cong., 1st Sess. 984(1949), was to exclude "evidence" rather than

just "statements." Attempting to allow admission of evidence ob-
tained from statements which were the product of coercion, un-

lawful influence, or unlawful inducement would appear to be both

against public policy and unnecessarily complicated. Similarly, the

1969 Manual's attempt to limit the exclusion of derivative evi-
dence to that obtained through compulsion caused by "Government agents" has been deleted in favor of the simpler

exclusion of all derivative evidence. This change, however, does

A22-9
not affect the limitation, as expressed in current case law, that the warning requirements apply only when the interrogating individual is either a civilian law enforcement officer or an individual subject to the Uniform Code of Military Justice acting in an official disciplinary capacity or in a position of authority over a suspect or accused. The House hearings indicate that all evidence obtained in violation of Article 31 was to be excluded and all persons subject to the Uniform Code of Military Justice may violate Article 31(a). Consequently, the attempted 1969 Manual restriction could affect at most only derivative evidence obtained from involuntary statements compelled by private citizens. Public policy demands that private citizens not be encouraged to take the law into their own hands and that law enforcement agents not be encouraged to attempt to circumvent an accused’s rights via proxy interrogation.

It is clear that truly spontaneous statements are admissible as they are not “obtained” from an accused or suspect. An apparently volunteered statement which is actually the result of coercive circumstances intentionally created or used by interrogators will be involuntary. Cf: Brewer v. Williams, 430 U.S. 387 (1977), Rule 305(b)(2). Manual language dealing with this area has been deleted as being unnecessary.


February 1986 Amendment: Rule 304(b)(2) was added to incorporate the “inevitable discovery” exception to the exclusionary rule based on Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984); see also United States v. Kozak, 12 M.J. 389 (C.M.A. 1982); Analysis of Rule 304(b)(2).

1990 Amendment: Subsection (b)(1) was amended by adding “the requirements of Mil. R. Evid. 305(c) and 305(f), or.” This language expands the scope of the exception and thereby permits statements obtained in violation of Article 31(b), UCMJ, and Mil. R. Evid. 305(c) and (f) to be used for impeachment purposes or at a later trial for perjury, false swearing or the making of a false official statement. See Harris v. New York, 401 U.S. 222 (1971); cf. United States v. Williams, 23 M.J. 362 (C.M.A. 1987). An accused cannot pervert the procedural safeguards of Article 31(b) into a license to testify perjuriously in reliance on the Government’s disability to challenge credibility utilizing the traditional truth-testing devices of the adversary process. See Walder v. United States, 347 U.S. 62 (1954); United States v. Knox, 396 U.S. 77 (1969). Similarly, when the procedural protections of Mil. R. Evid. 305(f) and Edwards v. Arizona, 451 U.S. 477 (1981), are violated, the deterrent effect of excluding the unlawfully obtained evidence is fully vindicated by preventing its use in the Government’s case-in-chief, but permitting its collateral use to impeach an accused who testifies inconsistently or perjuriously. See Oregon v. Hass, 420 U.S. 714 (1975). Statements which are not the product of free and rational choice, Greenwald v. Wisconsin, 390 U.S. 519 (1968), or are the result of coercion, unlawful influence, or unlawful inducements are involuntary and thus inadmissible, because of their untrustworthiness, even as impeachment evidence. See Mincey v. Arizona, 437 U.S. 385 (1978).

(c) Definitions.

1. Confession and admission. Rules 304(c)(1) and (2) express without change the definitions found in Para. 140a(1), MCM, 1969 (Rev.). Silence may constitute an admission when it does not involve a reliance on the privilege against self-incrimination or related rules. Rule 301(f)(3). For example, if an imputation against a person comes to his or her attention under circumstances that would reasonably call for a denial of its accuracy if the imputation were not true, a failure to utter such a denial could possibly constitute an admission by silence. Note, however, in this regard, Rule 304(b)(3), and Rule 801(a)(2).

2. Involuntary. The definition of “involuntary” in Rule 304(c)(3) summarizes the prior definition of “not voluntary” as found in Para. 140a(2), MCM, 1969 (Rev.). The examples in Para. 140a(2) are set forth in this paragraph. A statement obtained in violation of the warning and waiver requirements of Rule 305 is “involuntary.” Rule 305(a).

The language governing statements obtained through the use of “coercion, unlawful influence, and unlawful inducement,” found in Article 31(d) makes it clear that a statement obtained by any person, regardless of status, that is the product of such conduct is involuntary. Although it is unlikely that a private citizen may run afoul of the prohibition of unlawful influence or inducement, such a person clearly may coerce a statement and such coercion will yield an involuntary statement.

A statement made by the accused during a mental examination ordered under Para. 121, MCM, 1969 (Rev.) (now R.C.M. 706, MCM, 1984) is treated as an involuntary statement under Rule 304. See Rule 302(a). The basis for this rule is that Para. 121 and Rule 302 compel the accused to participate in the Government examination or face a judicial order prohibiting the accused from presenting any expert testimony on the issue of mental responsibility.

Insofar as Rule 304(c)(3) is concerned, some examples which may by themselves or in conjunction with others constitute coercion, unlawful influence, or unlawful inducement in obtaining a confession or admission are:

Injunction of bodily harm including questioning accompanied by deprivation of the necessities of life such as food, sleep, or adequate clothing;

Threats of bodily harm;

Imposition of confinement or deprivation of privileges or necessities because a statement was not made by the accused, or threats thereof if a statement is not made;

Promises of immunity or clemency as to any offense allegedly committed by the accused;
ANALYSIS OF THE MILITARY RULES OF EVIDENCE

App. 22, M.R.E.

Promises of reward or benefit, or threats of disadvantage likely to induce the accused to make the confession or admission.

There is no change in the principle, set forth in the fifth paragraph of Para. 140a(2), MCM, 1969 (Rev.), that a statement obtained "in an interrogation conducted in accordance with all applicable rules is not involuntary because the interrogation was preceded by one that was not so conducted, if it clearly appears that all improper influences of the preceding interrogations had ceased to operate on the mind of the accused or suspect at the time that he or she made the statement." In such a case, the effect of the involuntary statement is sufficiently attenuated to permit a determination that the latter statement was not "obtained in violation of" the rights and privileges found in Rule 304(c)(3) and 305(a) (emphasis added).

(d) Procedure. Rule 304(d) makes a significant change in prior procedure. Under Para. 140a(2), MCM, 1969 (Rev.), the prosecution was required to prove a statement to be voluntary before it could be admitted in evidence absent explicit defense waiver. Rule 304(d) is intended to reduce the number of unnecessary objections to evidence on voluntariness grounds and to narrow what litigation remains by requiring the defense to move to suppress or to object to evidence covered by this Rule. Failure to so move or object constitutes a waiver of the motion or objection. This follows civilian procedure in which the accused is provided an opportunity to assert privilege against self-incrimination and related rights but may waive any objection to evidence obtained in violation of the privilege through failure to object.

(1) Disclosure. Prior procedure (Para. 121, MCM, 1969 (Rev.)) is changed to assist the defense in formulating its challenges. The prosecution is required to disclose prior to arraignment all statements by the accused known to the prosecution which are relevant to the case (including matters likely to be relevant in rebuttal and sentencing) and within military control. Disclosure should be made in writing in order to prove compliance with the Rule and to prevent misunderstandings. As a general matter, the trial counsel is not authorized to obtain statements made by the accused at a sanity board, with limited exceptions. If the trial counsel has knowledge of such statements, they must be disclosed. Regardless of trial counsel's knowledge, the defense is entitled to receive the full report of the sanity board.

(2) Motions and objections. The defense is required under Rule 304(d)(2) to challenge evidence disclosed prior to arraignment under Rule 304(d)(1) prior to submission of plea. In the absence of a motion or objection prior to plea, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to challenge disclosed evidence waives the objection. This is a change from prior law under which objection traditionally has been made after plea but may be made, at the discretion of the military judge, prior to plea. This change brings military law into line with civilian federal procedure and resolves what is presently a variable and uncertain procedure.

Ligation of a defense motion to suppress or an objection to a statement made by the accused or to any derivative evidence should take place at a hearing held outside the presence of the court members. See, e.g., Rule 104(c).

(3) Specificity. Rule 304(d)(3) permits the military judge to require the defense to specify the grounds for an objection under Rule 304, but if the defense has not had adequate opportunity to interview those persons present at the taking of a statement, the military judge may issue an appropriate order including granting a continuance for purposes of interview or permiting a general objection. In view of the waiver that results in the event of failure to object, defense counsel must have sufficient information in order to decide whether to object to the admissibility of a statement by the accused. Although telephone or other long distance communications may be sufficient to allow a counsel to make an informed decision, counsel may consider a personal interview to be essential in this area and in such a case counsel is entitled to personally interview the witnesses to the taking of a statement before specificity can be required. When such an interview is desired but despite due diligence counsel has been unable to interview adequately those persons included in the taking of a statement, the military judge has authority to resolve the situation. Normally this would include the granting of a continuance for interviews, or other appropriate relief. If an adequate opportunity to interview is absent, even if this results solely from the witness' unwillingness to speak to the defense, then the specificity requirement does not apply. Lacking adequate opportunity to interview, the defense may be authorized to enter a general objection to the evidence. If a general objection has been authorized, the prosecution must present evidence to show affirmatively that the statement was voluntary in the same manner as it would be required to do under prior law. Defense counsel is not required to meet the requirements of Para. 115, MCM, 1969 (Rev.), in order to demonstrate "due diligence" under the Rule. Nor shall the defense be required to present evidence to raise a matter under the Rule. The defense shall present its motion by offer of proof, but it may be required to present evidence in support of the motion should the prosecution first present evidence in opposition to the motion.

If a general objection to the prosecution evidence is not authorized, the defense may be required by Rule 304(d)(3) to make specific objection to prosecution evidence. It is not the intent of the Committee to require extremely technical pleading, but enough specificity to reasonably narrow the issue is desirable. Examples of defense objections include but are not limited to one or more of the following non-exclusive examples:

That the accused was a suspect but not given Article 31(b) or Rule 305(c) warnings prior to interrogation.

That although 31(b) or Rule 305(c) warnings were given, counsel warnings under Rule 305(d) were necessary and not given (or given improperly). (Rule 305(d); United States v. Temple, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).)

That despite the accused's express refusal to make a statement, she was questioned and made an admission. (See e.g., Rule 305(f), Michigan v. Mosely, 423 U.S. 96 (1975); United States v. Westmore, 17 U.S.C.M.A. 406, 38 C.M.R. 204 (1968).)

That the accused requested counsel but was interrogated by the military police without having seen counsel. (See e.g., Rule 305(a) and (d), United States v. Gaines, 21 U.S.C.M.A. 236, 45 C.M.R. 10 (1972).)

That the accused was induced to make a statement by a promise of leniency by his squadron commander. (See e.g., Rule 304(b)(3), Manual for Courts-Martial, United States, 1969 (Rev. ed.), Para 140a(2), People v. Pineda, 182 Colo. 388, 513 P2d 452 (1973).)

That an accused was threatened with prosecution of her husband if she failed to make a statement. (See e.g., Rule 304(b)(3), Jarriel v. State, 317 So. 2d 141 (Fla. App. 1975).)
That the accused was held incommunicado and beaten until she confessed. (See e.g., Rule 304(b)(3), Payne v. Arkansas, 356 U.S. 560 (1958).)

That the accused made the statement in question only because he had previously given a statement to his division officer which was involuntary because he was improperly warned. (See e.g., Rule 304(b)(3), United States v. Seay, 1 M.J. 201 (C.M.A. 1978).) Although the prosecution retains at all times the burden of proof in this area, a specific defense objection under this Rule must include enough facts to enable the military judge to determine whether the objection is appropriate. These facts will be brought before the court via recital by counsel; the defense will not be required to offer evidence in order to raise the issue. If the prosecution concurs with the defense recital, the facts involved will be taken as true for purposes of the motion and evidence need not be presented. If the prosecution does not concur and the defense facts would justify relief if taken as true, the prosecution will present its evidence and the defense will then present its evidence.

The general intent of this provision is to narrow the litigation as much as may be possible without affecting the prosecution's burden.

In view of the Committee’s intent to narrow litigation in this area, it has adopted a basic structure in which the defense, when required by the military judge to object with specificity, has total responsibility in terms of what objection, if any, to raise under this Rule.

(4) Rulings. Rule 304(d)(4) is taken without significant change from Federal Rule of Criminal Procedure 12(e). As a plea of guilty waives all self-incrimination or voluntariness objections, Rule 304(d)(5), it is contemplated that litigation of confession issues raised before the plea will be fully concluded prior to plea. Cases involving trials by military judge alone in which the accused will enter a plea of not guilty are likely to be the only ones in which deferral of ruling is even theoretically possible. If the prosecution does not intend to use against the accused a statement challenged by the accused under this Rule but is unwilling to abandon the possible use of such statement, two options exist. First, the matter can be litigated before plea, or second, if the accused clearly intends to plead not guilty regardless of the military judge's ruling as to the admissibility of the statements in question, the matter may be deferred until such time as the prosecution indicates a desire to use the statements.


(c) Burden of proof. Rule 304(e) substantially changes military law. Under the prior system, the armed forces did not follow the rule applied in the civilian federal courts. Instead, MCM, 1969 (Rev.) utilized the minority "Massachusetts Rule," sometimes known as the "Two Bite Rule." Under this procedure the defense first raises a confession or admission issue before the military judge who determines it on a preponderance basis: if the judge determines the issue adversely to the accused, the defense may raise the issue again before the members. In a case where the members must be instructed not to consider the evidence in question unless they find it to have been voluntary beyond a reasonable doubt, the Committee determined that this bifurcated system unnecessarily complicated the final instructions to the members to such an extent as to substantially confuse the important matters before them. In view of the preference expressed in Article 36 for the procedure used in the trial of criminal cases in the United States district courts, the Committee adopted the majority "Orthodox Rule" as used in Article III courts. Pursuant to this procedure, the military judge determines the admissibility of confessions or admissions using a preponderance basis. No recourse exists to the court members on the question of admissibility. In the event of a ruling on admissibility adverse to the accused, the accused may present evidence to the members as to voluntariness for their consideration in determining what weight to give to the statements in question.

It should be noted that under the Rules the prosecution's burden extends only to the specific issue raised by the defense under Rule 304(d), should specificity have been required pursuant to Rule 304(d)(3).

(1) In general. Rule 304(e)(1) requires that the military judge find by a preponderance that a statement challenged under this rule was made voluntarily. When a trial is before a special court-martial without a military judge, the ruling of the President of the court is subject to objection by any member. The President's decision may be overruled. The Committee authorized use of this procedure in view of the importance of the issue and the absence of a legally trained presiding officer.

(2) Weight of the evidence. Rule 304(e)(2) allows the defense to present evidence with respect to voluntariness to the members for the purpose of determining what weight to give the statement. When a trial is by judge alone, the evidence received by the military judge on the question of admissibility also shall be considered by the military judge on the question of weight without the necessity of a formal request to do so by counsel. Additional evidence may, however, be presented to the military judge on the matter of weight if counsel chooses to do so.

(3) Derivative evidence. Rule 304(e)(3) recognizes that derivative evidence is distinct from the primary evidence dealt with by Rule 304, i.e., statements. The prosecution may prove that notwithstanding an involuntary statement, the evidence in question was not "obtained by use of" it and is not derivative.

February 1986 Amendment: Because of the 1986 addition of Rule 304(b)(2), the prosecution may prove that, notwithstanding an involuntary statement, derivative evidence is admissible under the "inevitable discovery" exception. The standard of proof is a preponderance of the evidence (Nix v. Williams, 467 U.S. 437, 104 S.Ct. 2501 (1984)).

(f) Defense evidence. Rule 304(f) generally restates prior law as found in Para. 140a(3) & (6), MCM, 1969 (Rev.). Under this Rule, the defense must specify that the accused plans to take the stand under this subdivision. This is already normal practice and it is intended to prevent confusion. Testimony given under this subdivision may not be used at the same trial at which it is given for any other purpose to include impeachment. The language, "the accused may be cross-examined only as to matters on which he or she so testifies" permits otherwise proper and relevant impeachment of the accused. See, e.g., Rule 607-609; 613.

(g) Corroboration. Rule 304(g) restates the prior law of corroboration with one major procedural change. Previously, no instruction on the requirement of corroboration was required unless the evidence was substantially conflicting, self-contradictory, uncertain, or improbable and there was a defense request for such an in-
struction. *United States v. Seigle*, 22 U.S.C.M.A. 403, 47 C.M.R. 340 (1973). The holding in *Seigle* in consistent with the 1969 Manual's view that the issue of admissibility may be decided by the members, but it is inconsistent with the position taken in Rule 304(d) that admissibility is the sole responsibility of the military judge. Inasmuch as the Rule requires corroborating evidence as a condition precedent to admission of the statement, submission of the issue to the members would seem to be both unnecessary and confusing. Consequently, the Rule does not follow *Seigle* insofar as the case allows the issue to be submitted to the members. The members must still weigh the evidence when determining the guilt or innocence of the accused, and the nature of any corroborating evidence is an appropriate matter for the members to consider when weighing the statement before them.

The corroboration rule requires only that evidence be admitted which would support an inference that the essential facts admitted in the statement are true. For example, presume that an accused charged with premeditated murder has voluntarily confessed that, intending to kill the alleged victim, she concealed herself so that she might surprise the victim at a certain place and that when the victim passed by, she plunged a knife in his back. At trial, the prosecution introduces independent evidence that the victim was found dead as a result of a knife wound in his back at the place where, according to the confession, the incident occurred. This fact would corroborate the confession because it would support an inference of the truth of the essential facts admitted in the confession.

(h) Miscellaneous.

(1) Oral statements. Rule 304(h)(1) is taken verbatim from 1969 Manual paragraph 140a(6). It recognizes that although an oral statement may be transcribed, the oral statement is separate and distinct from the transcription and that accordingly the oral statement may be received into evidence without violation of the best evidence rule unless the specific writing is in question, see Rule 1002. So long as the oral statement is complete, no specific rule would require the prosecution to offer the transcription. The defense could of course offer the writing when it would constitute impeachment.

(2) Completeness. Rule 304(h)(2) is taken without significant change from 1969 Manual paragraph 140a(6). Although Rule 106 allows a party to require an adverse party to complete and otherwise incomplete written statement in an appropriate case, Rule 304(h)(2) allows the defense to complete an incomplete statement regardless of whether the statement is oral or in writing. As Rule 304(h)(2) does not by its terms deal only with oral statements, it provides the defense in this area with the option of using Rule 106 or 304(h)(2) to complete a written statement.

(3) Certain admission by silence. Rule 304(h)(3) is taken from Para. 140a(4) of the 1969 Manual. That part of the remainder of Para. 140a(4) dealing with the existence of the privilege against self-incrimination is now set forth in Rule 301(f)(3). The remainder of Para. 140a(4) has been set forth in the Analysis to subdivision (d)(2), dealing with an admission by silence, or has been omitted as being unnecessary.

1986 Amendment: Mil. R. Evid. 304(h)(4) was added to make clear that evidence of a refusal to obey a lawful order to submit to a chemical analysis of body substances is admissible evidence when relevant either to a violation of such order or an offense which the test results would have been offered to prove. The Supreme Court in *South Dakota v. Neville*, 459 U.S. 553 (1983) held that where the government may compel an individual to submit to a test of a body substance, evidence of a refusal to submit to the test is constitutionally admissible. Since the results of tests of body substances are non-testimonial, a servicemember has no Fifth Amendment or Article 31 right to refuse to submit to such a test. *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980); *Schmerber v. State of California*, 384 U.S. 757 (1966). A test of body substances in various circumstances, such as search incident to arrest, probable cause and exigent circumstances, and inspection or random testing programs, among others, is a reasonable search and seizure in the military. *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); Mil. R. Evid. 312; Mil. R. Evid. 313. Under the Uniform Code of Military Justice, a military order is a valid means to compel a servicemember to submit to a test of a body substance. *Murray v. Haldeman*, supra. Evidence of a refusal to obey such an order may be relevant as evidence of consciousness of guilt. *People v. Ellis*, 65 Cal.2d 529, 421 P.2d 393 (1966). See also *State v. Anderson*, Or.App., 631 P.2d 822 (1981); *Newhouse v. Misterly*, 415 F.2d 514 (9th Cir. 1969), cert. denied 397 U.S. 966 (1970).

This Rule creates no right to refuse a lawful order. A servicemember may still be compelled to submit to the test. See, e.g., Mil. R. Evid. 312. Any such refusal may be prosecuted separately for violation of an order.

**Rule 305. Warnings About Rights**

(a) General Rule. Rule 305(a) makes statements obtained in violation of Rule 305, e.g., statements obtained in violation of Article 31(b) and the right to counsel, involuntary within the meaning of Rule 304. This approach eliminates any distinction between statements obtained in violation of the common law voluntariness doctrine (which is, in any event, included within Article 31(d) and those statements obtained in violation, for example, of *Miranda* (Miranda v. Arizona, 384 U.S. 435 (1966) warning requirements. This is consistent with the approach taken in the 1969 Manual, e.g., Para. 140a(2).

(b) Definitions.

(1) Persons subject to the Uniform Code of Military Justice. Rule 305(b)(1) makes it clear that under certain conditions a civilian may be a "person subject to the Uniform Code of Military Justice" for purposes of warning requirements, and would be required to give Article 31(b) (Rule 305(c)) warnings. See, generally, *United States v. Penn*, 18 U.S.C.M.A. 194, 39 C.M.R. 194 (1969). Consequently civilian members of the law enforcement agencies of the Armed Forces, e.g., the Naval Investigative Service and the Air Force Office of Special Investigations, will have to give Article 31 (Rule 305(c)) warnings. This provision is taken in substance from Para. 140a(2) of the 1969 Manual.

(2) Interrogation. Rule 305(b)(2) defines interrogation to include the situation in which an incriminating response is either sought or is a reasonable consequence of such questioning. The definition is expressly not a limited one and interrogation thus includes more than the putting of questions to an individual. See, e.g., *Brewer v. Williams*, 430 U.S. 387 (1977).

The Rule does not specifically deal with the situation in which an "innocent" question is addressed to a suspect and results unexpectedly in an incriminating response which could not have been foreseen. This legislative history and the cases are unclear as to
whether Article 31 allows nonincriminating questioning. See Lederer, Rights, Warnings in the Armed Services, 72 Mil. L. Rev. 1, 32-33 (1976), and the issue is left open for further development.

(c) Warnings concerning the accusation, right to remain silent, and use of statement. Rule 305(c) basically requires that those persons who are required by statute to give Article 31(b) warnings give such warnings. The Rule refrains from specifying who must give such warnings in view of the unsettled nature of the particular case law in the area.

It was not the intent of the Committee to adopt any particular interpretation of Article 31(b) insofar as who must give warnings except as provided in Rule 305(b)(1) and the Rule explicitly defers to Article 31 for the purpose of determining who must give warnings. The Committee recognized that numerous decisions of the Court of Military Appeals and its subordinate courts have dealt with this issue. These courts have rejected literal application of Article 31(b), but have not arrived at a conclusive rule. See e.g., United States v. Dohle, 1 M.J. 223 (C.M.A. 1975). The Committee was of the opinion, however, that both Rule 305(c) and Article 31(b) should be construed at a minimum, and in compliance with numerous cases, as requiring warnings by those personnel acting in an official disciplinary or law enforcement capacity. Decisions such as United States v. French, 25 C.M.R. 851 (A.F.B.R. 1958), aff'd in relevant part, 10 U.S.C.M.A. 171, 27 C.M.R. 245 (1959) (undercover agent) are not affected by the Rule.

Spontaneous or volunteered statements do not require warnings under Rule 305. The fact that a person may have known of his or her rights under the Rule is of no importance if warnings were required but not given.

Normally, neither a witness nor an accused need to be warned under any part of this Rule when taking the stand to testify at a trial by court-martial. See, however, Rule 801(b)(2).

The Rule requires in Rule 305(c)(2) that the accused or suspect be advised that he or she has the “right to remain silent” rather than the statutory Article 31(b) warning which is limited to silence on matters relevant to the underlying offense. The new language was inserted upon the suggestion of the Department of Justice in order to provide clear advice to the accused as to the absolute right to remain silent. See Miranda v. Arizona, 384 U.S. 436 (1966).

(d) Counsel rights and warnings. Rule 305(d) provides the basic right to counsel at interrogations and requires that an accused or suspect entitled to counsel at an interrogation be warned of that fact. The Rule restates the basic counsel entitlement for custodial interrogations found in both Para. 140c(2), MCM, 1969 (Rev.), and United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), and recognizes that the right to counsel attaches after certain procedural steps have taken place.

(1) General rule. Rule 305(d)(1) makes it clear that the right to counsel only attaches to an interrogation in which an individual’s Fifth Amendment privilege against self-incrimination is involved. This is a direct result of the different coverages of the statutory and constitutional privileges. The Fifth Amendment to the Constitution of the United States is the underpinning of the Supreme Court’s decision in Miranda v. Arizona, 384 U.S. 436 (1966) which is in turn of the origin of the military right to counsel at an interrogation. United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). Article 31, on the other hand, does not provide any right to counsel at an interrogation; but see United States v. McOmber, 1 M.J. 380 (C.M.A. 1976). Consequently, interrogations which involve only the Article 31 privilege against self-incrimination do not include a right to counsel. Under present law such interrogations include requests for voice and handwriting samples and perhaps request for bodily fluids. Compare United States v. Dionizio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973); and Schmerber v. California, 384 U.S. 757 (1967) with United States v. White, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967); United States v. Greer, 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953); and United States v. Ruiz, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974). Rule 305(d)(1) requires that an individual who is entitled to counsel under the Rule be advised of the nature of that right before an interrogation involving evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment (an interrogation as defined in Rule 305(d)(2) and modified in this case by Rule 305(d)(1)) may lawfully proceed. Although the Rule does not specifically require any particular wording or format for the right to counsel warning, reasonable specificity is required. At a minimum, the right to counsel warning must include the following substantive matter:

(1) That the accused or suspect has the right to be represented by a lawyer at the interrogation if he or she so desires;

(2) That the right to have counsel at the interrogation includes the right to consult with counsel and to have counsel at the interrogation;

(3) That if the accused or suspect so desires, he or she will have a military lawyer appointed to represent the accused or suspect at the interrogation at no expense to the individual, and the accused or suspect may obtain civilian counsel at no expense to the Government in addition to or instead of free military counsel.

It is important to note that those warnings are in addition to such other warnings and waiver questions as may be required by Rule 305.

Rule 305(d)(1)(A) follows the plurality of civilian jurisdiction by utilizing an objective test in defining “custodial” interrogation. See also United States v. Temperley, 22 U.S.C.M.A. 383, 47 C.M.R. 235 (1978). Unfortunately, there is no national consensus as to the exact nature of the test that should be used. The language used in the Rule results from an analysis of Miranda v. Arizona, 384 U.S. 436 (1966) which leads to the conclusion that Miranda is predominately a voluntariness decision concerned with the effects of the psychological coercion inherent in official questioning. See e.g., Lederer, Miranda v. Arizona—The Law Today, 78 Mil. L. Rev. 107, 130 (1977).

The variant chosen adopts an objective test that complies with Miranda’s intent by using the viewpoint of the suspect. The objective nature of the test, however, makes it improbable that a suspect would be able to claim a custodial status not recognized by the interrogator. The test makes the actual belief of the suspect irrelevant because of the belief that it adds nothing in practice and would unnecessarily lengthen trial.

Rule 305(d)(1)(B) codifies the Supreme Court’s decisions in Brewer v. Williams, 480 U.S. 387 (1977) and Massiah v. United States, 377 U.S. 201 (1964). As modified by Brewer, Massiah requires that an accused or suspect be advised of his or her right to counsel prior to interrogation, whether open or surreptitious, if that interrogation takes place after either arraignment or indictment. As the Armed Forces lack any equivalent to those civilian procedural points, the initiation of the formal military criminal
process has been utilized as the functional equivalent. Accordingly, the right to counsel attaches if an individual is interrogated after preferential of charges or imposition of pretrial arrest, restriction, or confinement. The right is not triggered by apprehension or temporary detention. Undercover investigation prior to the formal beginning of the criminal process will not be affected by this, but jailhouse interrogations will generally be prohibited. Compare Rule 305(d)(1)(B) with United States v. Hinkson, 17 U.S.C.M.A. 126, 37 C.M.R. 390 (1967) and United States v. Gibson, 3 U.S.C.M.A. 746, 14 C.M.R. 164 (1954).


Rule 305(d)(2) clarifies prior practice insofar as it explicitly indicates that no right to individual military counsel of the suspect’s or accused’s choice exists. See e.g., United States v. Wilcox, 3 M.J. 803 (A.C.M.R. 1977).

(e) Notice to Counsel. Rule 305(e) is taken from United States v. McOmber, 1 M.J. 380 (C.M.A. 1976). The holding of that case has been expanded slightly to clarify the situation in which an interrogator does not have actual knowledge that an attorney has been appointed for or retained by the accused or suspect with respect to the offenses, but reasonably should be so aware. In the absence of the expansion, present law places a premium on law enforcement ignorance and has the potential for encouraging perjury. The change rejects the view expressed in United States v. Roy, 4 M.J. 840 (A.C.M.R. 1978) which held that in the absence of bad faith a criminal investigator who interviewed the accused one day before the scheduled Article 32 investigation was not in violation of McOmber because he was unaware of the appointment of counsel.

Factors which may be considered in determining whether an interrogator should have reasonably known that an individual had counsel for purposes of this Rule include:

Whether the interrogator knew that the person to be questioned had requested counsel;

Whether the interrogator knew that the person to be questioned had already been involved in a pretrial proceeding at which he would ordinarily be represented by counsel;

Any regulations governing the appointment of counsel;

Local standard operating procedures;

The interrogator’s military assignment and training; and

The interrogator’s experience in the area of military criminal procedure.

The standard involved is purely an objective one.

(f) Exercise of rights. Rule 305(f) restates prior law in that it requires all questioning to cease immediately upon the exercise of either the privilege against self-incrimination or the right to counsel. See Michigan v. Mosely, 423 U.S. 96 (1975). The Rule expressly does not deal with the question of whether or when questioning may be resumed following an exercise of a suspect’s rights and does not necessarily prohibit it. The Committee notes that both the Supreme Court, see e.g., Brewer v. Williams, 480 U.S. 387 (1977); Michigan v. Mosely, 423 U.S. 96 (1975), and the Court of Military Appeals, see e.g., United States v. Hill, 5 M.J. 114 (C.M.A. 1978); United States v. Collier, 1 M.J. 358 (C.M.A. 1976) have yet to fully resolve this matter.

(g) Waiver. The waiver provision of Rule 305(g) restates current military practice and is taken in part from Para. 140a(2) of the 1969 Manual.

Rule 305(g)(1) sets forth the general rule for waiver and follows Miranda v. Arizona, 384 U.S. 436, 475 (1966). The Rule requires that an affirmative acknowledgment of the right be made before an adequate waiver may be found. Thus, three waiver questions are required under Rule 305(g):

(1) Do you understand your rights?

(2) Do you want a lawyer?

(3) Are you willing to make a statement? The specific wording of the questions is not detailed by the Rule and any format may be used so long as the substantive content is present.

Notwithstanding the above, Rule 305(g)(2), following North Carolina v. Butler, 441 U.S. 369 (1979), recognizes that the right to counsel, and only the right to counsel, may be waived even absent an affirmative declaration. The burden of proof is on the prosecution in such a case to prove by a preponderance that the accused waived the right to counsel.

The second portion of Rule 305(g)(2) dealing with notice to counsel is new. The intent behind the basic notice provision, Rule 305(e), is to give meaning to the right to counsel by preventing interrogators who know or reasonably should know an individual has counsel from circumventing the right to counsel by obtaining a waiver from that person without counsel present. Permitting a Miranda type waiver in such a situation clearly would defeat the purpose of the Rule. Rule 305(g)(2) thus permits a waiver of the right to counsel when notice to counsel is required only if it can be demonstrated either that the counsel, after reasonable efforts, could not be notified, or that the counsel did not attend the interrogation which was scheduled within a reasonable period of time after notice was given.

A statement given by an accused or suspect who can be shown to have his rights as set forth in this Rule and who intentionally frustrated the diligent attempt of the interrogator to comply with this Rule shall not be involuntary solely for failure to comply with the rights warning requirements of this Rule or of the waiver requirements. United States v. Sikorski, 21 U.S.C.M.A. 345, 45 C.M.R. 119 (1972).

(h) Non-military interrogations. Para. 140a(2) of the 1969 Manual, which governed civilian interrogations of military personnel basically restated the holding of Miranda v. Arizona, 384 U.S. 436 (1966). Recognizing that the Supreme Court may modify the Miranda rule, the Committee has used the language in Rule 305(h)(1) to make practice in this area dependent upon the way the Federal district courts would handle such interrogations. See Article 36.

Rule 305(h)(2) clarifies the law of interrogations as it relates to interrogations conducted abroad by officials of a foreign government or their agents when the interrogation is not conducted, instigated, or participated in by military personnel or their agents. Such an interrogation does not require rights warnings under subdivisions (c) or (d) or notice to counsel under subdivision (e). The only test to be applied in such a case is that of common law voluntariness: whether a statement obtained during such an interrogations
tion was obtained through the use of "coercion, unlawful influence, or unlawful inducement." Article 31(d).

Whether an interrogation has been "conducted, instigated, or participated in by military personnel or their agents" is a question of fact depending on the circumstances of the case. The Rule makes it clear that a United States personnel do not participate in an interrogation merely by being present at the scene of the interrogation, see United States v. Jones, 6 M.J. 226 (C.M.A. 1979) and the Analysis to Rule 311(c), or by taking steps which are in the best interests of the accused. Also, an interrogation is not "participated in" by military personnel or their agents who act as interpreters during the interrogation if there is no other participation. See Rule 311(c). The omission of express reference to interpreters in Rule 305(h)(2) was inadvertent.

Rule 306. Statements by one of several accused
Rule 306 is taken from the fifth subparagraph Para. 140b of the 1969 Manual and states the holding of Bruton v. United States, 391 U.S. 123 (1968). The remainder of the associated material in the Manual is primarily concerned with the co-conspirator’s exception to the hearsay rule and has been superseded by adoption of the Federal Rules of Evidence. See Rule 801.

When it is impossible to effectively delete all references to a co-accused, alternative steps must be taken to protect the co-accused. This may include the granting of a sequestration.

The Committee was aware of the Supreme Court's decision in Parker v. Randolph, 442 U.S. 62 (1979) dealing with interlocking confessions. In view of the lack of a consensus in Parker, however, the Committee determined that the case did not provide a sufficiently precise basis for drafting a rule, and decided instead to apply Bruton to interlocking confessions.

Rule 311. Evidence obtained from unlawful searches and seizures
(a) General rule. Rule 311(a) restates the basic exclusionary rule for evidence obtained from an unlawful search or seizure and is taken generally from Para. 152 of the 1969 Manual although much of the language of Para. 152 has been deleted for purposes of both clarity and brevity. The Rule requires suppression of derivative as well as primary evidence and follows the 1969 Manual rule by expressly limiting exclusion of evidence to that resulting from unlawful searches and seizures involving governmental activity. Those persons whose actions may thus give rise to exclusion are listed in Rule 311(c) and are taken generally from Para. 152 with some expansion for purposes of clarity. Rule 311 recognizes that discovery of evidence may be so unrelated to an unlawful search or seizure as to escape exclusion because it was not "obtained as a result" of that search or seizure.

The Rule recognizes that searches and seizures are distinct acts the legality of which must be determined independently. Although a seizure will usually be unlawful if it follows an unlawful search, a seizure may be unlawful even if preceded by a lawful search. Thus, adequate cause to seize may be distinct from legality of the search or observations which preceded it. Note in this respect Rule 316(d)(4)(C), Plain View.

(1) Objection. Rule 311(a)(1) requires that a motion to suppress or, as appropriate, an objection be made before evidence can be suppressed. Absent such motion or objection, the issue is waived. Rule 311(i).

(2) Adequate interest. Rule 311(a)(2) represents a complete redrafting of the standing requirements found in Para. 152 of the 1969 Manual. The Committee viewed the Supreme Court decision in Rakas v. Illinois, 443 U.S. 128 (1978), as substantially modifying the Manual language. Indeed, the very use of the term "standing" was considered obsolete by a majority of the Committee. The Rule distinguishes between searches and seizures. To have sufficient interest to challenge a search, a person must have "a reasonable expectation of privacy in the person, place, or property searched." "Reasonable expectation of privacy" was used in lieu of "legitimate expectation of privacy," often used in Rakas, supra, as the Committee believed the two expressions to be identical. The Committee also considered that the expression "reasonable expectation" has a more settled meaning. Unlike the case of a search, an individual must have an interest distinct from an expectation of privacy to challenge a seizure. When a seizure is involved rather than a search the only invasion of one's rights is the removal of the property in question. Thus, there must be some recognizable right to the property seized. Consequently, the Rule requires a "legitimate interest in the property or evidence seized." This will normally mean some form of possessory interest. Adequate interest to challenge a seizure does not per se give adequate interest to challenge a prior search that may have resulted in the seizure.

The Rule also recognizes an accused’s rights to challenge a search or seizure when the right to do so would exist under the Constitution. Among other reasons, this provision was included because of the Supreme Court’s decision in Jones v. United States, 302 U.S. 257 (1960), which created what has been termed the "automatic standing rule." The viability of Jones after Rakas and other cases is unclear, and the Rule will apply Jones only to the extent that Jones is constitutionally mandated.

February 1986 Amendment: The words "including seizures of the person" were added to expressly apply the exclusionary rule to unlawful apprehensions and arrests, that is, seizures of the person. Procedures governing apprehensions and arrests are contained in R.C.M. 302. See also Mil.R.Evid. 316(c).

(b) Exceptions: Rule 311(b) states the holding of Walker v. United States, 347 U.S. 62 (1954), and restates with minor change the rule as found in Para. 152 of the 1969 Manual.

February 1986 Amendment: Rule 311(b)(2) was added to incorpate the "inevitable discovery" exception to the exclusionary rule of Nix v. Williams, 467 U.S. 431 (1984). There is authority for the proposition that this exception applies to the primary evidence tainted by an illegal search or seizure, as well as to evidence derived secondarily from a prior illegal search or seizure. United States v. Romero, 692 F.2d 699 (10th Cir. 1982), cited with approval in Nix v. Williams, supra, 467 U.S. 431, n.2. See also United States v. Kozak, 12 M.J. 389 (C.M.A. 1982); United States v. Yandel, 13 M.J. 616 (A.F.C.M.R. 1982). Contra, United States v. Ward, 19 M.J. 505 (A.F.C.M.R. 1984). There is also authority for the proposition that the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the investigative authority and were being actively pursued prior to the occurrence of the illegal conduct which results in discovery.
of the evidence (United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984)).

As a logical extension of the holdings in Nix and United States v. Kozak, supra, the leading military case, the inevitable discovery exception should also apply to evidence derived from apprehensions and arrests determined to be illegal under R.C.M. 302 (State v. Nagel, 308 N.W.2d 539 (N.D. 1981) (alternative holding)). The prosecution may prove that, notwithstanding the illegality of the apprehension or arrest, evidence derived therefrom is admissible under the inevitable discovery exception.

Rule 311(b)(3) was added in 1986 to incorporate the “good faith” exception to the exclusionary rule based on United States v. Leon, 468 U.S. 897 (1984) and Massachusetts v. Sheppard, 468 U.S. 981 (1984). The exception applies to search warrants and authorizations to search or seize issued by competent civilian authority, military judges, military magistrates, and commanders. The test for determining whether the applicant acted in good faith is whether a reasonably well-trained law enforcement officer would have known the search or seizure was illegal despite the authorization. In Leon and Sheppard, the applicant’s good faith was enhanced by their prior consultation with attorneys.

The rationale articulated in Leon and Sheppard that the deterrence basis of the exclusionary rule does not apply to magistrates extends with equal force to search or seizure authorizations issued by commanders who are neutral and detached, as defined in United States v. Esell, 6 M.J. 307 (C.M.A. 1979). The United States Court of Military Appeals demonstrated in United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981), that commanders cannot be equated constitutionally to magistrates. As a result, commanders’ authorizations may be closely scrutinized for evidence of neutrality in deciding whether this exception will apply. In a particular case, evidence that the commander received the advice of a judge advocate prior to authorizing the search or seizure may be an important consideration. Other considerations may include those enumerated in Esell and: the level of command of the authorizing commander; whether the commander had training in the rules relating to search and seizure; whether the rule governing the search or seizure being litigated was clear; whether the evidence supporting the authorization was given under oath; whether the authorization was reduced to writing; and whether the defect in the authorization was one of form or substance.

As a logical extension of the holdings in Leon and Sheppard, the good faith exception also applies to evidence derived from apprehensions and arrests which are effectuated pursuant to an authorization or warrant, but which are subsequently determined to have been defective under R.C.M. 302 (United States v. Mahoney, 712 F.2d 956 (5th Cir. 1983); United States v. Beck, 729 F.2d 1329 (11th Cir. 1984)). The authorization or warrant must, however, meet the conditions set forth in Rule 311(b)(3).

It is intended that the good faith exception will apply to both primary and derivative evidence.

(c) Nature of search or seizure. Rule 311(c) defines “unlawful” searches and seizures and makes it clear that the treatment of a search or seizure varies depending on the status of the individual or group conducting the search or seizure.


(2) Other officials. Rule 311(c)(2) requires that the legality of a search or seizure performed by officials of the United States, of the District of Columbia, or of a state, commonwealth, or possession or political subdivision thereof, be determined by the principles of law applied by the United States district courts when resolving the legality of such a search or seizure.

(3) Officials of a foreign government or their agents. This provision is taken in part from United States v. Jordan, 1 M.J. 334 (C.M.A. 1976). After careful analysis, a majority of the Committee concluded that that portion of the Jordan opinion which purported to require that such foreign searches be shown to have complied with foreign law is dicta and lacks any specific legal authority to support it. Further the Committee noted the fact that most foreign nations lack any law of search and seizure and that in some cases, e.g., Germany, such law as may exist is purely theoretical and not subject to determination. The Jordan requirement thus unduly complicates trial without supplying any protection to the accused. Consequently, the Rule omits the requirement in favor of a basic due process test. In determining which version of the various due process phrasings to utilize, a majority of the Committee chose to use the language found in Para. 150b of the 1969 Manual rather than the language found in Jordan (which requires that the evidence not shock the conscience of the court) believing the Manual language is more appropriate to the circumstances involved.

Rule 311(c) also indicates that persons who are present at a foreign search or seizure conducted in a foreign nation have “not participated in” that search or seizure due either to their mere presence or because of any actions taken to mitigate possible damage to property or person. The Rule thus clarifies United States v. Jordan, 1 M.J. 334 (C.M.A. 1976) which stated that the Fourth Amendment would be applicable to searches and seizures conducted abroad by foreign police when United States personnel participate in them. The Court’s intent in Jordan was to prevent American authorities from sidestepping Constitutional protections by using foreign personnel to conduct a search or seizure that would have been unlawful if conducted by Americans. This intention is safeguarded by the Rule, which applies the Rules and the Fourth Amendment when military personnel or their agents conduct, instigate, or participate in a search or seizure. The Rule only clarifies the circumstances in which a United States official will be deemed to have participated in a foreign search or seizure. This follows dicta in United States v. Jones, 6 M.J. 226, 230 (C.M.A. 1979), which would require an “element of causation,” rather than mere presence. It seems apparent that an American servicemember is far more likely to be well served by United States presence—which might mitigate foreign conduct— than by its absence. Further, international treaties frequently require United States cooperation with foreign law enforcement. Thus, the Rule serves all purposes by prohibiting conduct by United States officials which might improperly support a search or seizure which would be unlawful if conducted in the United States while protecting both the accused and international relations.

The Rule also permits use of United States personnel as interpreters viewing such action as a neutral activity normally of po-
tential advantage to the accused. Similarly the Rule permits personnel to take steps to protect the person or property of the accused because such actions are clearly in the best interests of the accused.

(d) Motion to suppress and objections. Rule 311(d) provides for challenging evidence obtained as a result of an allegedly unlawful search or seizure. The procedure, normally that of a motion to suppress, is intended with a small difference in the disclosure requirements to duplicate that required by Rule 304(d) for confessions and admissions, the Analysis of which is equally applicable here.

Rule 311(d)(1) differs from Rule 304(c)(1) in that it is applicable only to evidence that the prosecution intends to offer against the accused. The broader disclosure provision for statements by the accused was considered unnecessary. Like Rule 304(d)(2)(C), Rule 311(d)(2)(C) provides expressly for derivative evidence disclosure of which is not mandatory as it may be unclear to the prosecution exactly what is derivative of a search or seizure. The Rule thus clarifies the situation.

(c) Burden of proof. Rule 311(e) requires that a preponderance of the evidence standard be used in determining search and seizure questions. Lego v. Twomey, 404 U.S. 477 (1972). Where the validity of a consent to search or seize is involved, a higher standard of "clear and convincing," is applied by Rule 314(e). This restates prior law.

February 1986 Amendment: Subparagraphs (e)(1) and (2) were amended to state the burden of proof for the inevitable discovery and good faith exceptions to the exclusionary rule, as prescribed in Nix v. Williams, 467 U.S. 431 (1984) and United States v. Leon, 468 U.S. 897 (1984), respectively.

1993 Amendment: The amendment to Mil. R. Evid. 311(e)(2) was made to conform Rule 311 to the rule of New York v. Harris, 495 U.S. 14 (1990). The purpose behind the exclusion of derivative evidence found during the course of an unlawful apprehension in a dwelling is to protect the physical integrity of the dwelling not to protect suspects from subsequent lawful police interrogation. See id. A suspect's subsequent statement made at another location that is the product of lawful police interrogation is not the fruit of the unlawful apprehension. The amendment also contains language added to reflect the "good faith" exception to the exclusionary role set forth in United States v. Leon, 468 U.S. 897 (1984), and the "inevitable discovery" exception set forth in Nix v. Williams, 467 U.S. 431 (1984).

(f) Defense evidence. Rule 311(f) restates prior law and makes it clear that although an accused is sheltered from any use at trial of a statement made while challenging a search or seizure, such statement may be used in a subsequent "prosecution for perjury, false swearing or the making of a false official statement."

(g) Scope of motions and objections challenging probable cause. Rule 311(g)(2) follows the Supreme Court decision in Franks v. Delaware, 422 U.S. 928 (1978), see also United States v. Turck, 49 C.M.R. 49, 53 (A.F.C.M.R. 1974), with minor modifications made to adopt the decision to military procedures. Although Franks involved perjured affidavits by police, Rule 311(a) is made applicable to information given by government agents because of the governmental status of members of the armed services. The Rule is not intended to reach misrepresentations made by informants without any official connection.

(h) Objections to evidence seized unlawfully. Rule 311(h) is new and is included for reasons of clarity.


Rule 312. Body views and intrusions

1984 Amendment: "Body" was substituted for "bodily" in the title and where appropriate in text. See United States v. Armstrong, 9 M.J. 374, 378 n.5 (C.M.A. 1980).

(a) General rule. Rule 312(a) limits all nonconsensual inspections, searches, or seizures by providing standards for examinations of the naked body and bodily intrusions. An inspection, search, or seizure that would be lawful but for noncompliance with this Rule is unlawful within the meaning of Rule 311.

(b) Visual examination of the body. Rule 312(b) governs searches and examinations of the naked body and thus controls what has often been loosely termed "strip searches." Rule 312(b) permits visual examination of the naked body in a wide but finite range of circumstances. In doing so, the Rule strictly distinguishes between visual examination of body cavities and actual intrusion into them. Intrusion is governed by Rule 312(c) and (e). Visual examination of the male genitals is permitted when a visual examination is permissible under this subdivision. Examination of cavi ties may include, when otherwise proper under the Rule, requiring the individual being viewed to assist in the examination.

Examination of body cavities within the prison setting has been vexatious. See, e.g., Hanley v. Ward, 584 F.2d 609 (2d Cir. 1978); Wolfish v. Levi, 573 F.2d 118, 131 (2d Cir. 1978), reversed sub nom Bell v. Wolfish, 441 U.S. 520 (1979); Daughtry v. Harris, 476 F.2d 292 (10th Cir. 1973), cert. denied, 414 U.S. 872 (1973); Frazier v. Ward, 426 F.Sup. 1354, 1362-67 (N.D.N.Y. 1977); Hodges v. Klein, 412 F.Sup. 896 (D.N.J. 1976). Institutional security must be protected while at the same time only privacy intrusions necessary should be imposed on the individual. The problem is particularly acute in this area of inspection of body cavities as such strong social taboos are involved. Rule 312(b)(2) allows examination of body cavities when reasonably necessary to maintain the security of the institution or its personnel. See, Bell v. Wolfish, 441 U.S. 520 (1979). Examinations likely to be reasonably necessary include examination upon entry or exit from the institution, examination subsequent to a personal visit, or examination pursuant to a reasonably clear indication that the individual is concealing property within a body cavity. Frazier v. Ward, 426 F.Sup. 1354 (N.D.N.Y. 1977); Hodges v. Klein, 412 F.Sup. 896 (D.N.J. 1976). Great deference should be given to the decisions of the commanders and staff of military confinement facilities. The concerns voiced by the Court of Appeals for the Tenth Circuit in Daughtry v. Harris, 476 F.2d 292 (10th Cir. 1973) about escape and related risks are likely to be particularly applicable to military prisoners because of their training in weapons and escape and evasion tactics.

As required throughout Rule 312, examination of body cavities must be accomplished in a reasonable fashion. This incorporates Rockin v. California, 342 U.S. 165 (1952), and recognizes society's particularly sensitive attitude in this area. Where possible, examination should be made in private and by members of the same sex as the person being examined.

1984 Amendment: In subsection (b)(2) and (c), "reasonable" replaced "real" before "suspicion." A majority of Circuit Courts
of Appeal have adopted a "reasonable suspicion" test over a "real suspicion" test. See United States v. Klein, 592 F.2d 909 (5th Cir. 1979); United States v. Asbury, 586 F.2d 973 (2d Cir. 1978); United States v. Wardlaw, 576 F.2d 932 (1st Cir. 1978); United States v. Himmelwright, 551 F.2d 991 (5th Cir.), cert. denied, 434 U.S. 902 (1977). But see United States v. Aman, 624 F.2d 911 (9th Cir. 1980). In practice, the distinction may be minimal. But see Perel v. Vanderford, 547 F.2d 278, 280 n.1 (5th Cir. 1977). However, the real suspicion formulation has been criticized as potentially confusing. United States v. Asbury, supra at 976.

(c) Intrusion into body cavities. Actual intrusion into body cavities, e.g., the anus and vagina, may represent both a significant invasion of the individual's privacy and a possible risk to the health of the individual. Rule 312(c) allows seizure of property discovered in accordance with Rules 312(b), 312(c)(2), or 316(d)(4)(C) but requires that intrusion into such cavities be accomplished by personnel with appropriate medical qualifications. The Rule thus does not specifically require that the intrusion be made by a doctor, nurse, or other similar medical personnel although Rule 312(g) allows the Secretary concerned to prescribe who may perform such procedures. It is presumed that an object easily located by sight can normally be easily extracted. The requirements for appropriate medical qualifications, however, recognize that circumstances may require more qualified personnel. This may be particularly true, for example, for extraction of foreign matter from a pregnant woman's vagina. Intrusion should normally be made either by medical personnel or by persons with appropriate medical qualifications who are members of the same sex as the person involved.

The Rule distinguishes between seizure of property previously located and intrusive searches of body cavities by requiring in Rule 312(c)(2) that such searches be made only pursuant to a search warrant or authorization, based upon probable cause, and conducted by persons with appropriate medical qualifications. Exigencies do not permit such searches without warrant or authorization unless Rule 312(f) is applicable. In the absence of express regulations issued by the Secretary concerned pursuant to Rule 312(g), the determination as to which personnel are qualified to conduct an intrusion should be made in accordance with normal procedures of the applicable medical facility.

Recognizing the peculiar needs of confinement facilities and related institutions, see, e.g., Bell v. Wolfish, 441 U.S. 520 (1979), Rule 312(c) authorizes body cavity searches without prior search warrant or authorization when there is a "real suspicion that the individual is concealing weapons, contraband, or evidence of crime."

(d) Extraction of body fluids. Seizure of fluids from the body may involve self-incrimination questions pursuant to Article 31 of the Uniform Code of Military Justice, and appropriate case law should be consulted prior to involuntary seizure. See generally Rule 301(a) and its Analysis. The Committee does not intend an individual's expelled breath to be within the definition of "body fluids."

The 1969 Manual Para. 152 authorization for seizure of bodily fluids when there has been inadequate time to obtain a warrant or authorization has been slightly modified. The prior language that there be "clear indication that evidence of crime will be found and that there is reason to believe that delay will threaten the destruction of evidence" has been modified to authorize such a seizure if there is reason to believe that the delay "could result in the destruction of the evidence." Personnel involuntarily extracting bodily fluids must have appropriate medical qualifications.

Rule 312 does not prohibit compulsory urinalysis, whether random or not, made for appropriate medical purposes, see Rule 312(f), and the product of such a procedure if otherwise admissible may be used in evidence at a court-martial.

1984 Amendment: The first word in the caption of subsection (d) was changed from "Seizure" to "Extraction." This is consistent with the text of subsection (d) and should avoid possible confusion about the scope of the subsection. Subsection (d) does not apply to compulsory production of body fluids (e.g., being ordered to void urine), but rather to physical extraction of body fluids (e.g., catheterization or withdrawal of blood). See Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983). See also Analysis, Mil.R.Evid. 313(b).

(e) Other intrusive searches. The intrusive searches governed by Rule 312(e) will normally involve significant medical procedures including surgery and include any intrusion into the body including x-rays. Applicable civilian cases lack a unified approach to surgical intrusions, see, e.g., United States v. Crowder, 513 F.2d 395 (D.C. Cir. 1976); Adams v. State, 299 N.E.2d 834 (Ind. 1973); Creamer v. State, 299 Ga. 511, 192 S.E.2d 350 (1972), Note, Search and Seizure: Compelled Surgical Intrusion, 27 Baylor L.Rev. 305 (1975), and cases cited therein, other than to rule out those intrusions which are clearly health threatening. Rule 312(e) balances the Government's need for evidence with the individual's privacy interest by allowing intrusion into the body of an accused or suspect upon search authorization or warrant when conducted by person with "appropriate medical qualification," and by prohibiting intrusion when it will endanger the health of the individual. This allows, however, considerable flexibility and leaves the ultimate issue to be determined under a due process standard of reasonableness. As the public's interest in obtaining evidence from an individual other than an accused or suspect is substantially less than the person's right to privacy in his or her body, the Rule prohibits the involuntary intrusion altogether if its purpose is to obtain evidence of crime.

(f) Intrusions for valid medical purposes. Rule 312(f) makes it clear that the Armed Forces retain their power to ensure the health of their members. A procedure conducted for valid medical purposes may yield admissible evidence. Similarly, Rule 312 does not affect in any way any procedure necessary for diagnostic or treatment purposes.

(g) Medical qualifications. Rule 312(g) permits but does not require that medical criteria be prescribed for medical searches necessary for persons to conduct the procedures and examinations specified in the Rule.

Rule 313. Inspections and inventories in the armed forces

Although inspections have long been recognized as being necessary and legitimate exercises of a commander's powers and responsibilities, see, e.g., United States v. Gebhart, 10 U.S.C.M.A. 606, 610 n.2, 28 C.M.R. 172, 176 n.2 (1959), the 1969 Manual for Courts-Martial omitted discussion of inspections except to note that the Para. 152 restrictions on seizures were not applicable to "administrative inspections." The reason for the omission is likely that military inspections per se have traditionally been con-
sidered administrative in nature and free of probable cause requirements. Cf. Frank v. Maryland, 359 U.S. 360 (1959). Inspections that have been utilized as subterfuge searches have been condemned. See, e.g., United States v. Lange, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965). Recent decisions of the United States Court of Military Appeals have attempted, generally without success, to define “inspection” for Fourth Amendment evidentiary purposes, see, e.g., United States v. Thomas, 1 M.J. 397 (C.M.A. 1976) (three separate opinions), and have been concerned with the intent, scope, and method of conducting inspections. See e.g., United States v. Harris, 5 M.J. 44 (C.M.A. 1978).

(a) General rule.

Rule 313 codifies the law of military inspections and inventories. Traditional terms used to describe various inspections, e.g., “shakedown inspection” or “gate search,” have been abandoned as being conducive to confusion.

Rule 313 does not govern inspections or inventories not conducted within the armed forces. These civilian procedures must be evaluated under Rule 311(c)(2). In general, this means that such inspections and inventories need only be permissible under the Fourth Amendment in order to yield evidence admissible at a court-martial.

Seizure of property located pursuant to a proper inspection or inventory must meet the requirements of Rule 316.

(b) Inspections. Rule 313(b) defines “inspection” as an “examination . . . conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, installation, vessel, aircraft, or vehicle.” Thus, an inspection is conducted for the primary function of ensuring mission readiness, and is a function of the inherent duties and responsibilities of those in the military chain of command. Because inspections are intended to discover, correct, and deter conditions detrimental to military efficiency and safety, they must be considered as a condition precedent to the existence of any effective armed force and inherent in the very concept of a military unit. Inspections as a general legal concept have their constitutional origins in the very provisions of the Constitution which authorize the armed forces of the United States. Explicit authorization for inspections has thus been viewed in the past as unnecessary, but in light of the present ambiguous state of the law, see, e.g. United States v. Thomas, supra; United States v. Roberts, 2 M.J. 31 (C.M.A. 1976), such authorization appears desirable. Rule 313 is thus, in addition to its status as a rule of evidence authorized by Congress under Article 36, an express Presidential authorization for inspections with such authorization being grounded in the President’s powers as Commander-in-Chief.

The interrelationship of inspections and the Fourth Amendment is complex. The constitutionality of inspections is apparent and has been well recognized; see e.g., United States v. Gebhart, 10 C.M.A. 606, 610 n.2, 28 C.M.R. 172, 176 n.2. (1959). There are three distinct rationales which support the constitutionality of inspections.

The first such rationale is that inspections are not technically “searches” within the meaning of the Fourth Amendment. Cf. Air Pollution Variance Board v. Western Alfalfa Corps, 416 U.S. 861 (1974); Hester v. United States, 265 U.S. 57 (1924). The intent of the framers, the language of the amendment itself, and the nature of military life render the application of the Fourth Amendment to a normal inspection questionable. As the Supreme Court has often recognized, the “Military is, by necessity, a specialized society separate from civilian society.” Brown v. Glines, 444 U.S. 348, 354 (1980) citing Parker v. Leav, 417 U.S. 733, 734 (1974). As the Supreme Court noted in Glines, supra, Military personnel must be ready to perform their duty whenever the occasion arises. To ensure that they always are capable of performing their mission promptly and reliably, the military services “must insist upon a respect for duty and a discipline without counterpart in civilian life.” 444 U.S. at 354 (citations omitted). An effective armed force without inspections is impossible—a fact amply illustrated by the unfettered right to inspect vested in commanders throughout the armed forces of the world. As recognized in Glines, supra, and Greer v. Spock, 424 U.S. 828 (1976), the way that the Bill of Rights applies to military personnel may be different from the way it applies to civilians. Consequently, although the Fourth Amendment is applicable to members of the armed forces, inspections may well not be “searches” within the meaning of the Fourth Amendment by reason of history, necessity, and constitutional interpretation. If they are “searches,” they are surely reasonable ones, and are constitutional on either or both of two rationales.

As recognized by the Supreme Court, highly regulated industries are subject to inspection without warrant, United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), both because of the necessity for such inspections and because of the “limited threats to . . . justifiable expectation of privacy.” United States v. Biswell, supra, at 316. The court in Biswell, supra, found that regulations of firearms traffic involved “large interests,” that “inspection is a crucial part of the regulatory scheme,” and that when a firearms dealer enters the business “he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection,” 406 U.S. 315, 316. It is clear that inspections within the armed forces are at least as important as regulation of firearms; that without such inspections effective regulation of the armed forces is impossible; and that all personnel entering the armed forces can be presumed to know that the reasonable expectation of privacy within the armed forces is exceedingly limited by comparison with civilian expectations. See e.g., Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975). Under Colonnade Catering, supra, and Bisell, supra, inspections are thus reasonable searches and may be made without warrant.

An additional rationale for military inspection is found within the Supreme Court’s other administrative inspection cases. See Marshall v. Barlow’s, Inc., 436 U.S. 397 (1978); Camara v. Municipal Court, 387 U.S. 523 (1967); See City of Seattle, 387 U.S. 541 (1967). Under these precedents an administrative inspection is constitutionally acceptable for health and safety purposes so long as such an inspection is first authorized by warrant. The warrant involved, however, need not be upon probable cause in the traditional sense, rather the warrant may be issued “if reasonable legislative or administrative standards for conducting an area inspection are satisfied . . .” Camara, supra, 387 U.S. at 538. Military inspections are intended for health and safety reasons in a twofold sense: they protect the health and safety of the personnel in peacetime in a fashion somewhat analogous to that which protects the health of those in a civilian environment, and, by ensuring the presence and proper condition of armed forces personnel, equip-
ment, and environment, they protect those personnel from becoming unnecessary casualties in the event of combat. Although Marshall v. Barlow’s Inc., Camara, and See, supra, require warrants, the intent behind the warrant requirement is to ensure that the person whose property is inspected is adequately notified that local law requires inspection, that the person is notified of the limits of the inspection, and that the person is adequately notified that the inspector is acting with proper authority. Camara v. Municipal Court, 387 U.S. 523, 532 (1967). Within the armed forces, the warrant requirement is met automatically if an inspection is ordered by a commander, as commanders are empowered to grant warrants. United States v. Ezell, 6 M.J. 307 (C.M.A. 1979). More importantly, the concerns voiced by the court are met automatically within the military environment in any event as the rank and assignment of those inspecting and their right to do so are known to all. To the extent that the search warrant requirements are intended to prohibit inspectors from utilizing inspections as subterfuge searches, a normal inspection fully meets the concern, and Rule 313(b) expressly prevents such subterfuges. The fact that an inspection that is primarily administrative in nature may result in a criminal prosecution is unimportant. Camara v. Municipal Court, 387 U.S. 523, 530–531 (1967). Indeed, administrative inspections may inherently result in prosecutions because such inspections are often intended to discover health and safety defects the presence of which are criminal offenses. Id. at 531. What is important, to the extent that the Fourth Amendment is applicable, is protection from unreasonable violations of privacy. Consequently, Rule 313(b) makes it clear that an otherwise valid inspection is not rendered invalid solely because the inspector has as his or her purpose a secondary “purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings . . .”. An examination made, however, with a primary purpose of prosecution is no longer an administrative inspection. Inspections are, as has been previously discussed, lawful acceptable measures to ensure the survival of the American armed forces and the accomplishment of their mission. They do not infringe upon the limited reasonable expectation of privacy held by service personnel. It should be noted, however, that it is possible for military personnel to be granted a reasonable expectation of privacy greater than the minimum inherently recognized by the Constitution. An installation commander might, for example, declare a BQO sacrosanct and set limits to inspections. In such a rare case the reasonable expectation of privacy held by the relevant personnel could prevent or substantially limit the power to inspect under the Rule. See Rule 311(c). Such extended expectations of privacy may, however, be negated with adequate notice. An inspection “may be made ‘of the whole or part’ of a unit, organization, installation, vessel, aircraft, or vehicle . . .(and is) conducted as an incident of command.” Inspections are usually quantitative examinations insofar as they do not normally single out specific individuals or small groups of individuals. There is, however, no requirement that the entirety of a unit or organization be inspected. Unless authority to do so has been withheld by competent superior authority, any individual placed in a command or appropriate supervisory position may inspect the personnel and property within his or her control.

Inspections for contraband such as drugs have posed a major problem. Initially, such inspections were viewed simply as a form of health and welfare inspection, see, e.g., United States v. Unruh, 22 C.M.A. 466, 47 C.M.R. 556 (1973). More recently, however, the Court of Military Appeals has tended to view them solely as searches for evidence of crime. See e.g. United States v. Roberts, 2 M.J. 31 (C.M.A. 1976); but see United States v. Harris, 5 M.J. 44, 58 (C.M.A. 1978). Illicit drugs, like unlawful weapons, represent, however, a potential threat to military efficiency of disastrous proportions. Consequently, it is entirely appropriate to treat inspections intended to rid units of contraband that would adversely affect military fitness as being health and welfare inspections, see e.g., Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975), and the Rule does so.

A careful analysis of the applicable case law, military and civilian, easily supports this conclusion. Military cases have long recognized the legitimacy of “health and welfare” inspections and have defined those inspections as examinations intended to ascertain and ensure the readiness of personnel and equipment. See, e.g., United States v. Gebhart, 10 C.M.A. 606, 610 n.2, 28 C.M.R. 172, 176 n.2 (1959); “(these) types of searches are not to be confused with inspections of military personnel . . . conducted by a commander in furtherance of the security of his command” United States v. Brushears, 45 C.M.R. 438 (A.C.M.R. 1972), rev’d on other grounds, 19 C.M.A. 522, 45 C.M.R. 526 (1972). Among the legitimate intents of a proper inspection is the location and confiscation of unauthorized weapons. See, e.g., United States v. Grace, 19 C.M.A. 409, 410, 42 C.M.R. 11, 12 (1970). The justification for this conclusion is clear: unauthorized weapons are a serious danger to the health of military personnel and therefore to mission readiness. Contraband that “would affect adversely the security, military fitness, or good order and discipline” is thus identical with unauthorized weapons insofar as their effects can be predicted. Rule 313(b) authorizes inspections for contraband, and is expressly intended to authorize inspections for unlawful drugs. As recognized by the Court of Military Appeals in United States v. Unruh, 22 C.M.A. 466, 469–70, 47 C.M.R. 556, 559–60 (1973), unlawful drugs pose unique problems. If uncontrolled, they may create an “epidemic,” 47 C.M.R. at 559. Their use is not only contagious as peer pressure in barracks, aboard ship, and in units, tends to impel the spread of improper drug use, but the effects are known to render units unfit to accomplish their missions. Viewed in this light, it is apparent that inspection for those drugs which would “affect adversely the security, military fitness, or good order and discipline of the command” is a proper administrative intent well within the decisions of the United States Supreme Court. See, e.g., Camara v. Municipal Court, 387 U.S. 523 (1967); United States v. Unruh, 22 C.M.A. 446, 471, 47 C.M.R. 556, 561 (1973) (Judge Duncan dissenting). This conclusion is buttressed by the fact that members of the military have defined those inspections as examinations intended to ascertain and ensure the readiness of personnel and equipment. Camara, supra; United States v. Thomas, supra; United States v. Roberts, 2 M.J. 31 (C.M.A. 1977), those decisions with their multiple opinions are not dispositive. Particularly important to this conclusion is the opinion of Judge Perry in United States v. Roberts, supra. Three significant themes are present in the opinion: lack of express authority for such inspections, the perception that unlawful drugs are merely
The fact that possession of contraband is itself unlawful renders higher than that for an inspection not intended to locate such material. The probability that an inspection may be a subterfuge somewhat than with prosecution of those found in possession of it.

Thirdly, Rule 313(b) specifically deals with the subterfuge question in order to prevent improper use of inspections.

Rule 313(b) requires that before an inspection intended to locate and confiscate unlawful weapons or other contraband, that would affect adversely the command may take place, there must be either "a reasonable suspicion that such property is present in the command" or the inspection must be "a previously scheduled examination of the command." The former requirement requires that an inspection not previously scheduled be justified by "reasonable suspicion that such property is present in the command." This standard is intentionally minimal and requires only that the person ordering the inspection have a suspicion that is, under the circumstances, reasonable in nature. Probable cause is not required. Under the latter requirement, an inspection shall be scheduled sufficiently far enough in advance to eliminate any reasonable possibility that the inspection is being used as a subterfuge, i.e., that it is being used to search for a given individual for evidence of crime when probable cause is lacking. Such scheduling may be made as a matter of date or event. In other words, inspections may be scheduled to take place on any specific date, e.g., a commander may decide on the first of a month to inspect on the 7th, 9th, and 21st, or on the occurrence of a specific event beyond the usual control of the commander, e.g., whenever an alert is ordered, forces are deployed, a ship sails, the stock market reaches a certain level of activity, etc. It should be noted that "previously scheduled" inspections that vest discretion in the inspector are permissible when otherwise lawful. So long as the examination, e.g., an entrance gate inspection, has been previously scheduled, the fact that reasonable exercise of discretion is involved in singling out individuals to be inspected is not improper; such inspection must not be in violation of the Equal Protection clause of the 5th Amendment or be used as a subterfuge intended to allow search of certain specific individuals.

The Rule applies special restrictions to contraband inspections because of the inherent possibility that such inspection may be used as subterfuge searches. Although a lawful inspection may be conducted with a secondary motive to prosecute those found in possession of contraband, the primary motive must be administrative in nature. The Rule recognizes the fact that commanders are ordinarily more concerned with removal of contraband from units—thereby eliminating its negative effects on unit readiness—than with prosecution of those found in possession of it. The fact that possession of contraband is itself unlawful renders the probability that an inspection may be a subterfuge somewhat higher than that for an inspection not intended to locate such material.

An inspection which has as its intent, or one of its intents, in whole or in part, the discovery of contraband, however slight, must comply with the specific requirements set out in the Rule for inspections for contraband. An inspection which does not have such an intent need not so comply and will yield admissible evidence if contraband is found incidentally by the inspection. Contraband is defined as material the possession of which is by its very nature unlawful. Material may be declared to be unlawful by appropriate statute, regulation, or order. For example, if liquor is prohibited aboard ship, a shipboard inspection for liquor must comply with the rules for inspections for contraband.

Before unlawful weapons or other contraband may be the subject of an inspection under Rule 313(b), there must be a determination that "such property would affect adversely the security, military fitness, or good order and discipline of the command." In the event of an adequate defense challenge under Rule 311 to an inspection for contraband, the prosecution must establish by a preponderance that such property would in fact so adversely affect the command. Although the question is an objective one, its resolution depends heavily on factors unique to the personnel or location inspected. If such contraband would adversely affect the ability of the command to complete its assigned mission in a significant way, the burden is met. The nature of the assigned mission is unimportant, for that is a matter within the prerogative of the chain of command only. The expert testimony of those within the chain of command of a given unit is worthy of great weight as the only purpose for permitting such an inspection is to ensure military readiness. The physiological or psychological effects of a given drug on an individual are normally irrelevant except insofar as such evidence is relevant to the question of the user's ability to perform duties without impaired efficiency. As inspections are generally quantitative examinations, the nature and amount of contraband sought is relevant to the question of the government's burden. The existence of five unlawful drug users in an Army division, for example, is unlikely to meet the Rule's test involving adverse effect, but five users in an Army platoon may well do so.

The Rule does not require that personnel to be inspected be given preliminary notice of the inspection although such advance notice may well be desirable as a matter of policy or in the interests, as perhaps in gate inspections, of establishing an alternative basis, such as consent, for the examination.

Rule 313(b) requires that inspections be conducted in a "reasonable fashion." The timing of an inspection and its nature may be of importance. Inspections conducted at a highly unusual time are not inherently unreasonable—especially when a legitimate reason of such timing is present. However, a 0200 inspection, for example, may be unreasonable depending upon the surrounding circumstances.

The Rule expressly permits the use of "any reasonable or natural technological aid." Thus, dogs may be used to detect contraband in an otherwise valid inspection for contraband. This conclusion follows directly from the fact that inspections for contraband conducted in compliance with Rule 313 are lawful. Consequently, the technique of inspection is generally unimportant under the new rules. The Committee did, however, as a matter of policy require that the natural or technological aid be "reasonable."

Rule 313(b) recognizes and affirms the commander's power to conduct administrative examinations which are primarily non-
prosecutorial in purpose. Personnel directing inspections for contraband must take special care to ensure that such inspections comply with Rule 313(b) and thus do not constitute improper general searches or subterfuges.

1984 Amendment: Much of the foregoing Analysis was rendered obsolete by amendments made in 1984. The third sentence of Rule 313(b) was modified and the fourth and sixth sentences are new.


Despite the absence in the rules of express authority for compulsory production of body fluids, it apparently was the intent of the drafters to permit such production as part of inspections, relying at least in part on the medical purpose exception in Mil.R.Evid. 312(f). Mil.R.Evid. 312(d) applies only to nonconsensual extraction (e.g., catheterization, drawing blood) of body fluids. This was noted in the Analysis, Mil.R.Evid. 312(d), which went on to state that "compulsory urinalysis, whether random or not, made for appropriate medical purposes, see Rule 312(f), and the product of such a procedure if otherwise admissible may be used at a court-martial."

There is considerable overlap between production of body fluid for a medical purpose under Mil.R.Evid. 312(f) and for determining and ensuring military fitness in a unit, organization, installation, vessel, aircraft, or vehicle. Frequently the two purposes are coterminous. Ultimately, the overall health of members of the organization is indivisible from the ability of the organization to perform the mission. To the extent that a "medical purpose" embraces anything relating to the physical or mental state of a person and that person's ability to perform assigned duties, then the two purposes may be identical. Such a construction of "medical purpose" would seem to swallow up the specific rules and limitations in Mil.R.Evid. 312(f), however. Therefore, a distinction may be drawn between a medical purpose—at least to the extent that that term is construed to concern primarily the health of the individual—and the goal of ensuring the overall fitness of the organization. For example, it may be appropriate to test—by compulsory production of urine—persons whose duties entail highly dangerous or sensitive duties. The primary purpose of such tests is to ensure that the mission will be performed safely and properly. Preserving the health of the individual is an incident—albeit a very important one—of that purpose. A person whose urine is found to contain dangerous drugs is relieved from duty during gunnery practice, for example, not so much to preserve that person's health as to protect the safety of others. On the other hand, a soldier who is extremely ill may be compelled to produce urine (or even have it extracted) not so much so that that soldier can return to duty—although the military has an interest in this—as for that soldier's immediate health needs.

Therefore, Mil.R.Evid. 313(b) provides an independent, although often closely related basis for compulsory production of body fluids, with Mil.R.Evid. 312(f). By expressly providing for both, possible confusion or an unnecessarily narrow construction under Mil.R.Evid. 312(f) will be avoided. Note that all of the requirements of Mil.R.Evid. 313(b) apply to an order to produce body fluids under that rule. This includes the requirement that the inspection be done in a reasonable fashion. This rule does not prohibit, as part of an otherwise lawful inspection, compelling a person to drink a reasonable amount of water in order to facilitate production of a urine sample. See United States v. Mitchell, 16 M.J. 654 (N.M.C.M.R. 1983).

The sixth sentence is based on United States v. Middleton, supra. Middleton was not decided on the basis of Mil.R. Evid. 313, as the inspection in Middleton occurred before the effective date of the Military Rules of Evidence. The Court discussed Mil.R.Evid. 313(b), but "did not now decide on the legality of this Rule (or) bless its application." United States v. Middleton, supra at 131. However, the reasoning and the holding in Middleton suggest that the former language in Mil.R.Evid. 313(b) may have established unnecessary burdens for the prosecution, yet still have been inadequate to protect against subterfuge inspections, under some circumstances.

The former language allowed an inspection for "unlawful weapons and other contraband when such property would affect adversely the security, military fitness, or good order and discipline of the command and when (1) there is a reasonable suspicion that such property is present in the command or (2) the examination is a previously scheduled examination of the command." This required a case-by-case showing of the adverse effects of the weapons or contraband (including controlled substances) in the particular unit, organization, installation, aircraft, or vehicle examined. See Analysis, Mil.R.Evid. 313(b). In addition, the examination had to be based on a reasonable suspicion such items were present, or be previously scheduled.

Middleton upheld an inspection which had as one of its purposes the discovery of contraband—i.e., drugs. Significantly, there is no indication in Middleton that a specific showing of the adverse effects of such contraband in the unit or organization is necessary. The court expressly recognized (see United States v. Middleton, supra at 129; cf. United States v. Trottier, 9 M.J. 337 (C.M.A. 1980)) the adverse effect of drugs on the ability of the armed services to perform the mission without requiring evidence on the point. Indeed, it may generally be assumed that if it is illegal to possess an item under a statute or lawful regulation, the adverse effect of such item on security, military fitness, or good order and discipline is established by such illegality, without requiring the commander to personally analyze its effects on a case-by-case basis and the submission of evidence at trial. The defense may challenge the constitutionality of the statute or legality of the regulation (cf. United States v. Wilson, 12 U.S.C.M.A. 165, 30 C.M.R. 165 (1961); United States v. Nation, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958)) but this burden falls on the defense. Thus, this part of the former test is deleted as unnecessary. Note, however, that it may be necessary to demonstrate a valid military purpose to inspect for some noncontraband items. See United States v. Brown, 12 M.J. 420 (C.M.A. 1982).

Middleton upheld broad authority in the commander to inspect for contraband, as well as other things, "when adequate safe-
guards are present which assure that the "inspection" was really intended to determine and assure the readiness of the unit inspected, rather than merely to provide a subterfuge for avoiding limitations that apply to a search and seizure in a criminal investigation." As noted above, the Court in *Middleton* expressly reserved judgment whether Mil.R.Evid. 313(b) as then written satisfied this test.

The two prongs of the second part of the former test were intended to prevent subterfuge. However, they did not necessarily do so. Indeed, the "reasonable suspicion" test could be read to expressly authorize a subterfuge search. See, e.g., *United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965). The "previously scheduled" test is an excellent way to prove that an inspection was not directed as the result of a reported offense, and the new formulation so retains it. However, it alone does not ensure absence of prosecutorial motive when specific individuals are singled out, albeit well in advance, for special treatment.

At the same time, the former test could invalidate a genuine inspection which had no prosecutorial purpose. For example, a commander whose unit was suddenly alerted for a special mission might find it necessary, even though the commander had no actual suspicion contraband is present, to promptly inspect for contraband, just to be certain none was present. A commander in such a position should not be prohibited from inspecting.

The new language removes these problems and is more compatible with *Middleton*. It does not establish unnecessary hurdles for the prosecution. A commander may inspect for contraband just as for any other deficiencies, problems, or conditions, without having to show any particular justification for doing so. As the fifth sentence in the rule indicates, any examination made primarily for the purpose of prosecution is not a valid inspection under the rule. The sixth sentence identifies those situations which, objectively, raise a strong likelihood of subterfuge. These situations are based on *United States v. Lange*, supra and *United States v. Hay*, 3 M.J. 654, 655-56 (A.C.M.R. 1977) (quoted in *United States v. Middleton*, supra at 127-28 n.7; see also *United States v. Brown*, supra). "Specific individuals" means persons named or identified on the basis of individual characteristics, rather than by duty assignment or membership in a subdivision of the unit, organization, installation, vessel, aircraft, or vehicle, such as a platoon or squad, or on a random basis. See *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978). The first sentence of subsection (b) makes clear that a part of one of the listed categories may be inspected. Cf. *United States v. King*, 2 M.J. 4 (C.M.A. 1976).

The existence of one or more of the three circumstances identified in the fifth sentence does not mean that the examination is, per se, not an inspection. The prosecution may still prove, by clear and convincing evidence, that the purpose of the examination was to determine and ensure security, military fitness, and good order and discipline, and not for the primary purpose of prosecution. For example, when an examination is ordered immediately following a report of a specific offense in the unit, the prosecution might prove the absence of subterfuge by showing that the evidence of the particular offense had already been recovered when the inspection was ordered and that general concern about the welfare of the unit was the motivation for the inspection. Also, if a commander received a report that a highly dangerous item (e.g., an explosive) was present in the command, it might be proved that the commander's concern about safety was the primary purpose for the examination, not prosecution. In the case in which specific individuals are examined, or subjected to more intrusive examinations than others, these indicia of subterfuge might be overcome by proof that these persons were not chosen with a view of prosecution, but on neutral ground or for an independent purpose—e.g., individuals were selected because they were new to the unit and had not been thoroughly examined previously. These examples are not exclusive.

The absence of any of the three circumstances in the fifth sentence, while indicative of a proper inspection, does not necessarily preclude a finding of subterfuge. However, the prosecution need not meet the higher burden of persuasion when the issue is whether the commander's purpose was prosecutorial, in the absence of these circumstances.

The new language provides objective criteria by which to measure a subjective standard, i.e., the commander's purpose. Because the standard is ultimately subjective, however, the objective criteria are not conclusive. Rather they provide concrete and realistic guidance for commanders to use in the exercise of their inspection power, and for judicial authorities to apply in reviewing the exercise of that power.

(c) Inventories. Rule 313(c) codifies prior law by recognizing the admissibility of evidence seized via bona fide inventory. The rationale behind this exception to the usual probable cause requirement is that such an inventory is not prosecutorial in nature and is a reasonable intrusion. See, e.g., *South Dakota v. Opperman*, 428 U.S. 364 (1976).

An inventory may not be used as subterfuge search, *United States v. Mossbauer*, 20 C.M.A. 584, 44 C.M.R. 14 (1971), and the basis for an inventory and the procedure utilized may be subject to challenge in any specific case. Inventories of the property of detained individuals have usually been sustained. See, e.g., *United States v. Brashears*, 21 C.M.A. 552, 45 C.M.R. 326 (1972).

The committee does not, however, express an opinion as to the lawful scope of an inventory. See, e.g., *South Dakota v. Opperman*, 428 U.S. 364 (1976), in which the court did not determine the propriety of opening the locked trunk or glovebox during the inventory of a properly impounded automobile.

Inventories will often be governed by regulation.

**Rule 314. Searches not requiring probable cause**

The list of non-probable cause searches contained within Rule 314 is intended to encompass most of the non-probable cause searches common in the military environment. The term "search" is used in Rule 314 in its broadest non-technical sense. Consequently, a "search" for purposes of Rule 314 may include examinations that are not "searches" within the narrow technical sense of the Fourth Amendment. See, e.g., Rule 314(j).

Insofar as Rule 314 expressly deals with a given type of search, the Rule pre-empts the area in that the Rule must be followed even should the Supreme Court issue a decision more favorable to the Government. If such a decision involves a non-probable cause search of a type not addressed in Rule 314, it will be fully applicable to the Armed Forces under Rule 314(k) unless other authority prohibits such application.

(a) General Rule. Rule 314(a) provides that evidence obtained from a search conducted pursuant to Rule 314 and not in violation of another Rule, e.g., Rule 312, Bodily Views and Intrusions, is admissible when relevant and not otherwise inadmissible.
(b) Border Searches. Rule 314(b) recognizes that military personnel may perform border searches when authorized to do so by Congress.

(c) Searches upon entry to United States installations, aircraft, and vessels abroad. Rule 314(c) follows the opinion of Chief Judge Fletcher in United States v. Rivera, 4 M.J. 215 (C.M.A. 1978), in which he applied 4 M.J. 215, 216 n.2, the border search doctrine, to entry searches of United States installations or enclaves on foreign soil. The search must be reasonable and its intent, in line with all border searches, must be primarily prophylactic. This authority is additional to any other powers to search or inspect that a commander may hold.

Although Rule 314(c) is similar to Rule 313(b), it is distinct in terms of its legal basis. Consequently, a search performed pursuant to Rule 314(c) need not comply with the burden of proof requirement found in Rule 313(b) for contraband inspections even though the purpose of the 314(c) examination is to prevent introduction of contraband into the installation, aircraft or vessel.

A Rule 314(c) examination must, however, be for a purpose denominated in the rule and must be rationally related to such purpose. A search pursuant to Rule 314(c) is possible only upon entry to the installation, aircraft or vessel, and an individual who chooses not to enter removes any basis for search pursuant to Rule 314(c). The Rule does not indicate whether discretion may be vested in the person conducting a properly authorized Rule 314(c) search. It was the opinion of members of the Committee, however, that such discretion is proper considering the Rule's underlying basis.

1984 Amendment: Subsection (c) was amended by adding “or exit from” based on United States v. Alleyne, 13 M.J. 331 (C.M.A. 1982).

(d) Searches of government property. Rule 314(d) restates prior law, see, e.g., United States v. Weshenfelder, 20 C.M.A. 416, 43 C.M.R. 256 (1971), and recognizes that personnel normally do not have sufficient interest in government property to have a reasonable expectation of privacy in it. Although the rule could be equally well denominated as a lack of adequate interest, see, Rule 311(a)(2), it is more usually expressed as a non-probable cause search. The Rule recognizes that certain government property may take on aspects of private property allowing an individual to develop a reasonable expectation of privacy surrounding it. Wall or floor lockers in living quarters issued for the purpose of storing personal property will normally, although not necessarily, involve a reasonable expectation of privacy. It was the intent of the Committee that such lockers give rise to a rebuttable presumption that they do have an expectation of privacy, and that insofar as other government property is concerned such property gives rise to a rebuttable presumption that such an expectation is absent.

Public property, such as streets, parade grounds, parks, and office buildings rarely if ever involves any limitations upon the ability to search.

(e) Consent Searches.

(1) General rule. The rule in force before 1980 was found in Para. 152, MCM, 1969 (Rev.), the relevant sections of which state:

A search of one's person with his freely given consent, or of property with the freely given consent of a person entitled in the situation involved to waive the right to immunity from an unreasona-
The rule recognizes the necessity for assisting police or law enforcement personnel in their investigations but specifically does not address the issue of the lawful duration of a stop nor of the nature of the questioning, if any, that may be involuntarily addressed to the individual stopped. See Brown v. Texas, 440 U.S. 903 (1979), generally prohibiting such questioning in civilian life. Generally, it would appear that any individual who can be lawfully stopped is likely to be a suspect for the purposes of Article 31(b). Whether identification can be demanded of a military suspect without Article 31(b) warnings is an open question and may be dependent upon whether the identification of the suspect is relevant to the offense possibly involved. See Lederer, Rights Warnings in the Armed Services, 72 Mil. L. Rev. 1, 40-41 (1976).


(g) Searches incident to a lawful apprehension. The 1969 Manual rule was found in Para. 152 and stated:

A search conducted as an incident of lawfully apprehending a person, which may include a search of his person, of the clothing he is wearing, and of property which, at time of apprehension, is in his immediate possession or control, or of an area from within which he might gain possession of weapons or destructible evidence; and a search of the place where the apprehension is made is lawful.

Rule 314(g) restates the principle found within the Manual text but utilizes new and clarifying language. The Rule expressly requires that an apprehension be lawful.

(1) General Rule. Rule 314(g)(1) expressly authorizes the search of a person of a lawfully apprehended individual without further justification.

(2) Search for weapons and destructible evidence. Rule 314(g)(2) delimits the area that can be searched pursuant to an apprehension and specifies that the purpose of the search is only to locate weapons and destructible evidence. This is a variation of the authority presently in the Manual and is based upon the Supreme Court’s decision in Chimel v. California, 395 U.S. 752 (1969). It is clear from the Court’s decision in United States v. Chadwick, 438 U.S. 1 (1977), that the scope of a search pursuant to a lawful apprehension must be limited to those areas which an individual could reasonably reach and utilize. The search of the area within the immediate control of the person apprehended is thus properly viewed as a search based upon necessity—the one based upon the safety of those persons apprehending or upon the necessity to safeguard evidence. Chadwick, holding that police could not search a sealed footlocker pursuant to an arrest, stands for the proposition that the Chimel search must be limited by its rationale.

That portion of the 1969 Manual subparagraph dealing with intrusive body searches has been incorporated into Rule 312. Similarly that portion of the Manual dealing with search incident to hot pursuit of a person has been incorporated into that portion of Rule 315 dealing with exceptions to the need for search warrants or authorizations.

1984 Amendment: Subsection (g)(2) was amended by adding language to clarify the permissible scope of a search incident to apprehension of the occupant of an automobile based on New York v. Belton, 453 U.S. 454 (1981). The holding of the Court used the term “automobile” so that word is used in the rule. It is intended that the term “automobile” have the broadest possible meaning.

(3) Examination for other persons. Rule 314(g)(3) is intended to permit personnel performing apprehensions. Consequently, it is extremely limited in scope and requires a good faith and reasonable belief that persons may be present who might interfere with the apprehension of individuals. Any search must be directed towards the finding of such persons and not evidence.


(l) Searches within jails, confinement facilities, or similar facilities. Personnel confined in a military confinement facility or housed in a facility serving a generally similar purpose will normally yield any normal Fourth Amendment protections to the reasonable needs of the facility. See, United States v. Maglio, 20 C.M.A. 456, 43 C.M.R. 296 (1971). See also Rule 312.

(i) Emergency searches to save life or for related purpose. This type of search is not found within the 1969 Manual provision but is in accord with prevailing civilian and military case law. See, United States v. Yarborough, 50 C.M.R. 149, 155 (A.F.C.M.R. 1975). Such a search must be conducted in good faith and may not be a subterfuge in order to circumvent an individual’s Fourth Amendment protections.

(j) Searches of open fields or woodlands. This type of search is taken from 1969 Manual paragraph 152. Originally recognized in Hester v. United States, 265 U.S. 57 (1924), this doctrine was re- 
vived by the Supreme Court in Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974). Arguably, such a search is not a search within the meaning of the Fourth Amendment. In Hester, Mr. Justice Holmes simply concluded that “the special protection accorded by the 4th Amendment to the people in their ‘persons, houses, papers, and effects’ is not extended to the open fields.” 265 U.S. at 59. In relying on Hester, the Court in Air Pollution Variance Board noted that it was “not advised that he [the air pollution investigator] was on premises from which the public was excluded.” 416 U.S. at 865. This suggests that the doctrine of open fields is subject to the caveat that a reasonable expectation of privacy may result in application of the Fourth Amendment to open fields.

(k) Other searches. Rule 314(k) recognizes that searches of a type not specified within the Rule but proper under the Constitution are also lawful.

Rule 315. Probable cause searches

(a) General Rule—Rule 315 states that evidence obtained pursuant to the Rule is admissible when relevant and not otherwise admissible under the Rules.

(b) Definitions.

(1) Authorization to search. Rule 315(b)(1) defines an “authorization to search” as an express permission to search issued by proper military authority whether commander or judge. As such, it replaces the term “search warrant” which is used in the Rules only when referring to a permission to search given by proper civilian authority. The change in terminology reflects the unique nature of the armed forces and of the role played by commanders.
(2) Search warrant. The expression "search warrant" refers only to the authority to search issued by proper civilian authority.

c) Scope of authorization.— Rule 315(c) is taken generally from Para. 152(1)-(3) of the 1969 Manual except that military jurisdiction to search upon military installations or in military aircraft, vessels, or vehicles has been clarified. Although civilians and civilian institutions on military installations are subject to search pursuant to a proper search authorization, the effect of any applicable federal statute or regulation must be considered. E.g., the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422, and DOD Directive 5400.12 (Obtaining Information From Financial Institutions).

Rule 315(c)(4) is a modification of prior law. Subdivision (c)(4)(A) is intended to ensure cooperation between Department of Defense agencies and other government agencies by requiring prior consent to DOD searches involving such other agencies. Although Rule 315(c)(4)(B) follows the 1969 Manual in permitting searches of "other property in a foreign country" to be authorized pursuant to subdivision (d), subdivision (c) requires that all applicable treaties be complied with or that prior concurrence with an appropriate representative of the foreign nation be obtained if no treaty or agreement exists. The Rule is intended to foster cooperation with host nations and compliance with all existing international agreements. The rule does not require specific approval by foreign authority of each search (unless, of course, applicable treaty requires such approval); rather the Rule permits prior blanket or categorical approvals. Because Rule 315(c)(4) is designed to govern intragovernmental and international relationships rather than relationships between the United States and its citizens, a violation of these provisions does not render a search unlawful.

(d) Power to authorize—Rule 315(d) grants power to authorize searches to impartial individuals of the included classifications. The closing portion of the subdivision clarifies the decision of the Court of Military Appeals in United States v. Ezell, 6 M.J. 307 (C.M.A. 1979), by stating that the mere presence of an authorizing officer at a search does not deprive the individual of an otherwise neutral character. This is in conformity with the decision of the United States Supreme Court in Lo-Ji Sales v. New York, 442 U.S. 319 (1979), from which the first portion of the language has been taken. The subdivision also recognizes the propriety of a commander granting a search authorization after taking a pretrial action equivalent to that which may be taken by a federal district judge. For example, a commander might authorize use of a drug detector dog, an action arguably similar to the granting of wiretap order by a federal judge, without necessarily depriving himself or herself of the ability to later issue a search authorization. The question would be whether the commander has acted in the first instance in an impartial judicial capacity.

(1) Commander— Rule 315(d)(1) restates the prior rule by recognizing the power of commanders to issue search authorizations upon probable cause. The Rule explicitly allows non-officers serving in a position designated by the Secretary concerned as a position of command to issue search authorizations. If a non-officer assumes command of a unit, vessel, or aircraft, and the command position is one recognized by regulations issued by the Secretary concerned, e.g., command of a company, squadron, vessel, or aircraft, the non-officer commander is empowered to grant search authorizations under this subdivision whether the assumption of command is pursuant to express appointment or devolution of command. The power to so do is thus a function of position rather than rank.

The Rule also allows a person serving as officer-in-charge or in a position designated by the Secretary as a position analogous to an officer-in-charge to grant search authorizations. The term "officer-in-charge" is statutorily defined, Article 1(4), as pertaining only to the Navy, Coast Guard, and Marine Corps, and the change will allow the Army and Air Force to establish an analogous position should they desire to do so in which case the power to authorize searches would exist although such individuals would not be "officers-in-charge" as that term is used in the U.C.M.J.

(2) Delegee— Former subsection (2), which purported to allow delegation of the authority to authorize searches, was deleted in 1984, based on United States v. Kalscheuer, 11 M.J. 373 (C.M.A. 1981). Subsection (3) was renumbered as subsection (2).

(3) Military judge— Rule 315(d)(2) permits military judges to issue search authorizations when authorized to do so by the Secretary concerned. MILITARY MAGISTRATES MAY ALSO BE EMPowered TO GRANT SEARCH AUTHORIZATIONS. This recognizes the practice now in use in the Army but makes such practice discretionary with the specific Service involved.

(e) Power to search. Rule 315(e) specifically denominates those persons who may conduct or authorize a search upon probable cause either pursuant to a search authorization or when such an authorization is not required for reasons of exigencies. The Rule recognizes, for example, that all officers and non-commissioned officers have inherent power to perform a probable cause search without obtaining of a search authorization under the circumstances set forth in Rule 315(g). The expression "criminal investigator" within Rule 315(e) includes members of the Army Criminal Investigation Command, the Marine Corps Criminal Investigation Division, the Naval Criminal Investigative Service, the Air Force Office of Special Investigations, and Coast Guard special agents.

(f) Basis for search authorizations. Rule 315(f) requires that probable cause be present before a search can be conducted under the Rule and utilizes the basic definition of probable cause found in 1969 Manual Para. 152.

For reasons of clarity the Rule sets forth a simple and general test to be used in all probable cause determinations: probable cause can exist only if the authorizing individual has a "reasonable belief that the information giving rise to the intent to search is believable and has a factual basis." This test is taken from the "two prong test" of Aguilar v. Texas, 378 U.S. 108 (1964), which was incorporated in Para. 152 of the 1969 Manual. The Rule expands the test beyond the hearsay and informant area. The "factual basis" requirement is satisfied when an individual reasonably concludes that the information, if reliable, adequately apprises the individual that the property in question is what it is alleged to be and is where it is alleged to be. Information is "believable" when an individual reasonably concludes that it is sufficiently reliable to be believed.

The twin test of "believability" and "basis in fact" must be met in all probable cause situations. The method of application of the test will differ, however, depending upon circumstances. The following examples are illustrative:
APPENDIX 22

(1) An individual making a probable cause determination who observes an incident first hand is only required to determine if the observation is reliable and that the property is likely to be what it appears to be.

For example, an officer who believes that she sees an individual in possession of heroin must first conclude that the observation was reliable (i.e., if her eyeglass was adequate—should glasses have been worn—and if there was sufficient time for adequate observation) and that she has sufficient knowledge and experience to be able to reasonably believe that the substance in question was in fact heroin.

(2) An individual making a probable cause determination who relies upon the in person report of an informant must determine both that the informant is believable and that the property observed is likely to be what the observer believes it to be. The determining individual may rely upon the demeanor of the informant in order to determine whether the observer is believable. An individual known to have a "clean record" and no bias against the individual to be affected by the search is likely to be credible.

(3) An individual making a probable cause determination who relies upon the report of an informant not present before the authorizing individual must determine both that the informant is credible and that the property observed is likely to be what the informant believed it to be. The determining individual may utilize one or more of the following factors, among others, in order to determine whether the informant is believable:

(A) Prior record as a reliable informant— Has the informant given information in the past which proved to be accurate?

(B) Corroborating detail— Has enough detail of the informant's information been verified to imply that the remainder can reasonably be presumed to be accurate?

(C) Statement against interest— Is the information given by the informant sufficiently adverse to the fiscal or penal interest of the informant to imply that the information may reasonably be presumed to be accurate?

(D) Good citizen— Is the character of the informant, as known by the individual making the probable cause determination, such as to make it reasonable to presume that the information is accurate?

Mere allegations may not be relied upon. For example, an individual may not reasonably conclude that an informant is reliable simply because the informant is so named by a law enforcement agent. The individual making the probable cause determination must be supplied with specific details of the informant's past actions to allow that individual to personally and reasonably conclude that the informant is reliable.

Information transmitted through law enforcement or command channels is presumed to have been reliably transmitted. This presumption may be rebutted by an affirmative showing that the information was transmitted with intentional error.

The Rule permits a search authorization to be issued based upon information transmitted by telephone or other means of communication.

The Rule also permits the Secretaries concerned to impose additional procedural requirements for the issuance of search authorizations.

1984 Amendment: The second sentence of subsection (g)(1) was deleted based on Illinois v. Gates, 462 U.S. 213 (1983), which overturned the mandatory two-prong test of Aguilar v. Texas, supra. Although the second sentence may be technically compatible with Gates, it could be construed as requiring strict application of the standards of Aguilar. The former language remains good advice for those deciding the existence of probable cause, especially for uncorroborated tips, but is not an exclusive test. See also Massachusetts v. Upton, 466 U.S. 767 (1984).

(g) Exigencies. Rule 315(g) restates prior law and delimits those circumstances in which a search warrant or authorization is unnecessary despite the ordinary requirement for one. In all such cases probable cause is required.

Rule 315(g)(1) deals with the case in which the time necessary to obtain a proper authorization would threaten the destruction or concealment of the property or evidence sought.

Rule 315(g)(2) recognizes that military necessity may make it tactically impossible to attempt to communicate with a person who could grant a search authorization. Should a nuclear submarine be on radio silence, for example, lack a proper authorizing individual, (perhaps for reasons of disqualification), no search could be conducted if the Rule were otherwise unless the ship broke radio silence and imperiled the vessel or its mission. Under the Rule this would constitute an "exigency." "Military operational necessity" includes similar necessity incident to the Coast Guard's performance of its maritime police mission.

The Rule also recognizes in subdivision (g)(3) the "automobile exception" created by the Supreme Court. See, e.g., United States v. Chadwick, 433 U.S. 1 (1977); South Dakota v. Opperman, 428 U.S. 364 (1976); Texas v. White, 423 U.S. 67 (1975), and, subject to the constraints of the Constitution, the Manual, or the Rules, applies it to all vehicles. While the exception will thus apply to vessels and aircraft as well as to automobiles, trucks, et al, it must be applied with great care. In view of the Supreme Court's reasoning that vehicles are both mobile and involve a diminished expectation of privacy, the larger a vehicle is, the more unlikely it is that the exception will apply. The exception has no application to government vehicles as they may be searched without formal warrant or authorization under Rule 314(d).

1984 Amendment: The last sentence of subsection (g) was amended by deleting "may be presumed to be." The former language could be construed to permit the accused to prove that the vehicle was in fact inoperable (that is, to rebut the presumption of operability) thereby negating the exception, even though a reasonable person would have believed the vehicle inoperable. The fact of inoperability is irrelevant; the test is whether the official(s) searching knew or should have known that the vehicle was inoperable.

(h) Execution. Rule 314(h)(1) provides for service of a search warrant or search authorization upon a person whose property is to be searched when possible. Noncompliance with the Rule does not, however, result in exclusion of the evidence. Similarly, Rule 314(h)(2) provides for the inventory of seized property and provisions of a copy of the inventory to the person from whom the property was seized. Noncompliance with the subdivision does not, however, make the search or seizure unlawful. Under Rule 315(h)(3) compliance with foreign law is required when executing a search authorization outside the United States, but noncompliance does not trigger the exclusionary rule.

Rule 316. Seizures

(a) General Rule. Rule 316(a) provides that evidence obtained pursuant to the Rule is admissible when relevant and not other-
The Rule requires that the observation making up the alleged outside a window, via flashlight or binocular, for example, is observed in a "reasonable fashion" is a question to be considered on a case by case basis. Whether a person may properly enter upon private property in order to effect a seizure of matter located via plain view is not resolved by the Rule and is left to future case development.

1984 Amendment: Subsection (d)(5) was added based on United States v. Place, 462 U.S. 696 (1983).

(c) Power to seize. Rule 316(e) conforms with Rule 315(e) and has its origin in Para. 19, MCM, 1969 (Rev.).

Rule 317. Interception of wire and oral communication

(a) General Rule. The area of interception of wire and oral communications is unusually complex and fluid. At present, the area is governed by the Fourth Amendment, applicable federal statute, DOD directive, and regulations prescribed by the Service Secretaries. In view of this situation, it is preferable to refrain from codification and to vest authority for the area primarily in the Department of Defense or Secretary concerned. Rule 317(c) thus prohibits interception of wire and oral communications for law enforcement purposes by persons of the armed forces except as authorized by 18 U.S.C. § 2516, Rule 317(b), and when applicable, by regulations issued by the Secretary of Defense or the Secretary concerned. Rule 317(a), however, specifically requires exclusion of evidence resulting form noncompliance with Rule 317(c) only when exclusion is required by the Constitution or by an applicable statute. Insofar as a violation of a regulation is concerned, compare United States v. Dillard, 8 M.J. 213 (C.M.A. 1980) with United States v. Caceres, 440 U.S. 741 (1979).

(b) Authorization for Judicial Applications in the United States. Rule 317(b) is intended to clarify the scope of 18 U.S.C. § 2516 by expressly recognizing the Attorney General's authority to authorize applications to a federal court by the Department of Defense, Department of Transportation, or the military departments for authority to intercept wire or oral communications.

(c) Regulations. Rule 317(c) requires interception of wire or oral communications in the United States be first authorized by statute, see Rule 317(b), and interceptions abroad by appropriate regulations. See the Analysis to Rule 317(a), supra. The Committee intends 317(c) to limit only in interceptions that are non consensual under Chapter 119 of Title 18 of the United States Code.

Rule 321. Eyewitness identification

(a) General Rule

(1) Admissibility. The first sentence of Rule 321(a)(1) is the basic rule of admissibility of eyewitness identification and provides that evidence of a relevant out-of-court identification is admissible when otherwise admissible under the Rules. The intent of the provision is to allow any relevant out-of-court identification without any need to comply with the condition precedent such as in-court identification, significant change from the prior rule as found in Para. 153a, MCM, 1969 (Rev.).

The language "if such testimony is otherwise admissible under these rules" is primarily intended to ensure compliance with the hearsay rule. Rule 802. It should be noted that Rule 801(d)(1)(C) states that a statement of "identification of a person made after perceiving the person" is not hearsay when "the declarant testifies at the trial or hearing and is subject to cross-examination con-
cerning the statement." An eyewitness identification normally will be admissible if the declarant testifies. The Rule's statement, "the witness making the identification and any person who has observed the previous identification may testify concerning it," is not an express exception authorizing the witness to testify to an out-of-court identification notwithstanding the hearsay rule, rather it is simply an indication that in appropriate circumstances, see Rules 803 and 804, a witness to an out-of-court identification may testify concerning it.

The last sentence of subdivision (a)(1) is intended to clarify procedure by emphasizing that an in-court identification may be bolstered by an out-of-court identification notwithstanding the fact that the in-court identification has not been attacked.

(2) Exclusionary rule. Rule 321(a)(2) provides the basic exclusionary rule for eyewitness identification testimony. The substance of the Rule is taken from prior Manual paragraph 153a as modified by the new procedure for suppression motions. See Rules 304 and 311. Subdivision (a)(2)(A) provides that evidence of an identification will be excluded if it was obtained as a result of an "unlawful identification process conducted by the United States or other domestic authorities" while subdivision (a)(2)(B) excludes evidence of an identification if exclusion would be required by the due process clause of the Fifth Amendment to the Constitution. Under the burden of proof, subdivision (d)(2), an identification is not inadmissible if the prosecution proves by a preponderance of the evidence that the identification process was not so unnecessarily suggestive, in light of the totality of the circumstances, as to create a very substantial likelihood of irreparable mistaken identity. It is the unreliability of the evidence which is determinative. Manson v. Brathwaite, 432 U.S. 98 (1977). "United States or other domestic authorities" includes military personnel.

Although it is clear that an unlawful identification may taint a later identification, it is unclear at present whether an unlawful identification requires suppression of evidence other than identification of the accused. Consequently, the Rule requires exclusion of nonidentification derivative evidence only when the Constitution would so require.

(b) Definition of "unlawful." (1) Lineups and other identification processes. Rule 321(b) defines "unlawful lineup or other identification processes." When such a procedure is conducted by persons subject to the Uniform Code of Military Justice or their agents, it will be unlawful if it is "unnecessarily suggestive or otherwise in violation of the due process clause of the Fifth Amendment of the Constitution of the United States as applied to members of the armed forces." The expression, "unnecessarily suggestive" itself is a technical one and refers to an identification that is in violation of the due process clause because it is unreliable. See Manson v. Brathwaite, supra; Stovall v. Denno, 338 U.S. 292 (1967); Neil v. Biggers, 409 U.S. 188 (1972). See also Foster v. California, 394 U.S. 440 (1969). An identification is not unnecessarily suggestive in violation of the due process clause if the identification process was not so unnecessarily suggestive, in light of the totality of the circumstances, as to create a very substantial likelihood of irreparable mistaken identity. See Manson v. Brathwaite, supra, and subdivision (d)(2).

Subdivision (1)(A) differs from subdivision (1)(B) only in that it recognizes that the Constitution may apply differently to members of the armed forces than it does to civilians.

Rule 321(b)(1) is applicable to all forms of identification processes including showups and lineups.

The 1984 Amendment: Subsections (b)(1) and (d)(2) were modified to make clear that the test for admissibility of an out-of-court identification is reliability. See Manson v. Brathwaite, supra. This was apparently the intent of the drafters of the former Rule. See Analysis, Mil.R.Evid. 321. The language actually used in subsection (b)(1) and (d)(2) was subject to a different interpretation, however. See S. SALZBURG, L. SCHINASI, AND D. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL at 165-167 (1981); Gasperini, Eyewitness Identification Under the Military Rules of Evidence, The Army Lawyer at 42 (May 1980).

In determining whether an identification is reliable, the military judge should weigh all the circumstances, including: the opportunity of the witness to view the accused at the time of the offense; the degree of attention paid by the witness; the accuracy of any prior descriptions of the accused by the witness; the level of certainty shown by the witness in the identification; and the time between the crime and the confrontation. Against these factors should be weighed the corrupting effect of a suggestive and unnecessary identification. See Manson v. Brathwaite, supra; Neil v. Biggers, supra.

Note that the modification of subsection (b)(1) eliminates the distinction between identification processes conducted by persons subject to the code and other officials. Because the test is the reliability of the identification, and not a prophylactic standard, there is no basis to distinguish between identification processes conducted by each group. See Manson v. Brathwaite, supra.

(2) Lineups: right to counsel. Rule 321(b)(2) deals only with lineups. The Rule does declare that a lineup is "unlawful" if it is conducted in violation of the right to counsel. Like Rule 305 and 311, Rule 321(b)(2) distinguishes between lineups conducted by persons subject to the Uniform Code of Military Justice or their agents and those conducted by others.

Subdivision (b)(2)(A) is the basic right to counsel for personnel participating in military lineups. A lineup participant is entitled to counsel only if that participant is in pretrial restraint (pretrial arrest, restriction, or confinement) under paragraph 20 of the Manual or has had charges preferred against him or her. Mere apprehension or temporary detention does not trigger the right to counsel under the Rule. This portion of the Rule substantially changes military law and adapts the Supreme Court's decision in Kirby v. Illinois, 406 U.S. 682, 689 (1972) (holding that the right to counsel attached only when "adversary judicial criminal proceedings" have been initiated or "the government has committed itself to prosecute") to unique military criminal procedure. See also Rule 305(d)(1)(B).

Note that interrogation of a suspect will require rights warnings, perhaps including a warning of a right to counsel, even if counsel is unnecessary under Rule 321. See Rule 305.

As previously noted, the Rule does not define "lineup" and recourse to case law is necessary. Intentional exposure of the suspect to one or more individuals for purpose of identification is likely to be a lineup. Stovall v. Denno, 388 U.S. 293, 297 (1967), although in rare cases of emergency (e.g., a dying victim) such an identification may be considered a permissible "showup" rather than a "lineup." Truly accidental confrontations between victims and suspects leading to an identification by the victim are not gen-
 ANALYSIS OF THE MILITARY RULES OF EVIDENCE

App. 22, M.R.E.

Generally considered “lineups”; cf. United State ex rel Ragazzin v. Brierey, 321 F.Supp. 440 (W.D. Pa. 1970). Photographic identifications are not “lineups” for purposes of the right to counsel. United States v. Ash, 413 U.S. 300, 301 n.2 (1973). If a photographic identification is used, however, the photographs employed should be preserved for use at trial in the event that the defense should claim that the identification was “unnecessarily suggestive.” See subdivision (b)(1) supra.

A lineup participant who is entitled to counsel is entitled to only one lawyer under the Rule and is specifically entitled to free military counsel without regard to the indigency or lack thereof of the participant. No right to civilian counsel or military counsel of the participant’s own selection exists under the Rule, United States v. Wade, 388 U.S. 218, n.27 (1967). A lineup participant may waive any applicable right to counsel so long as the participant is aware of the right to counsel and the waiver is made “freely, knowingly, and intelligently.” Normally a warning of the right to counsel will be necessary for the prosecution to prove an adequate waiver should the defense adequately challenge the waiver. See, e.g., United States v. Avers, 426 F.2d 524 (2d Cir. 1970). See also Model Rules for Law Enforcement, Eye Witness Identification, Rule 404 (1974) cited in E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN, & F. LEPERER, CRIMINAL EVIDENCE 366 (1979).

1984 Amendment: In subsection (b)(2)(A), the words “or law specialist within the meaning of Article 1” were deleted as unnecessary. See R.C.M. 103(26).

Subdivision (b)(2)(B) grants a right to counsel at non-military lineups within the United States only when such a right to counsel is recognized by “the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar lineups.” The Rule presumes that an individual participating in a foreign lineup conducted by officials of a foreign nation without American participation has no right to counsel at such a lineup.

(c) Motions to suppress and objections. Rule 321(c) is identical in application to Rule 311(d). See the Analysis to Rules 304 and 311.

(d) Burden of proof. Rule 321(d) makes it clear that when an eyewitness identification is challenged by the defense, the prosecution need reply only to the specific cognizable defense complaint. See also Rules 304 and 311. The subdivision distinguishes between defense challenges involving alleged violation of the right to counsel and those involving the alleged unnecessarily suggestive identifications.

(1) Right to counsel. Subdivision (d)(1) requires that when an alleged violation of the right to counsel has been raised the prosecution must either demonstrate by preponderance of the evidence that counsel was present or that the right to counsel was waived voluntarily and intelligently. The Rule also declares that if the right to counsel is violated at a lineup that results in a decision without American participation has no right to counsel at

makes it clear that the prosecution must show, when the defense has raised the issue, that the identification in question was not based upon a preponderance of the evidence, “so unnecessarily suggestive in light of the totality of the circumstances, as to create a very substantial likelihood of irreparable mistaken identity.” This rule is taken from the Supreme Court’s decisions of Neil v. Biggers, 409 U.S. 188 (1972) and Stovall v. Denno, 388 U.S. 293 (1967), and unlike subdivision (d)(1), applies to all identification processes whether lineups or not. The Rule recognizes that the nature of the identification process itself may well be critical to the reliability of the identification and provides for exclusion of unreliable evidence regardless of its source. If the prosecution meets its burden, the mere fact that the identification process was unnecessary or suggestive does not require exclusion of the evidence, Manson v. Brathwaite, supra.

If the identification in question is subsequent to an earlier, unnecessarily suggestive identification, the later identification is admissible if the prosecution can show by clear and convincing evidence that the later identification is not the result of the earlier improper examination. This portion of the Rule is consistent both with 1969 Manual Para. 153a and Kirby v. Illinois, 406 U.S. 682 (1972).

(e) Defense evidence. Rule 321(e) is identical with the analogous provisions in Rules 304 and 311 and generally restates prior law.

(f) Rulings. Rule 321(f) is identical with the analogous provisions in Rules 304 and 321 and substantially changes prior law. See the Analysis to Rule 304(d)(4).

(g) Effect of guilty plea. Rule 321(g) is identical with the analogous provisions in Rules 304 and 311 and restates prior law.

SECTION IV

Relevancy and its Limits

Rule 401. Definition of “relevant evidence”

The definition of “relevant evidence” found within Rule 401 is taken without change from the Federal Rule and is substantially similar in effect to that used by Para. 137, MCM, 1969 (Rev.). The Rule’s definition may be somewhat broader than the 1969 Manual’s, as the Rule defines as relevant any evidence that has “any tendency to make the existence of any fact ... more probable or less probable than it would be without the evidence” while the 1969 Manual defines as “not relevant” evidence “too remote to have any appreciable probative value ...” To the extent that the 1969 Manual’s definition includes considerations of “legal relevance,” those considerations are adequately addressed by such other Rules as Rules 403 and 609. See, E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN & F. LEPERER, CRIMINAL EVIDENCE 62–65 (1979) (which, after defining “logical relevance” as involving only probative value, states at 63 that “under the rubric of ‘legal relevance,’ the courts have imposed an additional requirement that the item’s probative value outweighs any attendant probative dangers.”) The Rule is similar to the 1969 Manual in that it abandons any reference to “materiaility” in favor of a single standard of “relevancy.” Notwithstanding the specific terminology used, however, the concept of materiality survives in the Rule’s condition that to be relevant evidence must involve a fact “which is of consequence to the determination of the action.”

A22-31
Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

Rule 402 is taken without significant change from the Federal Rule. The Federal Rule's language relating to limitations imposed by "the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority" has been replaced by material tailored to the unique nature of the Military Rules of Evidence. Rule 402 recognizes that the Constitution may apply somewhat differently to members of the armed forces than to civilians, and the Rule deletes the Federal Rule's reference to "other rules prescribed by the Supreme Court" because such Rules do not apply directly in courts-martial. See Rule 101(b)(2).

Rule 402 provides a general standard by which irrelevant evidence is always inadmissible and by which relevant evidence is generally admissible. Qualified admissibility of relevant evidence is required by the limitations in Sections III and V and by such other Rules as 403 and 609 which intentionally utilize matters such as degree of probative value and judicial efficiency in determining whether relevant evidence should be admitted.

Rule 402 is not significantly different in its effect from Para. 137 of the 1969 Manual which it replaces, and procedures used under the 1969 Manual in determining relevance generally remain valid. Offers of proof are encouraged when items of doubtful relevance are proffered, and it remains possible, subject to the discretion of the military judge, to offer evidence "subject to later connection." Use of the latter technique, however, must be made with great care to avoid the possibility of bringing inadmissible evidence before the members of the court.

It should be noted that Rule 402 is potentially the most important of the new rules. Neither the Federal Rules of Evidence nor the Military Rules of Evidence resolve all evidentiary matters; see Rule 101(b). When specific authority to resolve an evidentiary issue is absent, Rule 402's clear result is to make relevant evidence admissible.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion or waste of time

Rule 403 is taken without change from the Federal Rule of Evidence. The Rule incorporates the concept often known as "legal relevance", see the Analysis to Rule 401, and provides that evidence may be excluded for the reasons stated notwithstanding its character as relevant evidence. The Rule vests the military judge with wide discretion in determining the admissibility of evidence that comes within the Rule.

If a party views specific evidence as being highly prejudicial, it may be possible to stipulate to the evidence and thus avoid its presentation to the court members. United States v. Grass, 602 F.2d 1192 (5th Cir. 1979), a prosecution for interstate transportation of obscene materials, illustrates this point. The defense offered to stipulate that certain films were obscene in order to prevent the jury from viewing the films, but the prosecution declined to join in the stipulation. The trial judge sustained the prosecution's rejection of the stipulation and the Fifth Circuit upheld the judge's decision. In its opinion, however, the Court of Appeals adopted a case by case balancing approach recognizing both the importance of allowing probative evidence to be presented and the use of stipulations as a tool to implement the policies inherent in Rule 403. Insofar as the latter is concerned, the court expressly recognized the power of a Federal district judge to compel the prosecution to accept a defense tendered stipulation.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

(a) Character evidence generally. Rule 404(a) replaces 1969 Manual Para. 138f and is taken without substantial change from the Federal Rule. Rule 404(a) provides, subject to three exceptions, that character evidence is not admissible to show that a person acted in conformity therewith.

Rule 404(a)(1) allows only evidence of a pertinent trait of character of the accused to be offered in evidence by the defense. This is a significant change from Para. 138f of the 1969 Manual which also allows evidence of "general good character" of the accused to be received in order to demonstrate that the accused is less likely to have committed a criminal act. Under the new rule, evidence of general good character is inadmissible because only evidence of a specific trait is acceptable. It is the intention of the Committee, however, to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders. The prosecution may present evidence of a character trait only in rebuttal to receive in evidence of defense character evidence. This is consistent with prior military law.

Rule 404(a)(2) is taken from the Federal Rule with minor changes. The Federal Rule allows the prosecution to present evidence of the character trait of peacefulness of the victim "in a homicide case to rebut evidence that the victim was the first aggressor." Thus, the Federal Rule allows prosecutorial use of character evidence in a homicide case in which self-defense has been raised. The limitation to homicide cases appeared to be inappropriate and impracticable in the military environment. All too often, assaults involving claims of self-defense take place in the densely populated living quarters common to military life. Whether aboard ship or within barracks, it is considered essential to allow evidence of the character trait of peacefulness of the victim. Otherwise, a substantial risk would exist of allowing unlawful assaults to go undeterred. The Federal Rule's use of the expression "first aggressor" was modified to read "an aggressor," as substantive military law recognizes that even an individual who is properly exercising the right of self-defense may overstep and become an aggressor. The remainder of Rule 404(a)(2) allows the defense to offer evidence of a pertinent trait of character of the victim of a crime and restricts the prosecution to rebuttal of that trait.

Rule 404(a)(3) allows character evidence to be used to impeach or support the credibility of a witness pursuant to Rules 607-609.

(b) Other crimes, wrongs, or acts. Rule 404(b) is taken without change from the Federal Rule, and is substantially similar to the 1969 Manual rule found in Para. 138g. While providing that evidence of other crimes, wrongs, or acts is not admissible to prove a predisposition to commit a crime, the Rule expressly permits use of such evidence on the merits when relevant to another specific purpose. Rule 404(b) provides examples rather than a list of justifications for admission of evidence of other misconduct. Other justifications, such as the tendency of such evidence to show the accused's consciousness of guilt of the offense charged, expressly permitted in Manual Para. 138g(4), remain effective. Such a pur-
pose would, for example, be an acceptable one. Rule 404(b), like Manual Para. 138g, expressly allows use of evidence of misconduct not amounting to conviction. Like Para. 138g, the Rule does not, however, deal with use of evidence of other misconduct for purposes of impeachment. See Rules 608-609. Evidence offered under Rule 404(b) is subject to Rule 403.

Rule 405. Methods of proving character

(a) Reputation or opinion. Rule 405(a) is taken without change from the Federal Rule. The first portion of the Rule is identical in effect with the prior military rule found in Para. 138(f)(1) of the 1969 Manual. An individual testifying under the Rule must have an adequate relationship with the community (see Rule 405(c)), in the case of reputation, or with the given individual in the case of opinion, in order to testify. The remainder of Rule 405(a) expressly permits inquiry or cross-examination into relevant specific instances of conduct. This is at variance with prior military practice under which such an inquiry was prohibited. See, Para. 138(f)(2), MCM, 1969 (Rev.) (character of the accused). Reputation evidence is exempted from the hearsay rule, Rule 803(21).

(b) Specific instances of conduct. Rule 405(b) is taken without significant change from the Federal Rule. Reference to “charge, claim, or defense” has been replaced with “offense or defense” in order to adapt the rule to military procedure and terminology.

(c) Affidavits. Rule 405(c) is not found within the Federal Rules and is taken verbatim from material found in Para. 138h of the 1969 Manual. Use of affidavits or other written statements is required due to the world wide disposition of the armed forces which makes it difficult if not impossible to obtain witnesses—particularly when the sole testimony of a witness is to be a brief statement relating to the character of the accused. This is particularly important for offenses committed abroad or in a combat zone, in which case the only witnesses likely to be necessary from the United States are those likely to be character witnesses. The Rule exempts statements used under it from the hearsay rule insofar as the mere use of an affidavit or other written statement is subject to that rule.

(d) Definitions. Rule 405(d) is not found within the Federal Rules of Evidence and has been included because of the unique nature of the armed forces. The definition of “reputation” is taken generally from 1969 Manual Para. 138h(1) and the definition of “community” is an expansion of that now found in the same paragraph. The definition of “community” has been broadened to add “regardless of size” to indicate that a party may proffer evidence of reputation within any specific military organization, whether a squad, company, division, ship, fleet, group, or wing, branch, or staff corps, for example. Rule 405(d) makes it clear that evidence may be offered of an individual’s reputation in either the civilian or military community or both.

Rule 406. Habit; routine practice

Rule 406 is taken without change from the Federal Rule. It is similar in effect to Para. 138h of the 1969 Manual. It is the intent of the Committee to include within Rule 406’s use of the word, “organization,” military organizations regardless of size. See Rule 405 and the Analysis to that Rule.

Rule 407. Subsequent remedial measures

Rule 407 is taken from the Federal Rules without change, and has no express equivalent in the 1969 Manual.

Rule 408. Compromise and offer to compromise

Rule 408 is taken from the Federal Rules without change, and has no express equivalent in the 1969 Manual.

Rule 409. Payment of medical and similar expenses

Rule 409 is taken from the Federal Rules without change. It has no present military equivalent and is intended to be applicable to courts-martial to the same extent that is applicable to civilian criminal cases. Unlike Rules 407 and 408 which although primarily applicable to civil cases are clearly applicable to criminal cases, it is arguable that Rule 409 may not apply to criminal cases as it deals only with questions of “liability”—normally only a civil matter. The Rule has been included in the Military Rules to ensure its availability should it, in fact, apply to criminal cases.

Rule 410. Inadmissibility of pleas, discussions, and related statements

Rule 410 as modified effective 1 August 1981 is generally taken from the Federal Rule as modified on 1 December 1980. It extends to plea bargaining as well as to statements made during a providency inquiry, civilian or military. E.g., United States v. Care, 18 C.M.A. 535 (1969). Subsection (b) was added to the Rule in recognition of the unique possibility of administrative disposition, usually separation, in lieu of court-martial. Determined differently within the various armed forces, this administrative procedure often requires a confession as a prerequisite. As modified, Rule 410 protects an individual against later use of a statement submitted in furtherance of such a request for administrative disposition. The definition of “on the record” was required because no “record” in the judicial sense exists insofar as request for administrative disposition is concerned. It is the belief of the Committee that a copy of the written statement of the accused in such a case is, however, the functional equivalent of such a record.

Although the expression “false statement” was retained in the Rule, it is the Committee’s intent that it be construed to include all related or similar military offenses.

Rule 411. Liability Insurance

Rule 411 is taken from the Federal Rule without change. Although it would appear to have potential impact upon some criminal cases, e.g., some negligent homicide cases, its actual application to criminal cases is uncertain. It is the Committee’s intent that Rule 411 be applicable to courts-martial only to the extent that it is applicable to criminal cases.

Rule 412. Nonconsensual sexual offenses; relevance of victim’s past behavior

Rule 412 is taken from the Federal Rules. Although substantially similar in substantive scope to Federal Rule of Evidence 412, the application of the Rule has been somewhat broadened and the
procedural aspects of the Federal Rule have been modified to adapt them to military practice.

Rule 412 is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses. In so doing, it recognizes that the prior rule, which it replaces, often yields evidence of at least minimal probative value with great potential for distraction and incidentally discourages both the reporting and prosecution of many sexual assaults. In replacing the unusually extensive rule found in Para. 153b(2)(b), MCM, 1969 (Rev.), which permits evidence of the victim's "unchaste" character regardless of whether he or she has testified, the Rule will significantly change prior military practice and will restrict defense evidence. The Rule recognizes, however, in Rule 412(b)(1), the fundamental right of the defense under the Fifth Amendment of the Constitution of the United States to present relevant defense evidence by admitting evidence that is "constitutionally required to be admitted." Further, it is the Committee's intent that the Rule not be interpreted as a rule of absolute privilege. Evidence that is constitutionally required to be admitted on behalf of the defense remains admissible notwithstanding the absence of express authorization in Rule 412(a). It is unclear whether reputation or opinion evidence in this area will rise to the level of constitutional magnitude, and great care should be taken with respect to such evidence.

Rule 412 applies to a "nonconsensual sexual offense" rather than to "rape or assault with intent to commit rape" as prescribed by the Federal Rule. The definition of "nonconsensual sexual offense" is set forth in Rule 412(e) and "includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses." This modification to the Federal Rule resulted from a desire to apply the social policies behind the Federal Rule to the unique military environment. The deterrence of sexual offenses in such circumstances is critical to military efficiency. There is thus no justification for limiting the scope of the Rule, intended to protect human dignity and to ultimately encourage the reporting and prosecution of sexual offenses, only to rape and/or assault with intent to commit rape.

Rule 412(a) generally prohibits reputation or opinion evidence of an alleged victim of a nonconsensual sexual offense.

Rule 412(b)(1) recognizes that evidence of a victim's past sexual behavior may be constitutionally required to be admitted. Although there are a number of circumstances in which this language may be applicable, see, S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 92-93 (2d ed. Supp. 1979) (giving example of potential constitutional problems offered by the American Civil Liberties Union during the House hearings on Rule 412), one may be of particular interest. If an individual has contracted for the sexual services of a prostitute and subsequent to the performance of the act the prostitute demands increased payment on pain of claiming rape, for example, the past history of that person will likely be constitutionally required to be admitted in a subsequent prosecution in which the defense claims consent to the extent that such history is relevant and otherwise admissible to corroborate the defense position. Absent such peculiar circumstances, however, the past sexual behavior of the alleged victim, not within the scope of Rule 412(b)(2), is unlikely to be admissible regardless of the past sexual history. The mere fact that an individual is a prostitute is not normally admissible under Rule 412.

Evidence of past false complaints of sexual offenses by an alleged victim of a sexual offense is not within the scope of this rule and is not objectionable when otherwise admissible.

Rule 412(c) provides the procedural mechanism by which evidence of past sexual behavior of a victim may be offered. The Rule has been substantially modified from the Federal Rule in order to adapt it to military practice. The requirement that notice be given not later than fifteen days before trial has been deleted as being impracticable in view of the necessity for speedy disposition of military cases. For similar reasons, the requirement for a written motion has been omitted in favor of an offer of proof, which could, of course, be made in writing, at the discretion of the military judge. Reference to hearings in chambers has been deleted as inapplicable; a hearing under Article 39(a), which may be without spectators, has been substituted. The propriety of holding a hearing without spectators is dependent upon its constitutionality which is in turn dependent upon the facts of any specific case.

Although Rule 412 is not per se applicable to such pretrial procedures as Article 32 and Court of Inquiry hearings, it may be applicable via Rule 303 and Article 31(c). See the Analysis to Rule 303.

It should be noted as a matter related to Rule 412 that the 1969 Manual's prohibition in Para. 153e of convictions for sexual offenses that rest on the uncorroborated testimony of the alleged victim has been deleted. Similarly, an express hearsay exception for fresh complaint has been deleted as being unnecessary. Consequently, evidence of fresh complaint will be admissible under the Military Rule only to the extent that it is either nonhearsay, see, Rule 801(d)(1)(B), or fits within an exception to the hearsay rule. See, subdivisions (1), (2), (3), (4), and (24) of Rule 803.

1993 Amendment. R.C.M. 405(i) and Mil. R. Evid. 1101(d) were amended to make the provisions of Rule 412 applicable at pretrial investigations. Congress intended to protect the victims of nonconsensual sex crimes at preliminary hearings as well as at trial when it passed Fed. R. Evid. 412. See Criminal Justice Subcommittee of the House Judiciary Committee Report, 94th Cong., 2d Session, July 1976.

SECTION V

PRIVILEGES

Rule 501. General rule

Section V contains all of the privileges applicable to military criminal law except for those privileges which are found within Rules 301, Privilege Concerning Compulsory Self-Incrimination; Rule 302, Privilege Concerning Mental Examination of an Accused; and Rule 303, Degrading Questions. Privilege rules, unlike other Military Rules of Evidence, apply in "investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence under Article 72; proceedings for search authorization; proceedings involving pretrial restraint; and in other proceedings authorized under the Uniform Code of Military Justice of this Manual and not listed in rule 1101(a)." See Rule 1101(c); see also Rule 1101(b).
In contrast to the general acceptance of the proposed Federal Rules of Evidence by Congress, Congress did not accept the proposed privilege rules because a consensus as to the desirability of a number of specific privileges could not be achieved. See generally, S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 200-201 (2d ed. 1977). In an effort to expedite the Federal Rules generally, Congress adopted a general rule, Rule 501, which basically provides for the continuation of common law in the privilege area. The Committee deemed the approach taken by Congress in the Federal Rules impracticable within the armed forces. Unlike the Article III court system, which is conducted almost entirely by attorneys functioning in conjunction with permanent courts in fixed locations, the military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law. This is particularly true because of the significant number of non-lawyers involved in the military criminal legal system. Commanders, convening authorities, non-lawyers investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not.

Section V combines the flexible approach taken by Congress with respect to privileges with that provided in the 1969 Manual. Rules 502-509 set forth specific rules of privilege to provide the certainty and stability necessary for military justice. Rule 501, on the other hand, adopts those privileges recognized in common law pursuant to Federal Rules of Evidence 501 with some limitations. Specific privileges are generally taken from the proposed Federal Rules of Evidence which although not adopted by Congress were non-controversial, or from the 1969 Manual.

Rule 501 is the basic rule of privilege. In addition to recognizing privileges required by or provided for in the Constitution, an applicable Act of Congress, the Military Rules of Evidence, and the Manual for Courts-Martial, Rule 501(a) also recognizes privileges "generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by court-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual." The latter language is taken from 1969 Manual Para. 137. As a result of Rule 501(a)(4), the common law of privileges as recognized in the Article III courts will be applicable to the armed forces except as otherwise provided by the limitation indicated above. Rule 501(d) prevents the application of a doctor-patient privilege. Such a privilege was considered to be totally incompatible with the clear interest of the armed forces in ensuring the health and fitness for duty of personnel. See 1969 Manual Para. 151c. The privilege expressed in Rule 302 and its conforming Manual change in Para. 121, is not a doctor-patient privilege and is not affected by Rule 501(d).

It should be noted that the law of the forum determines the application of privilege. Consequently, even if a service member should consult with a doctor in a jurisdiction with a doctor-patient privilege for example, such a privilege is inapplicable should the doctor be called as a witness before the court-martial.

Subdivision (b) is a non-exhaustive list of actions which constitute an invocation of a privilege. The subdivision is derived from Federal Rule of Evidence 501 as originally proposed by the Supreme Court, and the four specific actions listed are also found in the Uniform Rules of Evidence. The list is intentionally non-exclusive as a privilege might be claimed in a fashion distinct from those listed.

Subdivision (c) is derived from Federal Rule of Evidence 501 and makes it clear that an appropriate representative of a political jurisdiction or other organizational entity may claim an applicable privilege. The definition is intentionally non-exhaustive.

Rule 502. Lawyer-client privilege
(a) General rule of privilege. Rule 502(a) continues the substance of the attorney-client privilege found in Para. 151b(2) of the 1969 Manual. The Rule does, however, provide additional detail. Subdivision (a) is taken verbatim from subdivision (a) of Federal Rule of Evidence 503 as proposed by the Supreme Court. The privilege is only applicable when there are "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." A more discussion with an attorney does not invoke the privilege when the discussion is not made for the purpose of obtaining professional legal services.

(b) Definitions—
(1) Client. Rule 502(b)(1) defines a "client" as an individual or entity who receives professional legal services from a lawyer or consults a lawyer with a view to obtaining such services. The definition is taken from proposed Federal Rule 503(a)(1) as Para. 151b(2) of the 1969 Manual lacked any general definition of a client.

(2) Lawyer. Rule 502(b)(2) defines a "lawyer." The first portion of the paragraph is taken from proposed Federal Rule of Evidence 503(a)(2) and explicitly includes any person "reasonably believed by the client to be authorized" to practice law. The second clause is taken from 1969 Manual Para. 151b(2) and recognizes that a "lawyer" includes "a member of the armed forces detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding" regardless of whether that person is in fact a lawyer. See Article 27. Thus an accused is fully protected by the privilege even if defense counsel is not an attorney.

The second sentence of the subdivision recognizes the fact, particularly true during times of mobilization, that attorneys may serve in the armed forces in a nonlegal capacity. In such a case, the individual is not treated as an attorney under the Rule unless the individual fits within one of the three specific categories recognized by the subdivision. Subdivision (b)(2)(B) recognizes that a servicemember who knows that an individual is a lawyer in civilian life may not know that the lawyer is not functioning as such in the armed forces and may seek professional legal assistance. In such a case the privilege will be applicable so long as the individual was "reasonably believed by the client to be authorized to render professional legal services to members of the armed forces."

(3) Representative of a lawyer. Rule 502(b)(3) is taken from proposed Federal Rule of Evidence 503(a)(3) but has been modified to recognize that personnel are "assigned" within the armed forces as well as employed. Depending upon the particular situation, a paraprofessional or secretary may be a "representative of a lawyer." See Para. 151b(2) of the 1969 Manual.
Rule 503. Communications to clergy

(a) General rule of privilege. Rule 503(a) states the basic rule of privilege for communications to clergy and is taken from proposed Federal Rule of Evidence 506(b) and 1969 Manual Para. 151b(2). Like the 1969 Manual, the Rule protects communications to a clergymen's assistant in specific recognition of the nature of the military chaplaincy, and deals only with communications "made either as a formal act of religion or as a matter of conscience."

(b) Definitions.

(1) Clergyman. Rule 503(b)(1) is taken from proposed Federal Rule of Evidence 506(a)(1) but has been modified to include specific reference to a chaplain. The Rule does not define "a religious organization" and leaves resolution of that question to precedent and the circumstances of the case. "Clergyman" includes individuals of either sex.

(2) Confidential. Rule 503(b)(2) is taken generally from proposed Federal Rule of Evidence 506(a)(2) but has been expanded to include communications to a clergymen's assistant and to explicitly protect disclosure of a privileged communication when "disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication." The Rule is thus consistent with the definition of "confidential" used in the lawyer-client privilege, Rule 502(b)(4), and recognizes that military life often requires transmission of communications through third parties. The proposed Federal Rule's limitation of the privilege to communications made "privately" was deleted in favor of the language used in the actual Military Rule for the reasons indicated. The Rule is somewhat more protective than the 1969 Manual because of its application to statements which although intended to be confidential are overheard by others. See Rule 502(b)(4) and 510(a) and the Analysis thereto.

(c) Who may claim the privilege. Rule 503(c) is derived from proposed Federal Rule of Evidence 506(c) and includes the substance of 1969 Manual Para. 151b(2) which provided that the privilege may be claimed by the "penitent." The Rule supplies additional guidance as to who may actually claim the privilege and is consistent with the other Military Rules of Evidence relating to privileges. See Rule 502(c); 504(b)(3); 505(c); 506(c).

Rule 504. Husband-wife privilege

(a) Spousal incapacity. Rule 504(a) is taken generally from Tramel v. United States, 445 U.S. 40 (1980) and significantly changes military law in this area. Under prior law, see 1969 Manual Para. 148e, each spouse had a privilege to prevent the use of the other spouse as an adverse witness. Under the new rule, the witness' spouse is the holder of the privilege and may choose to testify or not to testify as the witness' spouse sees fit. But see Rule 504(c) (exceptions to the privilege). Implicit in the rule is the presumption that when a spouse chooses to testify against the other spouse the marriage no longer needs the protection of the privilege. Rule 504(a) must be distinguished from Rule 504(b), Confidential communication made during marriage, which deals with communications rather than the ability to testify generally at trial.

Although the witness' spouse ordinarily has a privilege to refuse to testify against the accused spouse, under certain circumstances no privilege may exist, and the spouse may be compelled to testify. See Rule 504(c).
(b) Confidential communication made during marriage. Rule 504(b) deals with communications made during a marriage and is distinct from a spouse’s privilege to refuse to testify pursuant to Rule 504(a). See 1969 Manual Para. 151(b)(2).

(1) General rule of privilege. Rule 504(b)(1) sets forth the general rule of privilege for confidential spousal communications and provides that a spouse may prevent disclosure of any confidential spousal communication made during marriage even though the parties are no longer married at the time that disclosure is desired. The accused may always require that the confidential spousal communication be disclosed. Rule 504(b)(3).

No privilege exists under subdivision (b) if the communication was made when the spouses were legally separated.

(2) Definition. Rule 504(b)(2) defines “confidential” in a fashion similar to the definition utilized in Rules 502(b)(4) and 503(b)(2). The word “privately” has been added to emphasize that the presence of third parties is not consistent with the spousal privilege, and the reference to third parties found in Rules 502 and 503 has been omitted for the same reason. Rule 504(b)(2) extends the definition of “confidential” to statements disclosed to third parties who are “reasonably necessary for transmission of the communication.” This recognizes that circumstances may arise, especially in military life, where spouses may be separated by great distances or by operational activities, in which transmission of a communication via third parties may be reasonably necessary.

(3) Who may claim the privilege. Rule 504(b)(3) is consistent with 1969 Manual Para. 151(b)(2) and gives the privilege to the spouse who made the communication. The accused may, however, disclose the communication even though the communication was made to the accused.

(c) Exceptions.

(1) Spouse incapacity only. Rule 504(c)(1) provides exceptions to the spousal incapacity rule of Rule 504(a). The rule is taken from 1969 Manual Para. 148(e) and declares that a spouse may not refuse to testify against the other spouse when the marriage has been terminated by divorce or annulment. Annulment has been added to the present military rule as being consistent with its purpose. Separation of spouses via legal separation or otherwise does not affect the privilege of a spouse to refuse to testify against the other spouse. For other circumstances in which a spouse may be compelled to testify against the other spouse, see Rule 504(c)(2).

Confidential communications are not affected by the termination of a marriage.

(2) Spousal incapacity and confidential communications. Rule 504(c)(2) prohibits application of the spousal privilege, whether in the form of spousal incapacity or in the form of a confidential communication, when the circumstances specified in paragraph (2) are applicable. Subparagraphs (A) and (C) deal with anti-marital acts, e.g., acts which are against the spouse and thus the marriage. The Rule expressly provides that when such an act is involved a spouse may not refuse to testify. This provision is taken from proposed Federal Rule 505(c)(1) and reflects in part the Supreme Court’s decision in Wyatt v. United States, 362 U.S. 525 (1960). See also Trammel v. United States, 445 U.S. 40 at n.7 (1980). The Rule thus recognizes society’s overriding interest in prosecution of anti-marital offenses and the probability that a spouse may exercise sufficient control, psychological or otherwise, to be able to prevent the other spouse from testifying voluntarily. The Rule is similar to 1969 Manual Para. 148(e) but has deleted the Manual’s limitation of the exceptions to the privilege to matters occurring after marriage or otherwise unknown to the spouse as being inconsistent with the intent of the exceptions.

Rule 504(c)(2)(B) is derived from Para. 148(e) and 151(b)(2) of the 1969 Manual. The provision prevents application of the privileges as to privileged communications if the marriage was a sham at the time of the communication, and prohibits application of the spousal incapacity privilege if the marriage was begun as a sham and is a sham at the time the testimony of the witness is to be offered. Consequently, the Rule recognizes for purposes of subdivision (a) that a marriage that began as a sham may have ripened into a valid marriage at a later time. The intent of the provision is to prevent individuals from marrying witnesses in order to effectively silence them.

Rule 505. Classified information

Rule 505 is based upon H.R. 4745, 96th Cong., 1st Sess. (1979), which was proposed by the Executive Branch as a response to what is known as the “graymail” problem in which the defendant in a criminal case seeks disclosure of sensitive national security information, the release of which may force the government to discontinue the prosecution. The Rule is also based upon the Supreme Court’s discussion of executive privilege in United States v. Reynolds, 345 U.S. 1 (1953), and United States v. Nixon, 418 U.S. 683 (1974). The rule attempts to balance the interests of an accused who desires classified information for his or her defense and the interests of the government in protecting that information.

(a) General rule of privilege. Rule 505(a) is derived from United States v. Reynolds, supra and 1969 Manual Para. 151. Classified information is only privileged when its “disclosure would be detrimental to the national security.”

1993 Amendment: The second sentence was added to clarify that this rule, like other rules of privilege, applies at all stages of all actions and is not relaxed during the sentencing hearing under M.R.E. 1101(c).

(b) Definitions.

(1) Classified information. Rule 505(b)(1) is derived from section 2 of H.R. 4745. The definition of “classified information” is a limited one and includes only that information protected “pursuant to an executive order, statute, or regulation,” and that material which constitutes restricted data pursuant to 42 U.S.C. 2014(y) (1976).

(2) National security. Rule 505(b)(2) is derived from section 2 of H.R. 4745.

(c) Who may claim the privilege. Rule 505(c) is derived from Para. 151 of the 1969 Manual and is consistent with similar provisions in the other privilege rules. See Rule 501(c). The privilege may be claimed only “by the head of the executive or military department or government agency concerned” and then only upon “a finding that the information is properly classified and that disclosure would be detrimental to the national security.” Although the authority of a witness or trial counsel to claim the privilege is presumed in the absence of evidence to the contrary, neither a witness nor a trial counsel may claim the privilege without prior direction to do so by the appropriate department or agency head. Consequently, expedited coordination with senior headquarters is advised in any situation in which Rule 505 appears to be applicable.
APPENDIX 22

(d) Action prior to referral of charges. Rule 505(d) is taken from section 4(b)(1) of H.R. 4745. The provision has been modified to reflect the fact that pretrial discovery in the armed forces, prior to referral, is officially conducted through the convening authority. The convening authority should disclose the maximum amount of requested information as appears reasonable under the circumstances.

(e) Pretrial session. Rule 505(e) is derived from section 3 of H.R. 4745.

(f) Action after referral of charges. Rule 505(f) provides the basic procedure under which the government should respond to a determination by the military judge that classified information “apparently contains evidence that is relevant and material to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence.” See generally the Analysis to Rule 507(d).

It should be noted that the government may submit information to the military judge for in camera inspection pursuant to subdivision (f). If the defense requests classified information that it alleges is “relevant and material,” and the government refuses to disclose the information to the military judge for inspection, the military judge may presume that the information is in fact “relevant and material.”

(g) Disclosure of classified information to the accused. Paragraphs (1) and (2) of Rule 505(g) are derived from section 4 of H.R. 4745. Paragraph (2) is taken from section 10 of H.R. 4745 but has been modified in view of the different application of the Jencks Act, 18 U.S.C. § 3500 (1976) in the armed forces. Paragraph (4) is taken from sections 4(b)(2) and 10 of H.R. 4745. The reference in H.R. 4745 to a recess has been deleted as being unnecessary in view of the military judge’s inherent authority to call a recess.

1993 Amendment: Subsection (g)(1)(D) was amended to make clear that the military judge’s authority to require security clearances extends to persons involved in the conduct of the trial as well as pretrial preparation for it. The amendment requires persons needing security clearances to submit to investigations necessary to obtain the clearance.

(h) Notice of the accused's intention to disclose classified information. Rule 505(h) is derived from section 5 of H.R. 4745. The intent of the provision is to prevent disclosure of classified information by the defense until the government has had an opportunity to determine what position to take concerning the possible disclosure of that information. Pursuant to Rule 505(h)(5), failure to comply with subdivision (h) may result in a probability on the use of the information involved.

1993 Amendment: Subsection (h)(3) was amended to require specificity in detailing the items of classified information expected to be introduced. The amendment is based on United States v. Collins, 720 F.2d. 1195 (11th Cir. 1983).

(i) In camera proceedings for cases involving classified information. Rule 505(i) is derived generally from section 5 of H.R. 4745. The “in camera” procedure utilized in subdivision (i) is generally new to military law. Neither the accused nor defense counsel may be excluded from the in camera proceeding. However, nothing within the Rule requires that the defense be provided with a copy of the classified material in question when the government submits such information to the military judge pursuant to Rule 505(i)(3) in an effort to obtain an in camera proceeding under this Rule. If such information has not been disclosed previously, the government may describe the information by generic category, rather than by identifying the information. Such description is subject to approval by the military judge, and if not sufficiently specific to enable the defense to proceed during their camera session, the military judge may order the government to release the information for use during the proceeding or fact the sanctions under subdivision (i)(4)(E).

1993 Amendment: Subsection (i)(3) was amended to clarify that the classified material and the government’s affidavit are submitted only to the military judge. The word “only” was placed at the end of the sentence to make it clear that it refers to “military judge” rather than to “examination.” The military judge is to examine the affidavit and the classified information without disclosing it before determining to hold an in camera proceeding as defined in subsection(i)(1).

The second sentence of subsection (i)(4)(B) was added to provide a standard for admission of classified information in sentencing proceedings.


1993 Amendment: Subsection (j)(5) was amended to provide that the military judge’s authority to exclude the public extends to the presentation of any evidence that discloses classified information, and not merely to the testimony of witnesses. See generally, United States v. Hershey, 20 M.J. 433 (C.M.A. 1985), cert. denied, 474 U.S. 1062 (1986), (specifies factors to be considered in the trial judge’s determination to close the proceedings).

(k) Security procedures to safeguard against compromise of classified information disclosed to courts-martial. Rule 505(k) is derived from section 9 of H.R. 4745.

Rule 506. Government information other than classified information

(a) General rule of privilege. Rule 506(a) states the general rule of privilege for nonclassified government information. The Rule recognizes that in certain extraordinary cases the government should be able to prohibit release of government information which is detrimental to the public interest. The Rule is modeled on Rule 505 but is more limited in its scope in view of the greater limitations applicable to nonclassified information. Compare United States v. Nixon, 418 U.S. 683 (1974) with United States v. Reynolds, 345 U.S. 1 (1953). Rule 506 addresses those similar matters found in 1969 Manual Para. 151(b)(1) and 151(b)(3). Under Rule 506(a) information is privileged only if its disclosure would be “detrimental to the public interest.” It is important to note that pursuant to Rule 506(c) the privilege may be claimed only “by the head of the executive or military department or government agency concerned” unless investigations of the Inspectors General are concerned.

Under Rule 506(a) there is no privilege if disclosure of the information concerned is required by an Act of Congress such as the Freedom of Information Act, 5 U.S.C. § 552 (1976). Disclosure of information will thus be broader under the Rule than under the 1969 Manual. See United States v. Nixon, supra.

(b) Scope. Rule 506(b) defines “Government information” in a nonexclusive fashion, and expressly states that classified information and information relating to the identity of informants are solely within the scope of other Rules.
(c) Who may claim the privilege. Rule 506(c) distinguishes between government information in general and investigations of the Inspectors General. While the privilege for the latter may be claimed “by the authority ordering the investigation or any superior authority,” the privilege for other government information may be claimed only “by the head of the executive or military department or government agency concerned.” See generally the Analysis to Rule 505(c).

1990 Amendment: Subsection (c) was amended by substituting the words “records and information” for “investigations,” which is a term of art vis-a-vis Inspector General functions. Inspectors General also conduct “inspections” and “inquiries,” and use of the word “records and information” is intended to cover all documents and information generated by or related to the activities of Inspectors General. “Records” includes reports of inspection, inquiry, and investigation conducted by an Inspector General and extracts, summaries, exhibits, memoranda, notes, internal correspondence, handwritten working materials, untranscribed shorthand or stenotype notes of unrecorded testimony, tape recordings and other supportive records such as automated data extracts. In conjunction with this change, the language identifying the official entitled to claim the privilege for Inspector General records was changed to maintain the previous provision which allowed the Inspectors General to claim the privilege for Inspector General records, rather than the officers themselves, to claim the privilege.

(d) Action prior to referral of charges. Rule 506(d) specifies action to be taken prior to referral of charges in the event of a claim of privilege under the Rule. See generally Rule 505(d) and its Analysis. Note that disclosures can be withheld only if action under paragraph (1)-(4) of subdivision (d) cannot be made “without causing identifiable damage to the public interest.” (Emphasis added).

(e) Action after referral of charges. See generally Rule 505(f) and its Analysis. Note that unlike Rule 505(f), however, Rule 506(e) does not require a finding that failure to disclose the information in question “would materially prejudice a substantial right of the accused.” Dismissal is required when the relevant information is not disclosed in a “reasonable period of time.”

(f) Pretrial session. Rule 506(f) is taken from Rule 505(e). It is the intent of the Committee that if classified information arises during a proceeding under Rule 506, the procedures of Rule 505 will be used.

(g) Disclosure of government information to the accused. Rule 506(g) is taken from Rule 505(g) but deletes references to classified information and clearances due to their inapplicability.

(h) Prohibition against disclosure. Rule 506(h) is derived from Rule 505(h)(4). The remainder of Rule 505(h)(4) and Rule 505(h) generally has been omitted as being unnecessary. No sanction for violation of the requirement has been included.

(i) In camera proceedings. Rule 506(i) is taken generally from Rule 505(i), but the standard involved reflects 1969 Manual Para. 151 and the Supreme Court’s decision in United States v. Nixon, supra. In line with Nixon, the burden is on the party claiming the privilege to demonstrate why the information involved should not be disclosed. References to classified material have been deleted as being inapplicable.

(j) Introduction of government information subject to a claim of privilege. Rule 506(j) is derived from Rule 505(j) with appropriate modifications being made to reflect the nonclassified nature of the information involved.

(k) Procedures to safeguard against compromise of government information disclosed to courts-martial. Rule 506(k) is derived from Rule 505(k). Such procedures should reflect the fact that material privileged under Rule 506 is not classified.

Rule 507. Identity of informant

(a) Rule of privilege. Rule 507(a) sets forth the basic rule of privilege for informants and contains the substance of 1969 Manual Para. 151b(1). The new Rule, however, provides greater detail as to the application of the privilege than did the 1969 manual.

The privilege is that of the United States or political subdivision thereof and applies only to information relevant to the identity of an informant. An “informant” is simply an individual who has supplied “information resulting in an investigation of a possible violation of law” to a proper person and thus includes good citizen reports to command or police as well as the traditional “confidential informants” who may be consistent sources of information.

(b) Who may claim the privilege. Rule 507(b) provides for claiming the privilege and distinguishes between representatives of the United States and representatives of a state or subdivision thereof. Although an appropriate representative of the United States may always claim the privilege when applicable, a representative of a state or subdivision may do so only if the information in question was supplied to an officer of the state or subdivision. The Rule is taken from proposed Federal Rule of Evidence 510(b), with appropriate modifications, and is similar in substance to Para. 151b(1) of the 1969 Manual which permitted “appropriate governmental authorities” to claim the privilege.

The Rule does not specify who an “appropriate representative” is. Normally, the trial counsel is an appropriate representative of the United States. The Rule leaves the question open, however, for case by case resolution. Regulations could be promulgated which could specify who could be an appropriate representative.

(c) Exceptions. Rule 507(c) sets forth the circumstances in which the privilege is inapplicable.

(1) Voluntary disclosures; informant as witness. Rule 507(c)(1) makes it clear that the privilege is inapplicable if circumstances have nullified its justification for existence. Thus, there is no reason for the privilege, and the privilege is consequently inapplicable, if the individual who would have cause to resent the informant has been made aware of the informant’s identity by a holder of the privilege or by the informant’s own action or when the witness testifies for the prosecution thus allowing that person to ascertain the informant’s identity. This is in accord with the intent of the privilege which is to protect informants from reprisals. The Rule is taken from Para. 151b(1) of the 1969 Manual.

(2) Testimony on the issue of guilt or innocence. Rule 507(c)(2) is taken from 1969 Manual Para. 151b(1) and recognizes that in certain circumstances the accused may have a due process right under the Fifth Amendment, as well as a similar right under the Uniform Code of Military Justice, to call the informant as a witness. The subdivision intentionally does not specify what circumstances would require calling the informant and leaves resolution of the issue to each individual case.

(3) Legality of obtaining evidence. Rule 507(c)(3) is new. The Rule recognizes that circumstances may exist in which the Constitution may require disclosure of the identity of an informant in the context of determining the legality of obtaining evidence.
under Rule 311; see, e.g., Franks v. Delaware, 438 U.S. 154, 170 (1978); McCray v. Illinois, 386 U.S. 300 (1976) (both cases indicate that disclosure may be required in certain unspecified circumstances but do not in fact require such disclosure). In view of the highly unsettled nature of the issue, the Rule does not specify whether or when such disclosure is mandated and leaves the determination to the military judge in light of prevailing case law utilized in the trial of criminal cases in the Federal district courts. (d) Procedures. Rule 507(d) sets forth the procedures to be followed in the event of a claim of privilege under Rule 507. If the prosecution elects not to disclose the identity of an informant when the judge has determined that disclosure is required, that matter shall be reported to the convening authority. Such a report is required so that the convening authority may determine what action, if any, should be taken. Such actions could include disclosure of the informant’s identity, withdrawal of charges, or some appropriate appellate action.

Rule 508. Political vote
Rule 508 is taken from proposed Federal Rule of Evidence 507 and expresses the substance of 18 U.S.C. § 596 (1976) which is applicable to the armed forces. The privilege is considered essential for the armed forces because of the unique nature of military life.

Rule 509. Deliberation of courts and juries
Rule 509 is taken from 1969 Manual Para. 151 but has been modified to ensure conformity with Rule 606(b) which deals specifically with disclosure of deliberations in certain cases.

Rule 510. Waiver of privilege by voluntary disclosure
Rule 510 is derived from proposed Federal Rule of Evidence 511 and is similar in substance to 1969 Manual Para. 151a which notes that privileges may be waived. Rule 510(a) simply provides that “disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to claim the privilege” will defeat and waive the privilege. Disclosure of privileged matter may be, however, itself privileged; see Rules 502(b)(4); 503(b)(2); 504(b)(2). Information disclosed in the form of an otherwise privileged telephone call (e.g., information overheard by an operator) is privileged, Rule 511(b), and information disclosed via transmission using other forms of communication may be privileged; Rule 511(b). Disclosure under certain circumstances may not be “inappropriate” and the information will retain its privileged character. Thus, disclosure of an informant’s identity by one law enforcement agency to another may well be appropriate and not render Rule 507 inapplicable.

Rule 511(b) is taken from Para. 151b(1) of the 1969 Manual and makes it clear that testimony pursuant to a grant of immunity does not waive the privilege. Similarly, an accused who testifies in his or her own behalf does not waive the privilege unless the accused testifies voluntarily to the privileged matter of communication.

Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege
Rule 511(a) is similar to proposed Federal Rule of Evidence 512. Placed in the context of the definition of “confidential” utilized in the privilege rules, see, Rule 502(b)(4), the Rule is substantially different from prior military law inasmuch as prior law permitted utilization of privileged information which had been gained by a third party through accident or design. See Para. 151b(1), MCM, 1969 (Rev.). Such disclosures are generally safeguarded against via the definition “confidential” used in the new Rules. Generally, the Rules are more protective of privileged information than was the 1969 Manual.

Rule 511(b) is new and deals with electronic transmission of information. It recognizes that the nature of the armed forces today often requires such information transmission. Like 1969 Manual Para. 151b(1), the new Rule does not make a nonprivileged communication privileged; rather, it simply safeguards already privileged information under certain circumstances.

The first portion of subdivision (b) expressly provides that otherwise privileged information transmitted by telephone remains privileged. This is in recognition of the role played by the telephone in modern life and particularly in the armed forces where geographical separations are common. The Committee was of the opinion that legal business cannot be transacted in the 20th century without customary use of the telephone. Consequently, privileged communications transmitted by telephone are protected even though those telephone conversations are known to be monitored for whatever purpose.

Unlike telephonic communications, Rule 511(b) protects other forms of electronic communication only when such means “is necessary and in furtherance of the communication.” It is irrelevant under the Rule as to whether the communication in question was in fact necessary. The only relevant question is whether, once the individual decided to communicate, the means of communication was necessary and in furtherance of the communication.

Transmission of information by radio is a means of communication that must be tested under this standard.

Rule 512. Comment upon or inference from claim of privilege; instruction

Rule 512(a)(1) prohibits any inference or comment upon the exercise of a privilege by the accused and is taken generally from proposed Federal Rule of Evidence 513(a).

Rule 512(a)(2) creates a qualified prohibition with respect to any inference or comment upon the exercise of a privilege by a person not the accused. The Rule recognizes that in certain circumstances the interests of justice may require such an inference and comment. Such a situation could result, for example, when the government’s exercise of a privilege has been sustained, and an inference adverse to the government is necessary to preserve the fairness of the proceeding.
Section VI: Witnesses

Rule 601. General rule of competency
Rule 601 is taken without change from the first portion of Federal Rule of Evidence 601. The remainder of the Federal Rule was deleted due to its sole application to civil cases.

In declaring that subject to any other Rule, all persons are competent to be witnesses, Rule 601 supersedes Para. 148 of the 1969 Manual which required, among other factors, that an individual know the difference between truth and falsehood and understand the moral importance of telling the truth in order to testify. Under Rule 601 such matters will go only to the weight of the testimony and not to its competency. The Rule's reference to other rules includes Rules 603 (Oath or Affirmation), 605 (Competency of Military Judge as Witness); 606 (Competency of Court Member as Witness), and the rules of privilege.

The plain meaning of the Rule appears to deprive the trial judge of any discretion whatsoever to exclude testimony on grounds of competency unless the testimony is incompetent under those specific rules already cited supra, see, United States v. Fowler, 605 F.2d 181 (5th Cir. 1979), a conclusion bolstered by the Federal Rules of Evidence Advisory Committee's Note. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 270 (2d ed. 1977). Whether this conclusion is accurate, especially in the light of Rule 403, is unclear. Id. at 269; see also United States v. Calahan, 442 F.Supp. 1213 (D. Minn. 1978).

Rule 602. Lack of personal knowledge
Rule 602 is taken without significant change from the Federal Rule and is similar in content to Para. 138d, MCM, 1969 (Rev.). Although the 1969 Manual expressly allowed an individual to testify as a witness for the defense under prior precedent. Rule 606(a) deals only with the competency of court members as witnesses and does not affect the military judge if he is a witness for the prosecution ...” and is silent on whether a witness for the defense is eligible to sit, the Committee believes that the specific reference in the code was not intended to create a right and was the result only of an attempt to highlight the more grievous case. In any event, Rule 605, unlike Article 26(d), does not deal with the question of eligibility to sit as a military judge, but deals solely with the military judge's competency as a witness. The rule does not affect voir dire.

Rule 603. Oath or affirmation
Rule 603 is taken from the Federal Rule without change. The oaths found within Chapter XXII of the Manual satisfy the requirements of Rule 603. Pursuant to Rule 1101(c), this Rule is inapplicable to the accused when he or she makes an unsworn statement.

Rule 604. Interpreters
Rule 604 is taken from the Federal Rule without change and is consistent with Para. 141, MCM, 1969 (Rev.). The oath found in Paras. 114c, MCM, 1969 (Rev.) (now R.C.M. 807(b)(2) (Discussion), MCM, 1984), satisfies the oath requirements of Rule 604.

Rule 605. Competency of military judge as witness
Rule 605(a) restates the Federal Rule without significant change. Although Article 26(d) of the Uniform Code of Military Justice states in relevant part that “no person is eligible to act as a military judge if he is a witness for the prosecution ...” and is silent on whether a witness for the defense is eligible to sit, the Committee believes that the specific reference in the code was not intended to create a right and was the result only of an attempt to highlight the more grievous case. In any event, Rule 605, unlike Article 26(d), does not deal with the question of eligibility to sit as a military judge, but deals solely with the military judge's competency as a witness. The rule does not affect voir dire.

Rule 606. Competency of court member as witness
(a) At the court-martial. Rule 606(a) is taken from the Federal Rule without substantive change. The Rule alters prior military law only to the extent that a member of the court could testify as a defense witness under prior precedent. Rule 606(a) deals only with the competency of court members as witnesses and does not affect other Manual provisions governing the eligibility of the individuals to sit as members due to their potential status as witnesses. See, e.g., Paras. 62f and 63, MCM, 1969 (Rev.). The Rule does not affect voir dire.

(b) Inquiry into validity of findings or sentence. Rule 606(b) is taken from the Federal Rule with only one significant change. The rule, retitled to reflect the sentencing function of members, recognizes unlawful command influence as a legitimate subject of inquiry and permits testimony by a member on that subject. The addition is required by the need to keep proceedings free from any taint of unlawful command influence and further implements Article 37(a) of the Uniform Code of Military Justice. Use of superior rank or grade by one member of a court to sway other members would constitute unlawful command influence for purposes.

A22-41
of this Rule under Para. 74d(1), MCM, 1969 (Rev.). Rule 606 does not itself prevent otherwise lawful polling of members of the court, see generally, United States v. Hendon, 6 M.J. 171, 174 (C.M.A. 1979) and does not prohibit attempted lawful clarification of an ambiguous or inconsistent verdict. Rule 606(b) is in general accord with prior military law.

**Rule 607. Who may impeach**

Rule 607 is taken without significant change from the Federal Rule. It supersedes Para. 153b(1), MCM, 1969 (Rev.), which restricted impeachment of one's own witness to those situations in which the witness is indispensable or the testimony of the witness proves to be unexpectedly adverse.

Rule 607 thus allows a party to impeach its own witness. Indeed, when relevant, it permits a party to call a witness for the sole purpose of impeachment. It should be noted, however, that an apparent inconsistency exists when Rule 607 is compared with Rules 608(b) and 609(a). Although Rule 607 allows impeachment on direct examination, Rules 608(b) and 609(a) would by their explicit language restrict the methods of impeachment to cross-examination. The use of the expression "cross-examination" in these rules appears to be accidental and to have been intended to be synonymous with impeachment while on direct examination. See generally, S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 298-99 (2d ed. 1977). It is the intent of the Committee that the Rules be so interpreted unless the Article III courts should interpret the Rules in a different fashion.

**Rule 608. Evidence of character, conduct, and bias of witness**

(a) **Opinion and reputation evidence of character.** Rule 608(a) is taken verbatim from the Federal Rule. The Rule, which is consistent with the philosophy behind Rule 404(a), limits use of character evidence in the form of opinion or reputation evidence on the issue of credibility by restricting such evidence to matters relating to the character for truthfulness or untruthfulness of the witness. General good character is not admissible under the Rule. Rule 608(a) prohibits presenting evidence of good character until the witness is indispensable or the testimony of the witness has testified as to the character of another witness, the witness is indispensable or the testimony of the witness proves to be unexpectedly adverse.

(b) **Specific instances of conduct.** Rule 608(b) is taken from the Federal Rule without significant change. The Rule is somewhat similar in effect to the military practice found in Para. 153b(2) of the 1969 Manual in that it allows use of specific instances of conduct of a witness to be brought out on cross-examination but prohibits use of extrinsic evidence. Unlike Para. 153b(2), Rule 608(b) does not distinguish between an accused and other witnesses.

The fact that the accused is subject to impeachment by prior acts of misconduct is a significant factor to be considered by the military judge when he or she is determining whether to exercise the discretion granted by the Rule. Although the Rule expressly limits this form of impeachment to inquiry on cross-examination, it is likely that the intent of the Federal Rule was to permit inquiry on direct as well, see Rule 607, and the use of the term "cross-examination" was an accidental substitute for "impeachment." See S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 312-13 (2d ed. 1977). It is the intent of the Committee to allow use of this form of evidence on direct examination to the same extent, if any, it is so permitted in the Article III courts.

The Rule does not prohibit receipt of extrinsic evidence in the form of prior convictions, Rule 609, or to show bias. Rule 608(c).

(c) **Evidence of bias.** Rule 608(c) is taken from 1969 Manual Para. 153d and is not found within the Federal Rule. Impeachment by bias was apparently accidentally omitted from the Federal Rule, see, S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 313 142d ed. 1977, but is acceptable under the Federal Rules; see, e.g., United States v. Leja, 566 F.2d 493 (6th Cir. 1977); United States v. Alvarez-Lopez, 559 F.2d 1155 (9th Cir. 1977). Because of the critical nature of this form of impeachment and the fact that extrinsic evidence may be used to show it, the Committee believed that its omission would be impracticable.

It should be noted that the Federal Rules are not exhaustive, and that a number of different types of impeachment are not explicitly codified.

The failure to so codify them does not mean that they are no longer permissible. See, e.g., United states v. Alvarez-Lopez, supra 155; Rule 412. Thus, impeachment by contradiction, see also Rule 304(a)(2); 311(g), and impeachment via prior inconsistent statements, Rule 613, remain appropriate. To the extent that the Military Rules do not acknowledge a particular form of impeachment, it is the intent of the Committee to allow that method to the same extent it is permissible in the Article III courts. See, e.g., Rules 402; 403.

Impeachment of an alleged victim of a sexual offense through evidence of the victim's past sexual history and character is dealt with in Rule 412, and evidence of fresh complaint is admissible to the extent permitted by Rules 801 and 803.

**Rule 609. Impeachment by evidence of conviction of crime**

(a) **General Rules.** Rule 609(a) is taken from the Federal Rule but has been slightly modified to adopt it to military law. For example, an offense for which a dishonorable discharge may be adjudged may be used for impeachment. This continues the rule as found in Para. 153b(2)(b)(1) of the 1969 Manual. In determining whether a military offense may be used for purposes of impeachment under Rule 609(a)(1), recourse must be made to the maxi-
Rule 609(a) differs slightly from the prior military rule. Under Rule 609(a)(1), a civilian conviction’s availability for impeachment is solely a function of its maximum punishment under “the law in which the witness was convicted.” This is different from Para. 153b(2)(b)(3) of the 1969 Manual which allowed use of a non-federal conviction analogous to a federal felony or characterized by the jurisdiction as a felony or “as an offense of comparable gravity.” Under the new rule, comparisons and determinations of relative gravity will be unnecessary and improper.

Convictions that “involve moral turpitude or otherwise affect ... credibility” were admissible for impeachment under Para. 153b(2)(b) of the 1969 Manual. The list of potential convictions expressed in Para. 153b(2)(b) was illustrative only and non-exhaustive. Unlike the 1969 Manual rule, Rule 609(a) is exhaustive.

Although a conviction technically fits within Rule 609(a)(1), its admissibility remains subject to finding by the military judge that its probative value outweighs its prejudicial effect to the accused.

Rule 609(a)(2) makes admissible convictions involving “dishonesty or false statement, regardless of punishment.” This is similar to intent in Para. 153b(2)(b)(4) of the 1969 Manual which makes admissible “a conviction of any offense involving fraud, deceit, larceny, wrongful appropriation, or the making of false statement.” The exact meaning of “dishonesty” within the meaning of Rule 609 is unclear and has already been the subject of substantial litigation. The Congressional intent appears, however, to have been extremely restrictive with “dishonesty” being used in the sense of untruthfulness. See generally S. SALTBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 336-45 (2d ed. 1977). Thus, a conviction for fraud, perjury, or embezzlement would come within the definition, but a conviction for simple larceny would not. Pending further case development in the Article III courts, caution would suggest close adherence to this highly limited definition.

It should be noted that admissibility of evidence within the scope of Rule 609(a)(2) is not explicitly subject to the discretion of the military judge. The application of Rule 403 is unclear.

While the language of Rule 609(a) refers only to cross-examination, it would appear that the Rule does refer to direct examination as well. See the Analysis to Rules 607 and 608(b).

As defined in Rule 609(f), a court-martial conviction occurs when a sentence has been adjudged.

1993 Amendment. The amendment to Mil. R. Evid. 609(a) is based on the 1990 amendment to Fed. R. Evid. 609(a). The previous version of Mil. R. Evid. 609(a) was based on the now superseded version of the Federal Rule. This amendment removes from the rule the limitation that the conviction may only be elicited during cross-examination. Additionally, the amendment clarifies the relationship between Rules 403 and 609. The amendment clarifies that the special balancing test found in Mil. R. Evid. 609(a)(1) applies to the accused’s convictions. The convictions of all other witnesses are only subject to the Mil. R. Evid. 403 balancing test. See Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989).

(b) Time limit. Rule 609(b) is taken verbatim from the Federal Rule. As it has already been made applicable to the armed forces, United States v. Weaver, 1 M.J. 111 (C.M.A. 1975), it is consistent with the present military practice.

(c) Effect of pardon, annulment or certificate of rehabilitation. Rule 609(c) is taken verbatim from the Federal Rule except that convictions punishable by dishonorable discharge have been added. Rule 609(c) has no equivalent in present military practice and represents a substantial change as it will prohibit use of convictions due to evidence of rehabilitation. In the absence of a certificate of rehabilitation, the extent to which the various Armed Forces post-conviction programs, such as the Air Force’s 3320th Correction and Rehabilitation Squadron and the Army’s Retraining Brigade, come within Rule 609(c) is unclear, although it is probable that successful completion of such a program is “an equivalent procedure based on the finding of the rehabilitation of the persons convicted” within the meaning of the Rule.

(d) Juvenile adjudications. Rule 609(d) is taken from the Federal Rule without significant change. The general prohibition in the Rule is substantially different from Para. 153b(2)(b) of the 1969 Manual which allowed use of juvenile adjudications other than those involving an accused. The discretionary authority vested in the military judge to admit such evidence comports with the accused’s constitutional right to a fair trial, Davis v. Alaska, 415 U.S. 308 (1974).

(e) Pendency of appeal. The first portion of Rule 609(e) is taken from the Federal Rule and is substantially different from Para. 153b(2)(b) of the 1969 Manual which prohibited use of convictions for impeachment purposes while they were undergoing appellate review. Under the Rule, the fact of review may be shown but does not affect admissibility. A different rule applies, however, for convictions by summary court-martial or by special court-martial without a military judge. The Committee believed that because a legally trained presiding officer is not required in these proceedings, a conviction should not be used for impeachment until review has been completed.

February 1986 Amendment: The reference in subsection (e) to “Article 65(c)” was changed to “Article 64” to correct an error in MCM. 1984.

(f) Definition. This definition of conviction has been added because of the unique nature of the court-martial. Because of its recognition that a conviction cannot result until at least sentencing, cf. Lederer, Reappraising the Legality of Post-trial Interviews, The Army Lawyer, July 1977, at 12, the Rule may modify United States v. Mathews, 6 M.J. 357 (C.M.A. 1979).

Rule 610. Religious beliefs or opinions
Rule 610 is taken without significant change from the Federal Rules and had no equivalent in the 1969 Manual for Courts-Martial. The Rule makes religious beliefs or opinions inadmissible for the purpose of impeaching or bolstering credibility. To the extent that such opinions may be critical to the defense of a case, however, there may be constitutional justification for overcoming the Rule’s exclusion. Cf. Davis v. Alaska, 415 U.S. 308 (1974).

Rule 611. Mode and order of interrogation and presentation
(a) Control by the military judge. Rule 611(a) is taken from the Federal Rule without change. It is a basic source of the military judge’s power to control proceedings and replaces 1969 Manual Para. 149a and that part of Para. 137 dealing with cumulative evidence. It is within the military judge’s discretion to control meth-
ods of interrogation of witnesses. The Rule does not change prior law. Although a witness may be required to limit an answer to the question asked, it will normally be improper to require that a "yes" or "no" answer be given unless it is clear that such an answer will be a complete response to the question. A witness will ordinarily be entitled to explain his or her testimony at some time before completing this testimony. The Manual requirement that questions be asked through the military judge is now found in Rule 614.

Although the military judge has the discretion to alter the sequence of proof to the extent that the burden of proof is not affected, the usual sequence for examination of witnesses is: prosecution witnesses, defense witnesses, prosecution rebuttal witnesses, defense rebuttal witnesses, and witnesses for the court.

The usual order of examination of a witness is: direct examination, cross-examination, redirect examination, recross-examination, and examination by the court, Para. 54a, MCM, 1969 (Rev.).

(b) Scope of cross-examination. Rule 611(b) is taken from the Federal Rule without change and replaces Para. 149(b)(1) of the 1969 Manual which was similar in scope. Under the Rule the military judge may allow a party to adopt a witness and proceed as if on direct examination. See Rule 301(b)(2); (judicial advice as to the privilege against self-incrimination for an apparently uninformed witness); Rule 301(f)(2); and Rule 303 (Effect of claiming the privilege against self-incrimination on cross-examination). Rule 303 (Deciding Questions); and Rule 608(b) (Evidence of Character, Conduct, and Bias of Witness).

(c) Leading questions. Rule 611(c) is taken from the Federal Rule without significant change and is similar to Para. 149c of the 1969 Manual. The reference in the third sentence of the Federal Rule to an "adverse party" has been deleted as being applicable to civil cases only.

A leading question is one which suggests the answer it is desired that the witness give. Generally, a question that is susceptible to being answered by "yes" or "no" is a leading question.

The use of leading questions is discretionary with the military judge. Use of leading questions may be appropriate with respect to the following witnesses, among others: children, persons with mental or physical disabilities, the extremely elderly, hostile witnesses, and witnesses identified with the adverse party.

It is also appropriate with the military judge’s consent to utilize leading questions to direct a witness’s attention to a relevant area of inquiry.

Rule 612. Writing used to refresh memory

Rule 612 is taken generally from the Federal Rule but a number of modifications have been made to adapt the Rule to military practice. Language in the Federal Rule relating to the Jencks Acts, 18 U.S.C. § 3500, which would have shielded material from disclosure to the defense under Rule 612 was discarded. Such shielding was considered to be inappropriate in view of the general military practice and policy which utilizes and encourages broad discovery on behalf of the defense.

The decision of the president of a special court-martial without a military judge under this rule is an interlocutory ruling not subject to objection by the members, Para. 57a, MCM, 1969 (Rev.).

Rule 612 codifies the doctrine of past recollection refreshed and replaces that portion of Para. 146a of the 1969 Manual which dealt with the issue. Although the 1969 Manual rule was similar, in that it authorized inspection by the opposing party of a memorandum used to refresh recollection and permitted it to be offered into evidence by that party to show the improbability of it refreshing recollection, the Rule is somewhat more extensive as it also deals with writings used before testifying.

Rule 612 does not affect in any way information required to be disclosed under any other rule or portion of the Manual. See, Rule 304(c)(1).

Rule 613. Prior statements of witnesses

(a) Examining witness concerning prior statement. Rule 613(a) is taken from the Federal Rule without change. It alters military practice inasmuch as it eliminates the foundation requirements found in Para. 153b(2)(c) of the 1969 Manual. While it will no longer be a condition precedent to admissibility to acquaint a witness with the prior statement and to give the witness an opportunity to either change his or her testimony or to reaffirm it, such a procedure may be appropriate as a matter of trial tactics.

It appears that the drafters of Federal Rule 613 may have inadvertently omitted the word "inconsistent" from both its caption and the text of Rule 613(a). The effect of that omission, if any, is unclear.

(b) Extrinsic evidence of prior inconsistent statement of witness. Rule 613(b) is taken from the Federal Rule without change. It requires that the witness be given an opportunity to explain or deny a prior inconsistent statement when the party proffers extrinsic evidence of the statement. Although this foundation is not required under Rule 613(a), it is required under Rule 613(b) if a party wishes to utilize more than the witness’ own testimony as brought out on cross-examination. The Rule does not specify any particular timing for the opportunity for the witness to explain or deny the statement nor does it specify any particular method. The Rule is inapplicable to introduction of prior inconsistent statements on the merits under Rule 801.

Rule 614. Calling and interrogation of witnesses by the court-martial

(a) Calling by the court-martial. The first sentence of Rule 614(a) is taken from the Federal Rule but has been modified to recognize the power of the court members to call and examine witnesses. The second sentence of the subdivision is new and reflects the members’ power to call or recall witnesses. Although recognizing that power, the Rule makes it clear that the calling of such witnesses is contingent upon compliance with these Rules and this Manual. Consequently, the testimony of such witnesses must be relevant and not barred by any Rule or Manual provision.

(b) Interrogation by the court-martial. The first sentence of Rule 614(b) is taken from the Federal Rule but modified to reflect the power under these Rules and Manual of the court-members to interrogate witnesses. The second sentence of the subdivision is new and modifies Para. 54a and Para. 149a of the present Manual by requiring that questions of members be submitted to the military judge in writing. This change in current practice was made in order to improve efficiency and to prevent prejudice to either party. Although the Rule states that its intent is to ensure that the questions will "be in a form acceptable to the military judge," it is not the intent of the Committee to grant carte blanche to the military
judge in this matter. It is the Committee's intent that the president will utilize the same procedure.

(c) Objections. Rule 614(c) is taken from the Federal Rule but modified to reflect the powers of the members to call and interrogate witnesses. This provision generally restates prior law but recognizes counsel's right to request an Article 39(a) session to enter an objection.

Rule 615. Exclusion of witnesses
Rule 615 is taken from the Federal Rule with only minor changes of terminology. The first portion of the Rule is in conformity with prior practice, e.g., Para. 53f, MCM, 1969 (Rev.). The second portion, consisting of subdivisions (2) and (3), represents a substantial departure from prior practice and will authorize the prosecution to designate another individual to sit with the trial counsel. Rule 615 thus modifies Para. 53f. Under the Rule, the military judge lacks any discretion to exclude potential witnesses who come within the scope of Rule 615(2) and (3) unless the accused's constitutional right to a fair trial would be violated. Developing Article III practice recognizes the defense right, upon request, to have a prosecution witness, not excluded because of Rule 615, testify before other prosecution witnesses.

Rule 615 does not prohibit exclusion of either accused or counsel due to misbehavior when such exclusion is not prohibited by the Constitution of the United States, the Uniform Code of Military Justice, this Manual or these Rules.

SECTION VII
OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses
Rule 701 is taken from the Federal Rule without change and supersedes that portion of Para. 138e, MCM, 1969 (Rev.), which dealt with opinion evidence by lay witnesses. Unlike the prior Manual rule which prohibited lay opinion testimony except when the opinion was of a "kind which is commonly drawn and which cannot, or ordinarily cannot, be conveyed to the court by a mere recitation of the observed facts," the Rule permits opinions or inferences whenever rationally based on the perception of the witness and helpful to either a clear understanding of the testimony or the determination of a fact in issue. Consequently, the Rule is broader in scope than the Manual provision it replaces. The specific examples listed in the Manual, "the speed of an automobile, whether a voice heard was that of a man, woman or child, and whether or not a person was drunk" are all within the potential scope of Rule 701.

Rule 702. Testimony by experts
Rule 702 is taken from the Federal Rule verbatim, and replaces that portion of Para. 138e, MCM, 1969 (Rev.), dealing with expert testimony. Although the Rule is similar to the prior Manual rule, it may be broader and may supersede Pye v. United States, 293 F.2d 1013 (D.C. Cir. 1923), an issue now being extensively litigated in the Article III courts. The Rule's sole explicit test is whether the evidence in question "will assist the trier of fact to understand the evidence or to determine a fact in issue." Whether any particular piece of evidence comes within the test is normally a matter within the military judge's discretion.

Under Rule 103(a) any objection to an expert on the basis that the individual is not in fact adequately qualified under the Rule will be waived by a failure to so object.

Para. 142e of the 1969 Manual, "Polygraph tests and drug-induced or hypnosis-induced interviews," has been deleted as a result of the adoption of Rule 702. Para. 142e states, "The conclusions based upon or graphically represented by a polygraph test and conclusions based upon, and the statements of the person interviewed made during a drug-induced or hypnosis-induced interview are inadmissible in evidence." The deletion of the explicit prohibition on such evidence is not intended to make such evidence per se admissible, and is not an express authorization for such procedures. Clearly, such evidence must be approached with great care. Considerations surrounding the nature of such evidence, any possible prejudicial effect on a fact finder, and the degree of acceptance of such evidence in the Article III courts are factors to consider in determining whether it can in fact "assist the trier of fact." As of late 1979, the Committee was unaware of any significant decision by a United States Court of Appeals sustaining the admissibility of polygraph evidence in a criminal case, see e.g., United States v. Masri, 547 F.2d 932 (5th Cir. 1977); United States v. Cardarella, 570 F.2d 264 (8th Cir. 1978), although the Seventh Circuit, see e.g., United States v. Bursten, 560 F.2d 779 (7th Cir. 1977) (holding that polygraph admissibility is within the sound discretion of the trial judge) and perhaps the Ninth Circuit, United States v. Benveniste, 564 F.2d 335, 339 n.3 (9th Cir. 1977), at least recognize the possible admissibility of such evidence. There is reason to believe that evidence obtained via hypnosis may be treated somewhat more liberally than is polygraph evidence. See, e.g., Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975).

Rule 703. Bases of opinion testimony of experts
Rule 703 is taken from the Federal Rule without change. The Rule is similar in scope to Para. 138e of the 1969 Manual, but is potentially broader as it allows reliance upon "facts or data" whereas the 1969 Manual's limitation was phrased in terms of the personal observation, personal examination or study, or examination or study "of reports of others of a kind customarily considered in the practice of the expert's specialty." Hypothetical questions of the expert are not required by the Rule. A limiting instruction may be appropriate if the expert while expressing the basis for an opinion states facts or data that are not themselves admissible. See Rule 105.

Whether Rule 703 has modified or superseded the Frye test for scientific evidence, Frye v. United States, 293 F.1013 (D.C. Cir. 1923), is unclear and is now being litigated within the Article III courts.

Rule 704. Opinion on ultimate issue
Rule 704 is taken from the Federal Rule verbatim. The 1969 Manual for Courts-Martial was silent on the issue. The Rule does not permit the witness to testify as to his or her opinion as to the guilt or innocence of the accused or to state legal opinions. Rather it simply allows testimony involving an issue which must be decided by the trier of fact. Although the two may be closely related, they are distinct as a matter of law.

February 1986 Amendment: Fed.R.Evid. 704(b), by operation of Mil.R.Evid. 1102, became effective in the military as
Rule 705. Disclosure of facts or data underlying expert opinion
Rule 705 is taken from the Federal Rule without change and is similar in result to the requirement in Para. 138 of the 1969 Manual that the "expert may be required, on direct or cross-examination, to specify the data upon which his opinion was based and to relate the details of his observation, examination, or study." Unlike the 1969 Manual, Rule 705 requires disclosure on direct examination only when the military judge so requires.

Rule 706. Court appointed experts
(a) Appointment and compensation. Rule 706(a) is the result of a complete redraft of subdivision (a) of the Federal Rule that was required to be consistent with Article 46 of the Uniform Code of Military Justice which was implemented in Paras. 115 and 116, MCM, 1969 (Rev.). Rule 706(a) states the basic rule that prosecution, defense, military judge, and the court members all have equal opportunity under Article 46 to obtain expert witnesses. The second sentence of the subdivision replaces subdivision (b) of the Federal Rule which is inapplicable to the armed forces in light of the Manual. Rule 706(b) is taken from Fed.R.Evid. 706(c) without change and removes certain prior statements by witness from the definition of hearsay. Under the 1969 Manual, Rule 705 requires disclosure on direct examination only when the military judge so requires.

Rule 707 Polygraph Examinations.
Rule 707 is new and is similar to Cal. Evid. Code 351.1 (West 1988 Supp.). The Rule prohibits the use of polygraph evidence in courts-martial and is based on several policy grounds. There is a real danger that court members will be misled by polygraph evidence that "is likely to be shrouded with an aura of near infallibility". United States v. Alexander, 536 F.2d 161, 168-169 (8th Cir. 1975). To the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members "trivialize their responsibility to collectively ascertain the facts and adjudge guilt or innocence. If the standard is lowered, the reliability of the evidentiary process itself is impaired". Id. There is also a danger of confusion of the issues, especially when conflicting polygraph evidence diverts the members' attention from a determination of guilt or innocence to a judgment of the validity and limitations of polygraphs. This could result in the court-martial degenerating into a trial of the polygraph machine. State v. Grier, 300 S.E.2d 351 (N.C. 1983). Polygraph evidence also can result in a substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case. Polygraph evidence places a burden on the administration of justice that outweighs the probative value of the evidence. The reliability of polygraph evidence has not been sufficiently established and its use at trial imputes upon the integrity of the judicial system. See People v. Kegler, 242 Cal. Rptr. 897 (Cal. Ct. App. 1987). Thus, this amendment adopts a bright-line rule that polygraph evidence is not admissible by any party to a court-martial even if stipulated to by the parties. This amendment is not intended to accept or reject United States v. Gipson, 24 M.J. 343 (C.M.A. 1987), concerning the standard for admissibility of other scientific evidence under Mil. R. Evid. 702 or the continued vitality of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Finally, subsection (b) of the rule ensures that any statements which are otherwise admissible are not rendered inadmissible solely because the statements were made during a polygraph examination.

# HEARSAY

## Rule 801. Definitions
(a) Statement. Rule 801(a) is taken from the Federal Rule without change and is similar to Para. 139a of the 1969 Manual. (b) Declarant. Rule 801(b) is taken from the Federal Rule verbatim and is the same definition used in prior military practice. (c) Hearsay. Rule 801(c) is taken from the Federal Rule verbatim. It is similar to the 1969 Manual definition, found in Para. 139a, which stated: "A statement which is offered in evidence to prove the truth of the matters stated therein, but which was not made by the author when a witness before the court at a hearing in which it is so offered, is hearsay." Although the two definitions are basically identical, they actually differ sharply as a result of the Rules' exceptions which are discussed infra. (d) Statements which are not hearsay. Rule 801(d) is taken from the Federal Rule without change and removes certain categories of evidence from the definition of hearsay. In all cases, those categories represent hearsay within the meaning of the 1969 Manual definition.

(1) Prior statement by witness. Rule 801(d)(1) is taken from the Federal Rule without change and removes certain prior statements by the witness from the definition of hearsay. Under the 1969 Manual rule, an out-of-court statement not within an exception to the hearsay rule and adopted by the testifying witness, is inadmissible hearsay notwithstanding the fact that the declarant is now on the stand and able to be cross-examined. Para. 139a; United States v. Burge, 1 M.J. 408 (C.M.A. 1976) (Cook, J., concurring). The justification for the 1969 Manual rule is presumably
the traditional view that out-of-court statements cannot be ade-
quately tested by cross-examination because of the time differen-
tial between the making of the statement and the giving of the in-
court testimony. The Federal Rules of Evidence Advisory Com-
mittee rejected this view in part believing both that later cross-ex-
amination is sufficient to ensure reliability and that earlier state-
ments are usually preferable to later ones because of the possibility
of memory loss. See generally, J. W. WEINSTEIN & M. BERGER,
thus not only makes an im-
portant shift in the military theory of hearsay, but also makes an
important change in law by making admissible a number of types
of statements that were either inadmissible or likely to be inad-
missible under prior military law.

Rule 801(d)(1)(A) makes admissible on the merits a statement
inconsistent with the in-court testimony of the witness when the
prior statement “was given under oath subject to the penalty of
perjury at a trial, hearing, or other proceeding, or in a depo-
sition.” The Rule does not require that the witness have been sub-
ject to cross-examination at the earlier proceeding, but requires
that the witness must have been under oath and subject to penalty
of perjury. Although the definition of “trial, hearing, or other pro-
ceeding” is uncertain, it is apparent that the Rule was in-
tended to include grand jury testimony and may be extremely
broad in scope. See, United States v. Castro-Ayon, 537 F.2d 1055
(9th Cir.), cert. denied, 429 U.S. 983 (1976) (tape recorded state-
ments given under oath at a Border Patrol station found to be
within the Rule). It should clearly apply to Article 32 hearings.
The Rule does not require as a prerequisite a statement “given
under oath subject to the penalty of perjury.” The mere fact that
a statement was given under oath may not be sufficient. No founda-
ton other than that indicated as a condition precedent in the Rule
is apparently necessary to admit the statement under the Rule.
But see WEINSTEIN’S EVIDENCE 801–74 (1978).

Rule 801(d)(1)(B) makes admissible on the merits a statement
consistent with the in-court testimony of the witness and “offered
to rebut an express or implied charge against the declarant of re-
cent fabrication or improper influence or motive.” Unlike Rule
801(d)(1)(A), the earlier consistent statement need not have been
made under oath or at any type of proceeding. On its face, the
Rule does not require that the consistent statement offered have
been made prior to the time the improper influence or motive
arose or prior to the alleged recent fabrication. Notwithstanding
this, at least two circuits have read such a requirement into the
rule. United States v. Quinto, 582 F.2d 224 (2d Cir. 1978); United
States v. Scholle, 553 F.2d 1109 (8th Cir. 1977). See also United
States v. Dominguez, 604 F.2d 304 (4th Cir. 1979).

The propriety of this limitation is clearly open to question. See
generally United States v. Rubin, 609 F.2d 51 (2d Cir. 1979). The
limitation does not, however, prevent admission of consistent
statements made after the inconsistent statement but before the
improper influence or motive arose. United States v. Scholle,
supra. Rule 801(d)(1)(B) provides a possible means to admit evi-
dence of fresh complaint in prosecution of sexual offenses. Al-
though limited to circumstances in which there is a charge, for ex-
ample, of recent fabrication, the Rule, when applicable, would
permit not only fact of fresh complaint, as is presently possible,
but also the entire portion of the consistent statement.

Under Rule 801(d)(1)(C) a statement of identification is not
hearsay. The content of the statement as well as the fact of identi-
fication is admissible. The Rule must be read in conjunction with
Rule 321 which governs the admissibility of statements of pretrial
identification.

(2) Admission by party opponent. Rule 801(d)(2) eliminates a
number of categories of statements from the scope of the hearsay
rule. Unlike those statements within the purview of Rule
802(d)(l), these statements would have come within the excep-
tions to the hearsay rule as recognized in the 1969 Manual. Con-
sequently, their “reclassification” is a matter of academic interest
only. No practical differences result. The reclassification results
from a belief that the adversary system impels admissibility and
that reliability is not a significant factor.

Rule 801(d)(2)(A) makes admissible against a party a state-
ment made in either the party’s individual or representative ca-
city. This was treated as an admission or confession under Para.
140u of the 1969 Manual, and is an exception of the prior
hearsay rule.

Rule 801(d)(2)(B) makes admissible “a statement of which the
party has manifested the party’s adoption or belief in its truth.”
This is an adoptive admission and was an exception to the prior
may be treated as an admission on the facts of a given case, see,
Rule 304(h)(3) and the analysis thereto, under Rule 801(d)(2)
that silence must have been intended by the declarant to have
been an assertion. Otherwise, the statement will not be hearsay
within the meaning of Rule 801(d)(2) and will presumably be ad-
missible, if at all, as circumstantial evidence.

Rule 801(d)(2)(C) makes admissible “a statement by a person
authorized by the party to make a statement concerning the sub-
ject.” While this was not expressly dealt with by the 1969 Manu-
al, it would be admissible under prior law as an admission; Cf.
Para. 140b, utilizing agency theory.

Rule 801(d)(2)(D) makes admissible “a statement by the party’s agent or servant concerning a matter within the scope of
the agency or employment of the agent or servant, made during
the existence of the relationship.” These statements would appear
to be admissible under prior law. Statements made by inter-
preters, as by an individual serving as a translator for a service mem-
ber in a foreign nation who is, for example, attempting to consum-
mate a drug transaction with a non-English speaking person,
should be admissible under Rule 801(d)(2)(D) or Rule
801(d)(2)(C).

Rule 801(d)(2)(E) makes admissible “a statement by a co-con-
spirator of a party during the course and in furtherance of the
conspiracy.” This is similar to the military hearsay exception
found in Para. 140b of the 1969 Manual. Whether a conspiracy
existed for purposes of this Rule is solely a matter for the military
judge. Although this is the prevailing Article III rule, it is also the
consequence of the Military Rules’ modification to Federal Rule
of Evidence 104(b). Rule 801(d)(2)(E) does not address many
critical procedural matters associated with the use of co-conspir-
ator evidence. See generally, Comment, Restructuring the Inde-
pendant Evidence Requirement of the Coconspirator Hearsay
Exception, 127 U.Pa.L.Rev. 1439 (1979). For example, the bur-
edge of proof placed on the proponent is unclear although a pre-
ponderance appears to be the developing Article III trend. Simi-
larly, there is substantial confusion surrounding the question of

A22-47
whether statements of an alleged co-conspirator may be considered by the military judge when determining whether the declarant was in fact a co-conspirator. This process, known as bootstrapping, was not permitted under prior military law. See e.g., United States v. Duffy, 49 C.M.R. 208, 210 (A.F.C.M.R. 1974); United States v. LaBossiere, 13 C.M.A. 337, 339, 32 C.M.R. 337, 339 (1962). A number of circuits have suggested that Rule 104(a) allows the use of such statements, but at least two circuits have held that other factors prohibit bootstrapping. United States v. James, 59O F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); United States v. Valencia, 609 F.2d 603 (2d Cir. 1979). Until such time as the Article III practice is settled, discretion would dictate that prior military law be followed and that bootstrapping not be allowed. Other procedural factors may also prove troublesome although not to the same extent as bootstrapping. For example, it appears to be appropriate for the military judge to determine the co-conspirator question in a preliminary Article 39(a) session. Although receipt of evidence “subject to later connection” or proof is legally possible, the probability of serious error, likely requiring a mistrial, is apparent.

Rule 801(d)(2)(E) does not appear to change what may be termed the “substantive law” relating to statements made by co-conspirators. Thus, whether a statement was made by a co-conspirator in furtherance of a conspiracy is a question for the military judge, and a statement made by an individual after he or she was withdrawn from a conspiracy is not made “in furtherance of the conspiracy.”

Official statements made by an officer—as by the commanding officer of a battalion, squadron, or ship, or by a staff officer, in an endorsement of other communication—are not excepted from the operation of the hearsay rule merely by reason of the official character of the communication or the rank or position of the officer making it.

The following examples of admissibility under this Rule may be helpful:

(1) A is being tried for assaulting B. The defense presents the testimony of C that just before the assault C heard B say to A that B was about to kill A with B's knife. The testimony of C is not hearsay, for it is offered to show that A acted in self-defense because B made the statement and not to prove the truth of B's statement.

(2) A is being tried for rape of B. If B testifies at trial, the testimony of B that she had previously identified A as her attacker at an identification lineup would be admissible under Rule 801(d)(1)(C) to prove that it was A who raped B.

(3) Private A is being tried for disobedience of a certain order given him orally by Lieutenant B. C is able to testify that he heard Lieutenant B give the order to A. This testimony, including testimony of C as to the terms of the order, would not be hearsay.

(4) The accused is being tried for the larceny of clothes from a locker. A is able to testify that B told A that B saw the accused leave the quarters in which the locker was located with a bundle resembling clothes about the same time the clothes were stolen. This testimony from A would not be admissible to prove that facts stated by B.

(5) The accused is being tried for wrongly selling government clothing. A policeman is able to testify that while on duty he saw the accused go into a shop with a bundle under his arm; that he entered the shop and the accused ran away; that he was unable to catch the accused; and that thereafter the policeman asked the proprietor of the shop what the accused was doing there; and that the proprietor replied that the accused sold him some uniforms for which he paid the accused $30. Testimony by the policeman as to the reply of the proprietor would be hearsay if it was offered to prove the facts stated by the proprietor. The fact that the policeman was acting in the line of duty at the time the proprietor made the statement would not render the evidence admissible to prove the truth of the statement.

(6) A defense witness in an assault case testifies on direct examination that the accused did not strike the alleged victim. On cross-examination by the prosecution, the witness admits that at a preliminary investigation he stated that the accused had struck the alleged victim. The testimony of the witness as to this statement will be admissible if he was under oath at the time and subject to a prosecution for perjury.

Rule 802. Hearsay rule

Rule 802 is taken generally from the Federal Rule but has been modified to recognize the application of any applicable Act of Congress.

Although the basic rule of inadmissibility for hearsay is identical with that found in Para. 139a of the 1969 Manual, there is a substantial change in military practice as a result of Rule 103(a). Under the 1969 Manual, hearsay was incompetent evidence and did not require an objection to be inadmissible. Under the new Rules, however, admission of hearsay will not be error unless there is an objection to the hearsay. See Rule 103(a).

Rule 803. Hearsay exceptions; availability of declarant immaterial

Rule 803 is taken generally from the Federal Rule with modifications as needed for adaptation to military practice. Overall, the Rule is similar to practice under Manual Paras. 142 and 144 of the 1969 Manual. The Rule is, however, substantially more detailed and broader in scope than the 1969 Manual.

(1) Present sense impression. Rule 803(1) is taken from the Federal Rule verbatim. The exception it establishes was not recognized in the 1969 Manual for Courts-Martial. It is somewhat similar to a spontaneous exclamation, but does not require a startling event. A fresh complaint by a victim of a sexual offense may come within this exception depending upon the circumstances.

(2) Excited utterance. Rule 803(2) is taken from the Federal Rule verbatim. Although similar to Para. 142b of the 1969 Manual with respect to spontaneous exclamations, the Rule would appear to be more lenient as it does not seem to require independent evidence that the startling event occurred. An examination of the Federal Rules of Evidence Advisory Committee Note indicates some uncertainty, however. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 540 (2d ed. 1977). A fresh complaint of a sexual offense may come within this exception depending on the circumstances.

(3) Then existing mental, emotional, or physical condition. Rule 803(3) is taken from the Federal Rule verbatim. The Rule is similar to that found in 1969 Manual Para. 142d but may be slightly more limited in that it may not permit statements by an individual to be offered to disclose the intent of another person. Fresh com
ANALYSIS OF THE MILITARY RULES OF EVIDENCE

plaint by a victim of a sexual offense may come within this exception.

(4) Statements for purposes of medical diagnosis or treatment. Rule 803(4) is taken from the Federal Rule verbatim. It is substantially broader than the state of mind or body exception found in Para. 142d of the 1969 Manual. It allows, among other matters, statements as to the cause of the medical problem presented for diagnosis or treatment. Potentially, the Rule is extremely broad and will permit statements made even to non-medical personnel (e.g., members of one’s family) and on behalf of others so long as the statements are made for the purpose of diagnosis or treatment. The basis for the exception is the presumption that an individual seeking relief from a medical problem has incentive to make accurate statements. See generally, 4 J WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE Para. 804(4)(01) (1978). The admissibility under this exception of those portions of a statement not relevant to diagnosis or treatment is uncertain. Although statements made to a physician, for example, merely to enable the physician to testify, do not appear to come within the Rule, statements solicited in good faith by others in order to ensure the health of the declarant would appear to come within the Rule. Rule 803(4) may be used in an appropriate case to present evidence of fresh complaint in a sexual case.

(5) Recorded recollection. Rule 803(5) is taken from the Federal Rule without change, and is similar to the present exception for past recollection recorded found in Paras. 146a and 146c(1)(b) of the 1969 Manual except that under the Rule the memorandum may be read but not presented to the fact finder unless offered by the adverse party.

(6) Record of regularly conducted activity. Rule 803(6) is taken generally from the Federal Rule. Two modifications have been made, however, to adapt the rule to military practice. The definition of “business” has been expanded to explicitly include the armed forces to ensure the continued application of this hearsay exception, and a descriptive list of documents, taken generally from 1969 Manual Para. 144d, has been included. Although the activities of the armed forces do not constitute a profit making business, they do constitute a business within the meaning of the hearsay exception, see Para. 144c, of the 1969 Manual, as well as a “regularly conducted activity.”

The specific types of records included within the Rule are those which are normally records of regularly conducted activity within the armed forces. They are included because of their importance and because their omission from the Rule would be impracticable. The fact that a record is of a type described within subdivision does not eliminate the need for its proponent to show that the particular record comes within the Rule when the record is challenged; the Rule does establish that the types of records listed are normally business records.

Chain of custody receipts or documents have been included to emphasize their administrative nature. Such documents perform the critical function of accounting for property obtained by the United States Government. Although they may be used as prosecution evidence, their primary purpose is simply one of property accountability. In view of the primary administrative purpose of these matters, it was necessary to provide expressly for their admissibility as an exception to the hearsay rule in order to clearly reject the interpretation of Para. 144d of the 1969 Manual with respect to chain of custody forms as set forth in United States v. Porter, 7 M.J. 32 (C.M.A. 1979) and United States v. Nault, 4 M.J. 318 (C.M.A. 1978) insofar as they concerned chain of custody forms.

Laboratory reports have been included in recognition of the function of forensic laboratories as impartial examining centers. The report is simply a record of “regularly conducted” activity of the laboratory. See, e.g., United States v. Strangstallen, 7 M.J. 225 (C.M.A. 1979); United States v. Evans, 21 U.S.C.M.A. 579, 45 C.M.R. 353 (1972).

Paragraph 144d prevented a record “made principally with a view to prosecution, or other disciplinary or legal action . . .”, from being admitted as a business record. The limitation has been deleted, but see Rule 803(8)(B) and its Analysis. It should be noted that a record of “regularly conducted activity” is unlikely to have a prosecutorial intent in any event.

The fact that a record may fit within another exception, e.g., Rule 803(8), does not generally prevent it from being admissible under this subdivision although it would appear that the exclusion found in Rule 803(8)(B) for “matters observed by police officers and other personnel acting in a law enforcement capacity” prevent any such record from being admissible as a record of regularly conducted activity. Otherwise the limitation in subdivision (8) would serve no useful purpose. See also Analysis to Rule 803(8)(B).

Rule 803(6) is generally similar to the 1969 Manual rule but is potentially broader because of its use of the expression “regularly conducted” activity in addition to “business.” It also permits records of opinion which were prohibited by Para. 144d of the 1969 Manual. Offsetting these factors is the fact that the Rule requires that the memorandum was “made at or near the time by, or from information transmitted by a person with knowledge . . .”, but Para. 144c of the 1969 Manual rule expressly did not require such knowledge as a condition of admissibility.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Rule 803(7) is taken verbatim from the Federal Rule. The Rule is similar to Paras. 143a(2)(h) and 143b(3) of the 1969 Manual.

(8) Public records and reports. Rule 803(8) has been taken generally from the Federal Rule but has been slightly modified to adapt it to the military environment. Rule 803(8)(B) has been redrafted to apply to “police officers and other personnel acting in a law enforcement capacity” rather the Federal Rule’s “police officers and other law enforcement personnel”. The change was necessitated by the fact that all military personnel may act in a disciplinary capacity. Any officer, for example, regardless of assignment, may potentially act as a military policeman. The capacity within which a member of the armed forces acts may be critical.

The Federal Rule was also modified to include a list of records that, when made pursuant to a duty required by law, will be admissible notwithstanding the fact that they may have been made as “matters observed by police officers and other personnel acting in a law enforcement capacity.” Their inclusion is a direct result of the fact, discussed above, that military personnel may all function within a law enforcement capacity. The Committee determined it would be impracticable and contrary to the intent of the Rule to allow the admissibility of records which are truly administrative in nature and unrelated to the problems inherent in records prepared only for purposes of prosecution to depend upon whether the maker was at that given instant acting in a law en-
forcement capacity. The language involved is taken generally from Para. 144 of the 1969 Manual. Admissibility depends upon whether the record is "a record of a fact or event if made by a person within the scope of his official duties and those duties included a duty to know or ascertain through appropriate and trustworthy channels of information the truth of the fact or event...." Whether any given record was obtained in such a trustworthy fashion is a question for the military judge. The explicit limitation on admissibility of records made "principally with a view to prosecution" found in Para. 144d has been deleted.

The fact that a document may be admissible under another exception to the hearsay rule, e.g., Rule 803(6), does not make it inadmissible under this subdivision.

Military Rule of Evidence 803(8) raises numerous significant questions. Rule 803(8)(A) extends to "records, reports, statements, or data compilations" of public offices or agencies, setting forth (A) the activities of the office or agency. The term "public office or agency" within this subdivision is defined to include any government office or agency including those of the armed forces. Within the civilian context, the definition of "public offices or agencies" is fairly clear and the line of demarcation between governmental and private action can be clearly drawn in most cases. The same may not be true within the armed forces. It is unlikely that every action taken by a servicemember is an "activity" of the department of which he or she is a member. Presumably, Rule 803(8) should be restricted to activities of formally sanctioned instrumentalities roughly similar to civilian entities. For example, the activities of a squadron headquarters or a staff section would come within the definition of "office or agency." Pursuant to this rationale, there is no need to have a military regulation or directive to make a statement of a "public office or agency" under Rule 803(8)(A). However, such regulations or directives might well be highly useful in establishing that a given administrative mechanism was indeed an "office or agency" within the meaning of the Rule.

Rule 803(8)(B) encompasses "matters observed pursuant to duty imposed by law as to which matters there was a duty to report...." This portion of Rule 803(8) is broader than subdivision (8)(A) as it extends to far more than just the normal procedures of an office or agency. Perhaps because of this extent, it requires that there be a specific duty to observe and report. This duty could take the form of a statement, general order, regulation, or any competent order.

The exclusion in the Federal Rule for "matters observed pursuant to duty imposed by law as to which matters there was a duty to report...." This portion of Rule 803(8) is broader than subdivision (8)(A) as it extends to far more than just the normal procedures of an office or agency. Perhaps because of this extent, it requires that there be a specific duty to observe and report. This duty could take the form of a statement, general order, regulation, or any competent order.

The exclusion in the Federal Rule for "matters observed pursuant to duty imposed by law as to which matters there was a duty to report...." This portion of Rule 803(8) is broader than subdivision (8)(A) as it extends to far more than just the normal procedures of an office or agency. Perhaps because of this extent, it requires that there be a specific duty to observe and report. This duty could take the form of a statement, general order, regulation, or any competent order.

The exclusion in the Federal Rule for "matters observed pursuant to duty imposed by law as to which matters there was a duty to report...." This portion of Rule 803(8) is broader than subdivision (8)(A) as it extends to far more than just the normal procedures of an office or agency. Perhaps because of this extent, it requires that there be a specific duty to observe and report. This duty could take the form of a statement, general order, regulation, or any competent order.

The exclusion in the Federal Rule for "matters observed pursuant to duty imposed by law as to which matters there was a duty to report...." This portion of Rule 803(8) is broader than subdivision (8)(A) as it extends to far more than just the normal procedures of an office or agency. Perhaps because of this extent, it requires that there be a specific duty to observe and report. This duty could take the form of a statement, general order, regulation, or any competent order.
ANALYSIS OF THE MILITARY RULES OF EVIDENCE

App. 22, M.R.E.

attention on cross-examination. Such statements may not, however, be given to the fact finder as exhibits.

(19–20) Reputation concerning personal or family history; reputation concerning boundaries or general history. Rules 803(19)–(20) are taken without change from the Federal Rules and had no express equivalents in the 1969 Manual.

(21) Reputation as to character. Rule 803(21) is taken from the Federal Rule without change. It is similar to Para. 138f of the 1969 Manual in that it creates an exception to the hearsay rule for reputation evidence. "Reputation" and "community" are defined in Rule 405(d), and "community" includes a "military organization regardless of sizes." Affidavits and other written statements are admissible to show character under Rule 405(c), and, when offered pursuant to that Rule, are an exception to the hearsay rule.

(22) Judgment or previous conviction. Rule 803(22) is taken from the Federal Rule but has been modified to recognize convictions of a crime punishable by a dishonorable discharge, a unique punishment not present in civilian life. See also Rule 609 and its Analysis.

There is no equivalent to this Rule in military law. Although the Federal Rule is clearly applicable to criminal cases, its original intent was to allow use of a prior criminal conviction in a subsequent civil action. To the extent that it is used for criminal cases, significant constitutional issues are raised, especially if the prior conviction is a foreign one, a question almost certainly not anticipated by the Federal Rules Advisory Committee.

(23) Judgment as to personal, family or general history, or boundaries. Rule 803(23) is taken verbatim from the Federal Rule, and had no express equivalent in the 1969 Manual. Although intended for civil cases, it clearly has potential use in courts-martial for such matters as proof of jurisdiction.

(24) Other exceptions. Rule 803(24) is taken from the Federal Rule without change. It had no express equivalent in the 1969 Manual as it establishes a general exception to the hearsay rule. The Rule implements the general policy behind the Rules of permitting admission of probative and reliable evidence. Not only must the evidence in question satisfy the three conditions listed in the Rule (materiality, more probative than any other evidence which can be reasonably obtained, and admission would be in the interest of justice) but the procedural requirements of notice must be complied with. The extent to which this exception may be employed is unclear. The Article III courts have divided as to whether the exception may be used only in extraordinary cases or whether it may have more general application. It is the intent of the Committee that the Rule be employed in the same manner as it is generally applied in the Article III courts. Because the general exception found in Rule 803(24) is basically one intended to apply to highly reliable and necessary evidence, recourse to the theory behind the hearsay rule itself may be helpful. In any given case, both trial and defense counsel may wish to examine the hearsay evidence in question to determine how well it relates to the four traditional considerations usually invoked to exclude hearsay testimony: how truthful was the original declarant? to what extent were his or her powers of observation adequate? was the declaration truthful? was the original declarant able to adequately communicate the statement? Measuring evidence against this framework should assist in determining the reliability of the evidence. Rule 803(24) itself requires the necessity which is the other usual justification for hearsay exceptions.

Rule 804. Hearsay exception; declarant unavailable

(a) Definition of unavailability. Subdivisions (a)(1)–(a)(5) of Rule 804 are taken from the Federal Rule without change and are generally similar to the relevant portions of Paras. 145a and 145b of the 1969 Manual, except that Rule 804(a)(3) provides that a witness who "testifies as to a lack of memory of the subject matter of the declarant's statement" is unavailable. The Rule also does not distinguish between capital and non-capital cases.

February 1986 Amendment: The phrase "claim of lack of memory" was changed to "claim of lack of memory" to correct an error in MCM, 1984.

Rule 804(a)(6) is new and has been added in recognition of certain problems, such as combat operations, that are unique to the armed forces. Thus, Rule 804(a)(6) will make unavailable a witness who is unable to appear and testify in person for reason of military necessity within the meaning of Article 49(d)(2). The meaning of "military necessity" must be determined by reference to the cases construing Article 49. The expression is not intended to be a general escape clause, but must be restricted to the limited circumstances that would permit use of a deposition.

(b) Hearsay exceptions

(1) Former testimony. The first portion of Rule 804(b)(1) is taken from the Federal Rule with omission of the language relating to civil cases. The second portion is new and has been included to clarify the extent to which those military tribunals in which a verbatim record normally is not kept come within the Rule.

The first portion of Rule 804(b)(1) makes admissible former testimony when "the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Unlike Para. 145b of the 1969 Manual, the Rule does not explicitly require that the accused, when the evidence is offered against him or her, have been "afforded at the former trial an opportunity, to be adequately represented by counsel." Such a requirement should be read into the Rule's condition that the party have had "opportunity and similar motive." In contrast to the 1969 Manual, the Rule does not distinguish between capital and non-capital cases.

The second portion of Rule 804(b)(1) has been included to ensure that testimony from military tribunals, many of which ordinarily do not have verbatim records, will not be admissible unless such testimony is presented in the form of a verbatim record. The Committee believed substantive use of former testimony to be too important to be presented in the form of an incomplete statement.

Investigations under Article 32 of the Uniform Code of Military Justice present a special problem. Rule 804(b)(1) requires that "the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony" at the first hearing. The "similar motive" requirement was intended primarily to ensure sufficient identity of issues between the two proceedings and thus to ensure an adequate interest in examination of the witness. See, e.g., J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE Para. 804(b)(1)(d)(4) (1978). Because Article 32 hearings represent a unique hybrid of preliminary hearings and grand juries with features dissimilar to both, it
was particularly difficult for the Committee to determine exactly how subdivision (b)(1) of the Federal Rule would apply to Article 32 hearings. The specific difficulty stems from the fact that Article 32 hearings were intended by Congress to function as discovery devices for the defense as well as to recommend an appropriate disposition of charges to the convening authority. *Huston v. United States*, 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970); *United States v. Samuels*, 10 U.S.C.M.A. 206, 212, 27 C.M.R. 280, 286 (1959). See generally, *Hearing on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess., 997 (1949). It is thus permissible, for example, for a defense counsel to limit cross-examination of an adverse witness at an Article 32 hearing using the opportunity for discovery alone, for example, rather than impeachment. In such a case, the defense would not have the requisite "similar motive" found within Rule 804(b)(1).

Notwithstanding the inherent difficulty of determining the defense counsel's motive at an Article 32 hearing, the Rule is explicitly intended to prohibit use of testimony given at an Article 32 hearing unless the requisite "similar motive" was present during that hearing. It is clear that some Article 32 testimony is admissible under the Rule notwithstanding the Congressionally sanctioned discovery purpose of the Article 32 hearing. Consequently, one is left with the question of the extent to which the Rule actually does apply to Article 32 testimony. The only apparent practical solution to what is otherwise an irresolvable dilemma is to read the Rule as permitting only Article 32 testimony preserved via a verbatim record that is not objected to as having been obtained without the requisite "similar motive." While defense counsel's assertion of his or her intent in not examining one or more witnesses or in not fully examining a specific witness is not binding upon the military judge, clearly the burden of establishing admissibility under the Rule is on the prosecution and the burden so placed may be impossible to meet should the defense counsel adequately raise the issue. As a matter of good trial practice, a defense counsel who is limiting cross-examination at the Article 32 hearing because of discovery should announce that intent sometime during the Article 32 hearing so that the announcement may provide early notice to all concerned and hopefully avoid the necessity for counsel to testify at the later trial.

The Federal Rule was modified by the Committee to require that testimony offered under Rule 804(b)(1) which was originally "given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article 32" and which is otherwise admissible under the Rule be offered in the form of a verbatim record. The modification was intended to ensure accuracy in view of the fact that only summarized or minimal records are required of some types of military proceedings.

An Article 32 hearing is a "military tribunal." The Rule distinguishes between Article 32 hearings and other military tribunals in order to recognize that there are other proceedings which are considered the equivalent of Article 32 hearings for purposes of former testimony under Rule 804(b)(1).

(2) *Statement under belief of impending death.* Rule 804(b)(2) is taken from the Federal Rule except that the language, "for any offense resulting in the death of the alleged victim," has been added and reference to civil proceedings has been omitted. The new language has been added because there is no justification for limiting the exception only to those cases in which a homicide charge has actually been preferred. Due to the violent nature of military operations, it may be appropriate to charge a lesser included offense rather than homicide. The same justifications for the exception are applicable to lesser included offenses which are also, of course, of lesser severity. The additional language, taken from Para. 142a, thus retains the 1969 Manual rule, modification of which was viewed as being impracticable.

Rule 804(b)(2) is similar to the dying declaration exception found in Para. 142a of the 1969 Manual, except that the Military Rule does not require that the declarant be dead. So long as the declarant is unavailable and the offense is one for homicide or other offense resulting in the death of the alleged victim, the hearsay exception may be applicable. This could, for example, result from a situation in which the accused, intending to shoot A, shoots both A and B; uttering the hearsay statement, under a belief of impending death, B dies, and although A recovers, A is unavailable to testify at trial. In a trial of the accused for killing B, A's statement will be admissible.

There is no requirement that death immediately follow the declaration, but the declaration is not admissible under this exception if the declarant had a hope of recovery. The declaration may be made by spoken words or intelligible signs or may be in writing. It may be spontaneous or in response to solicitation, including leading questions. The utmost care should be exercised in weighing statements offered under this exception since they are often made under circumstances of mental and physical debility and are not subject to the usual tests of veracity. The military judge may exclude those declarations which are viewed as being unreliable. See, Rule 403.

A dying declaration and its maker may be contradicted and impeached in the same manner as other testimony and witnesses. Under the prior law, the fact that the deceased did not believe in a deity or in future rewards or punishments may be offered to affect the weight of a declaration offered under this Rule but does not defeat admissibility. Whether such evidence is now admissible in the light of Rule 610 is unclear.

(3) *Statement against interest.* Rule 804(b) is taken from the Federal Rule without change, and has no express equivalent in the 1969 Manual. It has, however, been made applicable by case law, *United States v. Johnson*, 3 M.J. 143 (C.M.A. 1977). It makes admissible statements against a declarant's interest, whether pecuniary, proprietary, or penal when a reasonable person in the position of the declarant would not have made the statement unless such a person would have believed it to be true.

The Rule expressly recognizes the penal interest exception and permits a statement tending to expose the declarant to criminal liability. The penal interest exception is qualified, however, when the declaration is offered to exculpate the accused by requiring the "corroborating circumstances clearly indicate the trustworthiness of the statement." This requirement is applicable, for example, when a third party confesses to the offense the accused is being tried for and the accused offers the third party's statement or confession. The declaration is admissible when "the corroborating circumstances clearly indicate the trustworthiness of the statement." It is thus permissible, for example, for a defense counsel to limit cross-examination of an adverse witness at an Article 32 hearing using the opportunity for discovery alone, for example, rather than impeachment. In such a case, the defense would not have the requisite "similar motive" found within Rule 804(b)(1).

The Rule expressly recognizes the penal interest exception and permits a statement tending to expose the declarant to criminal liability. The penal interest exception is qualified, however, when the declaration is offered to exculpate the accused by requiring the "corroborating circumstances clearly indicate the trustworthiness of the statement." This requirement is applicable, for example, when a third party confesses to the offense the accused is being tried for and the accused offers the third party's statement in evidence to exculpate the accused. The basic penal interest exception is established as a matter of constitutional law by the Supreme Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973), which may be broader than the Rule as the case may not require either corroborating evidence or an unavailable declarant.

In its present form, the Rule fails to address a particularly vexing problem—that of the declaration against penal interest which
implicates the accused as well as the declarant. On the face of the Rule, such a statement should be admissible, subject to the effects, if any, of Bruton v. United States, 391 U.S. 123 (1968) and Rule 306. Notwithstanding this, there is considerable doubt as to the applicability of the Rule to such a situation. See generally, 4J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 804–93, 804–16 (1978). Although the legislative history reflects an early desire on the part of the Federal Rules of Evidence Advisory Committee to prohibit such testimony, a provision doing so was not included in the material reviewed by Congress. Although the House included such a provision, it did so apparently in large part based upon a view that Bruton, supra, prohibited such statements—arguably an erroneous view of Bruton, supra, see, Bruton, supra n.3 at 128, Dutton v. Evans, 400 U.S. 74 (1970). The Conference Committee deleted the House provision, following the Senate's desires, because it believed it inappropriate to "codify constitutional evidentiary principles" WEINSTEIN'S EVIDENCE at 804–16 (1978) citing CONG.REC.H 11931–32 (daily ed. Dec. 14, 1974). Thus, applicability of the hearsay exception to individuals implicating the accused may well rest only on the extent to which Bruton, supra, governs such statement. The Committee intends that the Rule extend to such statements to the same extent that subdivision 804(b)(4) is held by the Article III courts to apply to such statements.

(4) Statement of personal or family history. Rule 804(b)(4) of the Federal Rule is taken verbatim from the Federal Rule, and had no express equivalent in the 1969 Manual. The primary feature of Rule 803(b)(4)(A) is its application even though the “declarant had no means of acquiring personal knowledge of the matter stated.”

(5) Other exceptions. Rule 804(b)(5) is taken without change from the Federal Rule and is identical to Rule 803(24). As Rule 803 applies to hearsay statements regardless of the declarant's availability or lack thereof, this subdivision is actually superfluous. As to its effect, see the Analysis to Rule 803(24).

Rule 805. Hearsay within hearsay

Rule 805 is taken verbatim from the Federal Rule. Although the 1969 Manual did not exactly address the issue, the military rule is identical with the new rule.

Rule 806. Attacking and supporting credibility of declarant

Rule 806 is taken from the Federal Rule without change. It restates the prior military rule that a hearsay declarant or statement may always be contradicted or impeached. The Rule eliminates any requirement that the declarant be given "an opportunity to deny or explain" an inconsistent statement or inconsistent conduct when such statement or conduct is offered to attack the hearsay statement. As a result, Rule 806 supersedes Rule 613(b) which would require such an opportunity for a statement inconsistent with in-court testimony.
Rule 902. Self-authentication

Rule 902 has been taken from the Federal Rule without significant change except that a new subdivision, 4a, has been added and subdivisions (4) and (10) have been modified. The Rule describes forms of self-authentication.

1. Domestic public documents under seal. Rule 902(1) is taken verbatim from the Federal Rule, and is similar to aspects of Paras. 143b(2)(c) and (d) of the 1969 Manual. The Rule does not distinguish between original document and copies. A seal is self-authenticating and, in the absence of evidence to the contrary, is presumed genuine. Judicial notice is not required.

2. Domestic public documents not under seal. Rule 902(2) is taken from the Federal Rule without change. It is similar in scope to aspects of Paras. 143b(2)(c) and (d) of the 1969 Manual in that it authorizes use of a certification under seal to authenticate a public document not itself under seal. This provision is not the only means of authenticating a domestic public record under this Rule. Compare Rule 902(4), 902(4a).

3. Foreign public documents. Rule 902(3) is taken without change from the Federal Rule. Although the Rule is similar to Paras. 143b(2)(c) and (d) of the 1969 Manual, the Rule is potentially narrower than the prior military one as the Rule does not permit "final certification" to be made by military personnel as did the Manual rule nor does it permit authentication made by military personnel as did the Manual rule nor does it permit authentication made solely pursuant to the laws of the foreign nation. On the other hand, the Rule expressly permits the military judge to order foreign documents to be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

4. Certified copies of public records. Rule 902(4) is taken verbatim from the Federal Rule except that it has been modified by adding "or applicable regulations prescribed pursuant to statutory authority." The additional language is required by military necessity and includes the now existing statutory powers of the President and various Secretaries to promulgate regulations. See generally, Analysis to Rule 901(b).

Rule 902(4) expands upon prior forms of self-authentication to acknowledge the propriety of certified public records or reports and related materials domestic or foreign, the certification of which complies with subdivisions (1), (2), or (3) of the Rule.

4a. Documents or records of the United States accompanied by attesting certificates. This provision is new and is taken from the third subparagraph of Para. 143b(2)(c) of the 1969 Manual. It has been inserted due to the necessity to facilitate records of the United States in general and military records in particular. Military records do not have seals and it would not be practicable to either issue them or require submission of documents to those officials with them. In many cases, such a requirement would be impossible to comply with due to geographical isolation or the unwarranted time such a requirement could demand.

An "attesting certificate" is a certificate or statement, signed by the custodian of the record or the deputy or assistant of the custodian, which in any form indicates that the writing to which the certificate or statement refers is a true copy of the record or an accurate "translation" of a machine, electronic, or coded record, and the signer of the certificate or statement is acting in an official capacity as the person having custody of the record or as the deputy or assistant thereof. See Para. 143a(2)(a) of the 1969 Manual. An attesting certificate does not require further authentication and, absent proof to the contrary, the signature of the custodian or deputy or assistant thereof on the certificate is presumed to be genuine.

5-9 Official publications; Newspapers and periodicals; Trade inscriptions and the like; Acknowledged documents; Commercial paper and related documents. Rules 902(5)–(9) are taken verbatim from the Federal Rules and have no equivalents in the 1969 Manual or in military law.

10. Presumptions under Acts of Congress and Regulations. Rule 902(10) was taken from the Federal Rule but was modified by adding "and Regulations" in the caption and "or by applicable regulation prescribed pursuant to statutory authority." See generally the Analysis to Rule 901(b)(10) for the reasons for the additional language. The statutory authority referred to includes the presently existing authority for the President and various Secretaries to prescribe regulations.

Rule 903. Subscribing witness' testimony unnecessary

Rule 903 is taken verbatim from the Federal Rule and has no express equivalent in the 1969 Manual.

SECTION X

CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions

1. Writings and recordings. Rule 1001(1) is taken verbatim from the Federal Rule and is similar in scope to Para. 143d of the 1969 Manual. Although the 1969 Manual was somewhat more detailed, the Manual was clearly intended to be expansive. The Rule adequately accomplishes the identical purpose through a more general reference.

2. Photographs. Rule 1001(2) is taken verbatim from the Federal Rule and had no express equivalent in the 1969 Manual. It does, however, reflect current military law.

3. Original. Rule 1001(3) is taken verbatim from the Federal Rule and is similar to Para. 143a(1) of the 1969 Manual. The 1969 Manual, however, treated "duplicate originals," i.e., carbon and photographic copies made for use as an original, as an "original" while Rule 1001(4) treats such a document as a "duplicate."

4. Duplicate. Rule 1004(4) is taken from the Federal Rule verbatim and includes those documents Para. 143a(1) of the 1969 Manual defined as "duplicate originals." In view of Rule 1003's rule of admissibility for "duplicate," no appreciable negative result stems from the reclassification.

Rule 1002. Requirement of the original

Rule 1002 is taken verbatim from the Federal Rule except that "this Manual" has been added in recognition of the efficacy of other Manual provisions. The Rule is similar in scope to the best evidence rule found in Para. 143a(19) of the 1969 Manual except that specific reference is made in the rule to recordings and photographs. Unlike the 1969 Manual, the Rule does not contain the
misleading reference to "best evidence" and is plainly applicable to writings, recordings, or photographs.

It should be noted that the various exceptions to Rule 1002 are similar to but not identical with those found in the 1969 Manual. Compare Rules 1003–1007 with Para. 143a(2)(f) of the 1969 Manual. For example, Paras. 143a(2)(e) and 144c of the 1969 Manual excepted banking records and business records from the rule as categories while the Rule does not. The actual difference in practice, however, is not likely to be substantial as Rule 1003 allows admission of duplicates unless, for example, "a genuine question is raised as to the authenticity of the original." This is similar in result to the treatment of business records in Para. 144a of the 1969 Manual. Omission of other 1969 Manual exceptions, e.g., certificates of fingerprint comparison and identity, see Rule 703, 803, evidence of absence of official or business entries, and copies of telegrams and radiograms, do not appear substantial when viewed against the entirety of the Military Rules which are likely to allow admissibility in a number of ways.

The Rule's reference to "Act of Congress" will now incorporate those statutes that specifically direct that the best evidence rule be inapplicable in one form or another. See, e.g., 1 U.S.C. §209 (copies of District of Columbia Codes of Laws). As a rule, such statutes permit a form of authentication as an adequate substitute for the original document.

Rule 1003. Admissibility of duplicates

Rule 1003 is taken verbatim from the Federal Rule. It is both similar to and distinct from the 1969 Manual. To the extent that the Rule deals with those copies which were intended at the time of their creation to be used as originals, it is similar to the 1969 Manual's treatment of "duplicate originals," Para. 143a(1), except that under the 1969 Manual there was no distinction to be made between originals and "duplicate originals". Accordingly, in this case the Rule would be narrower than the 1969 Manual. To the extent that the Rule deals with copies not intended at their time of creation to serve as originals, however, e.g., when copies are made of pre-existing documents for the purpose of litigation, the Rule is broader than the 1969 Manual because that Manual prohibited such evidence unless an adequate justification for the non-production of the original existed.

Rule 1004. Admissibility of other evidence of contents

Rule 1004 is taken from the Federal Rule without change, and is similar in scope to the 1969 Manual. Once evidence comes within the scope of Rule 1004, secondary evidence is admissible without regard to whether "better" forms of that evidence can be obtained. Thus, no priority is established once Rule 1002 is escaped. Although the 1969 Manual stated in Para. 143a(2) that "the contents may be proved by an authenticated copy or by the testimony of a witness who has seen and can remember the substance of the writing" when the original need not be produced, that phrasing appears illustrative only and not exclusive. Accordingly, the Rule, the Manual, and common law are in agreement in not requiring categories of secondary evidence.

(1) Originals lost or destroyed. Rule 1004(1) is similar to the 1969 Manual except that the Rule explicitly exempts originals destroyed in "bad faith." Such an exemption was implicit in the 1969 Manual.
(2) Original not obtained. Rule 1004(2) is similar to the justification for nonproduction in Para. 143a(2) of the 1969 Manual, "an admissible writing . . . cannot feasibly be produced."
(3) Original in possession of opponent.

Rule 1004(3) is similar to the 1969 Manual provision in Para. 143a(2) that when a document is in the possession of the accused the original need not be produced except that the 1969 Manual explicitly did not require notice to the accused, and the Rule may require such notice. Under the Rule, the accused must be "put on notice, by the pleadings or otherwise, that the contents would be subject of proof at the hearing." Thus, under certain circumstances, a formal notice to the accused may be required. Under no circumstances should such a request or notice be made in the presence of the court members. The only purpose of such notice is to justify use of secondary evidence and does not serve to compel the surrender of evidence from the accused. It should be noted that Rule 1004(3) acts in favor of the accused as well as the prosecution and allows notice to the prosecution to justify defense use of secondary evidence.

(4) Collateral matters. Rule 1004 is not found within the Manual but restates prior military law. The intent behind the Rule is to avoid unnecessary delays and expense. It is important to note that important matters which may appear collateral may not be so in fact due to their weight. See, e.g., United States v. Parker, 13 U.S.C.M.A. 579, 33 C.M.R. 111 (1963) (validity of divorce decree of critical prosecution witness not collateral when witness would be prevented from testifying due to spousal privilege if the divorce were not valid). The Rule incorporates this via its use of the expression "related to a controlling issue."

Rule 1005. Public records

Rule 1005 is taken verbatim from the Federal Rule except that "or attested to" has been added to conform the Rule to the new Rule 902(4a). The Rule is generally similar to Para. 143a(2)(c) of the 1969 Manual although some differences do exist. The Rule is somewhat broader in that it applies to more than just "official records." Further, although the 1969 Manual permitted "a properly authenticated" copy in lieu of the official record, the Rule allows secondary evidence of contents when a certified or attested copy cannot be obtained by the exercise of reasonable diligence. The Rule does, however, have a preference for a certified or attested copy.

Rule 1006. Summaries

Rule 1006 is taken from the Federal Rule without change, and is similar to the exception to the best evidence rule now found in Para. 143a(2)(b) of the 1969 Manual. Some difference between the Rule and the 1969 Manual exists, however, because the Rule permits use of "a chart, summary, or calculation" while the Manual permitted only "a summarization." Additionally, the Rule does not include the 1969 Manual requirement that the summarization be made by a "qualified person or group of qualified persons," nor does the Rule require, as the Manual appeared to, that the preparer of the chart, summary, or calculation testify in order to authenticate the document. The nature of the authentication required is not clear although some form of authentication is required under Rule 901(a).
rule

It is possible for a summary that is admissible under Rule 1006 to include information that would not itself be admissible if that information is reasonably relied upon by an expert preparing the summary. See generally Rule 703 and S. Saltzberg & K. Redden, Federal Rules of Evidence Manual 694 (2d ed. 1977).

Rule 1007. Testimony or written admission of party

Rule 1007 is taken from the Federal Rule without change and had no express equivalent in the 1969 Manual. The Rule establishes an exception to Rule 1002 by allowing the contents of a writing, recording or photograph to be proven by the testimony or deposition of the party against whom offered or by the party’s written admission.

Rule 1008. Functions of military judge and members

Rule 1008 is taken from the Federal Rule without change, and had no formal equivalent in prior military practice. The Rule specifies three situations in which members must determine issues which have been conditionally determined by the military judge. The members have been given this responsibility in this narrow range of issues because the issues that are involved go to the very heart of a case and may prove totally dispositive. Perhaps the best example stems from the civil practice. Should the trial judge in a contract action determine that an exhibit is in fact the original of a contested contract, that admissibility decision could determine the ultimate result of trial if the jury were not given the opportunity to be the final arbiter of the issue. A similar situation could result in a criminal case, for example, in which the substance of a contested written confession is determinative (this would be rare because in most cases the fact that a written confession was made is unimportant, and the only relevant matter is the content of the oral statement that was later transcribed) or in a case in which the accused is charged with communication of a written threat. A decision by the military judge that a given version is authentic could easily determine the trial. Rule 1008 would give the member the final decision as to accuracy. Although Rule 1008 will rarely be relevant to the usual court-martial, it will adequately protect the accused from having the case against him or her depend upon a single best evidence determination by the military judge.

SECTION XI
MISCELLANEOUS RULES

Rule 1101. Applicability of rules

The Federal Rules have been revised extensively to adapt them to the military criminal legal system. Subdivision (a) of the Federal Rule specifies the types of courts to which the Federal Rules are applicable, and Subdivision (b) of the Federal Rule specifies the types of proceedings to be governed by the Federal Rules. These sections are inapplicable to the military criminal legal system and consequently were deleted. Similarly, most of Federal Rule of Evidence 1101(d) is inapplicable to military law due to the vastly different jurisdictions involved.

Rule 1102. Amendments

Rule 1102 has been substantially revised from the original Federal Rule which sets forth a procedure by which the Supreme Court promulgates amendments to the Federal Rules subject to Congressional objection. Although it is the Committee’s intent that the Federal Rules of Evidence apply to the armed forces to the extent practicable, see Article 36(a), the Federal Rules are often in need of modification to adapt them to military criminal legal system. Further, some rules may be impracticable. As Congress may make changes during the initial period following Supreme Court publication, some period of time after an amendment’s effective date was considered essential for the armed forces to review the final form of amendments and to propose any necessary modifications to the President. Six months was considered the minimally appropriate time period.

Amendments to the Federal Rules are not applicable to the armed forces until 180 days after the effective date of such amendment, unless the President directs earlier application. In the absence of any Presidential action, however, an amendment to the Federal Rule of Evidence will be automatically applicable on the 180th day after its effective date. The President may, however, affirmatively direct that any such amendment may not apply, in whole or in part, to the armed forces and that direction shall be binding upon courts-martial.

Rule 1103. Title

In choosing the title, Military Rules of Evidence, the Committee intends that it be clear that military evidentiary law should echo the civilian federal law to the extent practicable, but should
also ensure that the unique and critical reasons behind the separate military criminal legal system be adequately served.
EXECUTIVE ORDER 12473
AS AMENDED BY EXECUTIVE ORDER 12484
MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By virtue of the authority vested in me as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States (Uniform Code of Military Justice), I hereby prescribe the following Manual for Courts-Martial to be designated as “Manual for Courts-Martial, United States, 1984.”

This Manual shall take effect on August 1, 1984, with respect to all court-martial processes taken on and after that date: Provided, That nothing contained in this Manual shall be construed to invalidate any restraint, investigation, referral of charges, designation or detail of a military judge or counsel, trial in which arraignment had been had, or other action begun prior to that date, and any such restraint, investigation, trial, or other action may be completed in accordance with applicable laws, Executive orders, and regulations in the same manner and with the same effect as if this Manual had not been prescribed; Provided further, That Rules for Courts-Martial 908, 1103(j), 1105-1107, 1110-1114, 1201, and 1203 shall not apply to any case in which the findings and sentence were adjudged by a court-martial before August 1, 1984, and the post-trial and appellate review of such cases shall be completed in accordance with applicable laws, Executive orders, and regulations in the same manner and with the same effect as if this Manual had not been prescribed; Provided further, That nothing contained in this Manual shall be construed to make punishable any act done or omitted prior to August 1, 1984, which was not punishable when done or omitted; Provided further, That nothing in part IV of this Manual shall be construed to invalidate the prosecution of any offense committed before the effective date of this Manual; Provided further, That the maximum punishment for an offense committed prior to August 1, 1984, shall not exceed the applicable limit in effect at the time of the commission of such offense; Provided further, That for offenses committed prior to August 1, 1984, for which a sentence is adjudged on or after August 1, 1984, if the maximum punishment authorized in this Manual is less than that previously authorized, the lesser maximum authorized punishment shall apply; And provided further, That Part V of this Manual shall not apply to nonjudicial punishment proceedings which were initiated before August 1, 1984, and nonjudicial punishment proceedings in such cases shall be completed in accordance with applicable laws, Executive orders, and regulations in the same manner and with the same effect as if this Manual had not been prescribed.


The Secretary of Defense shall cause this Manual to be reviewed annually and shall recommend to the President any appropriate amendments.

The Secretary of Defense, on behalf of the President, shall transmit a copy of this Order to the Congress of the United States in accord with Section 836 of Title 10 of the United States Code.

Ronald Reagan

THE WHITE HOUSE
13 July 1984
EXECUTIVE ORDER 12550
AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code (Uniform Code of Military Justice), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. R.C.M. 707(a) is amended to read as follows:

★b. R.C.M. 805(b) is amended by
★c. R.C.M. 903(c)(3) is amended by
★d. R.C.M. 909 is amended
★e. R.C.M. 916(e)(3) is amended by
★f. R.C.M. 920(e)(2) is amended by
★g. R.C.M. 921(d) is amended by
★h. R.C.M. 922(b) is amended
★i. R.C.M. 1001 is amended
★j. R.C.M. 1003(b)(10)(B) is amended by
★k. R.C.M. 1004 is amended
★l. R.C.M. 1010 is amended
★m. R.C.M. 1106(b) is amended by
★n. R.C.M. 1114(c) is amended by

Section 2. Part III of the Manual for Courts-Martial, United States, 1984, is amended as follows:

★a. Mil. R. Evid. 304 is amended as follows:
★b. Mil. R. Evid. 311 is amended as follows:
★c. Mil. R. Evid. 609(e) is amended by
★d. Mil. R. Evid. 804(a) is amended by

Section 3. Part IV of the Manual for Courts-Martial, United States, 1984, is amended as follows:

★a. Paragraph 16 is amended
★b. Part IV is amended by inserting the following new paragraph after paragraph 30:
★c. Part IV is amended by adding the following new sentence at the end of paragraph 105e:

Section 4. Part V of the Manual for Courts-Martial, United States, 1984, is amended as follows:

Section 5. The amendments to Mil. R. Evid. 704, which were implemented on 10 April 1985 pursuant to Mil. R. Evid. 1102, are hereby rescinded; Provided, That this rescission shall not apply in the trial of any case in which arraignment occurred while such amendments were in effect.

Section 6. These amendments shall take effect on 1 March 1986, with respect to all court-martial processes taken on and after that date: Provided, That nothing contained in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to that date, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed; Provided further, That the amendments made in Rule for Court-Martial 1004(c) shall apply in the trial of offenses committed on or after 1 March 1986; Provided further, That nothing contained in these amendments shall be construed to invalidate any capital sentencing proceeding conducted prior to 1 March 1986, and any such proceeding shall be completed and reviewed in the same manner and with the same effect as if these amendments had not been prescribed; Provided further, That amendments to Rule for Court-Martial 707(a) shall not apply to any condition on liberty im-
posed before 1 March 1986, and the effect of such a condition on liberty shall be considered under Rule for Court-Martial 707(a) as it existed before 1 March 1986; Provided further, That the amendments made in paragraph 16 of Part IV shall apply in trials of offenses committed on or after 1 March 1986; Provided further, That the amendments made in paragraph 30a of Part IV shall apply in the trials of offenses committed under Article 106a on or after 1 March 1986; And provided further, That the amendments made in paragraph 30a of Part IV authorizing capital punishment shall apply with respect to offenses under Article 106a committed on or after 1 March 1986.

Section 7. The Secretary of Defense, on behalf of the President, shall transmit a copy of this Order to the Congress of the United States in accord with Section 836 of Title 10 of the United States Code.

THE WHITE HOUSE
February 19, 1986.

Ronald Reagan
APPENDIX 23

EXECUTIVE ORDER 12586
AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution of the United States and by Chapter 47 of title 10 of the United States Code (Uniform Code of Military Justice), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order Nos. 12484 and 12550, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, 1984, is amended as follows:

★a. R.C.M. 201(e) is amended as follows:
★b. Chapter II is amended by inserting the following new Rule following R.C.M. 203:
★c. R.C.M. 503(a)(2) is amended by
★d. R.C.M. 701(b)(2) is amended by
★e. R.C.M. 706(c)(1) is amended to read as follows:
★f. R.C.M. 706(c)(2) is amended as follows:
★g. R.C.M. 707 is amended—
★h. R.C.M. 903 is amended—
★i. R.C.M. 916 is amended as follows:
★j. R.C.M. 918(a) is amended—
★k. R.C.M. 920(e)(5)(D) is amended by
★l. R.C.M. 921(c) is amended—
★m. R.C.M. 924(b) is amended by
★n. R.C.M. 1001(b)(2) is amended by
★o. R.C.M. 1003(c) is amended—
★p. R.C.M. 1010(c) is amended to read as follows:
★q. R.C.M. 1105(c) is amended by—
★r. R.C.M. 1106(f)(5) is amended by
★s. R.C.M. 1107(b)(5) is amended to read as follows:
★t. R.C.M. 1109 is amended—
★u. R.C.M. 1112 is amended—
★v. R.C.M. 1113(d)(1) is amended to read as follows:
★w. R.C.M. 1114 is amended as follows:
★x. R.C.M. 1201(b)(3)(A) is amended by
★y. R.C.M. 1203(c) is amended by
★z. R.C.M. 1305(b)(2) is amended by

Section 2. Part III of the Manual for Courts-Martial, United States, 1984, is amended as follows:

★a. Mil. R. Evid. 304(h) is amended by
★b. Mil. R. Evid. 613(a) is amended by
★c. Mil. R. Evid. 902(1) is amended by

Section 3. Part IV of the Manual for Courts-Martial, United States, 1984, is amended as follows:

★a. Paragraph 4 is amended
★b. Paragraph 10 is amended
★c. Paragraph 32 is amended—
★d. Paragraph 35 is amended—
★e. Paragraph 42 is amended
★f. Paragraph 46 is amended
Section 4. Part V of the Manual for Courts-Martial, United States, 1984, is amended by paragraph 5 by—

Section 5. These amendments shall take effect on 12 March 1987, subject to the following:
a. The addition of Rule for Courts-Martial 204, the amendments made to Rules for Courts-Martial 707 and 1003(c), and the amendments made to paragraph 5 of Part V, shall apply to any offense committed on or after 12 March 1987.
b. The amendments made to Rules for Courts-Martial 701(b), 706(c)(2), 916(b), 916(k), 918(a), 920(e), 921(c), and 924(b) shall apply to any offense committed on or after November 14, 1986, the date of enactment of the National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661.
c. The amendments made to Rules for Courts-Martial 503 and 903 shall apply only in cases in which arraignment has been completed on or after 12 March 1987.
d. The amendments made to Rules for Courts-Martial 1105 and 1106 shall apply only in cases in which the sentence is adjudged on or after 12 March 1987.
e. Except as provided in section 5.b, nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to 12 March 1987, which was not punishable when done or omitted.
f. The maximum punishment for an offense committed prior to 12 March 1987 shall not exceed the applicable maximum in effect at the time of the commission of such offense.
g. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to 12 March 1987, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

Section 6. The Secretary of Defense, on behalf of the President, shall transmit a copy of this Order to the Congress of the United States in accord with Section 836 of title 10 of the United States Code.

Ronald Reagan

THE WHITE HOUSE
March 3, 1987
EXECUTIVE ORDER 12708
AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution of the United States and by chapter 47 of title 10 of the United States Code (Uniform Code of Military Justice), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order Nos. 12484, 12550 and 12586, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. R.C.M. 302(b)(2) is amended to read as follows:

b. R.C.M. 905(e) is amended to read as follows:

c. R.C.M. 913(a) is amended by

d. R.C.M. 1003(b)(2) is amended by

e. R.C.M. 1103(b)(2)(B)(i) is amended to read as follows:

f. R.C.M. 1103(e) is amended to read as follows:

g. R.C.M. 1106(c) is amended to read as follows:

h. R.C.M. 1106(f) is amended—

i. R.C.M. 1107(b)(4) is amended to read as follows:

j. R.C.M. 1108(b) is amended—

k. R.C.M. 1112(b) is amended to read as follows:

l. R.C.M. 1114(c)(2) is amended to read as follows:

m. R.C.M. 1201(b)(3)(C) is amended to read as follows:

Section 2. Part III of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. Mil. R. Evid. 304(b)(1) is amended to read as follows:

Section 3. Part IV of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. Paragraph 10 is amended—

b. Paragraph 101 is deleted—

c. Paragraph 105 is amended by—

Section 4. Part V of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. Paragraph 5 is amended by—

b. Paragraph 6a is amended by—

Section 5. These amendments shall take effect on 1 April 1990, subject to the following:

a. The amendment made to paragraph 10 of Part IV, shall apply to any offense committed on or after 1 April 1990.

b. The amendments made to Rule for Courts-Martial 905 and to Military Rule of Evidence 304 shall apply only in cases in which arraignment has been completed on or after 1 April 1990.

c. The amendment made to Rule for Courts-Martial 1106 shall apply only in cases in which the sentence is adjudged on or after 1 April 1990.

d. Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to 1 April 1990 which was not punishable when done or omitted.

e. The maximum punishment for an offense committed prior to 1 April 1990 shall not exceed the applicable maximum in effect at the time of the commission of such offense.

f. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to 1 April 1990, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same
HISTORICAL EXECUTIVE ORDERS

effect as if these amendments had not been prescribed.

Section 6. The Secretary of Defense, on behalf of the President, shall transmit a copy of this Order to the Congress of the United States in accord with Section 836 of title 10 of the United States Code.

THE WHITE HOUSE
23 March 1990
EXECUTIVE ORDER NO. 12767
AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution of the United States of America and by chapter 47 of title 10 of the United States Code (Uniform Code of Military Justice), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550, Executive Order No. 12586, and Executive order No. 12708, it is hereby ordered as follows:

Section I. Part I of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. R.C.M. 405(g)(1)(A) is amended to read as follows:

"(A) Witnesses. Except as provided in subsection (g)(4)(A) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative shall be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is ‘reasonably available’ when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness’ appearance. A witness who is unavailable under Mil. R. Evid. 804(a) (1)-(6) is not ‘reasonably available.’"

b. R.C.M. 405(g)(4)(B) is amended—

(1) in clause (iii) to read as follows:

“(iii) Prior testimony under oath;”

(2) in clause (iv) to read as follows:

“(iv) Depositions of that witness; and”; and

(3) by adding the following clause at the end thereof:

“(v) In time of war, unsworn statements.”

c. R.C.M. 701(a)(3)(B) is amended to read as follows:

“(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under subsection (b) (1) or (2) of this rule.”

d. R.C.M. 701(b) is amended—

(1) in subparagraph (1) to read as follows:

“(1) Names of witnesses and statements.

(A) Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of the trial counsel, the defense shall also

(i) provide the trial counsel with the names and addresses of any witnesses whom the defense intends to call at the presentencing proceedings under R.C.M. 1001(c); and

(ii) permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.”;

(2) in subparagraph (2) to read as follows:

“(2) Notice of certain defenses. The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused’s mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses.”; and

(3) in subparagraph (5) to read as follows:

“(5) Inadmissibility of withdrawn defense. If an intention to rely upon a defense under subsection (b)(2) of this rule is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not, in any court-martial, admissible against the accused who gave notice of the intention.”

e. R.C.M. 705(c)(2) is amended by deleting the first sentence and substituting therefor the following sentence:

“(2) Permissible terms or conditions. Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit either party from proposing the following additional conditions:”.

f. R.C.M. 705(d) is amended—

(1) by deleting subparagraph (1);

(2) by redesignating subparagraph (2) as subparagraph (1) and amending it to read as follows:
"(1) Negotiation. Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel."

(3) by redesignating subparagraph (3) as subparagraph (2) and amending it to read as follows:

"(2) Formal submission. After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement."

(4) by redesigning subparagraph (4) as subparagraph (3) and amending it to read as follows:

"(3) Acceptance. The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement, or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign." and

(5) by redesignating subparagraph (5) as subparagraph (4).

g. R.C.M. 707 is amended to read as follows:

"Rule 707. Speedy trial
(a) In general. The accused shall be brought to trial within 120 days after the earlier of:
(1) Preferral of charges;
(2) The imposition of restraint under R.C.M. 304(a) (2)-(4); or,
(3) Entry on active duty under R.C.M. 204.
(b) Accountability.
(1) In general. The date of preferral of charges, the date on which pretrial restraint under R.C.M. 304(a) (2)-(4) is imposed, or the date of entry on active duty under R.C.M. 204 shall not count for the purpose of computing time under subsection (a) of this rule. The date on which the accused is brought to trial shall count. The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904.
(2) Multiple charges. When charges are preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge.
(3) Events which affect time periods.
(A) Dismissal or mistrial. If charges are dismissed, or if a mistrial is granted, a new 120-day time period under this rule shall begin on the date of dismissal or mistrial for cases in which there is no repreferral and cases in which the accused is in pretrial restraint. In all other cases, a new 120-day time period under this rule shall begin on the earlier of
(i) the date of repreferral;
(ii) the date of imposition of restraint under R.C.M. 304(a) (2)-(4).
(B) Release from restraint. If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of
(i) the date of preferral of charges;
(ii) the date on which restraint under R.C.M. 304(a) (2)-(4) is reimposed; or
(iii) the date of entry on active duty under R.C.M. 204.
(C) Government appeals. If notice of appeal under R.C.M. 908 is filed, a new 120-day time period under this rule shall begin, for all charges neither proceeded on nor severed under R.C.M. 908(b)(4), on the date of notice to the parties under R.C.M. 908(b)(8) or 908(c)(3), unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. After the decision of the Court of Military Review under R.C.M. 908, if there is a further appeal to the Court of Military Appeals or, subsequently, to the Supreme Court, a new 120-day time period under this rule shall begin on the date the parties are notified of the final decision of the Court of Military Appeals or, if appropriate, the Supreme Court.
(D) Rehearings. If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing."
(c) Excludable delay. All periods of time covered by stays issued by appellate courts and all other pre-trial delays approved by a military judge or the convening authority shall be excluded when determining whether the period in subsection (a) of this rule has run.

(1) Procedure. Prior to referral, all requests for pre-trial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution. After referral, such requests for pre-trial delay will be submitted to the military judge for resolution.

(2) Motions. Upon accused's timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case. This chronology should be made part of the appellate record.

(d) Remedy. A failure to comply with the right to a speedy trial will result in dismissal of the affected charges. This dismissal will be with or without prejudice to the government's right to re instituted court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a reprosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

(e) Waiver. Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense.

(f) Rights of Parties. No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial.

(j) Pretrial confinement of accused pending appeal. If an accused is in pretrial confinement at the time the United States files notice of its intent to appeal under subsection (3) above, the commander, in determining whether the accused should be confined pending the outcome of an appeal by the United States, should consider the same factors which would authorize the imposition of pretrial confinement under R.C.M. 305(h)(2)(B).”

(k) R.C.M. 1004(c)(8) is amended to read as follows:

“(8) That, only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, sodomy, rape, robbery, or aggravated arson was major and who manifested a reckless indifference for human life;”

(l) R.C.M. 1010 is amended to read as follows:

“In each general and special court-martial, prior to adjournment, the military judge shall ensure that the defense counsel has informed the accused orally and in writing of:

(a) The right to submit matters to the convening authority to consider before taking action;

(b) The right to appellate review, as applicable, and the effect of waiver or withdrawal of such right;

(c) The right to apply for relief from the Judge Advocate General if the case is neither reviewed by a Court of Military Review nor reviewed by the Judge Advocate General under R.C.M. 1201(b)(1); and

(d) The right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and the defense counsel and inserted in the record of trial as an appellate exhibit.”

(m) R.C.M. 1103(b)(2)(D) is amended by—

(1) redesignating clause (iv) as clause (v); and

(2) inserting the following new clause (iv) after clause (iii):

“(iv) the original dated, signed action by the convening authority.”

(n) R.C.M. 1107(f)(1) is amended to read as follows:

“(1) In general. The convening authority shall state in writing and insert in the record of trial the convening authority's decision as to the sentence, whether any findings of guilty are disapproved, and
orders as to further disposition. The action shall be signed personally by the convening authority. The convening authority's authority to sign shall appear below the signature."

o. R.C.M. 1110(h)(1) is amended to read as follows:

“(1) Waiver. The accused may sign a waiver of appellate review at any time after the sentence is announced. The waiver must be filed within 10 days after the accused or defense counsel is served with a copy of the action under R.C.M. 1107(h). Upon written application of the accused, the convening authority may extend this period for good cause, for not more than 30 days."

p. R.C.M. 1113(c)(1) is amended in the final paragraph thereof to read as follows:

“A dishonorable or a bad-conduct discharge may be ordered executed only after a final judgment within the meaning of R.C.M. 1209 has been rendered in the case. If on the date of final judgment a servicemember is not on appellate leave and more than 6 months have elapsed since approval of the sentence by the convening authority, before a dishonorable or a bad-conduct discharge may be executed, the officer exercising general court-martial jurisdiction over the servicemember shall consider the advice of that officer's staff judge advocate as to whether retention of the servicemember would be in the best interest of the service. Such advice shall include the findings and sentence as finally approved, the nature and character of duty since approval of the sentence by the convening authority, and a recommendation whether the discharge should be executed.”

Section 2. Part III of the Manual for Courts-Martial, United States, 1984, is amended by adding the following new rule at the end of Section VII thereof:

“Rule 707. Polygraph examinations

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.”

Section 3. Part IV of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. Paragraph 4e is amended to read as follows:

“e. Maximum punishment. Any person subject to the code who is found guilty of an attempt under Article 80 to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for commission of the offense attempted, except that in no case shall the death penalty be adjudged, nor shall any mandatory minimum punishment provisions apply; and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged.”

b. Paragraph 19 is amended—

(1) in subparagraph b(4) by adding the following thereto:

“[Note: if the escape was post-trial confinement, add the following element]

(d) That the confinement was the result of a court-martial conviction.”

(2) in subparagraph c(4)(a) by adding the following thereto:

“For purposes of the aggravating element of post-trial confinement (subparagraph b(4)(d), above) and increased punishment therefor (subparagraph e(4), below), the confinement must have been imposed pursuant to an adjudged sentence of a court-martial and not as a result of pretrial restraint or nonjudicial punishment.”

(3) in subparagraph e by—

(a) amending clause (3) to read as follows:

“(3) Escape from custody, pretrial confinement, or confinement on bread and water or diminished rations imposed pursuant to Article 15. Dishonorable discharge, forfeiture of all pay and allowances, and confinements for 1 year.”

(b) adding the following new clause at the end thereof:

“(4) Escape from post-trial confinement. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.”

(4) in subparagraph f(4) to read as follows:

“(4) Escape from confinement.

In that ________ (personal jurisdiction data), having been placed in (post-trial) confinement in (place of confinement), by a person authorized to order accused into confinement did, (at/on board ________ location) (subject-matter jurisdiction data, if required), on or about ________ 19__, escape from confinement.”

c. Paragraph 35c(2) is amended to read as follows:

“(2) Operating. Operating a vehicle includes not only driving or guiding it while in motion, either in person or through the agency or another, but also the manipulation of its controls so as to cause the
APPENDIX 23

particular vehicle to move, or the setting of its motive power in action.”

Paragraph 57d is amended to read as follows:

“d. Lesser included offense. Article 80—attempts.”

e. Paragraph 96f is amended to read as follows:

“f. Sample specification.

In that _______ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ________, 19______, wrongfully (endeavor to [impede (a trial by court-martial) (an investigation) (______)] [influence the actions of ________] (a trial counsel of the court-martial) (a defense counsel of the court-martial) (an officer responsible for making a recommendation concerning disposition of charges) (______]) [(influence) (alter) the testimony of ________ as a witness before a (court-martial) (an investigating officer) (______)] in the case of ________ by [(promising) (offering) (giving) to the said ________, (the sum of $______) (______ of a value of about $______)][communicating to the said ________ a threat to ________] [______], (if) (unless) he/she, the said ________, would [recommend dismissal of the charges against said ________] [(wrongfully refuse to testify) (testify falsely concerning ________)(______)] [(at such trial) (before such investigating officer)] [______].”

Section 4. These amendments shall take effect on 6 July 1991, subject to the following:

a. The amendments made to Rule for Courts-Martial 1004(c)(8) and paragraphs 4c, 19, and 35c(2) of Part IV shall apply to any offense committed on or after 6 July 1991.

b. Military Rule of Evidence 707 shall apply only in cases in which arraignment has been completed on or after 6 July 1991.

c. The amendments made to Rules for Courts-Martial 701 and 705 shall apply only in cases in which charges are preferred on or after 6 July 1991.

d. The amendments made to Rules for Courts-Martial 707 and 1010 shall apply only to cases in which arraignment occurs on or after 6 July 1991.

e. The amendment made to Rule for Courts-Martial 908(b)(9) shall apply only to cases in which pretrial confinement is imposed on or after 6 July 1991.

f. The amendment made to Rule for Courts-Martial 1113(c)(1) shall apply only in cases in which the sentence is adjudged on or after 6 July 1991.

g. Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to 6 July 1991, which was not punishable when done or omitted.

h. The maximum punishment for an offense committed prior to 6 July 1991 shall not exceed the applicable maximum in effect at the time of the commission of such offense.

i. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to 6 July 1991, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

Section 5. The Secretary of Defense, on behalf of the President, shall transmit a copy of this Order to the Congress of the United States in accord with section 836 of title 10 of the United States Code.

THE WHITE HOUSE
June 27, 1991
EXECUTIVE ORDER 12888
AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550, Executive Order No. 12586, Executive Order No. 12708, and Executive Order No. 12767, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. R.C.M. 109 is amended as follows:

"(a) In general. Each Judge Advocate General is responsible for the professional supervision and discipline of military trial and appellate military judges, judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual. To discharge this responsibility each Judge Advocate General may prescribe rules of professional conduct not inconsistent with this rule or this Manual. Rules of professional conduct promulgated pursuant to this rule may include sanctions for violations of such rules. Sanctions may include but are not limited to indefinite suspension from practice in courts-martial and in the Courts of Military Review. Such suspensions may only be imposed by the Judge Advocate General of the armed service of such courts. Prior to imposing any discipline under this rule, the subject of the proposed action must be provided notice and an opportunity to be heard. The Judge Advocate General concerned may upon good cause shown may modify or revoke suspension. Procedures to investigate complaints against military trial judges and appellate military judges are contained in subsection (c) of this rule.

(b) Action after suspension or disbarment. When a Judge Advocate General suspends a person from practice or the Court of Military Appeals disbars a person, any Judge Advocate General may suspend that person from practice upon written notice and opportunity to be heard in writing.

(c) Investigation of judges.

(1) In general. These rules and procedures promulgated pursuant to Article 6a are established to investigate and dispose of charges, allegations, or information pertaining to the fitness of a military trial judge or appellate military judge to perform the duties of the judge's office.

(2) Policy. Allegations of judicial misconduct or unfitness shall be investigated pursuant to the procedures of this rule and appropriate action shall be taken. Judicial misconduct includes any act or omission that may serve to demonstrate unfitness for further duty as a judge, including but not limited to violations of applicable ethical standards.

(3) Complaints. Complaints concerning a military trial judge or appellate military judge will be forwarded to the Judge Advocate General of the service concerned or to a person designated by the Judge Advocate General concerned to receive such complaints.

(4) Initial action upon receipt of a complaint. Upon receipt, a complaint will be screened by the Judge Advocate General concerned or by the individual designated in subsection (c)(3) of this rule to receive complaints. An initial inquiry is necessary if the complaint, taken as true, would constitute judicial misconduct or unfitness for further service as a judge. Prior to the commencement of an initial inquiry, the Judge Advocate General concerned shall be notified that a complaint has been filed and that an initial inquiry will be conducted. The Judge Advocate General concerned may temporarily suspend the subject of a complaint from performing judicial duties pending the outcome of any inquiry or investigation conducted pursuant to this rule. Such inquiries or investigations shall be conducted with reasonable promptness.

(5) Initial inquiry.

(A) In general. An initial inquiry is necessary to determine if the complaint is substantiated. A complaint is substantiated upon finding that it is more likely than not that the subject judge has engaged in judicial misconduct or is otherwise unfit for further service as a judge.

(B) Responsibility to conduct initial inquiry. The Judge Advocate General concerned, or the person designated to receive complaints under subsection (c)(3) of this rule, will conduct or order an initial inquiry. The individual designated to conduct the inquiry should, if practicable, be senior to the
HISTORICAL EXECUTIVE ORDERS

subject of the complaint. If the subject of the complaint is a military trial judge, the individual designated to conduct the initial inquiry should, if practicable, be a military trial judge or an individual with experience as a military trial judge. If the subject of the complaint is an appellate military judge, the individual designated to conduct the inquiry should, if practicable, have experience as an appellate military judge.

(C) Due process. During the initial inquiry, the subject of the complaint will, at a minimum, be given notice and an opportunity to be heard.

(D) Action following the initial inquiry. If the complaint is not substantiated pursuant to subsection (c)(5)(A) of this rule, the complaint shall be dismissed as unfounded. If the complaint is substantiated, minor professional disciplinary action may be taken or the complaint may be forwarded, with findings and recommendations, to the Judge Advocate General concerned. Minor professional disciplinary action is defined as counseling or the issuance of an oral or written admonition or reprimand. The Judge Advocate General concerned will be notified prior to taking minor professional disciplinary action or dismissing a complaint as unfounded.

(6) Action by the Judge Advocate General.

(A) In general. The Judge Advocates General are responsible for the professional supervision and discipline of military trial and appellate military judges under their jurisdiction. Upon receipt of findings and recommendations required by subsection (c)(5)(D) of this rule the Judge Advocate General concerned will take appropriate action.

(B) Appropriate Actions. The Judge Advocate General concerned may dismiss the complaint, order an additional inquiry, appoint an ethics commission to consider the complaint, refer the matter to another appropriate investigative agency or take appropriate professional disciplinary action pursuant to the rules of professional conduct prescribed by the Judge Advocate General under subsection (a) of this rule. Any decision of a Judge Advocate General, under this rule, is final and is not subject to appeal.

(C) Standard of Proof. Prior to taking professional disciplinary action, other than minor disciplinary action is defined in subsection (c)(5)(D) of this rule, the Judge Advocate General concerned shall find, in writing, that the subject of the complaint engaged in judicial misconduct or is otherwise unfit for continued service as a military judge, and that such misconduct or unfitness is established by clear and convincing evidence.

(D) Due process. Prior to taking final action on the complaint, the Judge Advocate General concerned will ensure that the subject of the complaint is, at a minimum, given notice and an opportunity to be heard.

(7) The Ethics Commission.

(A) Membership. If appointed pursuant to subsection (c)(6)(B) of this rule, an ethics commission shall consist of at least three members. If the subject of the complaint is a military trial judge, the commission should include one or more military trial judges or individuals with experience as a military trial judge. If the subject of the complaint is an appellate military judge, the commission should include one or more individuals with experience as an appellate military judge. Members of the commission should, if practicable, be senior to the subject of the complaint.

(B) Duties. The commission will perform those duties assigned by the Judge Advocate General concerned. Normally, the commission will provide an opinion as to whether the subject’s acts or omissions constitute judicial misconduct or unfitness. If the commission determines that the affected judge engaged in judicial misconduct or is unfit for continued judicial service, the commission may be required to recommend an appropriate disposition to the Judge Advocate General concerned.

(8) Rules of procedure. The Secretary of Defense or the Secretary of the service concerned may establish additional procedures consistent with this rule and Article 6A.

b. R.C.M. 305(f) is amended to read as follows:

“Military Counsel. If requested by the prisoner and such request is made known to military authorities, military counsel shall be provided to the prisoner before the initial review under subsection (i) of this rule or within 72 hours of such request being first communicated to military authorities, whichever occurs first. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner shall be so informed. Unless otherwise provided by regulations of the Sec-
APPENDIX 23

A prisoner does not have the right under this rule to have military counsel of the prisoner's own selection.

(A) Decision. Not later than 72 hours after the commander's ordering of a prisoner into pretrial confinement, or after receipt of a report that a member of the commander's unit or organization has been confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue.

Decision to grant immunity. Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the appropriate general court-martial convening authority. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion of the defense, grant appropriate relief directing that either an appropriate general court-martial convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated, upon findings that:

(1) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; and

(2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own over-reaching, has forced the witness to invoke the privilege against self-incrimination; and

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses.

As to a specification. General findings as to a specification may be: guilty; not guilty of an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty. A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial.

In general. In general and special courts-martial which require a verbatim transcript under subsections (b) or (c) of this rule and are subject to review by a Court of Military Review under Article 66, the trial counsel shall cause to be prepared an original and four copies of the record of trial. In all other general and special courts-martial the trial counsel...
shall cause to be prepared an original and one copy of the record of trial.”.

Section 2. Part III of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. Mil. R. Evid. 311(e)(2) is amended to read as follows:

“(2) Derivative Evidence. Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence ultimately would have been obtained by lawful means even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant. Notwithstanding other provisions of this Rule, an apprehension made in a dwelling in a manner that violates R.C.M. 302 (d)(2)&(e) does not preclude the admission into evidence of a statement of an individual apprehended provided (1) that the apprehension was based on probable cause, (2) that the statement was made subsequent to the apprehension at a location outside the dwelling, and (3) that the statement was otherwise in compliance with these rules.”.

b. Mil. R. Evid. 505(a) is amended to read as follows:

“(a) General rule of privilege. Classified information is privileged from disclosure if disclosure would be detrimental to the national security. As with other rules of privilege this rule applies to all stages of the proceedings.”.

c. Mil. R. Evid. 505(g)(1)(D) is amended by adding the following at the end:

“All persons requiring security clearance shall cooperate with investigatory personnel in any investigations which are necessary to obtain a security clearance.”.

d. Mil. R. Evid. 505(h)(3) is amended to read as follows:

“(3) Content of notice. The notice required by this subdivision shall include a brief description of the classified information. The description, to be sufficient, must be more than a mere general statement of the areas about which evidence may be introduced. The accused must state, with particularity, which items of classified information he reasonably expects will be revealed by his defense.”.

e. Mil. R. Evid. 505(i)(3) is amended to read as follows:

“(3) Demonstration of national security nature of the information. In order to obtain an in camera proceeding under this rule, the Government shall submit the classified information and an affidavit ex parte for examination by the military judge only. The affidavit shall demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation.”.

f. Mil. R. Evid. 505(j)(4)(B) is amended to read as follows:

“(Standard. Classified information is not subject to disclosure under this subdivision unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence. In presentencing proceedings, relevant and material classified information pertaining to the appropriateness of, or the appropriate degree of, punishment shall be admitted only if no unclassified version of such information is available.”.

g. Mil. R. Evid. 505(j)(5) is amended to read as follows:

“(5) Closed session. The military judge may exclude the public during that portion of the presentation of evidence that discloses classified information.”.

h. Mil. R. Evid. 609(a) is amended to read as follows:

“(a) General rule. For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Mil. R. Evid. 403, if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. In determining whether a crime
tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial."

i. Mil. R. Evid. 1101(d) is amended to read as follows:

"(d) Rules inapplicable. These rules (other than with respect to privileges and Mil. R. Evid. 412) do not apply in investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence pursuant to Article 72; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the code or this Manual and not listed in subdivision (a)."

Section 3. Part IV of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. Paragraph 37c is amended by inserting the following new subparagraphs (10) and (11) at the end thereof:

"(10) Use. ‘Use’ means to inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance. Knowledge of the presence of the controlled substance is a required component of use. Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused’s body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government’s burden of proof as to knowledge.”.

"(11) Deliberate ignorance. An accused who consciously avoids knowledge of the presence of a controlled substance or the contraband nature of the substance is subject to the same criminal liability as one who has actual knowledge.”.

b. The last paragraph of paragraph 37e is amended to read as follows:

“When an offense under paragraph 37 is committed: while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under the control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; while receiving special pay under 37 U.S.C. Section 310; in time of war; or in a confinement facility used by or under the control of the armed forces, the maximum period of confinement authorized for such an offense shall be increased by 5 years.”.

c. Paragraph 43d is amended to read as follows:

“(d) Lesser included offenses.

(1) Premeditated murder and murder during certain offenses. Article 118(2) and (3)—murder

(2) All murders under Article 118.

(a) Article 119—involuntary manslaughter

(b) Article 128—assault; assault consummated by a battery; aggravated assault

(c) Article 134—negligent homicide

(3) Murder as defined in Article 118(1), (2), and (4).

(a) Article 80—attempts

(b) Article 119—voluntary manslaughter

(c) Article 134—assault with intent to commit murder

(d) Article 134—assault with intent to commit voluntary manslaughter”.

d. Para 45d(1) is amended by adding the following at the end thereof:

“(e) Article 120(b)—carnal knowledge”.

e. Para 45f(1) is amended to read as follows:

“(1) Rape.

In that ______________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about ______________ 19 ______________ (a person who had not attained the age of 16 years).”.

f. The following new paragraph is inserted after paragraph 96:

“96a. Article 134 (Wrongful interference with an adverse administrative proceeding)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused wrongfully did a certain act;

(2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be adverse administrative proceedings pending;

(3) That the act was done with the intent to influence, impede, or obstruct the conduct of such adverse administrative proceeding, or otherwise obstruct the due administration of justice;

(4) That under the circumstances, the conduct of the accused was to the prejudice of good or-
order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation. For purposes of this paragraph "adverse administrative proceeding" includes any administrative proceeding or action, initiated against a servicemember, that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification. Examples of wrongful interference include wrongfully influencing, intimidating, impeding, or injuring a witness, investigator, or other person acting on an adverse administrative action; by means of bribery, intimidation, misrepresentation, or force or threat of force delaying or preventing communication of information relating to such administrative proceeding; and, the wrongful destruction or concealment of information relevant to such adverse administrative proceeding.

d. Lesser included offenses. None.

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification. In that __________________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___________ 19__, wrongfully (endeavor to) [impede (an adverse administrative proceeding) (an investigation) (___________)] [influence the actions of ____________, (an officer responsible for making a recommendation concerning the adverse administrative proceeding) (an individual responsible for making a decision concerning an adverse administrative proceeding) (an individual responsible for processing an adverse administrative proceeding) (___________)] [(influence) (alter) the testimony of ____________ a witness before (a board established to consider an adverse administrative proceeding or elimination) (an investigating officer) (___________)] in the case of ____________, by [(promising) (offering) (giving) to the said ____________, (the sum of $___________) (___________ of a value of about $___________)] [communicating to the said ____________, a threat to ____________] [___________], (if) (unless) the said ____________, would [recommend dismissal of the action against said ____________] [(wrongfully refuse to testify) (testify falsely concerning ____________ (___________)] [(at such administrative proceeding) (before such investigating officer) (before such administrative board)] [___________].

Sec. 4. These amendments shall take effect on January 21, 1994, subject to the following:

a. The amendments made to paragraphs 37c, 37e, 43d(2), 45d(1), and 96a of Part IV shall apply to any offense committed on or after January 21, 1994.

b. The amendments made to Section III shall apply only in cases in which arraignment has been completed on or after January 21, 1994.

c. The amendment made to Rules for Courts-Martial 405(i), 701(g)(3)(C), and 704(e) shall apply only in cases in which charges are preferred on or after January 21, 1994.

d. The amendments made to Rules for Courts-Martial 910, 918, and 920 shall apply only to cases in which arraignment occurs on or after January 21, 1994.

e. The amendments made to Rule for Courts-Martial 305 shall apply only to cases in which pretrial confinement is imposed on or after January 21, 1994.

f. The amendment to Rule for Courts-Martial 1103(g)(1)(A) shall apply only in cases in which the sentence is adjudged on or after January 21, 1994.

g. Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to January 21, 1994, which was not punishable when done or omitted.

h. The maximum punishment for an offense prior to January 21, 1994, shall not exceed the applicable maximum in effect at the time of the commission of such offense.

i. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to January 21, 1994, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and
APPENDIX 23

with the same effect as if these amendments had not been prescribed.

Sec. 5. The Secretary of Defense, on behalf of the President, shall transmit a copy of this order to the Congress of the United States in accord with section 836 of title 10 of the United States Code.

THE WHITE HOUSE

Changes to the Discussion Accompanying the Manual for Courts-Martial, United States, 1984
A. The following Discussion is inserted after R.C.M. 109(c)(2):
   “The term ‘unfitness’ should be construed broadly, including, for example, matters to the incompetence, impartiality, and misconduct of the judge. Erroneous decisions of a judge are not subject to investigation under this rule. Challenges to these decisions are more appropriately left to the appellate process.”.

B. The following Discussion is inserted after R.C.M. 109(c)(3):
   “Complaints need not be made in any specific form, but if possible complaints should be made under oath. Complaints may be made by judges, lawyers, a party, court personnel, members of the general public or members of the military community. Reports in the news media relating to the conduct of a judge may also form the basis of a complaint.
   An individual designated to receive complaints under this subsection should have judicial experience. The chief trial judge of a service may be designated to receive complaints against military trial judges.”.

C. The following Discussion is inserted after R.C.M. 109(c)(4):
   “Complaints under this subsection will be treated with confidentiality. Confidentiality protects the subject judge and the judiciary when a complaint is not substantiated. Confidentiality also encourages the reporting of allegations of judicial misconduct or unfitness and permits complaints to be screened with the full cooperation of others.

D. The following Discussion is inserted after R.C.M. 109(c)(5)(B):
   “To avoid the type of conflict prohibited in Article 66(g), the Judge Advocate General’s designee should ordinarily not be a member of the same Court of Military Review as the subject of the complaint. If practicable, a former appellate military judge should be designated.”.

E. The following Discussion is inserted after R.C.M. 109(c)(6)(B):
   “The discretionary reassignment of military trial judges or appellate military judges to meet the needs of the service is not professional disciplinary action.”.

F. The following Discussion is inserted after R.C.M. 109(c)(7):
   “The Judge Advocate General concerned may appoint an ad hoc or a standing commission.”.

G. The Discussion to R.C.M. 701(g)(3) is amended by adding the following after the first paragraph:
   “The sanction of excluding the testimony of a defense witness should be used only upon finding that the defense counsel’s failure to comply with this rule was willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony. Moreover, the sanction of excluding the testimony of a defense witness should only be used if alternative sanctions could not have minimized the prejudice to the Government. Before imposing this sanction, the military judge must weigh the defendant’s right to compulsory process against the countervailing public interests, including (1) the integrity of the adversary process; (2) the interest in the fair and efficient administration of military justice; and (3) the potential prejudice to the truth-determining function of the trial process.”.

H. The Discussion following R.C.M. 910(a)(1) is amended to read as follows:
   “See paragraph 2, Part IV, concerning lesser included offenses. When the plea is to a named lesser included offense without the use of exceptions and substitutions, the defense counsel should provide a written revised specification accurately reflecting the plea and request that the revised specification be included in the record as an appellate exhibit. A plea
of guilty to a lesser included offense does not bar the prosecution from proceeding on the offense as charged. See also subsection (g) of this rule.

A plea of guilty does not prevent the introduction of evidence, either in support of the factual basis for the plea, or, after findings are entered in aggravation. See R.C.M. 1001(b)(4).

I. The last two paragraphs of the Discussion accompanying R.C.M. 918(a)(1) are amended to read as follows:

"Lesser included offenses. If the evidence fails to prove the offense charged but does prove an offense necessarily included in the offense charged, the factfinder may find the accused not guilty of the offense charged but guilty of a named lesser offense, which is included in the offense charged, without the use of exceptions and substitutions. Ordinarily, an attempt is a lesser included offense even if the evidence establishes that the offense charged was consummated. See Part IV concerning lesser included offenses.

Offenses arising from the same act or transaction. The accused may be found guilty of two or more offenses arising from the same act or transaction, whether or not the offenses are separately punishable. But see R.C.M. 906(b)(12); 907(b)(3)(B); 1003(c)(1)(C)."

J. The Discussion accompanying R.C.M. 920(b) is amended to read as follows:

"After members have reached a finding on a specification, instructions may not be given on an offense included therein which was not described in an earlier instruction unless the finding is illegal. This is true even if the finding has not been announced. When instructions are to be given is a matter within the sole discretion of the military trial judge.".

Changes to the Analysis Accompanying the Manual for Courts-Martial, United States, 1984


a. R.C.M. 109. The Analysis is amended by inserting the following at the end thereof:

"1993 Amendment: Subsection (a) was amended to conform with subsection (c). The amendment to subsection (a) clarifies that the Judge Advocates General are responsible for the supervision and discipline of judges and attorneys. The amendment to subsection (a) is not intended to limit the authority of a Judge Advocate General in any way.


Subsection (c)(2) is based on the committee report accompanying the FY 90 Defense Authorization Act. See Conf. Rep. No. 331 at 658. This subsection is designed to increase public confidence in the military justice system while contributing to the integrity of the system. See Landmark Communications v. Virginia, 435 U.S. 829 (1978).


Subsections (c)(3), (c)(5), and (c)(7) reflect, and adapt to the conditions of military practice, the general principle that judges should investigate judges.

The first paragraph of the Discussion to subsection (c)(3) is based on the commentary to ABA Model Standard 4.1.
APPENDIX 23

The discussion to subsection (c)(4) is based on the commentary to ABA Model Standard 4.6.

The clear and convincing standard found in subsection (c)(6)(c) is based on ABA Model Standard 7.10.

Under subsection (c)(7), the principle purpose of the omission is to advise the Judge Advocate General concerned as to whether the allegations contained in a complaint constitute a violation of applicable ethical standards. This subsection is not intended to preclude use of the commission for other functions such as rendering advisory opinions on ethical questions. See ABA Model Standard 9 on the establishment and role of an advisory committee.

Subsection (c)(7)(A) is based on ABA Model Standard 2.3, which provides that one-third of the members of a commission should be active or retired judges.”.

b. R.C.M. 305(f). The Analysis accompanying R.C.M. 305(f) is amended by inserting the following at the end thereof:

“1993 Amendment: The amendment to subsection (f) provides a specific time period by which to measure compliance. Because it is possible to obtain credit for violations of this section under subsection (k), a standard of compliance was thought necessary. See, e.g., United States v. Chapman, 26 M.J. 515 (A.C.M.R. 1988), pet. denied 27 M.J. 404 (C.M.A. 1989). This amendment, while protecting the rights of the prisoner, also gives reasonable protection to the Government in those areas where the prisoner is confined in a civilian facility and the request is never, or is belatedly, communicated to military authorities. While it is expected that military authorities will have procedures whereby civilian confinement authorities communicate such requests in a timely fashion, the failure to communicate such a request, or the failure to notify military authorities in a timely manner should be tested for prejudice under Article 59, and should not be considered as invoking the credit provisions of subsection (k) of this rule absent evidence of bad faith by military authorities in utilizing civilian custody. But see United States v. Ballesteros, 29 M.J., 14 (C.M.A. 1989). However, any time spent in civilian custody at the request of military authorities would be subject to pretrial confinement credit mandated by United States v. Allen, 17 M.J. 126 (C.M.A. 1984). The amendment further clarifies the method of calculation to determine if the rule has been violated. See United States v. DeLoatch, 25 M.J. 718 (A.C.M.R. 1987); contra, United States v. New, 23 M.J. 889 (A.C.M.R. 1987).”.

c. R.C.M. 305(h)(2)(A). The Analysis accompanying R.C.M. 305(h)(2)(A) is amended by inserting the following at the end thereof:

“1993 Amendment: The amendment to subsection (h)(2)(A) clarifies that the 72 hour period operates in two distinct situations: (a) if the commander orders the prisoner into pretrial confinement, the commander has 72 hours to decide whether pretrial confinement will continue, and (b) if someone other than the prisoner’s commander orders the prisoner into pretrial confinement, the prisoner’s commander has 72 hours from receipt of a report that the prisoner has been confined to decide whether pretrial confinement will continue.”.

d. R.C.M. 305(i)(1). The Analysis accompanying R.C.M. 305(i)(1) is amended by inserting the following at the end thereof:

“1993 Amendment: The amendment to subsection (i)(1) provides that the required review only becomes applicable whenever the accused is confined under military control. For example, if the prisoner was apprehended and is being held by civilian authorities as a military deserter in another state from where the prisoner’s unit is located and it takes three days to transfer the prisoner to an appropriate confinement facility, the seven day period under this rule would not begin to run until the date of the prisoner’s transfer to military authorities. Any unreasonable period of time that it may take to bring a prisoner under military control should be tested for prejudice under Article 59, and should not be considered as invoking the credit provisions of subsection (k) of this rule absent evidence of bad faith by military authorities in utilizing civilian custody. But see United States v. Allen, 17 M.J. 126 (C.M.A. 1984). The amendment further clarifies the method of calculation to determine if the rule has been violated. See United States v. DeLoatch, 25 M.J. 718 (A.C.M.R. 1987); contra, United States v. New, 23 M.J. 889 (A.C.M.R. 1987).”.

e. R.C.M. 405(i). The Analysis accompanying R.C.M. 405(i) is amended by inserting the following at the end thereof:

“1993 Amendment: The amendment to R.C.M. 405(i) makes the provisions of Mil. R. Evid. 412 applicable at pretrial investigations.”.

f. R.C.M. 701(g)(3)(C). The Analysis accompanying R.C.M. 701(g)(3)(C) is amended by inserting the following at the end thereof:

“1993 Amendment: The amendment to R.C.M. 701(g)(3)(C), based on the decision of Taylor v. Illinois, 484 U.S. 400 (1988), recognizes that the Sixth
Amendment compulsory process right does not preclude a discovery sanction that excludes the testimony of a material defense witness. This sanction, however, should be reserved to cases where the accused has willfully and blatantly violated applicable discovery rules, and alternative sanctions could not have minimized the prejudice to the Government. See Chappee v. Commonwealth of Massachusetts, 659 F.Supp. 1220 (D. Mass. 1988) The Discussion to R.C.M. 701(g)(3)(C) adopts the test, along with factors the judge must consider, established by the Taylor decision.

The prior military rule was based on United States v. Villines, supra, which had adopted the minority view espoused in Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980). This view permitted the court to also immunize a defense witness when the witness’ testimony was clearly exculpatory, essential to the defense case and there was no strong Government interest in withholding testimonial immunity. This rule has been sharply criticized. See, e.g., United States v. Turkish, supra; United States v. Taylor, supra; United States v. Pennel, supra; United States v. Zayas, 24 M.J. 132, 137 (C.M.A. 1987) (dissenting opinion by Judge Cox).

The current rule continues to recognize that a military judge is not empowered to immunize a witness. Upon a finding that all three prerequisites exist, a military judge may only abate the proceedings for the affected charges and specifications unless the convening authority grants immunity to the witness.”.

The majority rule recognizes that an accused has no Sixth Amendment right to immunized testimony of defense witnesses and, absent prosecutorial misconduct which is intended to disrupt the judicial fact-finding process, an accused is not denied Fifth Amendment due process from the Government’s failure to immunize a witness. If the military judge finds that the witness is a target for prosecution, there can be no claim of Government overreaching or discrimination if a grant of immunity is denied. United States v. Shandell, supra.

The prior military rule was based on United States v. Villines, supra, which had adopted the minority view espoused in Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980). This view permitted the court to also immunize a defense witness when the witness’ testimony was clearly exculpatory, essential to the defense case and there was no strong Government interest in withholding testimonial immunity. This rule has been sharply criticized. See, e.g., United States v. Turkish, supra; United States v. Taylor, supra; United States v. Pennel, supra; United States v. Zayas, 24 M.J. 132, 137 (C.M.A. 1987) (dissenting opinion by Judge Cox).

The current rule continues to recognize that a military judge is not empowered to immunize a witness. Upon a finding that all three prerequisites exist, a military judge may only abate the proceedings for the affected charges and specifications unless the convening authority grants immunity to the witness.”.

1993 Amendment: The amendment to R.C.M. 910(a)(1) removed the necessity of pleading guilty to a lesser included offense by exceptions and substitutions. This parallels the amendment to R.C.M. 918(a)(1), allowing a finding of guilty to a named lesser included offense without mandating the use of exceptions and substitutions, made to more closely correspond to verdict practice in federal district courts. See Analysis comments for R.C.M. 918(a)(1)."

The majority rule recognizes that an accused has no Sixth Amendment right to immunized testimony of defense witnesses and, absent prosecutorial misconduct which is intended to disrupt the judicial fact-finding process, an accused is not denied Fifth Amendment due process by the Government’s failure to immunize a witness. If the military judge finds that the witness is a target for prosecution, there can be no claim of Government overreaching or discrimination if a grant of immunity is denied. United States v. Shandell, supra.
that the accused stole several of the items alleged in the specification but not others."

j. R.C.M. 920(b). The Analysis accompanying R.C.M. 920(b) is amended by inserting the following at the end thereof:

"1993 Amendment: The amendment to R.C.M. 920(b) is based on the 1987 amendments to Federal Rule of Criminal Procedure 30. Federal Rule of Criminal Procedure 30 was amended to permit instructions either before or after arguments by counsel. The previous version of R.C.M. 920 was based on the now superseded version of the federal rule.

The purpose of this amendment is to give the court discretion to instruct the members before or after closing arguments or at both times. The amendment will permit courts to continue instructing the members after arguments as R.C.M. 920(b) had previously required. It will also permit courts to instruct before arguments in order to give the parties an opportunity to argue to the jury in light of the exact language used by the court. See United States v. Slubowski, 7 M.J. 461 (C.M.A. 1979); United States v. Pendry, 29 M.J. 694 (A.C.M.R. 1989)."

k. The Analysis accompanying R.C.M. 1103(g)(1)(A) is amended by inserting the following at the end thereof:

"1993 Amendment: Subsection (g)(1)(A) was amended by adding the phrase "and are subject to review by a Court of Military Review under Article 66" to eliminate the need to make four copies of verbatim records of trial for courts-martial which are not subject to review by a Court of Military Review. These cases are reviewed in the Office of the Judge Advocate General under Article 69 and four copies are not ordinarily necessary."

2. Changes to Appendix 22, the Analysis accompanying the Military Rules of Evidence (Part III, MCM, 1984).

a. The Analysis accompanying M.R.E. 303 is amended by inserting the following at the end thereof:

"1993 Amendment: The second sentence was added to clarify that this rule, like other rules of privilege, applies at all stages of all actions and is not relaxed during the sentencing hearing under M.R.E. 1101(c)."
The Analysis accompanying M.R.E. 505(g) is amended by inserting the following at the end thereof:

"1993 Amendment: Subsection (g)(1)(D) was amended to make clear that the military judge's authority to require security clearances extends to persons involved in the conduct of the trial as well as pretrial preparation for it. The amendment requires persons needing security clearances to submit to investigations necessary to obtain the clearance."

The Analysis accompanying M.R.E. 505(h) is amended by inserting the following at the end thereof:

"1993 Amendment: Subsection (h)(3) was amended to require specificity in detailing the items of classified information expected to be introduced. The amendment is based on United States v. Collins, 720 F.2d 1195 (11th Cir. 1983)."

The Analysis accompanying M.R.E. 505(i) is amended by inserting the following at the end thereof:

"1993 Amendment: Subsection (i)(3) was amended to clarify that the classified material and the government's affidavit are submitted only to the military judge. The word "only" was placed at the end of the sentence to make it clear that it refers to "military judge" rather than to "examination." The military judge is to examine the affidavit and the classified information without disclosing it before determining to hold an in camera proceeding as defined in subsection (i)(1). The second sentence of subsection (i)(4)(B) was added to provide a standard for admission of classified information in sentencing proceedings."

The Analysis accompanying M.R.E. 505(j) is amended by inserting the following at the end thereof:

"1993 Amendment: Subsection (j)(5) was amended to provide that the military judge's authority to exclude the public extends to the presentation of any evidence that discloses classified information, and not merely to the testimony of witnesses. See generally United States v. Hershey, 20 M.J. 433 (C.M.A. 1985), cert. denied, 474 U.S. 1062 (1986)."

The Analysis accompanying Mil. R. Evid. 609(a) is based on the 1990 amendment to Fed. R. Evid. 609(a). The previous version of Mil. R. Evid. 609(a) was based on the now superseded version of the Federal Rule. This amendment removes from the rule the limitation that the conviction may only be elicited during cross-examination. Additionally, the amendment clarifies the relationship between Rules 403 and 609. The amendment clarifies that the special balancing test found in Mil. R. Evid. 609(a)(1) applies to the accused's convictions. The convictions of all other witnesses are only subject to the Mil. R. Evid. 403 balancing test. See Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989)."

The Analysis accompanying Mil. R. Evid. 1101(d) is amended by inserting the following at the end thereof:

"1993 Amendment: Mil. R. Evid. 1101(d) was amended to make the provisions of Mil. R. Evid. 412 applicable at pretrial investigations."

Changes to Appendix 21, the Analysis accompanying the punitive articles (Part IV, MCM, 1984).

The Analysis accompanying paragraph 37c, Part IV, is amended by inserting the following at the end thereof:

"1993 Amendment: Paragraph c was amended by adding new paragraphs (10) and (11). Subparagraph (10) defines the term "use" and delineates knowledge of the presence of the controlled substance as a required component of the offense. See United States v. Mance, 26 M.J. 244 (C.M.A. 1988). The validity of a permissive inference of knowledge is recognized. See United States v. Ford, 23 M.J. 331 (C.M.A. 1987); United States v. Harper, 22 M.J. 157 (C.M.A. 1986). Subparagraph (11) precludes an accused from relying upon lack of actual knowledge when such accused has purposefully avoided knowledge of the presence or identity of controlled substances. See United States v. Mance, supra (Cox, J., concurring). When an accused deliberately avoids knowing the truth concerning a crucial fact (i.e., presence or identity) and there is a high probability that the crucial fact does exist, the accused is held accountable to the same extent as one who has actual knowledge. See United States v. Newman, 14 M.J. 474 (C.M.A. 1983). Subsection (11) follows federal authority which equates actual knowledge with deliberate ignorance. See United States v. Ramsey, 785 F.2d 184 (7th Cir.), cert. denied, 476 U.S. 1186 (1986)."
b. The Analysis accompanying paragraph 43d(2), Part IV, is amended by inserting the following at the end thereof:

"1993 Amendment. The listed lesser included offenses of murder under Article 118(3) were changed to conform to the rationale of United States v. Roa, 12 M.J. 210 (C.M.A. 1982). Inasmuch as Article 118(3) does not require specific intent, attempted murder, voluntary manslaughter, assault with intent to murder and assault with intent to commit voluntary manslaughter are not lesser included offenses of murder under Article 118(3)."

c. The Analysis accompanying paragraph 45(d), Part IV, is amended by inserting the following at the end thereof:

"1993 Amendment. The amendment to para 45d(1) represents an administrative change to conform the Manual with case authority. Carnal knowledge is a lesser included offense of rape where the pleading alleges that the victim has not attained the age of 16 years. See United States v. Baker, 28 M.J. 900 (A.C.M.R. 1989); United States v. Stratton, 12 M.J. 998 (A.F.C.M.R. 1982), pet. denied, 15 M.J. 107 (C.M.A. 1983); United States v. Smith, 7 M.J. 842 (A.C.M.R. 1979)."

d. The Analysis accompanying paragraph 96a, Part IV, is amended by inserting the following after the analysis to paragraph 96:

"1993 Amendment. Paragraph 96a is new and proscribes conduct that obstructs administrative proceedings. See generally 18 U.S.C. § 1505. Obstruction of proceedings before departments, agencies, and committees. This paragraph, patterned after paragraph 96, covers obstruction of certain administrative proceedings not currently covered by the definition of criminal proceeding found in paragraph 96c. This paragraph is necessary given the increased number of administrative actions initiated in each service."

THE WHITE HOUSE
23 December 1993

[Signature]

THE WHITE HOUSE
23 December 1993
**MCM INDEX**

<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abandoned property, seizure of</td>
<td>Mil. R. Evid. 316(d)(1)</td>
<td>III–15</td>
</tr>
<tr>
<td>Abandoned property of enemy, offenses concerning</td>
<td>IV. Para. 27</td>
<td>IV–39; II–40</td>
</tr>
<tr>
<td>Abandoning guard or watch</td>
<td>IV. Para. 10b(4)</td>
<td>IV–13</td>
</tr>
<tr>
<td><em>See also Sentinel or lookout.</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Abandonment or surrender of command, military property, place, unit or ship</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Shamefully</td>
<td>IV. Para. 23</td>
<td>IV–32; IV–33</td>
</tr>
<tr>
<td>Subordinate compelling</td>
<td>IV. Para. 24</td>
<td>IV–36</td>
</tr>
<tr>
<td>Abettor</td>
<td>IV. Para. 1b(1), (2)(b)</td>
<td>IV–1; IV–2</td>
</tr>
<tr>
<td><em>See also Principals.</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Absence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused’s</td>
<td></td>
<td></td>
</tr>
<tr>
<td>After trial</td>
<td>R.C.M. 1104(b)(1)(C)</td>
<td>II–141</td>
</tr>
<tr>
<td>During pretrial conference</td>
<td>R.C.M. 802(d)</td>
<td>II–78</td>
</tr>
<tr>
<td>During pretrial investigation</td>
<td>R.C.M. 405(h)(4)</td>
<td>II–39</td>
</tr>
<tr>
<td>During trial</td>
<td>R.C.M. 804</td>
<td>II–79</td>
</tr>
<tr>
<td>Speedy trial, effect on</td>
<td>R.C.M. 707</td>
<td>II–73</td>
</tr>
<tr>
<td>Defense counsel, during trial</td>
<td>R.C.M. 805(c)</td>
<td>II–80</td>
</tr>
<tr>
<td>Members</td>
<td>R.C.M. 805(b)</td>
<td>II–80</td>
</tr>
<tr>
<td>Military judge</td>
<td>R.C.M. 805(a)</td>
<td>II–80</td>
</tr>
<tr>
<td>Trial counsel, during trial</td>
<td>R.C.M. 805(c)</td>
<td>II–80</td>
</tr>
<tr>
<td>Absence without leave</td>
<td>IV. Para. 10</td>
<td>IV–12</td>
</tr>
<tr>
<td><em>See also Desertion</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accessory</td>
<td></td>
<td></td>
</tr>
<tr>
<td>After the fact</td>
<td>IV. Para. 3</td>
<td>IV–3</td>
</tr>
<tr>
<td>Before the fact</td>
<td>IV. Para 1b(1)</td>
<td>IV–1</td>
</tr>
<tr>
<td>Accident</td>
<td></td>
<td></td>
</tr>
<tr>
<td>As defense</td>
<td>R.C.M. 916(f)</td>
<td>II–111</td>
</tr>
<tr>
<td>Fleeing scene of</td>
<td>IV. Para. 82</td>
<td>IV–105</td>
</tr>
<tr>
<td>Accomplices</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>See also Conspiracy; Joint trial; Principals.</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Co-conspirators</td>
<td>IV. Para 5c</td>
<td>IV–5</td>
</tr>
<tr>
<td>Joint charge</td>
<td>R.C.M. 307(c)(5)</td>
<td>II–30</td>
</tr>
<tr>
<td>Accused</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>See also specific topics.</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Absence of</td>
<td>R.C.M. 1104(b)(1)(C)</td>
<td>II–141</td>
</tr>
<tr>
<td>Action, service of</td>
<td>R.C.M. 1107(h)</td>
<td>II–151</td>
</tr>
<tr>
<td>Announcement of presence in court</td>
<td>R.C.M. 813(a)(2)</td>
<td>II–87</td>
</tr>
<tr>
<td>Appearance of, at trial</td>
<td>R.C.M. 804(c)(1)</td>
<td>II–80</td>
</tr>
<tr>
<td>Appellate rights, advice</td>
<td></td>
<td></td>
</tr>
<tr>
<td>By defense counsel</td>
<td>R.C.M. 502(d)(6)</td>
<td>II–46</td>
</tr>
<tr>
<td>By military judge</td>
<td>R.C.M. 1010</td>
<td>II–133</td>
</tr>
<tr>
<td>Character evidence</td>
<td>Mil. R. Evid. 404(a)(1), (b)</td>
<td>III–18; III–19</td>
</tr>
<tr>
<td>Charges</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Index 1*
### INDEX

<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notification of</td>
<td>R.C.M. 308</td>
<td>II–31</td>
</tr>
<tr>
<td>Service of</td>
<td>R.C.M. 602</td>
<td>II–55</td>
</tr>
<tr>
<td>Composition of court-martial, elections</td>
<td>R.C.M. 903</td>
<td>II–91</td>
</tr>
<tr>
<td>Conferences</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Presence at</td>
<td>R.C.M. 802(d)</td>
<td>II–78</td>
</tr>
<tr>
<td>Rights at</td>
<td>R.C.M. 802(c)</td>
<td>II–78</td>
</tr>
<tr>
<td>Council</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Counsel; Defense counsel</td>
<td>R.C.M. 901(d)(4)</td>
<td>II–89</td>
</tr>
<tr>
<td>Rights to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Self-Incrimination.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appellate counsel</td>
<td>R.C.M. 1202</td>
<td>II–163</td>
</tr>
<tr>
<td>At general or special court-martial</td>
<td>R.C.M. 506</td>
<td>II–51</td>
</tr>
<tr>
<td>At interrogations</td>
<td>Mil. R. Evid. 305(d), (e)</td>
<td>III–7</td>
</tr>
<tr>
<td>At lineups</td>
<td>Mil. R. Evid. 321(b)(2)</td>
<td>III–17</td>
</tr>
<tr>
<td>At pretrial investigations</td>
<td>R.C.M. 405(d)(2)</td>
<td>II–35</td>
</tr>
<tr>
<td>At summary court-martial</td>
<td>R.C.M. 1301(e)</td>
<td>II–172</td>
</tr>
<tr>
<td>Before review of pretrial confinement</td>
<td>R.C.M. 305(f)</td>
<td>II–23</td>
</tr>
<tr>
<td>Counsel advice on post-trial rights</td>
<td>R.C.M. 1010(a)</td>
<td>II–133</td>
</tr>
<tr>
<td>Decision of Court of Military Review, service on</td>
<td>R.C.M. 908(c)(3); 1203(d)</td>
<td>II–100; II–165</td>
</tr>
<tr>
<td>After appeal by accused</td>
<td>R.C.M. 1203(d)</td>
<td>II–165</td>
</tr>
<tr>
<td>After appeal by United States</td>
<td>R.C.M. 908(c)(3)</td>
<td>II–100</td>
</tr>
<tr>
<td>Investigation, pretrial, rights</td>
<td>R.C.M. 405(f)</td>
<td>II–36</td>
</tr>
<tr>
<td>Joinder of</td>
<td>R.C.M. 601(e)(3)</td>
<td>II–55</td>
</tr>
<tr>
<td>Jurisdiction over</td>
<td>R.C.M. 202(a)</td>
<td>II–13</td>
</tr>
<tr>
<td>Mental examination of</td>
<td>R.C.M. 706</td>
<td>II–71</td>
</tr>
<tr>
<td>Notification of charges</td>
<td>R.C.M. 308</td>
<td>II–31</td>
</tr>
<tr>
<td>Post-trial rights</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Advice to accused</td>
<td>R.C.M. 1010</td>
<td>II–133</td>
</tr>
<tr>
<td>Right to submit matters to convening authority</td>
<td>R.C.M. 1010(a)(1); 1105</td>
<td>II–133; II–143</td>
</tr>
<tr>
<td>Presence at trial</td>
<td>R.C.M. 803; 804</td>
<td>II–78; II–79</td>
</tr>
<tr>
<td>Removal from courtroom</td>
<td>R.C.M. 804(b)</td>
<td>II–79</td>
</tr>
<tr>
<td>Restraint of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>During trial</td>
<td>R.C.M. 804(b), (c)(3)</td>
<td>II–79; II–80</td>
</tr>
<tr>
<td>Pretrial</td>
<td>R.C.M. 304, 305</td>
<td>II–20; 22</td>
</tr>
<tr>
<td>Sentencing. See Presenting procedure.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Service of appellate court decision</td>
<td>R.C.M. 908(c)(3); 1203(d)</td>
<td>II–100; II–165</td>
</tr>
<tr>
<td>Service of charges</td>
<td>R.C.M. 602</td>
<td>II–55</td>
</tr>
<tr>
<td>Severance of, motion for</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Joint trial.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 905(b)(5); 906(b)(9)</td>
<td>II–93; II–96</td>
</tr>
<tr>
<td>Time for</td>
<td>R.C.M. 905(b)(5)</td>
<td>II–93</td>
</tr>
<tr>
<td>Waiver</td>
<td>R.C.M. 905(e)</td>
<td>II–94</td>
</tr>
<tr>
<td>Accuser</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defined</td>
<td>Art. 1(9), UCMJ</td>
<td>A2–1</td>
</tr>
<tr>
<td>Disqualification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Convening authority</td>
<td>R.C.M. 504(c)(1); 601(c)</td>
<td>II–49; II–54</td>
</tr>
<tr>
<td>Defense counsel</td>
<td>R.C.M. 502(d)(4)(A)</td>
<td>II–48</td>
</tr>
<tr>
<td>Member</td>
<td>R.C.M. 912(f)(1)(C)</td>
<td>II–105</td>
</tr>
<tr>
<td>Personnel of court-martial</td>
<td>R.C.M. 502(e)(2)(A)</td>
<td>II–47</td>
</tr>
<tr>
<td>Reviewer</td>
<td>R.C.M. 1112(c)</td>
<td>II–156</td>
</tr>
<tr>
<td>Subordinate of convening authority</td>
<td>R.C.M. 504(c)(2)</td>
<td>II–49</td>
</tr>
</tbody>
</table>

Index 2
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trial counsel</td>
<td>R.C.M. 502(d)(4)(A)</td>
<td>II-45</td>
</tr>
<tr>
<td>Nominal accuser</td>
<td>R.C.M. 103(20); 307(a)</td>
<td>II-2; 27</td>
</tr>
<tr>
<td>Notification to accused of</td>
<td>R.C.M. 308</td>
<td>II-31</td>
</tr>
<tr>
<td>Preferral of charges</td>
<td>R.C.M. 307</td>
<td>II-27</td>
</tr>
<tr>
<td>Acquittal</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>See also Findings.</td>
<td></td>
</tr>
<tr>
<td>Motion for a finding of not guilty</td>
<td>R.C.M. 917</td>
<td>II-113</td>
</tr>
<tr>
<td>Reconsideration of</td>
<td>R.C.M. 924</td>
<td>II-119</td>
</tr>
<tr>
<td>Record of trial in case of</td>
<td>R.C.M. 1103(e)</td>
<td>II-139</td>
</tr>
<tr>
<td>Action of convening authority</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>See also Convening authority.</td>
<td></td>
</tr>
<tr>
<td>Ambiguous action</td>
<td>R.C.M. 1107(g)</td>
<td>II-151</td>
</tr>
<tr>
<td>Contents of action</td>
<td>R.C.M. 1107(f)</td>
<td>II-149</td>
</tr>
<tr>
<td>Dismissal of charges</td>
<td>R.C.M. 1107(c)(2)(A)</td>
<td>II-147</td>
</tr>
<tr>
<td>Errorneous action</td>
<td>R.C.M. 1107(g)</td>
<td>II-151</td>
</tr>
<tr>
<td>Findings, action on</td>
<td>R.C.M. 1107(c), (f)(3)</td>
<td>II-147; 149</td>
</tr>
<tr>
<td>Forms for</td>
<td>Appendix 16</td>
<td>A16-1</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1107(a)</td>
<td>II-146</td>
</tr>
<tr>
<td>Incomplete</td>
<td>R.C.M. 1107(g)</td>
<td>II-151</td>
</tr>
<tr>
<td>Lesser included offense, approval of</td>
<td>R.C.M. 1107(c)(1)</td>
<td>II-147</td>
</tr>
<tr>
<td>Matters considered</td>
<td>R.C.M. 1107(b)(3)</td>
<td>II-147</td>
</tr>
<tr>
<td>Mental capacity, when accused lacks</td>
<td>R.C.M. 1107(b)(5)</td>
<td>II-147</td>
</tr>
<tr>
<td>Mental responsibility, lack of</td>
<td>R.C.M. 1107(b)(4)</td>
<td>II-147</td>
</tr>
<tr>
<td>Modification of</td>
<td>R.C.M. 1107(f)(2), (g)</td>
<td>II-149; 151</td>
</tr>
<tr>
<td>New trial</td>
<td>R.C.M. 1107(f)(5)(B)</td>
<td>II-151</td>
</tr>
<tr>
<td>Not guilty findings, action on</td>
<td>R.C.M. 1107(b)(4)</td>
<td>II-147</td>
</tr>
<tr>
<td>Other trial, ordering</td>
<td>R.C.M. 1107(e)(2)</td>
<td>II-149</td>
</tr>
<tr>
<td>Pretrial agreement, effect of</td>
<td>R.C.M. 705(b)(2)(E)</td>
<td>II-70</td>
</tr>
<tr>
<td>Rehearing, ordering</td>
<td>R.C.M. 1107(c)(2)(B), (e)(1), (f)(5)</td>
<td>II-147; 148; 150</td>
</tr>
<tr>
<td>Sentence, action on</td>
<td>R.C.M. 1107(d)(f)(4)</td>
<td>II-147; 149</td>
</tr>
<tr>
<td>Service on accused</td>
<td>R.C.M. 1107(h)</td>
<td>II-151</td>
</tr>
<tr>
<td>Suspension of sentence</td>
<td>R.C.M. 1108</td>
<td>II-151</td>
</tr>
<tr>
<td>When taken</td>
<td>R.C.M. 1107(b)(2)</td>
<td>II-146</td>
</tr>
<tr>
<td>Who may take</td>
<td>R.C.M. 1107(a)</td>
<td>II-146</td>
</tr>
<tr>
<td>Withdrawal of</td>
<td>R.C.M. 1107(f)(2)</td>
<td>II-149</td>
</tr>
<tr>
<td>Additional charges</td>
<td>R.C.M. 307(c)(2)(B)</td>
<td>II-28</td>
</tr>
<tr>
<td>Adequate interest to challenge search and seizure</td>
<td>Mil. R. Evid. 311(a)(2)</td>
<td>III-8</td>
</tr>
<tr>
<td>Adjournment of courts-martial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1011</td>
<td>II-134</td>
</tr>
<tr>
<td>Sessions after</td>
<td>R.C.M. 803; 1102</td>
<td>II-78</td>
</tr>
<tr>
<td>Administrative action, to dispose of offense</td>
<td>R.C.M. 306(c)(2); V.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Para. 1d(1)</td>
<td>II-27</td>
</tr>
<tr>
<td>Admissions. See Self-incrimination.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Admission</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Of court-martial, member, military judge, or counsel</td>
<td>R.C.M. 104(a)(1)</td>
<td>II-5</td>
</tr>
<tr>
<td>Punishment, nonjudicial</td>
<td>V. Para. 5c(1)</td>
<td>V-5</td>
</tr>
<tr>
<td>Adultery</td>
<td>IV. Para. 62</td>
<td>IV-94</td>
</tr>
<tr>
<td>Advice, pretrial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contents</td>
<td>R.C.M. 406(b)</td>
<td>II-40</td>
</tr>
<tr>
<td>Distribution</td>
<td>R.C.M. 406(c)</td>
<td>II-41</td>
</tr>
<tr>
<td>General court-martial, requirement for</td>
<td>R.C.M. 601(d)(2)(B)</td>
<td>II-54</td>
</tr>
</tbody>
</table>

Index 3
Subject
Motion concerning .................................................. R.C.M. 905(b)(1); 906(b)(3) .... II–93; II–95
Responsibility for .......................................................... R.C.M. 406(a) .... II–40
Waiver .................................................................. R.C.M. 601(d)(2)(B) .... II–54
When required ............................................................. R.C.M. 406(a) .... II–40
Affidavits
Character of accused, proof by .......................................... Mil. R. Evid. 405(c) .... III–19
Sentencing proceedings .................................................. R.C.M. 1001(c)(3) .... II–121
Affirmation
See also Oaths.
Oath, included in .......................................................... R.C.M. 807(a) .... II–82
Affirmative defenses. See Defenses.
Aggravated assault. See Assault.
Aggravating circumstances, capital cases ............................ R.C.M. 1004(c) .... II–129
See also Capital case.
Aggravation, evidence in ................................................ R.C.M. 1001(b)(4) .... II–120
Agreement
Pretrial. See Pretrial agreement.
To commit offense. See Conspiracy.
Aider and abettor ................................................................ IV. Para. 1 .... IV–1
See also Principals.
Aiding the enemy
Attempts ................................................................ IV. Paras. 4c(5)(d), 28 .... IV–5; IV–40
Generally ................................................................ IV. Para. 28 .... IV–40
Aircraft carrier. See Vessel.
Alcohol. See Drunk; Intoxication.
Allib
Failure to disclose, effect of .............................................. R.C.M. 701(g)(3) .... II–60
Notice of, by defense .......................................................... R.C.M. 701(b)(1) .... II–59
Notice of rebuttal witnesses by trial counsel ......................... R.C.M. 701(a)(3)(B) .... II–58
Withdrawal after disclosure, effect of ................................. R.C.M. 701(b)(5) .... II–60
Amending charges and specifications.
See also Charges and specifications.
Ammunition, casting away ................................................. IV. Para 23 .... IV–32
Amphetamines. See Controlled substances, offenses involving.
Analysis
Military Rules of Evidence .............................................. Appendix 22 .... A22–1
Rules for Courts-Martial .................................................. Appendix 21 .... A21–1
Announcement
Findings ................................................................ R.C.M. 922 .... II–118
Form for .................................................................... Appendix 10 .... A10–1
Persons present or absent at trial ....................................... R.C.M. 813 .... II–87
Sentence .................................................................. R.C.M. 1007 .... II–132
Form for .................................................................... Appendix 11 .... A11–1
Pretrial agreement inquiry after ........................................ R.C.M. 910(h)(3) .... II–103
Appeals. See Appellate review.
Appellate counsel. See Appellate review.
Appeal by United States (Art. 62, UCMJ) ............................ R.C.M. 908 .... II–99
Appellate counsel
Duties ................................................................ R.C.M. 1202(b) .... II–163
Generally ................................................................ R.C.M. 1202(a) .... II–163
When appeal filed by United States .................................... R.C.M. 908(c)(1) .... II–100

index 4
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finality of courts-martial</td>
<td>R.C.M. 1209</td>
<td>II–168</td>
</tr>
<tr>
<td>Judge Advocate General, The</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cases of lack of mental responsibility</td>
<td>R.C.M. 1201(b)(3)(B)</td>
<td>II–162</td>
</tr>
<tr>
<td>Cases referred to Court of Military Review by (Art 66, UCMJ)</td>
<td>R.C.M. 1201(a)</td>
<td>II–162</td>
</tr>
<tr>
<td>Cases reviewed by (Art 69, UCMJ)</td>
<td>R.C.M. 1201(b)(1), (2), (3)</td>
<td>II–162</td>
</tr>
<tr>
<td>Remission and suspension of sentence by</td>
<td>R.C.M. 1201(c)</td>
<td>II–163</td>
</tr>
<tr>
<td>Review of summary court-martial by</td>
<td>R.C.M. 1306(d)</td>
<td>II–177</td>
</tr>
<tr>
<td>New trial. See New trial.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nonjudicial punishment</td>
<td>V. Para. 7</td>
<td>V–8</td>
</tr>
<tr>
<td>Powers and responsibilities of the Service Secretary</td>
<td>R.C.M. 1206</td>
<td>II–168</td>
</tr>
<tr>
<td>Restoration</td>
<td>R.C.M. 1208</td>
<td>II–168</td>
</tr>
<tr>
<td>Review by a judge advocate</td>
<td>R.C.M. 1112</td>
<td>II–156</td>
</tr>
<tr>
<td>Review by Court of Military Appeals. See Court of Military Appeals.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Review by Court of Military Review. See Court of Military Review.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Review by the Supreme Court (Art 67(h)(1), (2))</td>
<td>R.C.M. 1205(b)</td>
<td>II–167</td>
</tr>
<tr>
<td>Action by Court</td>
<td>R.C.M. 1205(a)</td>
<td>II–167</td>
</tr>
<tr>
<td>Cases subject to review</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sentence requiring approval of the President</td>
<td>R.C.M. 1207</td>
<td>II–168</td>
</tr>
<tr>
<td>Waiver or withdrawal of</td>
<td>R.C.M. 1110</td>
<td>II–154</td>
</tr>
<tr>
<td>Appellate rights waiver form</td>
<td>Appendix 19</td>
<td>A19–1</td>
</tr>
<tr>
<td>Appointment in armed forces. See Enlistment.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Apprehension</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Absence without leave, terminated by</td>
<td>IV. Para. 10e(2)(d)</td>
<td>IV–15</td>
</tr>
<tr>
<td>Attachment of jurisdiction</td>
<td>R.C.M. 202(c)(2)</td>
<td>II–15</td>
</tr>
<tr>
<td>Authorization, when required</td>
<td>R.C.M. 302(e)(2)</td>
<td>II–19</td>
</tr>
<tr>
<td>Custody, defined</td>
<td>IV. Para. 19e(3)(a)</td>
<td>IV–29</td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 302(a)</td>
<td>II–18</td>
</tr>
<tr>
<td>Deserters, by civilian authorities</td>
<td>R.C.M. 302(b)(a)</td>
<td>II–19</td>
</tr>
<tr>
<td>Desertion, terminated by</td>
<td>IV. Para. 9e2(a)</td>
<td>IV–12</td>
</tr>
<tr>
<td>Force, use of</td>
<td>R.C.M. 302(d)(3)</td>
<td>II–19</td>
</tr>
<tr>
<td>Grounds for</td>
<td>R.C.M. 302(c)</td>
<td>II–19</td>
</tr>
<tr>
<td>Procedure</td>
<td>R.C.M. 302(d)</td>
<td>II–19</td>
</tr>
<tr>
<td>Resisting</td>
<td>IV. Para. 19</td>
<td>IV–28</td>
</tr>
<tr>
<td>Search incident to</td>
<td>Mil. R. Evid. 314(g)</td>
<td>III–13</td>
</tr>
<tr>
<td>See also Search and seizure.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unlawful</td>
<td>IV. Para. 21</td>
<td>IV–31</td>
</tr>
<tr>
<td>Warrant, when required</td>
<td>R.C.M. 302(d)(2), (e)(2)</td>
<td>II–19; 19</td>
</tr>
<tr>
<td>Where made</td>
<td>R.C.M. 302(e)</td>
<td>II–19</td>
</tr>
<tr>
<td>Who may apprehend</td>
<td>R.C.M. 302(b)</td>
<td>II–18</td>
</tr>
<tr>
<td>Appropriation, wrongful</td>
<td>IV Para. 46</td>
<td>IV–65</td>
</tr>
<tr>
<td>Argument</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Control of, by military judge</td>
<td>R.C.M. 801(a)(3)</td>
<td>II–75</td>
</tr>
<tr>
<td>Findings</td>
<td>R.C.M. 919</td>
<td>II–115</td>
</tr>
<tr>
<td>Motions</td>
<td>R.C.M. 801(a)(3)</td>
<td>II–75</td>
</tr>
<tr>
<td>Sentence</td>
<td>R.C.M. 1001(g)</td>
<td>II–122</td>
</tr>
<tr>
<td>Statement, opening</td>
<td>R.C.M. 913(b)</td>
<td>II–107</td>
</tr>
<tr>
<td>Armed forces, defined</td>
<td>R.C.M. 103(20)</td>
<td>II–2</td>
</tr>
<tr>
<td>Arms, casting away</td>
<td>IV. Para. 23</td>
<td>IV–32</td>
</tr>
<tr>
<td>Arraignment</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Index 5
MCM, 1994

INDEX

Subject

Acquitted, presence required at ........................................... R.C.M. 804 .... II–79
Additional charges, effect on referral of .................................... R.C.M. 601(e)(2) .... II–55
Amending charges, effect on ............................................... R.C.M. 603(b), (c) .... II–56; 56
Generally .............................................................................. R.C.M. 904 .... II–92

Arrest

Attachment of jurisdiction, effecting ......................................... R.C.M. 202(c)(2) .... II–15
Breaking ................................................................................ IV. Para. 19 .... IV–28
In quarters, as nonjudicial punishment .................................... V. Para. 5b(1)(B)(i), (c)(3) .... V–4; V–5
Members, disqualification while in ......................................... R.C.M. 912(f)(1)(L) .... II–105

Pretrial

See also Restraint, pretrial.

Defined ................................................................................... R.C.M. 304(a)(3) .... II–21
Duties inconsistent with ....................................................... R.C.M. 304(a)(3) .... II–21
Grounds for ............................................................................ R.C.M. 304(c) .... II–21
Notice to persons in ............................................................. R.C.M. 304(e) .... II–22
Procedure ............................................................................... R.C.M. 304(d) .... II–22
Punishment prohibited ............................................................ R.C.M. 304(f) .... II–22
Release from

  Authority to grant ................................................................... R.C.M. 304(g) .... II–22
  When required ......................................................................... R.C.M. 707(d) .... II–74
  Speedy trial, effect on ........................................................... R.C.M. 707(b)(1), (2) .... II–73; 73
  Who may order ....................................................................... R.C.M. 304(b) .... II–21

Unlawful, as offense ............................................................... IV. Para. 21 .... IV–31

Arson

See also Burning with intent to defraud.

Aggravated ............................................................................. IV. Para 52 .... IV–77
  Murder while committing .................................................. IV. Para. 43 .... IV–60
Assault with intent to commit ................................................ IV. Para. 64 .... IV–94
Simple arson ........................................................................ IV. Para. 52 .... IV–77

Article 15. See Nonjudicial punishment.

Article 32. See Investigation, pretrial.

Article 39(a) session ............................................................... R.C.M. 803 .... II–78

Assault

Aggravated ........................................................................ IV. Para. 54 .... IV–79
Attempts ............................................................................... IV. Paras. 4c(5)(e); 54 .... IV–5; IV–79
Battery .................................................................................. IV. Para. 54 .... IV–79
Child, as victim ..................................................................... IV. Para. 54 .... IV–79
Commissioned officer, as victim

  In execution of office ......................................................... IV. Para. 14 .... IV–18
  Not in execution of office ................................................ IV. Para. 54 .... IV–79
  Of a friendly foreign power ............................................ IV. Para. 54(e)(3) .... IV–82
Defense of another ................................................................ R.C.M. 916(e)(5) .... II–109
Indecent ................................................................................ IV. Para. 63 .... IV–94
Law enforcement official, as victim ..................................... IV. Para. 54 .... IV–79
Maiming .............................................................................. IV. Para. 50 .... IV–75
Noncommissioned, petty, or warrant officer, as victim

  In execution of office ......................................................... IV. Para. 15 .... IV–21
  Not in execution of office ................................................ IV. Para. 54 .... IV–79
Self-defense ........................................................................ R.C.M. 916(e) .... II–109
Sentinel or lookout, as victim ............................................. IV. Para. 54 .... IV–79
Simple assault ...................................................................... IV. Para. 54 .... IV–79

With intent to commit arson, burglary, housebreaking.

Index 6
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>murder, rape, robbery, sodomy, or voluntary manslaughter</td>
<td>IV. Para. 64</td>
<td>IV–94</td>
</tr>
<tr>
<td>Assembly of court-martial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Announcement of</td>
<td>R.C.M. 901(b)</td>
<td>II–89</td>
</tr>
<tr>
<td>Effect on</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Changing members</td>
<td>R.C.M. 505(c)</td>
<td>II–44</td>
</tr>
<tr>
<td>Changing military judge</td>
<td>R.C.M. 505(e)</td>
<td>II–51</td>
</tr>
<tr>
<td>Enlisted members, request for</td>
<td>R.C.M. 903(a)(1), (d)</td>
<td>II–91; 92</td>
</tr>
<tr>
<td>Military judge alone, request for trial by</td>
<td>R.C.M. 903(b)(2), (d)</td>
<td>II–91; 92</td>
</tr>
<tr>
<td>Assistant counsel, See Counsel; Defense counsel; Trial counsel.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Associate defense counsel, See Counsel; Defense counsel.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attachment, warrant of</td>
<td>R.C.M. 703(e)(2)(G)</td>
<td>II–66</td>
</tr>
<tr>
<td>Attempts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aiding the enemy (Art. 104, UCMJ)</td>
<td>IV. Paras. 4c(5)(d); 28</td>
<td>IV–5; IV–40</td>
</tr>
<tr>
<td>Assault (Art. 128, UCMJ)</td>
<td>IV. Paras. 4c(5)(e); 54</td>
<td>IV–5; IV–79</td>
</tr>
<tr>
<td>Desertion (Art. 85, UCMJ)</td>
<td>IV. Paras. 4c(5)(a); 9</td>
<td>IV–5; IV–9</td>
</tr>
<tr>
<td>Generally (Art. 80, UCMJ)</td>
<td>IV. Para. 4</td>
<td>IV–4</td>
</tr>
<tr>
<td>Mutiny (Art. 94, UCMJ)</td>
<td>IV. Paras. 4c(5)(b); 18</td>
<td>IV–5; IV–26</td>
</tr>
<tr>
<td>Subordinate compelling surrender (Art. 100, UCMJ)</td>
<td>IV. Paras. 4c(5)(c); 24</td>
<td>IV–5; IV–36</td>
</tr>
<tr>
<td>Attorney, See Counsel; Defense counsel; Trial counsel.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attorney—client relationship</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Counsel; Defense counsel.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Availability of individual military counsel, effect on</td>
<td>R.C.M. 506(b)(2)</td>
<td>II–52</td>
</tr>
<tr>
<td>Change of defense counsel, effect on</td>
<td>R.C.M. 505(d)(2)</td>
<td>II–51</td>
</tr>
<tr>
<td>Privileged communications</td>
<td>Mil. R. Evid. 502</td>
<td>III–21</td>
</tr>
<tr>
<td>Attorney General, grants of immunity</td>
<td>R.C.M. 704(c)(1), (2)</td>
<td>II–68; 68</td>
</tr>
<tr>
<td>Authentication of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidence</td>
<td>Mil. R. Evid. 901; 902</td>
<td>III–38; III–39</td>
</tr>
<tr>
<td>Promulgating orders</td>
<td>R.C.M. 1114(e)</td>
<td>II–160</td>
</tr>
<tr>
<td>Record of trial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Certificate of correction</td>
<td>R.C.M. 1104(d)</td>
<td>II–142</td>
</tr>
<tr>
<td>Examination preceding</td>
<td>R.C.M. 1103(i)</td>
<td>II–139</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1104</td>
<td>II–141</td>
</tr>
<tr>
<td>Summary courts-martial</td>
<td>R.C.M. 1305(c)</td>
<td>II–176</td>
</tr>
<tr>
<td>Authorization to search, seize and apprehend. See Search and seizure.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Automobile, See Search and seizure, Automobile, Vehicle.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aviation cadet</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jurisdiction of courts-martial, subject to</td>
<td>Art. 2(a)(2), UCMJ; R.C.M. 202(a)</td>
<td>A2–1; II–13</td>
</tr>
<tr>
<td>Summary courts-martial, not subject to trial by</td>
<td>R.C.M. 1301(c)</td>
<td>II–172</td>
</tr>
<tr>
<td>Bad checks. See Checks.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bad-conduct discharge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Multiple offenses, authorizing</td>
<td>R.C.M. 1003(d)(3)</td>
<td>II–127</td>
</tr>
<tr>
<td>Prior convictions authorizing</td>
<td>R.C.M. 1003(b)(2)</td>
<td>II–127</td>
</tr>
<tr>
<td>Punishment, generally</td>
<td>R.C.M. 1003(b)(10)(C)</td>
<td>II–125</td>
</tr>
<tr>
<td>Special courts-martial, power to adjudge</td>
<td>R.C.M. 201(f)(2)(B)</td>
<td>II–12</td>
</tr>
<tr>
<td>Summary courts-martial, power to adjudge</td>
<td>R.C.M. 1301(d)</td>
<td>II–172</td>
</tr>
<tr>
<td>Bailiff</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Detailing</td>
<td>R.C.M. 501(c)</td>
<td>II–43</td>
</tr>
<tr>
<td>Disqualification of</td>
<td>R.C.M. 502(e)(2)</td>
<td>II–47</td>
</tr>
<tr>
<td>Duties</td>
<td>R.C.M. 502(e)(3)(C)</td>
<td>II–47</td>
</tr>
</tbody>
</table>

Index 7
### Index MCM, 1994

<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qualifications</td>
<td>R.C.M. 502(e)(1)</td>
<td>II-47</td>
</tr>
<tr>
<td>Lack of action on</td>
<td>R.C.M. 502(f)</td>
<td>II-47</td>
</tr>
<tr>
<td>Battery. See Assault.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Best evidence. See Evidence, Contents of writings, recordings, and photographs.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bias</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ground for challenge of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Member</td>
<td>R.C.M. 912(f)(1)(N)</td>
<td>II-105</td>
</tr>
<tr>
<td>Military judge</td>
<td>R.C.M. 902(a), (b)(I)</td>
<td>II-90; 80</td>
</tr>
<tr>
<td>Impeachment of witness</td>
<td>Mil. R. Evid. 608(c)</td>
<td>III-31</td>
</tr>
<tr>
<td>Bigamy</td>
<td>IV. Para. 65</td>
<td>IV-96</td>
</tr>
<tr>
<td>Bill of particulars</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Blasting caps, included in explosives</td>
<td>R.C.M. 103(11)</td>
<td>II-1</td>
</tr>
<tr>
<td>Blood extraction, as evidence</td>
<td>Mil. R. Evid. 312(d)</td>
<td>III-11</td>
</tr>
<tr>
<td>Board, sanity. See Mental capacity; Mental responsibility.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Boat. See Vessel.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bodily harm. See Assault.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Body fluids, seizure of</td>
<td>Mil. R. Evid. 312(d)</td>
<td>III-11</td>
</tr>
<tr>
<td>See also Search and seizure, Body views and intrusions.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bomb</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Explosive, included in</td>
<td>R.C.M. 103(11)</td>
<td>II-11</td>
</tr>
<tr>
<td>Hoax</td>
<td>IV. Para. 109</td>
<td>IV-48</td>
</tr>
<tr>
<td>Threat</td>
<td>IV. Para. 109</td>
<td>IV-48</td>
</tr>
<tr>
<td>Breach of correctional custody</td>
<td>IV. Para. 70</td>
<td>IV-98</td>
</tr>
<tr>
<td>Breach of peace</td>
<td>IV. Para. 41</td>
<td>IV-59</td>
</tr>
<tr>
<td>Breaking and entering. See Burglary; Housebreaking; Unlawful entry.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Breaking arrest</td>
<td>IV. Para. 19</td>
<td>IV-28</td>
</tr>
<tr>
<td>Breaking medical quarantine</td>
<td>IV. Para. 100</td>
<td>IV-115</td>
</tr>
<tr>
<td>Breaking restriction</td>
<td>IV. Para. 102</td>
<td>IV-116</td>
</tr>
<tr>
<td>See also Restriction.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bribery</td>
<td>IV. Para. 66</td>
<td>IV-96</td>
</tr>
<tr>
<td>Broadcasting of courts-martial, prohibited</td>
<td>R.C.M. 806(c)</td>
<td>II-80</td>
</tr>
<tr>
<td>Burden of proof.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Search and seizure, Burden of proof; Self-Incrimination, Burden of proof.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Challenges</td>
<td>R.C.M. 912(f)(3)</td>
<td>II-105</td>
</tr>
<tr>
<td>Defenses</td>
<td>R.C.M. 916(b)</td>
<td>II-109</td>
</tr>
<tr>
<td>Findings</td>
<td>R.C.M. 920(e)(5)</td>
<td>II-116</td>
</tr>
<tr>
<td>Motions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Admissions and confessions</td>
<td>Mil. R. Evid. 304(e)</td>
<td>III-4</td>
</tr>
<tr>
<td>Eyewitness identification</td>
<td>Mil. R. Evid. 321(d)</td>
<td>III-17</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 905(c)</td>
<td>II-93</td>
</tr>
<tr>
<td>Search and seizure</td>
<td>Mil. R. Evid. 311(e)</td>
<td>III-9</td>
</tr>
<tr>
<td>Burglary</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault with intent to commit</td>
<td>IV. Para. 64</td>
<td>IV-94</td>
</tr>
<tr>
<td>Generally</td>
<td>IV. Para. 55</td>
<td>IV-83</td>
</tr>
<tr>
<td>Housebreaking, distinguished from</td>
<td>IV. Para. 56c(1)</td>
<td>IV-85</td>
</tr>
<tr>
<td>Murder while committing</td>
<td>IV. Para. 43</td>
<td>IV-60</td>
</tr>
<tr>
<td>Burning with intent to defraud</td>
<td>IV. Para. 67</td>
<td>IV-97</td>
</tr>
<tr>
<td>Business records, admissibility</td>
<td>Mil. R. Evid. 803(6)</td>
<td>III-35</td>
</tr>
</tbody>
</table>

Index 8
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cadet</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conduct unbecoming officer and gentlemen</td>
<td>R.C.M. 1003(b)(10)(A)</td>
<td>II–124</td>
</tr>
<tr>
<td>Dismissal, punishment by</td>
<td>R.C.M. 1003(b)(10)(A)</td>
<td>II–124</td>
</tr>
<tr>
<td>Jurisdiction of courts-martial, subject to</td>
<td>Art. 2(a)(2), UCMJ; R.C.M. 202(a)</td>
<td>A2–1; II–13</td>
</tr>
<tr>
<td>Summary courts-martial, not subject to trial by</td>
<td>R.C.M. 1301(c)</td>
<td>II–172</td>
</tr>
<tr>
<td>Capital case</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Capital offense; Death, as punishment.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 103(2)</td>
<td>II–1</td>
</tr>
<tr>
<td>Deposition, use in</td>
<td>Art. 49, UCMJ; Mil. R. Evid.</td>
<td></td>
</tr>
<tr>
<td>Guilty plea prohibited in</td>
<td>R.C.M. 910(a)</td>
<td>II–101</td>
</tr>
<tr>
<td>Military judge alone, no jurisdiction to try</td>
<td>R.C.M. 201(f)(1)(C)</td>
<td>II–11</td>
</tr>
<tr>
<td>Notice of aggravating circumstances required</td>
<td>R.C.M. 1004(b)</td>
<td>II–127</td>
</tr>
<tr>
<td>Procedures in</td>
<td>R.C.M. 1004</td>
<td>II–127</td>
</tr>
<tr>
<td>Capital offense</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 103(3)</td>
<td>II–1</td>
</tr>
<tr>
<td>Referral</td>
<td>R.C.M. 201(f)(1)(A)(ii)(b)</td>
<td>II–11</td>
</tr>
<tr>
<td>To special court-martial</td>
<td>R.C.M. 201(f)(2)(C)</td>
<td>II–12</td>
</tr>
<tr>
<td>To summary court-martial</td>
<td>R.C.M. 1301(c)</td>
<td>II–172</td>
</tr>
<tr>
<td>Captain's mast. See Nonjudicial punishment.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Captured or abandoned property, offenses concerning</td>
<td>IV. Para. 27</td>
<td>IV–38</td>
</tr>
<tr>
<td>Carnal knowledge</td>
<td>IV. Para. 45</td>
<td>IV–64</td>
</tr>
<tr>
<td>Carrying concealed weapon</td>
<td>IV. Para. 112</td>
<td>IV–121</td>
</tr>
<tr>
<td>Casting away arms or ammunition</td>
<td>IV. Para. 23</td>
<td>IV–32</td>
</tr>
<tr>
<td>Causing false alarms</td>
<td>IV. Para. 23</td>
<td>IV–32</td>
</tr>
<tr>
<td>Censure</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court-martial, member, military judge, or counsel, prohibited</td>
<td>R.C.M. 104(a)(1)</td>
<td>II–5</td>
</tr>
<tr>
<td>Provoking speech and gestures, distinguished</td>
<td>IV. Para. 42(a)</td>
<td>IV–60</td>
</tr>
<tr>
<td>Certificate, medical</td>
<td>R.C.M. 1113(d)(5); 1305(d)</td>
<td>II–159; II–176</td>
</tr>
<tr>
<td>Certificate of correction</td>
<td>R.C.M. 1104(d)</td>
<td>II–142</td>
</tr>
<tr>
<td>Challenges</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Control of, by military judge</td>
<td>R.C.M. 801(a)(3)</td>
<td>II–75</td>
</tr>
<tr>
<td>Members</td>
<td></td>
<td></td>
</tr>
<tr>
<td>For cause</td>
<td>R.C.M. 912(f)</td>
<td>II–104</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 912</td>
<td>II–104</td>
</tr>
<tr>
<td>Peremptory</td>
<td>R.C.M. 912(g)</td>
<td>II–106</td>
</tr>
<tr>
<td>Presence of members during</td>
<td>R.C.M. 805(b)</td>
<td>II–80</td>
</tr>
<tr>
<td>Special court-martial without military judge</td>
<td>R.C.M. 912(h)</td>
<td>II–106</td>
</tr>
<tr>
<td>Military judge</td>
<td>R.C.M. 902</td>
<td>II–90</td>
</tr>
<tr>
<td>Change of venue</td>
<td>R.C.M. 906(b)(11)</td>
<td>II–97</td>
</tr>
<tr>
<td>Chaplains, privileged communications</td>
<td>Mil. R. Evid. 503</td>
<td>III–22</td>
</tr>
<tr>
<td>Character, evidence. See Evidence, Character evidence;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Presentencing procedure</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charges and specifications</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also specific offenses.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Additional charges</td>
<td>R.C.M. 307(c)(2)(B)</td>
<td>II–28</td>
</tr>
<tr>
<td>Amendment of</td>
<td>R.C.M. 603</td>
<td>II–56</td>
</tr>
<tr>
<td>Bill of particulars</td>
<td>R.C.M. 906(b)(6)</td>
<td>II–96</td>
</tr>
<tr>
<td>Charge Sheet</td>
<td>Appendix 4</td>
<td>A4–1</td>
</tr>
<tr>
<td>Definitions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charge</td>
<td>R.C.M. 307(c)(2)</td>
<td>II–28</td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>----------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Specification</td>
<td>R.C.M. 307(c)(3)</td>
<td>II-28</td>
</tr>
<tr>
<td>Dismissal of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>By commander</td>
<td>R.C.M. 306(c)(1); 401(c)(1)</td>
<td>II-27</td>
</tr>
<tr>
<td>By military judge</td>
<td>R.C.M. 907</td>
<td>II-97</td>
</tr>
<tr>
<td>Speedy trial</td>
<td>R.C.M. 707(b)(2), (c)</td>
<td>II-73</td>
</tr>
<tr>
<td>Disposition of</td>
<td>R.C.M. 401</td>
<td>II-32</td>
</tr>
<tr>
<td>Duplicitious</td>
<td>R.C.M. 906(b)(5)</td>
<td>II-96</td>
</tr>
<tr>
<td>Error in citation, effect of</td>
<td>R.C.M. 307(d)</td>
<td>II-31</td>
</tr>
<tr>
<td>Failure to state offense</td>
<td>R.C.M. 907(b)(1)(B)</td>
<td>II-97</td>
</tr>
<tr>
<td>Findings</td>
<td>R.C.M. 918(a)</td>
<td>II-114</td>
</tr>
<tr>
<td>Format</td>
<td>R.C.M. 307(c)(1); Appendix 4</td>
<td>II-28; A4-1</td>
</tr>
<tr>
<td>Forwading</td>
<td>R.C.M. 401(c)(2)</td>
<td>II-32</td>
</tr>
<tr>
<td>Investigation of. See Investigation, pretrial.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Joinder of</td>
<td>R.C.M. 307(c)(4); 601(c)(2)</td>
<td>II-30; II-55</td>
</tr>
<tr>
<td>Joint offenders</td>
<td>R.C.M. 307(c)(5); 601(c)(3)</td>
<td>II-30; II-55</td>
</tr>
<tr>
<td>Lesser included offenses. See Findings; Lesser included offenses.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Motions as to defects in</td>
<td>R.C.M. 905(b)(2); 906(b)(4), (5), (6)</td>
<td>II-93; II-96</td>
</tr>
<tr>
<td>Multiple offenders</td>
<td>R.C.M. 307(c)(5)</td>
<td>II-30</td>
</tr>
<tr>
<td>Multiple offenses</td>
<td>R.C.M. 307(c)(4)</td>
<td>II-30</td>
</tr>
<tr>
<td>Multiplicitious</td>
<td>R.C.M. 307(c)(4); 1003(c)(1)(C)</td>
<td>II-30; II-125</td>
</tr>
<tr>
<td>Notification to accused of</td>
<td>R.C.M. 308</td>
<td>II-31</td>
</tr>
<tr>
<td>Papers, accompanying, discovery of</td>
<td>R.C.M. 701(a)(1)</td>
<td>II-58</td>
</tr>
<tr>
<td>Preemption</td>
<td>R.C.M. 307(c)(2)(C)</td>
<td>II-30</td>
</tr>
<tr>
<td>Preferral. See Preferral of charges.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reading of, as part of arraignment</td>
<td>R.C.M. 904</td>
<td>II-92</td>
</tr>
<tr>
<td>Service of</td>
<td>R.C.M. 602</td>
<td>II-55</td>
</tr>
<tr>
<td>Severance of</td>
<td>R.C.M. 905(b)(5)</td>
<td>II-93</td>
</tr>
<tr>
<td>Staff judge advocate, advice as to</td>
<td>R.C.M. 406</td>
<td>II-40</td>
</tr>
<tr>
<td>Statute of limitations, tolling</td>
<td>R.C.M. 403(a)</td>
<td>II-33</td>
</tr>
<tr>
<td>War, effect on disposition of</td>
<td>R.C.M. 401(d); 407(b)</td>
<td>II-33; II-41</td>
</tr>
<tr>
<td>Withdrawal of</td>
<td>R.C.M. 604</td>
<td>II-56</td>
</tr>
<tr>
<td>Pursuant to pretrial agreement</td>
<td>R.C.M. 705(b)(2)(C)</td>
<td>II-70</td>
</tr>
<tr>
<td>Checks</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dishonorable failure to maintain funds</td>
<td>IV. Para. 68</td>
<td>IV-97</td>
</tr>
<tr>
<td>Forged</td>
<td>IV. Para. 48</td>
<td>IV-70</td>
</tr>
<tr>
<td>Child</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault consummated by battery on</td>
<td>IV. Para. 54(b)(3)(c)</td>
<td>IV-79</td>
</tr>
<tr>
<td>Carnal knowledge with</td>
<td>IV. Para. 45</td>
<td>IV-64</td>
</tr>
<tr>
<td>Indecent acts or liberties with</td>
<td>IV. Para. 87</td>
<td>IV-108</td>
</tr>
<tr>
<td>Sodomy on</td>
<td>IV. Para. 51</td>
<td>IV-76</td>
</tr>
<tr>
<td>Witness, competency</td>
<td>Mil. R. Evid. 601</td>
<td>III-30</td>
</tr>
<tr>
<td>Civilian authorities and tribunals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authority to apprehend persons under code</td>
<td>R.C.M. 302(a)(2), (b)(3)</td>
<td>II-18</td>
</tr>
<tr>
<td>Control by, effect on absence without leave</td>
<td>IV. Para. 10(c)(5)</td>
<td>IV-13</td>
</tr>
<tr>
<td>Delivery of military offenders to</td>
<td>R.C.M. 106</td>
<td>II-6</td>
</tr>
<tr>
<td>Former jeopardy, effect of trial by</td>
<td>R.C.M. 201(d); 907(b)(2)(C)</td>
<td>II-10; II-98</td>
</tr>
<tr>
<td>Martial law</td>
<td>I. Para. 2(a)(2)</td>
<td>I-1</td>
</tr>
<tr>
<td>Military occupation, superseding</td>
<td>I. Para. 2(a)(3)</td>
<td>I-1</td>
</tr>
<tr>
<td>Offenses subject to trial by</td>
<td>R.C.M. 201(d)</td>
<td>II-10</td>
</tr>
<tr>
<td>Civilian counsel. See Counsel; Defense counsel.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------------------------------</td>
<td>-------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Civilians</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aiding the enemy, subject to trial for</td>
<td>IV. Para. 28(c)(1)</td>
<td>IV–40</td>
</tr>
<tr>
<td>Authority to apprehend deserters</td>
<td>R.C.M. 302(b)(3)</td>
<td>II–19</td>
</tr>
<tr>
<td>Contempt, punishment for</td>
<td>R.C.M. 809(a), (e)</td>
<td>II–83; 84</td>
</tr>
<tr>
<td>Jurisdiction of courts-martial, subject to</td>
<td>R.C.M. 202(a)</td>
<td>II–13</td>
</tr>
<tr>
<td>Orders, subject to</td>
<td>IV. Para. 14c(3)</td>
<td>IV–19</td>
</tr>
<tr>
<td>Spying, subject to trial for</td>
<td>IV. Para. 30c(3)</td>
<td>IV–43</td>
</tr>
<tr>
<td>Witnesses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appear, neglect or refusal to</td>
<td>R.C.M. 703(e)(2)(G)</td>
<td>II–66</td>
</tr>
<tr>
<td>Subpoena of</td>
<td>R.C.M. 703(e)(2)</td>
<td>II–65</td>
</tr>
<tr>
<td>Warrant of attachment</td>
<td>R.C.M. 703(e)(2)(G)</td>
<td>II–66</td>
</tr>
<tr>
<td>Claims, false</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Closure of court-martial</td>
<td>R.C.M. 806(b)</td>
<td>II–81</td>
</tr>
<tr>
<td>Privilege concerning</td>
<td>Mil. R. Evid. 505</td>
<td>III–23</td>
</tr>
<tr>
<td>Record of trial</td>
<td>R.C.M. 1104(b)(1)(D), (2)</td>
<td>II–142</td>
</tr>
<tr>
<td>Clemency recommendation</td>
<td>R.C.M. 1105(b)(4)</td>
<td>II–143</td>
</tr>
<tr>
<td>Clergy, privileged communications to</td>
<td>Mil. R. Evid. 503</td>
<td>III–22</td>
</tr>
<tr>
<td>Clerk</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Detailing</td>
<td>R.C.M. 501(c)</td>
<td>IV–43</td>
</tr>
<tr>
<td>Disqualification</td>
<td>R.C.M. 502(e)(2)</td>
<td>IV–47</td>
</tr>
<tr>
<td>Duties</td>
<td>R.C.M. 502(e)(3)(C)</td>
<td>IV–47</td>
</tr>
<tr>
<td>Lack of qualifications, action</td>
<td>R.C.M. 502(f)</td>
<td>II–47</td>
</tr>
<tr>
<td>Qualifications</td>
<td>R.C.M. 502(e)(1)</td>
<td>II–47</td>
</tr>
<tr>
<td>Co-accused. See Accomplices; Conspiracy; Principals.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Code, defined</td>
<td>R.C.M. 103(4)</td>
<td>II–1</td>
</tr>
<tr>
<td>Coercion</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defense, as a</td>
<td>R.C.M. 916(h)</td>
<td>II–111</td>
</tr>
<tr>
<td>Of court-martial</td>
<td>R.C.M. 104(a)(2)</td>
<td>II–5</td>
</tr>
<tr>
<td>Of guilty plea</td>
<td>R.C.M. 910(d)</td>
<td>II–102</td>
</tr>
<tr>
<td>Cohabitation, wrongful</td>
<td>IV. Para. 69</td>
<td>IV–98</td>
</tr>
<tr>
<td>Command</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Abandoning, surrendering, giving up</td>
<td>IV. Para. 23</td>
<td>IV–32</td>
</tr>
<tr>
<td>Compelling surrender or abandonment of</td>
<td>IV. Para. 24</td>
<td>IV–36</td>
</tr>
<tr>
<td>Detached or separate</td>
<td>R.C.M. 504(b)(2)(A), (B)</td>
<td>II–49</td>
</tr>
<tr>
<td>Endangering safety of</td>
<td>IV. Para. 23</td>
<td>IV–32</td>
</tr>
<tr>
<td>Influence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>As an offense</td>
<td>IV. Para. 22</td>
<td>IV–31</td>
</tr>
<tr>
<td>Unlawful</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 104</td>
<td>II–5</td>
</tr>
<tr>
<td>Exceptions</td>
<td>R.C.M. 104(a)(3)</td>
<td>II–5</td>
</tr>
<tr>
<td>Over disposition of charges</td>
<td>R.C.M. 306(a)</td>
<td>II–26</td>
</tr>
<tr>
<td>Commander</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appearance of accused at trial, responsibility for assistance</td>
<td>R.C.M. 804(c)(1)</td>
<td>II–80</td>
</tr>
<tr>
<td>Authorization to search. See Search and seizure.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charges and specifications, authority to change</td>
<td>R.C.M. 603(b)</td>
<td>II–56</td>
</tr>
<tr>
<td>Charges, authority to dispose of</td>
<td>R.C.M. 401</td>
<td>II–32</td>
</tr>
<tr>
<td>Confinement</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Post-trial, authority to order</td>
<td>R.C.M. 1101(b)(2)</td>
<td>II–135</td>
</tr>
<tr>
<td>Pretrial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Action by</td>
<td>R.C.M. 305(h)</td>
<td>II–23</td>
</tr>
<tr>
<td>Release, authority to order</td>
<td>R.C.M. 305(g)</td>
<td>II–23</td>
</tr>
</tbody>
</table>

Index 11
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Convening authority. See Convening authority.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 103(5)</td>
<td>II-1</td>
</tr>
<tr>
<td>For authorization to search</td>
<td>Mil. R. Evid. 315(d)</td>
<td>III-14</td>
</tr>
<tr>
<td>Dismissal of charges by</td>
<td>R.C.M. 401(c)(1)</td>
<td>II-32</td>
</tr>
<tr>
<td>Disposition of charges by</td>
<td>R.C.M. 401; 402</td>
<td>II-32; II-33</td>
</tr>
<tr>
<td>Disposition of offenses</td>
<td>R.C.M. 306</td>
<td>II-26</td>
</tr>
<tr>
<td>Forbearing charges by</td>
<td>R.C.M. 401(c)(2); 402</td>
<td>II-32; II-33</td>
</tr>
<tr>
<td>Influence, unlawful command</td>
<td>R.C.M. 104; IV. Para. 22</td>
<td>II-5; IV-22</td>
</tr>
<tr>
<td>Inquiry into reported offenses</td>
<td>R.C.M. 303</td>
<td>II-20</td>
</tr>
<tr>
<td>Lack of mental capacity or responsibility action on</td>
<td>R.C.M. 706(a)</td>
<td>II-71</td>
</tr>
<tr>
<td>Nonjudicial punishment, authority to administer</td>
<td>V. Paras. 1c, d; 2a</td>
<td>V-1; V-2</td>
</tr>
<tr>
<td>Notification to accused of charges</td>
<td>R.C.M. 308</td>
<td>II-31</td>
</tr>
<tr>
<td>Preliminary investigation</td>
<td>R.C.M. 303</td>
<td>II-20</td>
</tr>
<tr>
<td>Relations with court-martial, members, military judge</td>
<td>R.C.M. 104(a)(1)</td>
<td>II-5</td>
</tr>
<tr>
<td>Report of offense, forwarded to</td>
<td>R.C.M. 301(b)</td>
<td>II-18</td>
</tr>
<tr>
<td>Subordinate, relations with</td>
<td>R.C.M. 306(a); 401(a); 601(c)</td>
<td>II-26; II-32; II-54</td>
</tr>
<tr>
<td>Commissioned officer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault on</td>
<td>IV. Paras. 14; 54</td>
<td>IV-18; IV-79</td>
</tr>
<tr>
<td>Conduct unbecoming</td>
<td>IV. Para. 59</td>
<td>IV-91</td>
</tr>
<tr>
<td>Disobedience of</td>
<td>IV. Para. 14</td>
<td>IV-18</td>
</tr>
<tr>
<td>Disrespect towards</td>
<td>IV. Para. 13</td>
<td>IV-18</td>
</tr>
<tr>
<td>Preferral of charges, oath</td>
<td>R.C.M. 307(b)(1)</td>
<td>II-28</td>
</tr>
<tr>
<td>Qualification as member of court-martial</td>
<td>R.C.M. 502(a)(1)(A)</td>
<td>II-43</td>
</tr>
<tr>
<td>Summary court-martial, power to try</td>
<td>R.C.M. 1301(c)</td>
<td>II-172</td>
</tr>
<tr>
<td>Commission, military. See Military commission.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Common trial. See Joint trial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Communicating a threat</td>
<td>IV. Para. 110</td>
<td>IV-120</td>
</tr>
<tr>
<td>Communications, privileged. See Evidence, Privileges.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Company punishment. See Nonjudicial punishment.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Competency of witness. See Evidence, Competency.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Composition of courts-martial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused’s elections</td>
<td>R.C.M. 903</td>
<td>II-91</td>
</tr>
<tr>
<td>Capital case</td>
<td>R.C.M. 201(f)(1)(C)</td>
<td>II-11</td>
</tr>
<tr>
<td>Changing</td>
<td>R.C.M. 505</td>
<td>II-50</td>
</tr>
<tr>
<td>General court-martial</td>
<td>R.C.M. 501(a)(1)</td>
<td>II-43</td>
</tr>
<tr>
<td>Jurisdiction requisite</td>
<td>R.C.M. 201(b)(2)</td>
<td>II-9</td>
</tr>
<tr>
<td>Special court-martial</td>
<td>R.C.M. 501(a)(2)</td>
<td>II-43</td>
</tr>
<tr>
<td>Empowered to adjudge a bad-conduct discharge</td>
<td>R.C.M. 201(f)(2)(B)(ii)</td>
<td>II-12</td>
</tr>
<tr>
<td>Summary court-martial</td>
<td>R.C.M. 1301(a)</td>
<td>II-172</td>
</tr>
<tr>
<td>Concealment of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidence, as accessory after the fact</td>
<td>IV. Para. 2c(1)</td>
<td>IV-3</td>
</tr>
<tr>
<td>Offender, as accessory after the fact</td>
<td>IV. Para. 2c(1)</td>
<td>IV-3</td>
</tr>
<tr>
<td>Stolen property</td>
<td>IV. Para. 106</td>
<td>IV-118</td>
</tr>
<tr>
<td>Weapon</td>
<td>IV. Para. 112</td>
<td>IV-121</td>
</tr>
<tr>
<td>Concurrent jurisdiction</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Civilian courts</td>
<td>R.C.M. 201(d)</td>
<td>II-10</td>
</tr>
<tr>
<td>Investigation of offenses, subject to</td>
<td>Appendix 3</td>
<td>A3-1</td>
</tr>
<tr>
<td>Military tribunars</td>
<td>R.C.M. 201(g)</td>
<td>II-12</td>
</tr>
<tr>
<td>Conditional guilty plea</td>
<td>R.C.M. 910(a)(2)</td>
<td>II-101</td>
</tr>
<tr>
<td>Conditions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In pretrial agreements</td>
<td>R.C.M. 705(c)</td>
<td>II-70</td>
</tr>
<tr>
<td>Of suspension</td>
<td>R.C.M. 1108(c)</td>
<td>II-151</td>
</tr>
</tbody>
</table>

Index 12
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>On liberty</td>
<td>R.C.M. 304(a)(1)</td>
<td>II–21</td>
</tr>
<tr>
<td>Procedures</td>
<td>R.C.M. 304</td>
<td>II–20</td>
</tr>
<tr>
<td>Conduct</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cowardly</td>
<td>IV. Para. 23c(5)</td>
<td>IV–33</td>
</tr>
<tr>
<td>Service discrediting, generally</td>
<td>IV. Para. 60c(3)</td>
<td>IV–92</td>
</tr>
<tr>
<td>Unbecoming an officer and gentleman</td>
<td>IV. Para. 59</td>
<td>IV–91</td>
</tr>
<tr>
<td>Conferences, pretrial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused’s presence at</td>
<td>R.C.M. 802(d)</td>
<td>II–78</td>
</tr>
<tr>
<td>Admissions made at</td>
<td>R.C.M. 802(c)</td>
<td>II–78</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 802(e)</td>
<td>II–78</td>
</tr>
<tr>
<td>Limitations</td>
<td>R.C.M. 802(f)</td>
<td>II–78</td>
</tr>
<tr>
<td>Matters on record</td>
<td>R.C.M. 802(b)</td>
<td>II–78</td>
</tr>
<tr>
<td>Rights of parties</td>
<td>R.C.M. 802(c)</td>
<td>II–78</td>
</tr>
<tr>
<td>Confessional stipulations</td>
<td>R.C.M. 705(b)(1)</td>
<td>II–69</td>
</tr>
<tr>
<td>Confessions. See Self-incrimination.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confinement</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attachment of jurisdiction, effecting</td>
<td>R.C.M. 202(c)(2)</td>
<td>II–14</td>
</tr>
<tr>
<td>Capital cases</td>
<td>R.C.M. 1107(f)(4)(D)</td>
<td>II–150</td>
</tr>
<tr>
<td>Deferment of</td>
<td>R.C.M. 1101(c)</td>
<td>II–135</td>
</tr>
<tr>
<td>See also Deferment of confinement.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Escape from</td>
<td>IV. Para. 19</td>
<td>IV–28</td>
</tr>
<tr>
<td>Hard labor without. See Hard labor without confinement.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In lieu of fine</td>
<td>R.C.M. 1113(d)(3)</td>
<td>II–159</td>
</tr>
<tr>
<td>On bread and water or diminished rations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>As nonjudicial punishment</td>
<td>V. Para. 5b(2)(A)(i), (B)(i), c(5)</td>
<td>V–4; V–5</td>
</tr>
<tr>
<td>Authorized punishment in court-martial</td>
<td>R.C.M. 1003(b)(9)</td>
<td>II–124</td>
</tr>
<tr>
<td>Execution</td>
<td>R.C.M. 1113(d)(5)</td>
<td>II–159</td>
</tr>
<tr>
<td>Medical certificate required</td>
<td>R.C.M. 1305(d)</td>
<td>II–176</td>
</tr>
<tr>
<td>Post-trial</td>
<td>R.C.M. 1101</td>
<td>II–135</td>
</tr>
<tr>
<td>Pretrial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Advice to accused</td>
<td>R.C.M. 305(e)</td>
<td>II–23</td>
</tr>
<tr>
<td>Authority to order</td>
<td>R.C.M. 304(b); 305(e)</td>
<td>II–21; II–22</td>
</tr>
<tr>
<td>Conditions of</td>
<td>R.C.M. 304(f)</td>
<td>II–22</td>
</tr>
<tr>
<td>Counsel</td>
<td>R.C.M. 305(e)(3), (f)</td>
<td>II–23</td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 304(a)(4); 305(a)</td>
<td>II–21; II–22</td>
</tr>
<tr>
<td>Grounds</td>
<td>R.C.M. 304(c); 305(d), (h)(2)(B)</td>
<td>II–21; II–22; II–23</td>
</tr>
<tr>
<td>Illegal, remedy for</td>
<td>R.C.M. 305(j)(2), (k)</td>
<td>II–25</td>
</tr>
<tr>
<td>Motions concerning</td>
<td>R.C.M. 906(b)(8)</td>
<td>II–100</td>
</tr>
<tr>
<td>Procedure for ordering</td>
<td>R.C.M. 305</td>
<td>II–22</td>
</tr>
<tr>
<td>Punishment prohibited</td>
<td>R.C.M. 304(f)</td>
<td>II–22</td>
</tr>
<tr>
<td>Release</td>
<td>R.C.M. 305(g)</td>
<td>II–23</td>
</tr>
<tr>
<td>Effect of</td>
<td>R.C.M. 305(k), (1)</td>
<td>II–25</td>
</tr>
<tr>
<td>Required</td>
<td>R.C.M. 707(d)</td>
<td>II–74</td>
</tr>
<tr>
<td>Review of</td>
<td>R.C.M. 305(i), (1)</td>
<td>II–24; II–25</td>
</tr>
<tr>
<td>Sea, effect of being at</td>
<td>R.C.M. 305(m)</td>
<td>II–25</td>
</tr>
<tr>
<td>Speedy trial, effect on</td>
<td>R.C.M. 707(b)(1), (2)</td>
<td>II–73</td>
</tr>
<tr>
<td>Punishment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contempt (Art. 48, UCMJ)</td>
<td>R.C.M. 809(e)</td>
<td>II–84</td>
</tr>
<tr>
<td>Deferment</td>
<td>R.C.M. 1101(e)</td>
<td>II–135</td>
</tr>
<tr>
<td>See also Deferment of confinement.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Subject

Execution ........................................ II–159
General court-martial ...................................... II–11
Generally ........................................ II–12
Place of ........................................ II–150; II–159
Special court-martial ...................................... II–12
Summary court-martial ...................................... II–172
Release from without authority IV. Para. 20 IV–30
Unlawful, as offense ................................... IV. Para. 21 IV–31
Congress, contemptuous words against IV. Para. 12 IV–16
Consent. See Search and seizure.

Conspiracy
See also Principals.
Evidence, statement of co-conspirator ............... III–35
Generally ........................................ IV–5

Constitution of the United States
Conductive condonation of desertion ................. II–78
Constructive enlistment .................................. II–13

Contempt
See also Disrespect.
Power of court-martial ................................... II–75; II–83
Toward noncommissioned, petty, or warrant officer IV. Para. 15 IV–21
Toward public officials ................................ IV. Para. 12 IV–16

Continuances
As remedy for
Failure to notify accused of charges .................. II–31
Failure to notify defense of evidence seized from the accused .................. III–9
Failure to notify defense of immunity or leniency granted to a government witness ............. III–3
Failure to notify defense of prior identification of the accused .................. III–17
Failure to notify defense of statements of the accused ............. III–5
Noncompliance with the discovery requirements .......... II–60
Examination of witness' prior statement, for purpose of .......... II–108
Generally ........................................ II–95
Speedy trial, effect on ................................ II–72

Controlled substances, offenses involving ............ IV. Para. 37 IV–53

Convening authority
Accuser
Disqualifications
To convene general or special courts-martial .......... II–49
To convene summary courts-martial ....................... II–173
To refer charges to general or special courts-martial .......... II–54
Subordinate of, disqualified ............................ II–49

Action by. See Action of convening authority.
Censure of court ....................................... II–5
Changing members ..................................... II–50

Charges and specifications
Authority to change ..................................... II–56
Authority to dispose of .................................. II–32; II–34; II–34; II–41

Command influence, unlawful ......................... II–41

Index 14
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Communications with staff judge advocate</td>
<td>R.C.M. 105(a)</td>
<td>II-5</td>
</tr>
<tr>
<td>Contempt</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Action on</td>
<td>R.C.M. 809(e), (f)</td>
<td>II-84</td>
</tr>
<tr>
<td>Review of</td>
<td>R.C.M. 809(d)</td>
<td>II-84</td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 103(6)</td>
<td>II-1</td>
</tr>
<tr>
<td>Delegation of authority as prohibited</td>
<td>R.C.M. 504(b)(4)</td>
<td>II-49</td>
</tr>
<tr>
<td>Deposition, authority to order</td>
<td>R.C.M. 702(b)</td>
<td>II-61</td>
</tr>
<tr>
<td>Detailing members</td>
<td>R.C.M. 503(a)</td>
<td>II-48</td>
</tr>
<tr>
<td>Disqualification to act as</td>
<td>R.C.M. 504(c); 601(c)</td>
<td>II-49; II-54</td>
</tr>
<tr>
<td>Execution of sentences, authority to order</td>
<td>R.C.M. 1113(b), (c)</td>
<td>II-158</td>
</tr>
<tr>
<td>General court-martial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Action on certain cases by</td>
<td>R.C.M. 1112(f)</td>
<td>II-157</td>
</tr>
<tr>
<td>Constructive condonation of desertion</td>
<td>R.C.M. 907(b)(2)(D)(iii)</td>
<td>II-98</td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 504(b)(1)</td>
<td>II-49</td>
</tr>
<tr>
<td>Disposition of charges by</td>
<td>R.C.M. 407</td>
<td>II-41</td>
</tr>
<tr>
<td>Immunity, authority to grant</td>
<td>R.C.M. 704(c)</td>
<td>II-68</td>
</tr>
<tr>
<td>National security matters, duties regarding</td>
<td>R.C.M. 407(b)</td>
<td>II-41</td>
</tr>
<tr>
<td>Vacation of suspension, action on</td>
<td>R.C.M. 1109(d)(2)</td>
<td>II-154</td>
</tr>
<tr>
<td>Mental capacity or responsibility of accused, inquiry into</td>
<td>R.C.M. 706</td>
<td>II-71</td>
</tr>
<tr>
<td>National security, case affecting disposition</td>
<td>R.C.M. 401(d)</td>
<td>II-33</td>
</tr>
<tr>
<td>Pretrial agreement, authority to enter</td>
<td>R.C.M. 705(a), (d)(4)</td>
<td>II-69, 71</td>
</tr>
<tr>
<td>Pretrial investigation, ordered by</td>
<td>R.C.M. 403(b)(5); 404(e); 405(c); 407(a)(5)</td>
<td>II-34; II-35</td>
</tr>
<tr>
<td>Referral of charges</td>
<td>R.C.M. 403(b)(4); 404(d); 407(a)(4), (6); 601</td>
<td>II-34; II-41; II-54</td>
</tr>
<tr>
<td>Special court-martial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 504(b)(2)</td>
<td>II-49</td>
</tr>
<tr>
<td>Disposition of charges by</td>
<td>R.C.M. 404</td>
<td>II-34</td>
</tr>
<tr>
<td>Staff judge advocate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Communications with</td>
<td>R.C.M. 105(a)</td>
<td>II-5</td>
</tr>
<tr>
<td>Delegation of authority</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Excusal of court members</td>
<td>R.C.M. 505(c)(1)(B)</td>
<td>II-50</td>
</tr>
<tr>
<td>Generally prohibited</td>
<td>R.C.M. 504(b)(4)</td>
<td>II-49</td>
</tr>
<tr>
<td>Successors, included in</td>
<td>R.C.M. 103(6)</td>
<td>II-1</td>
</tr>
<tr>
<td>Summary court-martial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charge sheet, recording receipt</td>
<td>R.C.M. 403(a)</td>
<td>II-33</td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 1302(a)</td>
<td>II-173</td>
</tr>
<tr>
<td>Disposition of charges by</td>
<td>R.C.M. 403(b)</td>
<td>II-34</td>
</tr>
<tr>
<td>Superior authority calling for transmittal of charges from subordinate</td>
<td>R.C.M. 601(f)</td>
<td>II-55</td>
</tr>
<tr>
<td>Superior authority withholding from subordinate the authority to dispose of charges</td>
<td>R.C.M. 306(a); 401(a)</td>
<td>II-26; II-32</td>
</tr>
<tr>
<td>Withdrawal of charges by</td>
<td>R.C.M. 604</td>
<td>II-56</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 705(b)(2)(C)</td>
<td>II-70</td>
</tr>
<tr>
<td>Pretrial agreement, pursuant to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Convening courts-martial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Convening authority.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 504</td>
<td>II-49</td>
</tr>
<tr>
<td>Jurisdictional requisite, as a</td>
<td>R.C.M. 201(b)</td>
<td>II-9</td>
</tr>
<tr>
<td>Summary courts-martial</td>
<td>R.C.M. 1302</td>
<td>II-173</td>
</tr>
<tr>
<td>Convening orders</td>
<td>R.C.M. 505(b)</td>
<td>II-50</td>
</tr>
</tbody>
</table>

Index 15
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Changing</td>
<td>R.C.M. 505(b)</td>
<td>II–50</td>
</tr>
<tr>
<td>Defense, copies to</td>
<td>R.C.M. 701(a)(1)(B)</td>
<td>II–58</td>
</tr>
<tr>
<td>Forms</td>
<td>Appendix 6</td>
<td>A6–1</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 504(d)</td>
<td>II–50</td>
</tr>
<tr>
<td>Summary court-martial</td>
<td>R.C.M. 1302(c)</td>
<td>II–173</td>
</tr>
<tr>
<td>Convictions, prior</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Admissibility in aggravation</td>
<td>R.C.M. 1001(b)(3)</td>
<td>II–120</td>
</tr>
<tr>
<td>Finality of</td>
<td>R.C.M. 1209</td>
<td>II–168</td>
</tr>
<tr>
<td>Impeachment by evidence of</td>
<td>Mil. R. Evid. 609</td>
<td>III–32</td>
</tr>
<tr>
<td>Increasing punishment authorized</td>
<td>R.C.M. 1003(d)(1), (2)</td>
<td>II–127</td>
</tr>
<tr>
<td>Correctional custody</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nonjudicial punishment</td>
<td>V. Para. 5b(2)(A)(ii), (B)(iii), c(4)</td>
<td>V–4; V–5</td>
</tr>
<tr>
<td>Offenses against</td>
<td>IV. Para. 70</td>
<td>IV–98</td>
</tr>
<tr>
<td>Correction of record of trial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>After authentication</td>
<td>R.C.M. 1104(d)</td>
<td>II–142</td>
</tr>
<tr>
<td>Before authentication</td>
<td>R.C.M. 1103(j)</td>
<td>II–139</td>
</tr>
<tr>
<td>Corroboration of confession</td>
<td>Mil. R. Evid. 304(g)</td>
<td>III–6</td>
</tr>
<tr>
<td>Counsel</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Defense counsel; Trial counsel</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appellate</td>
<td>R.C.M. 908(c)(1); 1202</td>
<td>II–100; II–163</td>
</tr>
<tr>
<td>Detailing</td>
<td>R.C.M. 503(c)</td>
<td>II–48</td>
</tr>
<tr>
<td>General courts-martial</td>
<td>R.C.M. 501(b)</td>
<td>II–43</td>
</tr>
<tr>
<td>Special courts-martial</td>
<td>R.C.M. 501(b)</td>
<td>II–43</td>
</tr>
<tr>
<td>Summary courts-martial</td>
<td>R.C.M. 1301(e)</td>
<td>II–172</td>
</tr>
<tr>
<td>Qualifications of</td>
<td>R.C.M. 502(d)</td>
<td>II–44</td>
</tr>
<tr>
<td>Supervision of</td>
<td>R.C.M. 109</td>
<td>II–6</td>
</tr>
<tr>
<td>Suspension of</td>
<td>R.C.M. 109</td>
<td>II–6</td>
</tr>
<tr>
<td>Counseling commission of offense</td>
<td>IV. Para. 1</td>
<td>IV–1</td>
</tr>
<tr>
<td>Countersign, improper use of</td>
<td>IV. Para. 25</td>
<td>IV–38</td>
</tr>
<tr>
<td>Court-martial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 103(8)</td>
<td>II–1</td>
</tr>
<tr>
<td>Types of</td>
<td>R.C.M. 201(f)</td>
<td>II–11</td>
</tr>
<tr>
<td>Court-martial orders. See Promulgating orders.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court of inquiry</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Admissibility of evidence taken in</td>
<td>Mil. R. Evid. 804(b)(1)</td>
<td>III–37</td>
</tr>
<tr>
<td>Application of Rules for Courts-Martial to</td>
<td>I Para. 2(b)(3)</td>
<td>I–1</td>
</tr>
<tr>
<td>Exercise of jurisdiction</td>
<td>I. Para. 2(b)(3)</td>
<td>I–1</td>
</tr>
<tr>
<td>Nonjudicial punishment based on</td>
<td>V. Para. 4d</td>
<td>V–4</td>
</tr>
<tr>
<td>Pretrial investigation, substitute for</td>
<td>R.C.M. 405(b)</td>
<td>II–35</td>
</tr>
<tr>
<td>Procedure</td>
<td>I. Para. 2(b)(3)</td>
<td>I–1</td>
</tr>
<tr>
<td>Subpoena, authority to issue</td>
<td>R.C.M. 703(e)(2)(C)</td>
<td>II–66</td>
</tr>
<tr>
<td>Court of Military Appeals</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Action on decision by</td>
<td>R.C.M. 1204(c)</td>
<td>II–167</td>
</tr>
<tr>
<td>Appeals by United States</td>
<td>R.C.M. 908(e)(3)</td>
<td>II–100</td>
</tr>
<tr>
<td>Cases reviewed by</td>
<td>R.C.M. 1204(a)</td>
<td>II–166</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1204</td>
<td>II–166</td>
</tr>
<tr>
<td>Petition by accused to</td>
<td>R.C.M. 1204(b)</td>
<td>II–166</td>
</tr>
<tr>
<td>Court of Military Review</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Action on decision by</td>
<td>R.C.M. 1203(c)</td>
<td>II–164</td>
</tr>
<tr>
<td>Appeals by United States to</td>
<td>R.C.M. 908(b)(7)</td>
<td>II–100</td>
</tr>
<tr>
<td>Armed force of accused as determining which court reviews</td>
<td>R.C.M. 201(e)(5)</td>
<td>II–11</td>
</tr>
<tr>
<td>Cases reviewed by</td>
<td>R.C.M. 1203(b)</td>
<td>II–164</td>
</tr>
</tbody>
</table>
INDEX

Subject | Ref. | Page
--- | --- | ---
Generally | R.C.M. 1203 | II–164
Notification to accused of decision | R.C.M. 1203(d) | II–165
Cowardly conduct | IV. Para. 23 | IV–32

Crimes

See Offenses; specific topics.

Crimes and offenses not capital | IV. Para. 60 | IV–91

Cross-examination at

Court-martial | Mil. R. Evid. 61 | III–32
Deposition | R.C.M. 702(g)(1)(B), (2)(C) | II–63
Pretrial investigation | R.C.M. 405(f)(6), (b)(1)(A) | II–36; II–38

Cruelty and maltreatment | IV. Para. 17 | IV–25

Culpable negligence, defined | IV. Para. 44c(2)(a)(i) | IV–63

Custody

Correctional. See Correctional custody.

Defined | IV. Para. 19c(3)(a) | IV–29
Escaped from | IV. Para. 19 | IV–28

Damage

Military property | IV. Para. 32 | IV–46
Nonmilitary property | IV. Para. 33 | IV–48

Dangerous weapon, defined | IV. Para. 54c(4)(a)(i) | IV–81

See also Assault.

Death, as punishment

See also Capital case; Capital offense.

Aiding the enemy | IV. Para. 28e | IV–41
Assaulting officer, time of war | IV. Para. 14e(3) | IV–20
Countersign, improper use of | IV. Para. 25e | IV–37
Desertion, time of war | IV. Para. 9e(3) | IV–12
Disobedience of officer, time of war | IV. Para. 14e(3) | IV–20
Execution | R.C.M. 1113(c)(3), (d)(1) | II–158; II–158
General court-martial, power to adjudge | R.C.M. 201(f)(1)(A)(ii), (B)(ii) | II–11
Generally | R.C.M. 1003(b)(11) | II–125
 Mandatory, votes required | R.C.M. 1006(d)(4)(A) | II–131
 Misbehavior before enemy | IV. Para. 23e | IV–35
 Murder | IV. Para. 43e(1) | IV–63
 Mutiny | IV. Para. 18e | IV–27
 Procedures for adjudging | IV. Para. 1004 | II–127
 Rape | IV. Para. 45e(1) | IV–65
 Safeguard, forcing | IV. Para. 26e | IV–38
 Sedition | IV. Para. 18e | IV–27
 Solicitation to desert, mutiny, to commit acts of misbehavior before the enemy, or to commit sedition | IV. Para. 6 | IV–7
 Special court-martial, no power to adjudge | R.C.M. 201(f)(2)(B)(i) | II–12
 Spying | IV. Para. 30e | IV–43
 Summary court-martial, no power to adjudge | R.C.M. 1301(d) | II–172
 Surrender, subordinate compelling | IV. Para. 24e | IV–37

Debt, dishonorably failing to pay | IV. Para. 71 | IV–99

Defendant. See Accused.

Defense counsel

Absence of | R.C.M. 805(c) | II–80
Accused

Inquiry as to rights | R.C.M. 901(d)(4) | II–89
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rights to, generally</td>
<td>R.C.M. 506</td>
<td>II–51</td>
</tr>
<tr>
<td>Announcement of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Absence</td>
<td>R.C.M. 813(a)(7)</td>
<td>II–88</td>
</tr>
<tr>
<td>Detailing</td>
<td>R.C.M. 503(c)(2)</td>
<td>II–49</td>
</tr>
<tr>
<td>Presence</td>
<td>R.C.M. 813(a)(6)</td>
<td>II–88</td>
</tr>
<tr>
<td>Qualifications</td>
<td>R.C.M. 901(d)(2)</td>
<td>II–89</td>
</tr>
<tr>
<td>Appellate</td>
<td>R.C.M. 1202</td>
<td>II–163</td>
</tr>
<tr>
<td>Assistant and associate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Absence of</td>
<td>R.C.M. 805(c)</td>
<td>II–80</td>
</tr>
<tr>
<td>Detailing</td>
<td>R.C.M. 501(b); 503(c)</td>
<td>II–43</td>
</tr>
<tr>
<td>Disqualification</td>
<td>R.C.M. 502(d)(4), (f)</td>
<td>II–45; II–47</td>
</tr>
<tr>
<td>Duties</td>
<td>R.C.M. 502(d)(6)</td>
<td>II–46</td>
</tr>
<tr>
<td>Individual counsel, effect of</td>
<td>R.C.M. 506(b)(3)</td>
<td>II–52</td>
</tr>
<tr>
<td>Oath</td>
<td>R.C.M. 807(b)(1)</td>
<td>II–82</td>
</tr>
<tr>
<td>Qualifications</td>
<td>R.C.M. 502(d)(2)</td>
<td>II–44</td>
</tr>
<tr>
<td>Change of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Announcement</td>
<td>R.C.M. 813(c)</td>
<td>II–88</td>
</tr>
<tr>
<td>Grounds</td>
<td>R.C.M. 505(d)(2); 506(b)(3); (c)</td>
<td>II–51; II–52</td>
</tr>
<tr>
<td>Procedure</td>
<td>R.C.M. 505(b)</td>
<td>II–50</td>
</tr>
<tr>
<td>Civilian</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused's right to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appellate review</td>
<td>R.C.M. 1202</td>
<td>II–163</td>
</tr>
<tr>
<td>Court-martial</td>
<td>R.C.M. 506</td>
<td>II–51</td>
</tr>
<tr>
<td>During interrogation</td>
<td>Mil. R. Evid. 305(d)(2)</td>
<td>III–7</td>
</tr>
<tr>
<td>Pretrial confinement</td>
<td>R.C.M. 305(e)(3)</td>
<td>II–23</td>
</tr>
<tr>
<td>Pretrial investigation</td>
<td>R.C.M. 405(d)(2)(C)</td>
<td>II–36</td>
</tr>
<tr>
<td>Advice to accused at trial concerning right to</td>
<td>R.C.M. 901(d)(4)(A)</td>
<td>II–89</td>
</tr>
<tr>
<td>Disqualification, action on</td>
<td>R.C.M. 901(d)(3)</td>
<td>II–89</td>
</tr>
<tr>
<td>Qualifications</td>
<td>R.C.M. 502(d)(3)</td>
<td>II–44</td>
</tr>
<tr>
<td>Deposition, detailed or assigned for</td>
<td>R.C.M. 702(d)(2)</td>
<td>II–62</td>
</tr>
<tr>
<td>Detailed</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused's right to</td>
<td>R.C.M. 506(a)</td>
<td>II–51</td>
</tr>
<tr>
<td>Change of</td>
<td>R.C.M. 505(a), (b), (d)(2)</td>
<td>II–50; II–51</td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 103(10)</td>
<td>II–3</td>
</tr>
<tr>
<td>Different armed force, counsel from</td>
<td>R.C.M. 503(c)(3)</td>
<td>II–49</td>
</tr>
<tr>
<td>Disqualification, action on</td>
<td>R.C.M. 901(d)(3)</td>
<td>II–89</td>
</tr>
<tr>
<td>Duties</td>
<td>R.C.M. 502(d)(6)</td>
<td>II–46</td>
</tr>
<tr>
<td>Excusal</td>
<td>R.C.M. 505(d)(2); 506(c)</td>
<td>II–51; II–52</td>
</tr>
<tr>
<td>General court-martial</td>
<td>R.C.M. 501(b)</td>
<td>II–43</td>
</tr>
<tr>
<td>Individual military counsel, effect of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 506(b)(3)</td>
<td>II–52</td>
</tr>
<tr>
<td>Investigation, pretrial</td>
<td>R.C.M. 405(d)(2)(B)</td>
<td>II–35</td>
</tr>
<tr>
<td>Investigation, pretrial, right to</td>
<td>R.C.M. 405(d)(2)(A)</td>
<td>II–35</td>
</tr>
<tr>
<td>Motion to retain</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 506(b)(3)</td>
<td>II–52</td>
</tr>
<tr>
<td>Preserved for record</td>
<td>R.C.M. 506(b)(2)</td>
<td>II–95</td>
</tr>
<tr>
<td>When made</td>
<td>R.C.M. 905(b)(6)</td>
<td>II–93</td>
</tr>
<tr>
<td>Orders</td>
<td>R.C.M. 503(c)(2)</td>
<td>II–49</td>
</tr>
<tr>
<td>Pretrial confinement, right to</td>
<td>R.C.M. 305(f)</td>
<td>II–23</td>
</tr>
<tr>
<td>Qualifications of</td>
<td>R.C.M. 502(d)(1)</td>
<td>II–44</td>
</tr>
<tr>
<td>Special court-martial</td>
<td>R.C.M. 501(b)</td>
<td>II–43</td>
</tr>
<tr>
<td>Withdrawal</td>
<td>R.C.M. 505(d)(2)(B); 506(c)</td>
<td>II–51; II–52</td>
</tr>
</tbody>
</table>

Index 18
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disqualification</td>
<td>R.C.M. 502(d)(4); 901(d)(3)</td>
<td>II-45; II-89</td>
</tr>
<tr>
<td>Duties</td>
<td>R.C.M. 502(d)(6)</td>
<td>II-46</td>
</tr>
<tr>
<td>Evaluation of</td>
<td>R.C.M. 104(b)(1)</td>
<td>II-5</td>
</tr>
<tr>
<td>Identification, right to at</td>
<td>Mil. R. Evid. 321(b)(2)</td>
<td>III-17</td>
</tr>
<tr>
<td>Individual military counsel</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused's right to request</td>
<td>R.C.M. 506(a)</td>
<td>II-51</td>
</tr>
<tr>
<td>Advice at trial to accused concerning right to</td>
<td>R.C.M. 901(d)(4)</td>
<td>II-89</td>
</tr>
<tr>
<td>Attorney-client relationship affecting right to</td>
<td>R.C.M. 506(b)(2)</td>
<td>II-52</td>
</tr>
<tr>
<td>Availability to act as</td>
<td>R.C.M. 506(b)(1), (2)</td>
<td>II-51; II-52</td>
</tr>
<tr>
<td>Detailed counsel, excusal of</td>
<td>R.C.M. 506(b)(3)</td>
<td>II-52</td>
</tr>
<tr>
<td>Investigation, pretrial, right to at</td>
<td>R.C.M. 405(d)(2)(B)</td>
<td>II-35</td>
</tr>
<tr>
<td>Motion on request for</td>
<td>R.C.M. 905(b)(6)</td>
<td>II-93</td>
</tr>
<tr>
<td>Pretrial confinement, no right to</td>
<td>R.C.M. 305(f)</td>
<td>II-23</td>
</tr>
<tr>
<td>Request for</td>
<td>R.C.M. 506(b)(2)</td>
<td>II-52</td>
</tr>
<tr>
<td>Qualifications of</td>
<td>R.C.M. 502(d)(3)</td>
<td>II-44</td>
</tr>
<tr>
<td>Interrogation, right to</td>
<td>Mil. R. Evid. 305(d), (e)</td>
<td>III-7</td>
</tr>
<tr>
<td>Member, ineligible to serve as</td>
<td>R.C.M. 912(f)(1)(E)</td>
<td>II-105</td>
</tr>
<tr>
<td>Military judge, disqualified to act as</td>
<td>R.C.M. 902(b)(2)</td>
<td>II-90</td>
</tr>
<tr>
<td>Nonlawyer presence at counsel table</td>
<td>R.C.M. 506(e)</td>
<td>II-52</td>
</tr>
<tr>
<td>Oath</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Announcement of status as to</td>
<td>R.C.M. 901(d)(2)</td>
<td>II-89</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 807(b)</td>
<td>II-82</td>
</tr>
<tr>
<td>Requirement to take</td>
<td>R.C.M. 901(d)(5)</td>
<td>II-90</td>
</tr>
<tr>
<td>Post-trial duties</td>
<td>R.C.M. 502(d)(6)</td>
<td>II-46</td>
</tr>
<tr>
<td>Presence of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 39(a) sessions</td>
<td>R.C.M. 803</td>
<td>II-78</td>
</tr>
<tr>
<td>Findings announcement</td>
<td>R.C.M. 922(a)</td>
<td>II-118</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 805</td>
<td>II-80</td>
</tr>
<tr>
<td>Pretrial conferences</td>
<td>R.C.M. 802</td>
<td>II-78</td>
</tr>
<tr>
<td>Sentence announcement</td>
<td>R.C.M. 1007(a)</td>
<td>II-132</td>
</tr>
<tr>
<td>Pretrial agreement, waiver not permitted</td>
<td>R.C.M. 705(c)(1)(B)</td>
<td>II-70</td>
</tr>
<tr>
<td>Pretrial confinement, right to</td>
<td>R.C.M. 305(f)</td>
<td>II-23</td>
</tr>
<tr>
<td>Privileged communications</td>
<td>Mil. R. Evid. 502</td>
<td>III-21</td>
</tr>
<tr>
<td>Summary courts-martial, right to</td>
<td>R.C.M. 1301(e)</td>
<td>II-172</td>
</tr>
<tr>
<td>Waiver of appellate review, right to consult with</td>
<td>R.C.M. 1110(b)(2)</td>
<td>II-154</td>
</tr>
<tr>
<td>Waiver of right to, in courts-martial</td>
<td>R.C.M. 506(d)</td>
<td>II-52</td>
</tr>
<tr>
<td>Withdrawal of appellate review, right to consult with</td>
<td>R.C.M. 1110(b)(3)</td>
<td>II-155</td>
</tr>
<tr>
<td>Defense of another</td>
<td>R.C.M. 916(e)(5)</td>
<td>II-111</td>
</tr>
<tr>
<td>Defenses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accident</td>
<td>R.C.M. 916(f)</td>
<td>II-111</td>
</tr>
<tr>
<td>Alibi, notice of</td>
<td>R.C.M. 701(b)(1)</td>
<td>II-59</td>
</tr>
<tr>
<td>Burden of proof</td>
<td>R.C.M. 916(b)</td>
<td>II-109</td>
</tr>
<tr>
<td>Coercion</td>
<td>R.C.M. 916(h)</td>
<td>II-111</td>
</tr>
<tr>
<td>Defense of another</td>
<td>R.C.M. 916(e)(5)</td>
<td>II-111</td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 916(a)</td>
<td>II-109</td>
</tr>
<tr>
<td>Duress</td>
<td>R.C.M. 916(h)</td>
<td>II-111</td>
</tr>
<tr>
<td>Entrapment</td>
<td>R.C.M. 916(g)</td>
<td>II-111</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 916</td>
<td>II-109</td>
</tr>
<tr>
<td>Ignorance of fact</td>
<td>R.C.M. 916(j)</td>
<td>II-112</td>
</tr>
<tr>
<td>Ignorance of law</td>
<td>R.C.M. 916(1)(1)</td>
<td>II-113</td>
</tr>
<tr>
<td>Inability</td>
<td>R.C.M. 916</td>
<td>II-112</td>
</tr>
<tr>
<td>Instructions on</td>
<td>R.C.M. 920(e)(3)</td>
<td>II-110</td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>---------------------------------------------------</td>
<td>---------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Justification</td>
<td>R.C.M. 916(c)</td>
<td>II–110</td>
</tr>
<tr>
<td>Lack of mental responsibility</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 916(k)</td>
<td>II–112</td>
</tr>
<tr>
<td>Notice of</td>
<td>R.C.M. 701(b)(2)</td>
<td>II–59</td>
</tr>
<tr>
<td>Mistake of fact</td>
<td>R.C.M. 916(j)</td>
<td>II–112</td>
</tr>
<tr>
<td>Mistake of law</td>
<td>R.C.M. 916(1)(1)</td>
<td>II–113</td>
</tr>
<tr>
<td>Obedience to orders</td>
<td>R.C.M. 916(d)</td>
<td>II–110</td>
</tr>
<tr>
<td>Self-defense</td>
<td>R.C.M. 916(e)</td>
<td>II–110</td>
</tr>
<tr>
<td>Voluntary intoxication</td>
<td>R.C.M. 916(1)(2)</td>
<td>II–113</td>
</tr>
<tr>
<td>Withdrawn, effect of notice</td>
<td>R.C.M. 701(b)(5)</td>
<td>II–60</td>
</tr>
<tr>
<td>Deferment of confinement</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Action of convening authority</td>
<td>R.C.M. 1107(f)(4)(E)</td>
<td>II–150</td>
</tr>
<tr>
<td>Contempt cases</td>
<td>R.C.M. 809(e)</td>
<td>II–84</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1101(c)</td>
<td>II–135</td>
</tr>
<tr>
<td>Orders</td>
<td>R.C.M. 1101(c)(4); 1107(f)(4)(E)</td>
<td>II–135; II–150</td>
</tr>
<tr>
<td>Termination of</td>
<td>R.C.M. 1101(c)(6)</td>
<td>II–136</td>
</tr>
<tr>
<td>Defraud</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Fraud.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Burning with intent to</td>
<td>IV, Para., 67</td>
<td>IV–97</td>
</tr>
<tr>
<td>Degradation questions</td>
<td>Mil. R. Evid. 303</td>
<td>III–4</td>
</tr>
<tr>
<td>Delay</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Continuances.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delay</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Government appeals</td>
<td>R.C.M. 908(b)(1)</td>
<td>II–99</td>
</tr>
<tr>
<td>Responsibility for, as offense</td>
<td>IV. Para. 22</td>
<td>IV–31</td>
</tr>
<tr>
<td>Speedy trial</td>
<td>R.C.M. 707(c)</td>
<td>II–73</td>
</tr>
<tr>
<td>Delegation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authority to impose pretrial restraint</td>
<td>R.C.M. 304(b)(3)</td>
<td>II–21</td>
</tr>
<tr>
<td>Convening courts-martial, power to</td>
<td>R.C.M. 504(b)(4)</td>
<td>II–49</td>
</tr>
<tr>
<td>Excusal of members</td>
<td>R.C.M. 505(c)(1)(B)</td>
<td>II–50</td>
</tr>
<tr>
<td>Nonjudicial punishment</td>
<td>V. Para. 2c</td>
<td>V–2</td>
</tr>
<tr>
<td>Deliberations and voting</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Capital cases</td>
<td>R.C.M. 1004(b)(7)</td>
<td>II–128</td>
</tr>
<tr>
<td>Contempt</td>
<td>R.C.M. 809(c)(2)(B)</td>
<td>II–84</td>
</tr>
<tr>
<td>Findings</td>
<td>R.C.M. 921</td>
<td>II–117</td>
</tr>
<tr>
<td>Interlocutory questions, special court-martial without military judge</td>
<td>R.C.M. 801(e)(3)</td>
<td>II–76</td>
</tr>
<tr>
<td>Military judge, presence during</td>
<td>R.C.M. 805(a)</td>
<td>II–80</td>
</tr>
<tr>
<td>Privilege protecting</td>
<td>Mil. R. Evid. 509</td>
<td>III–30</td>
</tr>
<tr>
<td>Exceptions to</td>
<td>Mil. R. Evid. 606</td>
<td>III–31</td>
</tr>
<tr>
<td>Sentencing</td>
<td>R.C.M. 1006</td>
<td>II–131</td>
</tr>
<tr>
<td>Delivering less than amount called for by receipt</td>
<td>IV. Para. 58</td>
<td>IV–87</td>
</tr>
<tr>
<td>Deposition</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Admissibility of</td>
<td>Mil. R. Evid. 804(b)(1); R.C.M. 1001(b)(4)</td>
<td>III–37; II–121</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 702</td>
<td>II–61</td>
</tr>
<tr>
<td>Objections</td>
<td>R.C.M. 702(h)</td>
<td>II–63</td>
</tr>
<tr>
<td>Officer</td>
<td>R.C.M. 702(d)(1), (f)</td>
<td>II–62</td>
</tr>
<tr>
<td>Oral</td>
<td>R.C.M. 702(g)(1), (h)(2)</td>
<td>II–63; 64</td>
</tr>
<tr>
<td>Procedure</td>
<td>R.C.M. 702(g)</td>
<td>II–63</td>
</tr>
<tr>
<td>Request for</td>
<td>R.C.M. 702(c)</td>
<td>II–61</td>
</tr>
<tr>
<td>Who may order</td>
<td>R.C.M. 702(b)</td>
<td>II–61</td>
</tr>
<tr>
<td>Witnesses, subpoena</td>
<td>Art. 47, UCMJ; Appendix 7</td>
<td>A2–13; A7–1</td>
</tr>
</tbody>
</table>
## INDEX  

### Subject  
- **Written**  
- **Dereliction in the performance of duty**  
- **Desertion**  
  - Apprehend deserter, authority to  
  - Attempted  
  - Generally  
  - Solicitation to commit  
- **Destroying**  
  - Mail  
  - Military property  
  - Nonmilitary property  
  - Offense  
  - Reparation for  
- **Detail**  
  - Bailiff  
  - Clerk  
  - Defense counsel  
  - Defined  
  - Escort  
  - Interpreter  
  - Members  
  - Military judge  
  - Orderly  
  - Orders  
    - Amending  
    - Appointing counsel  
    - Appointing military judge  
    - Convening  
  - Reporter  
  - Trial counsel  
- **Detention, unlawful**  
- **Discharge**  
  - See also Bad-conduct discharge; Dishonorable discharge.  
  - Effecting fraudulent  
  - Firearms  
    - Negligent  
    - Willful  
  - Fraudulent  
- **Disclosure and discovery**  
  - Aggravating circumstances, notice in capital cases  
  - Alibi defense  
  - Amending orders  
  - Charges, papers, accompanying  
  - Classified or privileged government information, intent to disclose at trial  
  - Continuing duty  
  - Convening orders  
  - Convictions, prior  
    - Accused, used against  
    - Witnesses, impeachment by convictions older than 10 years, intent to use  
  - Defense, disclosure by, generally  

### Ref.  
- R.C.M. 702(g)(2), (h)(3)  
- R.C.M. 302(b)(3)  
- R.C.M. 501(c)  
- R.C.M. 503(b); 503(c)  
- R.C.M. 505(b)  
- R.C.M. 503(c)(2)  
- R.C.M. 503(b)(2)  
- R.C.M. 504(d)  
- R.C.M. 501(b); 503(c)  
- R.C.M. 1004(b)(1)  
- R.C.M. 104(b)(1)  
- R.C.M. 701(a)(1)(A)  
- R.C.M. 701(a)(1)(B)  
- R.C.M. 701(d)  
- R.C.M. 701(a)(1)(B)  
- Mil. R. Evid. 505(h); 506(h)  
- Mil. R. Evid. 609(b)  
- Art. 139, UCMJ  

### Page  
- II–63; 64  
- II–19  
- IV–5; IV–9  
- IV–7  
- IV–110  
- IV–46  
- IV–48  
- A2–29  
- II–43  
- II–43  
- II–43; II–48  
- II–1  
- II–43  
- II–43  
- II–48  
- II–43  
- II–43  
- II–50  
- II–49  
- II–48  
- II–50  
- II–43  
- II–48; II–43  
- IV–31  
- IV–9  
- IV–104  
- IV–104  
- IV–8  
- III–25; III–28  
- II–60  
- II–58  
- III–39  
- II–59
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defense, intent to use insanity</td>
<td>R.C.M. 701(b)(2)</td>
<td>II–59</td>
</tr>
<tr>
<td>Defense, withdrawn, inadmissibility</td>
<td>R.C.M. 701(b)(5)</td>
<td>II–60</td>
</tr>
<tr>
<td>Deposition, witness statements</td>
<td>R.C.M. 702(g)(1)(B)</td>
<td>II–63</td>
</tr>
<tr>
<td>Documents</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In defense possession</td>
<td>R.C.M. 701(b)(3)</td>
<td>II–59</td>
</tr>
<tr>
<td>In government possession</td>
<td>R.C.M. 701(a)(2)(A)</td>
<td>II–58</td>
</tr>
<tr>
<td>Evidence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Access to</td>
<td>R.C.M. 701(c)</td>
<td>II–60</td>
</tr>
<tr>
<td>Favorable to defense</td>
<td>R.C.M. 701(a)(6)</td>
<td>II–58</td>
</tr>
<tr>
<td>Prior identifications of the accused</td>
<td>Mil. R. Evid. 321(c)(1)</td>
<td>III–17</td>
</tr>
<tr>
<td>Seized from the accused</td>
<td>Mil. R. Evid. 311(d)(1)</td>
<td>III–9</td>
</tr>
<tr>
<td>Examinations, physical</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In defense possession</td>
<td>R.C.M. 701(b)(4)</td>
<td>II–59</td>
</tr>
<tr>
<td>In government possession</td>
<td>R.C.M. 701(a)(2)(B)</td>
<td>II–58</td>
</tr>
<tr>
<td>Foreign law, intent to request judicial notice of</td>
<td>Mil. R. Evid. 201A(b)</td>
<td>III–2</td>
</tr>
<tr>
<td>Mental examinations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In defense possession</td>
<td>R.C.M. 701(b)(4)</td>
<td>II–59</td>
</tr>
<tr>
<td>In government possession</td>
<td>R.C.M. 701(a)(2)(B)</td>
<td>II–58</td>
</tr>
<tr>
<td>Statements of accused related to</td>
<td>R.C.M. 706(c)(5); Mil. R. Evid. 302</td>
<td>II–72; III–4</td>
</tr>
<tr>
<td>Military judge, regulation of</td>
<td>R.C.M. 701(g)</td>
<td>II–60</td>
</tr>
<tr>
<td>Military Rules of Evidence, pursuant to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidence seized from the accused</td>
<td>Mil. R. Evid. 311(d)(1)</td>
<td>III–9</td>
</tr>
<tr>
<td>Prior identifications of the accused</td>
<td>Mil. R. Evid. 321(c)(1)</td>
<td>III–17</td>
</tr>
<tr>
<td>Statements of the accused</td>
<td>Mil. R. Evid. 304(d)(1)</td>
<td>III–5</td>
</tr>
<tr>
<td>Motion relating to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 906(b)(7)</td>
<td>II–96</td>
</tr>
<tr>
<td>Waiver</td>
<td>R.C.M. 905(e)</td>
<td>II–94</td>
</tr>
<tr>
<td>When made</td>
<td>R.C.M. 905(b)(4)</td>
<td>II–93</td>
</tr>
<tr>
<td>Noncompliance, remedy for</td>
<td>R.C.M. 701(g)(3)</td>
<td>II–60</td>
</tr>
<tr>
<td>Objects</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In defense possession</td>
<td>R.C.M. 701(b)(3)</td>
<td>II–59</td>
</tr>
<tr>
<td>In government possession</td>
<td>R.C.M. 701(a)(2)(A)</td>
<td>II–58</td>
</tr>
<tr>
<td>Orders, protective</td>
<td>R.C.M. 701(g)(2)</td>
<td>II–60</td>
</tr>
<tr>
<td>Photographs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In defense possession</td>
<td>R.C.M. 701(b)(3)</td>
<td>II–59</td>
</tr>
<tr>
<td>In government possession</td>
<td>R.C.M. 701(a)(2)(A)</td>
<td>II–58</td>
</tr>
<tr>
<td>Preparation for trial, opportunity</td>
<td>R.C.M. 701(e)</td>
<td>II–60</td>
</tr>
<tr>
<td>Prior statements of witnesses</td>
<td>R.C.M. 914</td>
<td>II–108</td>
</tr>
<tr>
<td>Privileged information</td>
<td>R.C.M. 701(f)</td>
<td>II–60</td>
</tr>
<tr>
<td>See also Evidence, Privileges.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Psychiatric experts, intent to use</td>
<td>R.C.M. 701(b)(2)</td>
<td>II–59</td>
</tr>
<tr>
<td>Regulation of</td>
<td>R.C.M. 701(g)</td>
<td>II–60</td>
</tr>
<tr>
<td>Remedy for noncompliance</td>
<td>R.C.M. 701(g)(3)</td>
<td>II–60</td>
</tr>
<tr>
<td>Sexual behavior of victim, intent to offer evidence of</td>
<td>Mil. R. Evid. 412(c)</td>
<td>III–20</td>
</tr>
<tr>
<td>Statements relating to an offense</td>
<td>R.C.M. 701(a)(1)(C)</td>
<td>II–58</td>
</tr>
<tr>
<td>Statements of the accused</td>
<td>Mil. R. Evid. 304(d)(1)</td>
<td>III–4</td>
</tr>
<tr>
<td>Tests</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In defense possession</td>
<td>R.C.M. 701(b)(4)</td>
<td>II–59</td>
</tr>
<tr>
<td>In government possession</td>
<td>R.C.M. 701(a)(2)(B)</td>
<td>II–58</td>
</tr>
<tr>
<td>Trial counsel, disclosure by, generally</td>
<td>R.C.M. 701(a)</td>
<td>II–58</td>
</tr>
<tr>
<td>Witnesses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Access to</td>
<td>R.C.M. 701(e)</td>
<td>II–60</td>
</tr>
</tbody>
</table>
### INDEX

<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accused's limited testimony on motion, intent to use</td>
<td>Mil. R. Evid. 304(f); 311(f); 321(e)</td>
<td>III–5; III–10; III–18</td>
</tr>
<tr>
<td>Alibi, defense</td>
<td>R.C.M. 701(b)(1)</td>
<td>II–59</td>
</tr>
<tr>
<td>Failure to call</td>
<td>R.C.M. 701(c)</td>
<td>II–60</td>
</tr>
<tr>
<td>Merits</td>
<td>R.C.M. 701(a)(3)(A)</td>
<td>II–58</td>
</tr>
<tr>
<td>Prior statements of</td>
<td>R.C.M. 914</td>
<td>II–108</td>
</tr>
<tr>
<td>Psychiatric experts</td>
<td>R.C.M. 701(b)(2)</td>
<td>II–59</td>
</tr>
<tr>
<td>Rebuttal</td>
<td>R.C.M. 701(a)(3)(B)</td>
<td>II–58</td>
</tr>
<tr>
<td>Sentencing</td>
<td>R.C.M. 701(a)(5)(B)</td>
<td>II–58</td>
</tr>
<tr>
<td>Work product of counsel</td>
<td>R.C.M. 701(f)</td>
<td>II–60</td>
</tr>
<tr>
<td>Discreditable conduct of a nature to bring on armed forces</td>
<td>IV. Para. 60c(3)</td>
<td>IV–92</td>
</tr>
<tr>
<td>Dishonorable discharge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Death, included in sentence of</td>
<td>R.C.M. 1004(e)</td>
<td>II–129</td>
</tr>
<tr>
<td>Execution of</td>
<td>R.C.M. 1113(c)(1)</td>
<td>II–158</td>
</tr>
<tr>
<td>General courts-martial, power to adjudge</td>
<td>R.C.M. 201(f)(1)(A)(ii)</td>
<td>II–11</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1003(b)(10)(B)</td>
<td>II–125</td>
</tr>
<tr>
<td>Previous convictions authorizing</td>
<td>R.C.M. 1003(d)(1)</td>
<td>II–127</td>
</tr>
<tr>
<td>Special courts-martial, no power to adjudge</td>
<td>R.C.M. 201(f)(2)(B)(i)</td>
<td>II–11</td>
</tr>
<tr>
<td>Summary courts-martial, no power to adjudge</td>
<td>R.C.M. 1301(d)</td>
<td>II–172</td>
</tr>
<tr>
<td>Dishonorably failing to maintain funds</td>
<td>IV. Para. 68</td>
<td>IV–97</td>
</tr>
<tr>
<td>Dishonorably failing to pay debt</td>
<td>IV. Para. 71</td>
<td>IV–99</td>
</tr>
<tr>
<td>Disloyal statements</td>
<td>IV. Para. 72</td>
<td>IV–100</td>
</tr>
<tr>
<td>Dismissal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charges. See Charges and specifications.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Punishment</td>
<td>R.C.M. 1004(e)</td>
<td>II–129</td>
</tr>
<tr>
<td>Death, included in sentence of</td>
<td>R.C.M. 1113(c)(2)</td>
<td>II–158</td>
</tr>
<tr>
<td>Execution of</td>
<td>R.C.M. 201(f)(1)(A)(iii)</td>
<td>II–11</td>
</tr>
<tr>
<td>General courts-martial, power to adjudge</td>
<td>R.C.M. 1003(b)(10)(A)</td>
<td>II–124</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 201(f)(2)(B)(ii)</td>
<td>II–11</td>
</tr>
<tr>
<td>Disobedience of orders</td>
<td>IV. Para. 16</td>
<td>IV–23</td>
</tr>
<tr>
<td>Failure to obey</td>
<td>IV. Para. 14</td>
<td>IV–18</td>
</tr>
<tr>
<td>Willful</td>
<td>IV. Para. 15</td>
<td>IV–21</td>
</tr>
<tr>
<td>Commissioned officer</td>
<td>IV. Para. 16</td>
<td>IV–23</td>
</tr>
<tr>
<td>Noncommissioned, petty, or warrant officer</td>
<td>IV. Para. 73</td>
<td>IV–100</td>
</tr>
<tr>
<td>Disorderly conduct</td>
<td>IV. Para. 32</td>
<td>IV–46</td>
</tr>
<tr>
<td>Disposition of charges, generally</td>
<td>R.C.M. 401</td>
<td>II–32</td>
</tr>
<tr>
<td>Disposition of military property, wrongful</td>
<td>IV. Para. 32</td>
<td>IV–46</td>
</tr>
<tr>
<td>Disposition of offenses, generally</td>
<td>R.C.M. 306</td>
<td>II–26</td>
</tr>
<tr>
<td>Disposition of record of trial after action</td>
<td>R.C.M. 1111</td>
<td>II–156</td>
</tr>
<tr>
<td>Disqualification</td>
<td>R.C.M. 502(f)</td>
<td>II–47</td>
</tr>
<tr>
<td>See also specific topics.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discovery of, as to detailed personnel</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Disrespect</td>
<td>IV. Para. 13c(3)</td>
<td>IV–18</td>
</tr>
<tr>
<td>Defined</td>
<td>IV. Para. 104</td>
<td>IV–117</td>
</tr>
<tr>
<td>Sentinel or lookout</td>
<td>IV. Para. 104</td>
<td>IV–117</td>
</tr>
<tr>
<td>Superior commissioned officer</td>
<td>IV. Para. 13</td>
<td>IV–17</td>
</tr>
<tr>
<td>Noncommissioned, petty, or warrant officer</td>
<td>IV. Para. 15</td>
<td>IV–21</td>
</tr>
<tr>
<td>Distribution of controlled substances</td>
<td>IV. Para. 37</td>
<td>IV–53</td>
</tr>
<tr>
<td>Docketing</td>
<td>R.C.M. 801(a)(1)</td>
<td>II–75</td>
</tr>
<tr>
<td>Documents</td>
<td>Mil. R. Evid. 901</td>
<td>III–38</td>
</tr>
<tr>
<td>Authentication requirement</td>
<td>IV. Para. 31</td>
<td>IV–45</td>
</tr>
<tr>
<td>False</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-----------------------</td>
<td>------</td>
</tr>
<tr>
<td>Hearsay exceptions, declarant unavailable</td>
<td>Mil. R. Evid. 804</td>
<td>III-37</td>
</tr>
<tr>
<td>Hearsay exceptions, generally</td>
<td>Mil. R. Evid. 803</td>
<td>III-35</td>
</tr>
<tr>
<td>Hearsay inadmissible</td>
<td>Mil. R. Evid. 802</td>
<td>III-35</td>
</tr>
<tr>
<td>Original needed</td>
<td>Mil. R. Evid. 1002</td>
<td>III-40</td>
</tr>
<tr>
<td>Self-authentication</td>
<td>Mil. R. Evid. 902</td>
<td>III-39</td>
</tr>
<tr>
<td><strong>Double jeopardy. See Former jeopardy.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Draft, share or bank. See Checks.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Drinking liquor with prisoner</td>
<td>IV. Para. 74</td>
<td>IV-101</td>
</tr>
<tr>
<td>Driving, drunken or reckless</td>
<td>IV. Para. 35</td>
<td>IV-52</td>
</tr>
<tr>
<td><strong>Drugs</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Inspection for</td>
<td>Mil. R. Evid. 313(b)</td>
<td>III-11</td>
</tr>
<tr>
<td>Offenses involving illegal</td>
<td>IV. Para. 37</td>
<td>IV-53</td>
</tr>
<tr>
<td><strong>Drunk</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Intoxication.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>And disorderly</td>
<td>IV. Para. 73</td>
<td>IV-100</td>
</tr>
<tr>
<td>Defined</td>
<td>IV. Para. 35c(3)</td>
<td>IV-51</td>
</tr>
<tr>
<td>Driving</td>
<td>IV. Para. 35</td>
<td>IV-51</td>
</tr>
<tr>
<td>On duty</td>
<td>IV. Para. 36</td>
<td>IV-52</td>
</tr>
<tr>
<td>On station</td>
<td>IV. Para. 73</td>
<td>IV-100</td>
</tr>
<tr>
<td>Prisoner</td>
<td>IV. Para. 75</td>
<td>IV-101</td>
</tr>
<tr>
<td>Sentinel or lookout</td>
<td>IV. Para. 38</td>
<td>IV-56</td>
</tr>
<tr>
<td><strong>Drunkeness, incapacitation for performance of duties through</strong></td>
<td>IV. Para. 76</td>
<td>IV-101</td>
</tr>
<tr>
<td><strong>Dueling</strong></td>
<td>IV. Para. 39</td>
<td>IV-57</td>
</tr>
<tr>
<td><strong>Dupliciousness, in charging</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Charges and specifications.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Motion to sever</td>
<td>R.C.M. 906(b)(5)</td>
<td>II-96</td>
</tr>
<tr>
<td><strong>Duress</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Duress</td>
<td>R.C.M. 916(h)</td>
<td>II-111</td>
</tr>
<tr>
<td><strong>Duty</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defined</td>
<td>IV. Para. 36c(2)</td>
<td>IV-52</td>
</tr>
<tr>
<td>Dereliction in the performance of</td>
<td>IV. Para. 16</td>
<td>IV-23</td>
</tr>
<tr>
<td>Drunk on</td>
<td>IV. Para. 36</td>
<td>IV-52</td>
</tr>
<tr>
<td>Going from place of</td>
<td>IV. Para. 10</td>
<td>IV-12</td>
</tr>
<tr>
<td>To obey orders</td>
<td>IV. Para. 16c2(c)</td>
<td>IV-24</td>
</tr>
<tr>
<td><strong>Dying declarations</strong></td>
<td>Mil. R. Evid. 804(b)(2)</td>
<td>III-38</td>
</tr>
<tr>
<td><strong>Eavesdropping</strong></td>
<td>Mil. R. Evid. 317</td>
<td>III-16</td>
</tr>
<tr>
<td><strong>Effecting unlawful enlistment, appointment, or separation</strong></td>
<td>IV. Para. 8</td>
<td>IV-9</td>
</tr>
<tr>
<td><strong>Efficiency reports, members, military judge, counsel</strong></td>
<td>R.C.M. 104(b)</td>
<td>II-5</td>
</tr>
<tr>
<td><strong>Elements of offense</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also specific offenses.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Instruction on</td>
<td>R.C.M. 920(e)(1), (2)</td>
<td>II-116</td>
</tr>
<tr>
<td>Lesser included offenses</td>
<td>IV. Para. 2b(1)</td>
<td>IV-2</td>
</tr>
<tr>
<td>Specification, alleging</td>
<td>R.C.M. 307(c)(1), (3)</td>
<td>II-28</td>
</tr>
<tr>
<td><strong>Embezzlement</strong></td>
<td>IV. Para. 46</td>
<td>IV-65</td>
</tr>
<tr>
<td><strong>Emergency searches</strong></td>
<td>Mil. R. Evid. 314(i)</td>
<td>III-13</td>
</tr>
<tr>
<td><strong>Endangering command, unit, place, or military property</strong></td>
<td>IV. Para. 23</td>
<td>IV-32</td>
</tr>
<tr>
<td><strong>Enemy</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aiding</td>
<td>IV. Para. 28</td>
<td>IV-40</td>
</tr>
<tr>
<td>Commission, military, jurisdiction over</td>
<td>I. Para. 2(b)(2); R.C.M. 201(f)(1)(B)</td>
<td>I-1; II-11</td>
</tr>
<tr>
<td>Communicating with</td>
<td>IV. Para. 28</td>
<td>IV-40</td>
</tr>
<tr>
<td>Confinement with</td>
<td>Art. 12, UCMJ</td>
<td>A2-4</td>
</tr>
<tr>
<td>Defined</td>
<td>IV. Para. 23c1(b)</td>
<td>IV-34</td>
</tr>
<tr>
<td>Failing to engage</td>
<td>IV. Para. 23</td>
<td>IV-32</td>
</tr>
</tbody>
</table>

**Index 24**
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Military government, subject to</td>
<td>I. Para. 2(a)(3)</td>
<td>I-1</td>
</tr>
<tr>
<td>Misbehavior before</td>
<td>IV. Para. 23</td>
<td>IV-32</td>
</tr>
<tr>
<td>Prisoner in hands of, misconduct</td>
<td>IV. Para. 29</td>
<td>IV-42</td>
</tr>
<tr>
<td>Property taken from</td>
<td>IV. Para. 27</td>
<td>IV-38</td>
</tr>
<tr>
<td>Running away before</td>
<td>IV. Para. 23</td>
<td>IV-32</td>
</tr>
<tr>
<td>Spying</td>
<td>IV. Para. 30</td>
<td>IV-43</td>
</tr>
<tr>
<td>Enlisted persons</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Detailed to serve as court members</td>
<td>R.C.M. 503(a)(2)</td>
<td>II-48</td>
</tr>
<tr>
<td>Request by accused for court members</td>
<td>R.C.M. 503(a)(2)</td>
<td>II-48</td>
</tr>
<tr>
<td>Restraint of, who may order</td>
<td>R.C.M. 304(b)(2)</td>
<td>II-21</td>
</tr>
<tr>
<td>Unit, same as accused for court members</td>
<td>R.C.M. 912(f)(1)(B), (4)</td>
<td>II-105</td>
</tr>
<tr>
<td>Enlistment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constructive</td>
<td>Art. 2(c), UCMJ</td>
<td>A2-2</td>
</tr>
<tr>
<td>Desertion, effect</td>
<td>IV. Para. 9e(1)(d)</td>
<td>IV-11</td>
</tr>
<tr>
<td>Fraudulent</td>
<td>IV. Para. 7</td>
<td>IV-8</td>
</tr>
<tr>
<td>Unlawful, effecting</td>
<td>IV. Para. 8</td>
<td>IV-9</td>
</tr>
<tr>
<td>Entrapment</td>
<td>R.C.M. 916(g)</td>
<td>II-111</td>
</tr>
<tr>
<td>Entry, unlawful</td>
<td>IV. Para. 111</td>
<td>IV-121</td>
</tr>
<tr>
<td>Escalator clause</td>
<td>R.C.M. 1003(d)</td>
<td>II-127</td>
</tr>
<tr>
<td>Escape</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assisting another to</td>
<td>IV. Para. 2c(1)</td>
<td>IV-3</td>
</tr>
<tr>
<td>Confinement</td>
<td>IV. Para. 19</td>
<td>IV-28</td>
</tr>
<tr>
<td>Correctional custody</td>
<td>IV. Para. 70</td>
<td>IV-98</td>
</tr>
<tr>
<td>Custody</td>
<td>IV. Para. 19</td>
<td>IV-28</td>
</tr>
<tr>
<td>Prisoner of war</td>
<td>IV. Para. 28c(3)</td>
<td>IV-40</td>
</tr>
<tr>
<td>Suffering prisoner to</td>
<td>IV. Para. 20</td>
<td>IV-30</td>
</tr>
<tr>
<td>Escort</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Designation by military judge</td>
<td>R.C.M. 913(c)(3)</td>
<td>II-107</td>
</tr>
<tr>
<td>Detailing</td>
<td>R.C.M. 501(e)</td>
<td>II-43</td>
</tr>
<tr>
<td>Disqualification</td>
<td>R.C.M. 502(e)(2), (f)</td>
<td>II-47</td>
</tr>
<tr>
<td>Duties</td>
<td>R.C.M. 502(e)(3)(C); 913(c)(3)</td>
<td>II-47; II-107</td>
</tr>
<tr>
<td>Oath</td>
<td>R.C.M. 807(b)</td>
<td>II-82</td>
</tr>
<tr>
<td>Qualifications</td>
<td>R.C.M. 502(e)(1)</td>
<td>II-47</td>
</tr>
<tr>
<td>Views and inspections</td>
<td>R.C.M. 913(c)(3)</td>
<td>II-107</td>
</tr>
<tr>
<td>Espionage</td>
<td>IV. Para. 30</td>
<td>IV-43</td>
</tr>
<tr>
<td>Solicitation to commit</td>
<td>IV. Para. 30a</td>
<td>IV-44</td>
</tr>
<tr>
<td>Evidence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Search and seizure; Self-incrimination</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Absence of entry in records</td>
<td>Mil. R. Evid. 803(7)</td>
<td>III-35</td>
</tr>
<tr>
<td>Absence of public record or entry</td>
<td>Mil. R. Evid. 803(10)</td>
<td>III-36</td>
</tr>
<tr>
<td>Access to</td>
<td>R.C.M. 701(e)</td>
<td>II-60</td>
</tr>
<tr>
<td>Accident, evidence of other crimes, wrongs, or acts to prove absence</td>
<td>Mil. R. Evid. 404(b)</td>
<td>III-19</td>
</tr>
<tr>
<td>Accused</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Character of</td>
<td>Mil. R. Evid. 404(a)(1)</td>
<td>III-18</td>
</tr>
<tr>
<td>Favorable to, disclosure by trial counsel</td>
<td>R.C.M. 701(a)(6)</td>
<td>II-58</td>
</tr>
<tr>
<td>Testimony by, concerning admissibility of an admission or confession</td>
<td>Mil. R. Evid. 304(f)</td>
<td>III-6</td>
</tr>
<tr>
<td>Testimony by, concerning admissibility of evidence obtained from an</td>
<td>Mil. R. Evid. 311(f)</td>
<td>III-10</td>
</tr>
<tr>
<td>Testimony by, concerning admissibility of eyewitness</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Subject
Identification evidence ................................................. Mil. R. Evid. 321(c) III–18
Testimony upon preliminary matter, generally Mil. R. Evid. 104(d) III–2
Adjudicative facts ......................................................... Mil. R. Evid. 201 III–2
Admissibility
Effect of relevancy upon Mil. R. Evid. 402; 403 III–18
Erroneous rulings, effect of Mil. R. Evid. 103(a) III–1
For limited purpose Mil. R. Evid. 105 III–2
Motion as to Mil. R. Evid. 609(c) II–97
Preliminary determinations concerning Mil. R. Evid. 104(a) III–1
Admissions. See Self-Incrimination.
Affidavits Mil. R. Evid. 405(c) III–19
Amendments to the Military Rules of Evidence Mil. R. Evid. 1102 III–41
Analysis of the Military Rules of Evidence Appendix 21 A21–1
Ancient documents Mil. R. Evid. 803(16) III–36
Annulment of conviction, effect on impeachment Mil. R. Evid. 609(c) III–32
Appeal, effect on impeachment by evidence of conviction Mil. R. Evid. 609(e) III–32
Applicability of rules
Military Rules of Evidence Mil. R. Evid. 101(a); 1101(a) III–1; III–41
Other evidentiary rules Mil. R. Evid. 101(b) III–1
Attorney-client privilege Mil. R. Evid. 502 III–21
Authentication and identification
Attesting certificates Mil. R. Evid. 902(4)(a) III–40
Generally Mil. R. Evid. 901(a) III–38
Illustrations of Mil. R. Evid. 901(b) III–38
Self-authentication Mil. R. Evid. 902 III–39
Subscribing witness' testimony unnecessary Mil. R. Evid. 903 III–40
Availability of a witness, determination of Mil. R. Evid. 104(a) III–1
Baptismal certificates Mil. R. Evid. 803(12) III–36
Best evidence rule. See Contents of writings, recordings, and photographs, this heading.
Bias or prejudice
Compromise and offer to compromise, admissibility to prove Mil. R. Evid. 408 III–19
Evidence of bias to impeach Mil. R. Evid. 608(c) III–31
Exclusion of unfairly prejudicial evidence Mil. R. Evid. 403 III–18
Burden of proof. See Burden of proof.
Business entries Mil. R. Evid. 803(6) III–35
Certificate of rehabilitation, effect on impeachment Mil. R. Evid. 609(c) III–32
Chaplain, privileged communications to Mil. R. Evid. 503 III–22
Character
Inadmissibility to prove conduct; exceptions Mil. R. Evid. 404 III–18
Methods of proving Mil. R. Evid. 405 III–19
Circumstantial Mil. R. Evid. 901(b) II–115
Classified information, privilege concerning Mil. R. Evid. 505 III–23
Clergyman
Defined Mil. R. Evid. 503(b)(1) III–22
Privileged communications to Mil. R. Evid. 503(a) III–22
Co-accused, statements at joint trial Mil. R. Evid. 306 III–8
Co-conspirator, statements of Mil. R. Evid. 801(d)(2)(E) III–35
Commercial publications Mil. R. Evid. 803(17) III–36
Common law rules, applicability Mil. R. Evid. 101(b)(2) III–1
Competency
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court members as witnesses</td>
<td>Mil. R. Evid. 606</td>
<td>III-31</td>
</tr>
<tr>
<td>Military judge as witness</td>
<td>Mil. R. Evid. 605</td>
<td>III-31</td>
</tr>
<tr>
<td>Witnesses, generally</td>
<td>Mil. R. Evid. 601</td>
<td>III-30</td>
</tr>
<tr>
<td>Compromise and offer to compromise</td>
<td>Mil. R. Evid. 408</td>
<td>III-19</td>
</tr>
<tr>
<td>Concealing, as grounds for being accessory after the fact</td>
<td>IV. Para. 2c(1)</td>
<td>IV-3</td>
</tr>
<tr>
<td>Confessions. See Self-Incrimination. Confidential or privileged communications. See Privileges, this heading.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confusion of the issues, as grounds for, excluding relevant evidence</td>
<td>Mil. R. Evid. 403</td>
<td>III-18</td>
</tr>
<tr>
<td>Conspiracy, statement of co-conspirator</td>
<td>Mil. R. Evid. 801(d)(2)(E)</td>
<td>III-35</td>
</tr>
<tr>
<td>Contents of writings, recordings, and photographs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Admissibility of duplicates</td>
<td>Mil. R. Evid. 1003</td>
<td>III-40</td>
</tr>
<tr>
<td>Admissibility of other evidence as proof</td>
<td>Mil. R. Evid. 1004</td>
<td>III-40</td>
</tr>
<tr>
<td>Determination of fact issues related to</td>
<td>Mil. R. Evid. 1008</td>
<td>III-41</td>
</tr>
<tr>
<td>Proof by testimony or written admission of party</td>
<td>Mil. R. Evid. 1007</td>
<td>III-41</td>
</tr>
<tr>
<td>Public records</td>
<td>Mil. R. Evid. 1005</td>
<td>III-41</td>
</tr>
<tr>
<td>Requirement of an original</td>
<td>Mil. R. Evid. 1002</td>
<td>III-41</td>
</tr>
<tr>
<td>Summaries</td>
<td>Mil. R. Evid. 1006</td>
<td>III-41</td>
</tr>
<tr>
<td>Continuance, determination by military judge</td>
<td>Mil. R. Evid. 104(a)</td>
<td>III-1</td>
</tr>
<tr>
<td>Control, proof by subsequent remedial measures</td>
<td>Mil. R. Evid. 407</td>
<td>III-19</td>
</tr>
<tr>
<td>Conviction of crime, impeachment by</td>
<td>Mil. R. Evid. 609</td>
<td>III-32</td>
</tr>
<tr>
<td>Corroboration</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confessions or admissions</td>
<td>Mil. R. Evid. 304(g)</td>
<td>III-4</td>
</tr>
<tr>
<td>Witness' prior identification to corroborate in-court</td>
<td>Mil. R. Evid. 321(a)(1)</td>
<td>III-16</td>
</tr>
<tr>
<td>Court-martial, power to obtain evidence</td>
<td>R.C.M. 801(c)</td>
<td>II-75</td>
</tr>
<tr>
<td>Credibility or weight, right to introduce evidence concerning</td>
<td>Mil. R. Evid. 104(e)</td>
<td>III-2</td>
</tr>
<tr>
<td>Cross-examination</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Scope</td>
<td>Mil. R. Evid. 611(b)</td>
<td>III-32</td>
</tr>
<tr>
<td>Specific incidents of conduct to impeach</td>
<td>Mil. R. Evid. 608(b)</td>
<td>III-31</td>
</tr>
<tr>
<td>Cumulative, as grounds for excluding relevant evidence</td>
<td>Mil. R. Evid. 403</td>
<td>III-18</td>
</tr>
<tr>
<td>Death, statement under belief of impending</td>
<td>Mil. R. Evid. 804(b)(2)</td>
<td>III-38</td>
</tr>
<tr>
<td>Declarant</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attacking and supporting credibility of hearsay declarant</td>
<td>Mil. R. Evid. 806</td>
<td>III-38</td>
</tr>
<tr>
<td>Defined</td>
<td>Mil. R. Evid. 801(b)</td>
<td>III-34</td>
</tr>
<tr>
<td>Unavailability</td>
<td>Mil. R. Evid. 804(a)</td>
<td>III-37</td>
</tr>
<tr>
<td>Degrad ing questions</td>
<td>Mil. R. Evid. 303</td>
<td>III-4</td>
</tr>
<tr>
<td>Deliberations of courts and juries, privilege concerning</td>
<td>Mil. R. Evid. 509; 606</td>
<td>III-30; III-31</td>
</tr>
<tr>
<td>Disclosure, required</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidence of prior identification of the accused</td>
<td>Mil. R. Evid. 321(c)(1)</td>
<td>III-17</td>
</tr>
<tr>
<td>Evidence seized from the person or property of the accused</td>
<td>Mil. R. Evid. 311(d)(1)</td>
<td>III-9</td>
</tr>
<tr>
<td>Immunity or leniency granted to a witness</td>
<td>Mil. R. Evid. 301(c)(2)</td>
<td>III-3</td>
</tr>
<tr>
<td>Statements by accused</td>
<td>Mil. R. Evid. 304(d)(1)</td>
<td>III-5</td>
</tr>
<tr>
<td>Divorce or annulment, effect on husband-wife privilege</td>
<td>Mil. R. Evid. 504(c)(1)</td>
<td>III-22</td>
</tr>
<tr>
<td>Duplicate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Admissibility of</td>
<td>Mil. R. Evid. 1003</td>
<td>III-40</td>
</tr>
<tr>
<td>Defined</td>
<td>Mil. R. Evid. 1001(4)</td>
<td>III-40</td>
</tr>
<tr>
<td>Dying declaration</td>
<td>Mil. R. Evid. 804(b)(2)</td>
<td>III-38</td>
</tr>
<tr>
<td>Excited utterance</td>
<td>Mil. R. Evid. 803(2)</td>
<td>III-35</td>
</tr>
<tr>
<td>Exclusionary rules</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>See also Privileges, this heading; Search and seizure;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Self-incrimination</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Eyewitness identification</td>
<td>Mil. R. Evid. 321(a)(2)</td>
<td>III–16</td>
</tr>
<tr>
<td>Exclusion of, noncompliance with discovery requirements</td>
<td>R.C.M. 701(g)(3)(C)</td>
<td>II–60</td>
</tr>
<tr>
<td>Existing mental, emotional, or physical condition</td>
<td>Mil. R. Evid. 803(3)</td>
<td>III–35</td>
</tr>
<tr>
<td>Experts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appointment by court</td>
<td>Mil. R. Evid. 706</td>
<td>III–34</td>
</tr>
<tr>
<td>Bases of opinion by</td>
<td>Mil. R. Evid. 703</td>
<td>III–34</td>
</tr>
<tr>
<td>Disclosure of facts or data underlying opinion</td>
<td>Mil. R. Evid. 705</td>
<td>III–34</td>
</tr>
<tr>
<td>Employment at government expense</td>
<td>R.C.M. 703(d)</td>
<td>II–65</td>
</tr>
<tr>
<td>Opinion on ultimate issue</td>
<td>Mil. R. Evid. 704</td>
<td>III–34</td>
</tr>
<tr>
<td>Selection and employment by accused</td>
<td>Mil. R. Evid. 706(c)</td>
<td>III–34</td>
</tr>
<tr>
<td>Use, generally</td>
<td>Mil. R. Evid. 702</td>
<td>III–34</td>
</tr>
<tr>
<td>Extenuation and mitigation</td>
<td>R.C.M. 1001(c)(1)(A), (B)</td>
<td>II–121</td>
</tr>
<tr>
<td>Eyewitness identification</td>
<td>Mil. R. Evid. 321</td>
<td>III–16</td>
</tr>
<tr>
<td>Facts, judicial notice of</td>
<td>Mil. R. Evid. 201</td>
<td>III–2</td>
</tr>
<tr>
<td>Family records</td>
<td>Mil. R. Evid. 803(13)</td>
<td>III–36</td>
</tr>
<tr>
<td>Feasibility of precautionary measures, proof by subsequent</td>
<td></td>
<td></td>
</tr>
<tr>
<td>remedial measures</td>
<td>Mil. R. Evid. 407</td>
<td>III–19</td>
</tr>
<tr>
<td>Foreign law, judicial notice of</td>
<td>Mil. R. Evid. 201A(b)</td>
<td>III–2</td>
</tr>
<tr>
<td>Former testimony</td>
<td>Mil. R. Evid. 804(b)(1)</td>
<td>III–37</td>
</tr>
<tr>
<td>Government information, privilege concerning</td>
<td>Mil. R. Evid. 506</td>
<td>III–27</td>
</tr>
<tr>
<td>Habit</td>
<td>Mil. R. Evid. 406</td>
<td>III–19</td>
</tr>
<tr>
<td>Hearsay</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defined</td>
<td>Mil. R. Evid. 801</td>
<td>III–34</td>
</tr>
<tr>
<td>General rule</td>
<td>Mil. R. Evid. 802</td>
<td>III–35</td>
</tr>
<tr>
<td>Exceptions, availability of declarant immaterial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Absence of entry in records</td>
<td>Mil. R. Evid. 803(7)</td>
<td>III–35</td>
</tr>
<tr>
<td>Absence of public record of entry</td>
<td>Mil. R. Evid. 803(10)</td>
<td>III–36</td>
</tr>
<tr>
<td>Excited utterance</td>
<td>Mil. R. Evid. 803(2)</td>
<td>III–35</td>
</tr>
<tr>
<td>Family records</td>
<td>Mil. R. Evid. 803(13)</td>
<td>III–36</td>
</tr>
<tr>
<td>Government price lists</td>
<td>Mil. R. Evid. 803(17)</td>
<td>III–36</td>
</tr>
<tr>
<td>Judgment as to personal, family, or general history, or</td>
<td>Mil. R. Evid. 803(23)</td>
<td>III–37</td>
</tr>
<tr>
<td>boundaries</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judgment of previous conviction</td>
<td>Mil. R. Evid. 803(22)</td>
<td>III–37</td>
</tr>
<tr>
<td>Learned treatises</td>
<td>Mil. R. Evid. 803(18)</td>
<td>III–36</td>
</tr>
<tr>
<td>Market reports, commercial publications</td>
<td>Mil. R. Evid. 803(17)</td>
<td>III–36</td>
</tr>
<tr>
<td>Marriage, baptism, and similar certificates</td>
<td>Mil. R. Evid. 803(12)</td>
<td>III–36</td>
</tr>
<tr>
<td>Other exceptions</td>
<td>Mil. R. Evid. 803(24)</td>
<td>III–37</td>
</tr>
<tr>
<td>Present sense impressions</td>
<td>Mil. R. Evid. 803(1)</td>
<td>III–35</td>
</tr>
<tr>
<td>Public records and reports</td>
<td>Mil. R. Evid. 803(8)</td>
<td>III–36</td>
</tr>
<tr>
<td>Recorded recollection</td>
<td>Mil. R. Evid. 803(5)</td>
<td>III–35</td>
</tr>
<tr>
<td>Records of documents affecting an interest in property</td>
<td>Mil. R. Evid. 803(14)</td>
<td>III–36</td>
</tr>
<tr>
<td>Records of regularly conducted activity</td>
<td>Mil. R. Evid. 803(6)</td>
<td>III–35</td>
</tr>
<tr>
<td>Records of religious organizations</td>
<td>Mil. R. Evid. 803(11)</td>
<td>III–36</td>
</tr>
<tr>
<td>Records of vital statistics</td>
<td>Mil. R. Evid. 803(9)</td>
<td>III–36</td>
</tr>
<tr>
<td>Reputation as to character</td>
<td>Mil. R. Evid. 803(21)</td>
<td>III–37</td>
</tr>
<tr>
<td>Reputation concerning boundaries or general history</td>
<td>Mil. R. Evid. 803(20)</td>
<td>III–37</td>
</tr>
<tr>
<td>Reputation concerning personal or family history</td>
<td>Mil. R. Evid. 803(19)</td>
<td>III–37</td>
</tr>
<tr>
<td>Statements for purposes of medical diagnosis or treatment</td>
<td>Mil. R. Evid. 803(4)</td>
<td>III–35</td>
</tr>
<tr>
<td>Statements in ancient documents</td>
<td>Mil. R. Evid. 803(16)</td>
<td>III–36</td>
</tr>
</tbody>
</table>

Index 28
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statements in documents affecting an interest in property</td>
<td>Mil. R. Evid. 803(15)</td>
<td>III–36</td>
</tr>
<tr>
<td>Then existing mental, emotional or physical condition</td>
<td>Mil. R. Evid. 803(3)</td>
<td>III–35</td>
</tr>
<tr>
<td>Exceptions, declarant unavailable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Former testimony</td>
<td>Mil. R. Evid. 804(b)(1)</td>
<td>III–37</td>
</tr>
<tr>
<td>Other exceptions</td>
<td>Mil. R. Evid. 804(b)(5)</td>
<td>III–38</td>
</tr>
<tr>
<td>Statement against interest</td>
<td>Mil. R. Evid. 804(b)(3)</td>
<td>III–38</td>
</tr>
<tr>
<td>Statement of personal or family history</td>
<td>Mil. R. Evid. 804(b)(4)</td>
<td>III–38</td>
</tr>
<tr>
<td>Statement under belief of impending death</td>
<td>Mil. R. Evid. 804(b)(2)</td>
<td>III–38</td>
</tr>
<tr>
<td>Hearsay within hearsay</td>
<td>Mil. R. Evid. 805</td>
<td>III–38</td>
</tr>
<tr>
<td>History, statement of personal or family</td>
<td>Mil. R. Evid. 804(b)(4)</td>
<td>III–38</td>
</tr>
<tr>
<td>Husband-wife, privilege</td>
<td>Mil. R. Evid. 504</td>
<td>III–22</td>
</tr>
<tr>
<td>Identification</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidence of other crimes, wrongs, or acts as proof of</td>
<td>Mil. R. Evid. 404(b)</td>
<td>III–19</td>
</tr>
<tr>
<td>Eyewitness testimony as to</td>
<td>Mil. R. Evid. 321</td>
<td>III–16</td>
</tr>
<tr>
<td>Statements of, as non-hearsay</td>
<td>Mil. R. Evid. 801(d)(1)(C)</td>
<td>III–35</td>
</tr>
<tr>
<td>Immunity</td>
<td>R.C.M. 704</td>
<td>II–68</td>
</tr>
<tr>
<td><strong>See also Self-incrimination.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Impeachment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>By contradiction, using certain involuntary statements</td>
<td>Mil. R. Evid. 304(b)</td>
<td>III–4</td>
</tr>
<tr>
<td>By contradiction, using illegally seized evidence</td>
<td>Mil. R. Evid. 311(b)</td>
<td>III–8</td>
</tr>
<tr>
<td>Evidence of character, conduct, and bias</td>
<td>Mil. R. Evid. 608</td>
<td>III–31</td>
</tr>
<tr>
<td>Evidence of criminal conviction</td>
<td>Mil. R. Evid. 609</td>
<td>III–32</td>
</tr>
<tr>
<td>Juvenile adjudications</td>
<td>Mil. R. Evid. 609(d)</td>
<td>III–32</td>
</tr>
<tr>
<td>Prior statements of witnesses</td>
<td>Mil. R. Evid. 613</td>
<td>III–33</td>
</tr>
<tr>
<td>Religious beliefs or opinions</td>
<td>Mil. R. Evid. 610</td>
<td>III–32</td>
</tr>
<tr>
<td>Subsequent remedial measures</td>
<td>Mil. R. Evid. 407</td>
<td>III–19</td>
</tr>
<tr>
<td>Who may impeach</td>
<td>Mil. R. Evid. 607</td>
<td>III–31</td>
</tr>
<tr>
<td>Informant, identity of, privilege</td>
<td>Mil. R. Evid. 507</td>
<td>III–29</td>
</tr>
<tr>
<td>Insanity</td>
<td>Mil. R. Evid. 302; R.C.M. 916(k)</td>
<td>III–4; II–112</td>
</tr>
<tr>
<td>Intent, evidence of other crimes, wrongs, or acts, as proof of</td>
<td>Mil. R. Evid. 404(b)</td>
<td>III–19</td>
</tr>
<tr>
<td>Interest, statement against</td>
<td>Mil. R. Evid. 804(b)(3)</td>
<td>III–38</td>
</tr>
<tr>
<td>Interpreters</td>
<td>Mil. R. Evid. 604</td>
<td>III–31</td>
</tr>
<tr>
<td>Interrogation. <strong>See Self-incrimination.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Involuntary statement. <strong>See Self-incrimination.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Joint clients, effect on lawyer-client privilege</td>
<td>Mil. R. Evid. 502(d)(5)</td>
<td>III–22</td>
</tr>
<tr>
<td>Joint trial, statements of accused at</td>
<td>Mil. R. Evid. 306</td>
<td>III–8</td>
</tr>
<tr>
<td>Judgment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>As to personal, family, or general history, or boundaries</td>
<td>Mil. R. Evid. 803(23)</td>
<td>III–37</td>
</tr>
<tr>
<td>Previous conviction</td>
<td>Mil. R. Evid. 803(22)</td>
<td>III–37</td>
</tr>
<tr>
<td>Judicial notice</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adjudicative facts</td>
<td>Mil. R. Evid. 201</td>
<td>III–2</td>
</tr>
<tr>
<td>Laws, domestic and foreign</td>
<td>Mil. R. Evid. 201A</td>
<td>III–2</td>
</tr>
<tr>
<td>Statements in learned treatises</td>
<td>Mil. R. Evid. 803(18)</td>
<td>III–36</td>
</tr>
<tr>
<td>Juvenile adjudications, impeachment by</td>
<td>Mil. R. Evid. 609(d)</td>
<td>III–32</td>
</tr>
<tr>
<td>Knowledge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidence of other crimes, wrongs, or acts as proof of</td>
<td>Mil. R. Evid. 404(b)</td>
<td>III–19</td>
</tr>
<tr>
<td>Requirement for personal knowledge in order to testify</td>
<td>Mil. R. Evid. 602</td>
<td>III–31</td>
</tr>
<tr>
<td>Law, domestic, judicial notice of</td>
<td>Mil. R. Evid. 201(A)(a)</td>
<td>III–2</td>
</tr>
<tr>
<td>Law enforcement personnel, records and reports of observations</td>
<td>Mil. R. Evid. 803(8)(B)</td>
<td>III–36</td>
</tr>
<tr>
<td>Lawyer-client privilege</td>
<td>Mil. R. Evid. 502</td>
<td>III–21</td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-----------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Lawyer, defined for purposes of privilege</td>
<td>Mil. R. Evid. 502(b)(2)</td>
<td>III–21</td>
</tr>
<tr>
<td>Learned treatises</td>
<td>Mil. R. Evid. 803(18)</td>
<td>III–36</td>
</tr>
<tr>
<td>Liability insurance, admissibility</td>
<td>Mil. R. Evid. 411</td>
<td>III–20</td>
</tr>
<tr>
<td>Limited admissibility of</td>
<td>Mil. R. Evid. 105</td>
<td>III–2</td>
</tr>
<tr>
<td>Lineups and other identification processes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to counsel at</td>
<td>Mil. R. Evid. 321(b)(2)</td>
<td>III–17</td>
</tr>
<tr>
<td>When unlawful</td>
<td>Mil. R. Evid. 321(b)</td>
<td>III–17</td>
</tr>
<tr>
<td>Market reports</td>
<td>Mil. R. Evid. 803(17)</td>
<td>III–36</td>
</tr>
<tr>
<td>Marriage certificates</td>
<td>Mil. R. Evid. 803(12)</td>
<td>III–36</td>
</tr>
<tr>
<td>Medical diagnosis or treatment, statement for purposes of</td>
<td>Mil. R. Evid. 803(4)</td>
<td>III–35</td>
</tr>
<tr>
<td>Members</td>
<td></td>
<td></td>
</tr>
<tr>
<td>As witnesses</td>
<td>Mil. R. Evid. 606</td>
<td>III–31</td>
</tr>
<tr>
<td>Hearings out of presence of</td>
<td>Mil. R. Evid. 103(c); 104(c)</td>
<td>III–1</td>
</tr>
<tr>
<td>Mental examination of accused, privilege concerning</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See Self-incrimination</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Military judge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>As witness</td>
<td>Mil. R. Evid. 605</td>
<td>III–31</td>
</tr>
<tr>
<td>Defined</td>
<td>Mil. R. Evid. 101(c)</td>
<td>III–1</td>
</tr>
<tr>
<td>Military records, authentication by attesting certificates</td>
<td>Mil. R. Evid. 902(4 a)</td>
<td>III–40</td>
</tr>
<tr>
<td>Minister, privileged communication to</td>
<td>Mil. R. Evid. 503</td>
<td>III–22</td>
</tr>
<tr>
<td>Misconduct, acts of, admissibility</td>
<td>Mil. R. Evid. 404(b)</td>
<td>III–19</td>
</tr>
<tr>
<td>Mistake, admissibility of evidence of other crimes, wrongs, or acts to prove absence of</td>
<td>Mil. R. Evid. 404(b)</td>
<td>III–19</td>
</tr>
<tr>
<td>Mistrail, as remedy for</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Failing to produce a writing used to refresh memory</td>
<td>Mil. R. Evid. 612</td>
<td>III–33</td>
</tr>
<tr>
<td>Sustaining a claim of governmental privilege</td>
<td>Mil. R. Evid. 505(i)(4)(E)(ii)</td>
<td>III–26</td>
</tr>
<tr>
<td>Motive, evidence of other crimes, wrongs, or acts as proof of</td>
<td>Mil. R. Evid. 404(b)</td>
<td>III–19</td>
</tr>
<tr>
<td>Negligence, proof of subsequent remedial measures</td>
<td>Mil. R. Evid. 407</td>
<td>III–19</td>
</tr>
<tr>
<td>Negotiations on plea, admissibility</td>
<td>Mil. R. Evid. 410</td>
<td>III–19</td>
</tr>
<tr>
<td>Newly discovered, as grounds for new trial</td>
<td>R.C.M. 1210(f)</td>
<td>II–170</td>
</tr>
<tr>
<td>Nonconsensual sexual offenses, defined</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oath or affirmation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interpreters</td>
<td>Mil. R. Evid. 604</td>
<td>III–31</td>
</tr>
<tr>
<td>Witnesses</td>
<td>Mil. R. Evid. 603</td>
<td>III–31</td>
</tr>
<tr>
<td>Objections</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confessions and admissions, concerning</td>
<td>Mil. R. Evid. 304(a), (d)(2)</td>
<td>III–4; III–5</td>
</tr>
<tr>
<td>Eyewitness identification, concerning</td>
<td>Mil. R. Evid. 321(a)(1), (d)</td>
<td>III–16; III–17</td>
</tr>
<tr>
<td>Generally</td>
<td>Mil. R. Evid. 103(a)(1)</td>
<td>III–1</td>
</tr>
<tr>
<td>Member as a witness</td>
<td>Mil. R. Evid. 606(a)</td>
<td>III–31</td>
</tr>
<tr>
<td>Prior identification of the accused</td>
<td>Mil. R. Evid. 321(c)(2)</td>
<td>III–17</td>
</tr>
<tr>
<td>Search and seizure, concerning</td>
<td>Mil. R. Evid. 311(a)(1), (d)(2)</td>
<td>III–8; III–9</td>
</tr>
<tr>
<td>Witnesses, calling by military judge or members</td>
<td>Mil. R. Evid. 614(c)</td>
<td>III–33</td>
</tr>
<tr>
<td>Offer of proof</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Record of</td>
<td>Mil. R. Evid. 103(b)</td>
<td>III–1</td>
</tr>
<tr>
<td>Requirements of valid</td>
<td>Mil. R. Evid. 103(a)(2)</td>
<td>III–1</td>
</tr>
<tr>
<td>Ruling by military judge</td>
<td>Mil. R. Evid. 103(b)</td>
<td>III–1</td>
</tr>
<tr>
<td>Offer to compromise</td>
<td>Mil. R. Evid. 408</td>
<td>III–19</td>
</tr>
<tr>
<td>Official records</td>
<td>Mil. R. Evid. 803(8)</td>
<td>III–36</td>
</tr>
<tr>
<td>Opinion</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bases of expert opinion</td>
<td>Mil. R. Evid. 703</td>
<td>III–34</td>
</tr>
<tr>
<td>Character, as method for proving</td>
<td>Mil. R. Evid. 405(a)</td>
<td>III–19</td>
</tr>
<tr>
<td>Disclosure of facts or data underlying opinion</td>
<td>Mil. R. Evid. 705</td>
<td>III–34</td>
</tr>
</tbody>
</table>

Index 30
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expert testimony</td>
<td>Mil. R. Evid. 702</td>
<td>III-34</td>
</tr>
<tr>
<td>Lay witness testimony</td>
<td>Mil. R. Evid. 701</td>
<td>III-34</td>
</tr>
<tr>
<td>Rehabilitative potential of accused</td>
<td>R.C.M. 1001(b)(3)</td>
<td>II-120</td>
</tr>
<tr>
<td>Sexual behavior of alleged victim</td>
<td>Mil. R. Evid. 412(a)</td>
<td>III-20</td>
</tr>
<tr>
<td>Ultimate issue included in</td>
<td>Mil. R. Evid. 704</td>
<td>III-34</td>
</tr>
<tr>
<td>Opportunity, evidence of other crimes, wrongs, or acts as proof of</td>
<td>Mil. R. Evid. 404(b)</td>
<td>III-19</td>
</tr>
<tr>
<td>Order of interrogation and presentation</td>
<td>Mil. R. Evid. 611</td>
<td>III-32</td>
</tr>
<tr>
<td>Original</td>
<td>Mil. R. Evid. 1001(3)</td>
<td>III-40</td>
</tr>
<tr>
<td>Requirement to use</td>
<td>Mil. R. Evid. 1002</td>
<td>III-40</td>
</tr>
<tr>
<td>When original not required. See Contents of writings, recordings, and photographs, this heading.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other crimes, wrongs, or acts, evidence of</td>
<td>Mil. R. Evid. 404(b)</td>
<td>III-19</td>
</tr>
<tr>
<td>Ownership, proof by subsequent remedial measures</td>
<td>Mil. R. Evid. 407</td>
<td>III-19</td>
</tr>
<tr>
<td>Pardon, effect on impeachment by conviction</td>
<td>Mil. R. Evid. 609(c)</td>
<td>III-32</td>
</tr>
<tr>
<td>Past sexual behavior</td>
<td>Mil. R. Evid. 412(a), (b)</td>
<td>III-20</td>
</tr>
<tr>
<td>Admissibility</td>
<td>Mil. R. Evid. 412(d)</td>
<td>III-20</td>
</tr>
<tr>
<td>Defined</td>
<td>Mil. R. Evid. 303</td>
<td>III-4</td>
</tr>
<tr>
<td>Degrading questions</td>
<td>Mil. R. Evid. 412(c)</td>
<td>III-20</td>
</tr>
<tr>
<td>Procedural requirements for admission</td>
<td>Mil. R. Evid. 409</td>
<td>III-19</td>
</tr>
<tr>
<td>Payment of medical and similar expenses</td>
<td>Mil. R. Evid. 602</td>
<td>III-31</td>
</tr>
<tr>
<td>Personal knowledge, requirement for in order to testify</td>
<td>Mil. R. Evid. 1001(2)</td>
<td>III-40</td>
</tr>
<tr>
<td>Photographs, defined</td>
<td>Mil. R. Evid. 103(d)</td>
<td>I-31</td>
</tr>
<tr>
<td>Plain error</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Plan or design of accused, evidence of other crimes, wrongs, or acts as proof of</td>
<td>Mil. R. Evid. 404(b)</td>
<td>III-19</td>
</tr>
<tr>
<td>Pleas, plea discussions and related statements, admissibility</td>
<td>Mil. R. Evid. 410</td>
<td>III-19</td>
</tr>
<tr>
<td>Political vote, privilege concerning</td>
<td>Mil. R. Evid. 508</td>
<td>III-30</td>
</tr>
<tr>
<td>Prejudice, unfair</td>
<td>Mil. R. Evid. 403</td>
<td>III-18</td>
</tr>
<tr>
<td>Preliminary questions</td>
<td>Mil. R. Evid. 104</td>
<td>III-1</td>
</tr>
<tr>
<td>Preparation, evidence of other crimes, wrongs, or acts as proof of</td>
<td>Mil. R. Evid. 404(b)</td>
<td>III-19</td>
</tr>
<tr>
<td>Presentation on merits</td>
<td>R.C.M. 913(c)</td>
<td>II-107</td>
</tr>
<tr>
<td>Present sense impression</td>
<td>Mil. R. Evid. 803(1)</td>
<td>III-35</td>
</tr>
<tr>
<td>Previous convictions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Impeachment by evidence of</td>
<td>Mil. R. Evid. 609</td>
<td>III-32</td>
</tr>
<tr>
<td>Judgment or evidence of</td>
<td>Mil. R. Evid. 803(22)</td>
<td>III-37</td>
</tr>
<tr>
<td>Priest, privileged communications to</td>
<td>Mil. R. Evid. 503</td>
<td>III-22</td>
</tr>
<tr>
<td>Prior statements of witnesses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Impeachment by evidence of</td>
<td>Mil. R. Evid. 613</td>
<td>III-33</td>
</tr>
<tr>
<td>Prior consistent statement as non-hearsay</td>
<td>Mil. R. Evid. 801(d)(1)(B)</td>
<td>III-34</td>
</tr>
<tr>
<td>Prior inconsistent statement as non-hearsay</td>
<td>Mil. R. Evid. 801(d)(1)(A)</td>
<td>III-34</td>
</tr>
<tr>
<td>Prior statement of identification as non-hearsay</td>
<td>Mil. R. Evid. 801(d)(1)(C)</td>
<td>III-35</td>
</tr>
<tr>
<td>Privileges</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Applicability of rules concerning</td>
<td>Mil. R. Evid. 1101(b)</td>
<td>III-41</td>
</tr>
<tr>
<td>Classified information</td>
<td>Mil. R. Evid. 505</td>
<td>III-23</td>
</tr>
<tr>
<td>Comments upon or inference from claim of, at trial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Limiting instruction</td>
<td>Mil. R. Evid. 512(c)</td>
<td>III-30</td>
</tr>
<tr>
<td>Prohibited</td>
<td>Mil. R. Evid. 512(a)</td>
<td>III-30</td>
</tr>
<tr>
<td>Communication of privileged information by electronic means</td>
<td>Mil. R. Evid. 511(b)</td>
<td>III-30</td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Communication to clergy</td>
<td>Mil. R. Evid. 503</td>
<td>III-22</td>
</tr>
<tr>
<td>Compelled or unintentional disclosure of information</td>
<td>Mil. R. Evid. 511(a)</td>
<td>III-30</td>
</tr>
<tr>
<td>Deliberations of courts and juries</td>
<td>Mil. R. Evid. 509</td>
<td>III-30</td>
</tr>
<tr>
<td>Exceptions</td>
<td>Mil. R. Evid. 606</td>
<td>III-31</td>
</tr>
<tr>
<td>General rule</td>
<td>Mil. R. Evid. 501</td>
<td>III-21</td>
</tr>
<tr>
<td>Government information</td>
<td>Mil. R. Evid. 506</td>
<td>III-27</td>
</tr>
<tr>
<td>Husband-wife</td>
<td>Mil. R. Evid. 504</td>
<td>III-22</td>
</tr>
<tr>
<td>Identify of informant</td>
<td>Mil. R. Evid. 507</td>
<td>III-29</td>
</tr>
<tr>
<td>Lawyer-client</td>
<td>Mil. R. Evid. 502</td>
<td>III-21</td>
</tr>
<tr>
<td>Medical officer or civilian physician, no privilege</td>
<td>Mil. R. Evid. 501(d)</td>
<td>III-21</td>
</tr>
<tr>
<td>Mental examination of accused. See Self-incrimination.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Political vote</td>
<td>Mil. R. Evid. 508</td>
<td>III-30</td>
</tr>
<tr>
<td>Preliminary determinations concerning</td>
<td>Mil. R. Evid. 104(a)</td>
<td>III-1</td>
</tr>
<tr>
<td>Waiver by voluntary disclosure</td>
<td>Mil. R. Evid. 510</td>
<td>III-30</td>
</tr>
<tr>
<td>Probable cause. See Search and seizure.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Production of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Motion for</td>
<td>R.C.M. 905(b)(4); 906(b)(7)</td>
<td>II-93; II-96</td>
</tr>
<tr>
<td>Procedure for</td>
<td>R.C.M. 703(f)(4)</td>
<td>II-67</td>
</tr>
<tr>
<td>Right to</td>
<td>R.C.M. 703(f)</td>
<td>II-67</td>
</tr>
<tr>
<td>Property</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Records of documents affecting interest in</td>
<td>Mil. R. Evid. 803(14)</td>
<td>III-36</td>
</tr>
<tr>
<td>Statements in documents affecting interest in</td>
<td>Mil. R. Evid. 803(15)</td>
<td>III-36</td>
</tr>
<tr>
<td>Public records and reports</td>
<td>Mil. R. Evid. 803(8)</td>
<td>III-36</td>
</tr>
<tr>
<td>Qualifications to be a witness, determination by military judge</td>
<td>Mil. R. Evid. 104(a)</td>
<td>III-1</td>
</tr>
<tr>
<td>Rabbi, privileged communications to</td>
<td>Mil. R. Evid. 503</td>
<td>III-22</td>
</tr>
<tr>
<td>Reasonable doubt</td>
<td>R.C.M. 918(c)</td>
<td>II-115</td>
</tr>
<tr>
<td>Rebuttal</td>
<td>R.C.M. 1001(d)</td>
<td>II-121</td>
</tr>
<tr>
<td>Recollection recorded</td>
<td>Mil. R. Evid. 803(5)</td>
<td>III-35</td>
</tr>
<tr>
<td>Recordings, defined</td>
<td>Mil. R. Evid. 1001(1)</td>
<td>III-40</td>
</tr>
<tr>
<td>Refreshing memory, by use of writings</td>
<td>Mil. R. Evid. 612</td>
<td>III-33</td>
</tr>
<tr>
<td>Regularly conducted activity, records of</td>
<td>Mil. R. Evid. 803(6)</td>
<td>III-35</td>
</tr>
<tr>
<td>Relaxation of rules, in sentencing proceedings</td>
<td>Mil. R. Evid. 1101(c)</td>
<td>III-41</td>
</tr>
<tr>
<td>Relevancy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defined</td>
<td>Mil. R. Evid. 401</td>
<td>III-18</td>
</tr>
<tr>
<td>Effect on admissibility</td>
<td>Mil. R. Evid. 402</td>
<td>III-18</td>
</tr>
<tr>
<td>Exclusion of relevant evidence</td>
<td>Mil. R. Evid. 403</td>
<td>III-18</td>
</tr>
<tr>
<td>When conditioned on fact</td>
<td>Mil. R. Evid. 104(b)</td>
<td>III-1</td>
</tr>
<tr>
<td>Religious beliefs or opinions</td>
<td>Mil. R. Evid. 610</td>
<td>III-32</td>
</tr>
<tr>
<td>Religious organizations, record of</td>
<td>Mil. R. Evid. 803(11)</td>
<td>III-36</td>
</tr>
<tr>
<td>Remainder of, or related, writings or recorded statements</td>
<td>Mil. R. Evid. 106</td>
<td>III-2</td>
</tr>
<tr>
<td>Reputation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Character</td>
<td>Mil. R. Evid. 803(21)</td>
<td>III-37</td>
</tr>
<tr>
<td>Community, defined</td>
<td>Mil. R. Evid. 405(d)</td>
<td>III-19</td>
</tr>
<tr>
<td>Concerning boundaries or general history</td>
<td>Mil. R. Evid. 803(20)</td>
<td>III-37</td>
</tr>
<tr>
<td>Concerning personal or family history</td>
<td>Mil. R. Evid. 803(19)</td>
<td>III-37</td>
</tr>
<tr>
<td>Defined</td>
<td>Mil. R. Evid. 405(d)</td>
<td>III-19</td>
</tr>
<tr>
<td>Routine practice</td>
<td>Mil. R. Evid. 406</td>
<td>III-19</td>
</tr>
<tr>
<td>Rule of completeness</td>
<td>Mil. R. Evid. 106</td>
<td>III-2</td>
</tr>
<tr>
<td>Rules of Evidence, Military</td>
<td>Mil. R. Evid. 1102</td>
<td>III-41</td>
</tr>
<tr>
<td>Amendments to</td>
<td>Appendix 21</td>
<td>A21-1</td>
</tr>
<tr>
<td>Analysis of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Applicability</td>
<td>Mil. R. Evid. 101(a); 1101(a)</td>
<td>III-1; III-41</td>
</tr>
</tbody>
</table>

Index 32
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subject</td>
<td>Mil. R. Evid. 1103</td>
<td>III-42</td>
</tr>
<tr>
<td>Inapplicability</td>
<td>Mil. R. Evid. 1101(d)</td>
<td>III-41</td>
</tr>
<tr>
<td>Purpose and construction</td>
<td>Mil. R. Evid. 102</td>
<td>III-1</td>
</tr>
<tr>
<td>Relaxation during sentencing proceedings</td>
<td>Mil. R. Evid. 1101(c)</td>
<td>III-41</td>
</tr>
<tr>
<td>Ruling admitting or excluding evidence</td>
<td>Mil. R. Evid. 103(a)</td>
<td>III-1</td>
</tr>
<tr>
<td>Plain error</td>
<td>Mil. R. Evid. 103(d)</td>
<td>III-1</td>
</tr>
<tr>
<td>Search. See Search and seizure.</td>
<td>Mil. R. Evid. 902</td>
<td>III-39</td>
</tr>
<tr>
<td>Self-authentication</td>
<td>Mil. R. Evid. 902</td>
<td>III-39</td>
</tr>
<tr>
<td>Self-incrimination. See Self-incrimination.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>S. sentencing proceedings</td>
<td>R.C.M. 1001</td>
<td>II-120</td>
</tr>
<tr>
<td>Generally</td>
<td>Mil. R. Evid. 1101(c)</td>
<td>III-41</td>
</tr>
<tr>
<td>Sexual offenses, nonconsensual</td>
<td>Mil. R. Evid. 412</td>
<td>III-20</td>
</tr>
<tr>
<td>Specific instances of conduct, to prove character</td>
<td>Mil. R. Evid. 405(b)</td>
<td>III-19</td>
</tr>
<tr>
<td>Spontaneous exclamations</td>
<td>Mil. R. Evid. 803(2)</td>
<td>III-35</td>
</tr>
<tr>
<td>Stipulations</td>
<td>R.C.M. 705(b)(1)</td>
<td>II-69</td>
</tr>
<tr>
<td>Confessional</td>
<td>R.C.M. 811</td>
<td>II-86</td>
</tr>
<tr>
<td>Generally</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Striking testimony</td>
<td>Mil. R. Evid. 301(f)(2)</td>
<td>III-3</td>
</tr>
<tr>
<td>After witness asserts self-incrimination privilege</td>
<td>Mil. R. Evid. 612</td>
<td>III-33</td>
</tr>
<tr>
<td>Writing to refresh memory, failure to produce</td>
<td>Mil. R. Evid. 903</td>
<td>III-40</td>
</tr>
<tr>
<td>Subsequent remedial measures</td>
<td>Mil. R. Evid. 407</td>
<td>III-19</td>
</tr>
<tr>
<td>Summary court-martial, applicability of rules</td>
<td>Mil. R. Evid. 101(a); R.C.M. 1304(b)(2)(E)</td>
<td>III-1; II-174</td>
</tr>
<tr>
<td>Telephonic transmissions of privileged information, effect of Testimony</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Failure to testify by accused, instruction concerning</td>
<td>Mil. R. Evid. 301(g)</td>
<td>III-4</td>
</tr>
<tr>
<td>Preliminary matter, by accused</td>
<td>Mil. R. Evid. 104(d)</td>
<td>III-2</td>
</tr>
<tr>
<td>Trial counsel, duty to disclose</td>
<td>R.C.M. 701(a)</td>
<td>II-58</td>
</tr>
<tr>
<td>Unavailability of declarant, defined</td>
<td>Mil. R. Evid. 804(a)</td>
<td>III-37</td>
</tr>
<tr>
<td>Victim, character of</td>
<td>Mil. R. Evid. 404(a)(2)</td>
<td>III-18</td>
</tr>
<tr>
<td>Vital statistics, records of</td>
<td>Mil. R. Evid. 803(9)</td>
<td>III-36</td>
</tr>
<tr>
<td>Vote, political, privilege concerning</td>
<td>Mil. R. Evid. 508</td>
<td>III-30</td>
</tr>
<tr>
<td>Waiver</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Failure to object</td>
<td>Mil. R. Evid. 103(a)(1)</td>
<td>III-1</td>
</tr>
<tr>
<td>Guilty plea</td>
<td>Mil. R. Evid. 304(d)(5); 311(i); 321(g); R.C.M. 910(j)</td>
<td>III-5; III-10; III-18; II-103</td>
</tr>
<tr>
<td>Privileges</td>
<td>Mil. R. Evid. 510</td>
<td>III-30</td>
</tr>
<tr>
<td>Waste of time, as grounds for exclusion of relevant evidence</td>
<td>Mil. R. Evid. 403</td>
<td>III-18</td>
</tr>
<tr>
<td>Witnesses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Advice concerning self-incrimination</td>
<td>Mil. R. Evid. 301(b)(2)</td>
<td>III-3</td>
</tr>
<tr>
<td>Availability determination</td>
<td>Mil. R. Evid. 104(a)</td>
<td>III-1</td>
</tr>
<tr>
<td>Calling and interrogation by the court-martial</td>
<td>Mil. R. Evid. 614</td>
<td>III-33</td>
</tr>
<tr>
<td>Competency, general rule</td>
<td>Mil. R. Evid. 601</td>
<td>III-30</td>
</tr>
<tr>
<td>Court members as witnesses</td>
<td>Mil. R. Evid. 606</td>
<td>III-31</td>
</tr>
<tr>
<td>Exclusion from courtroom</td>
<td>Mil. R. Evid. 615</td>
<td>III-33</td>
</tr>
<tr>
<td>Impeachment of. See Impeachment, this heading.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Military judge as a witness</td>
<td>Mil. R. Evid. 605</td>
<td>III-31</td>
</tr>
<tr>
<td>Mode and order of interrogation and presentation</td>
<td>Mil. R. Evid. 611</td>
<td>III-32</td>
</tr>
<tr>
<td>Oath or affirmation</td>
<td>Mil. R. Evid. 603</td>
<td>III-31</td>
</tr>
</tbody>
</table>

Index 33
### Subject

| Personal knowledge, requirement for | Mil. R. Evid. 602 | III–31 |
| Production of Procedures for | R.C.M. 703(e) | II–65 |
| Right to Qualification as | Mil. R. Evid. 104(a) | III–1 |

### Writings and recordings

| Defined | Mil. R. Evid. 1001(1) | III–41 |
| Refresh memory, to | Mil. R. Evid. 612 | III–33 |
| Remainder of or related writings | Mil. R. Evid. 106 | III–2 |
| Requirement of original to prove | Mil. R. Evid. 1002 | III–41 |

### Examination

| Members | R.C.M. 912(d) | II–104 |
| Questionnaire, use of | R.C.M. 912(a) | II–104 |
| Record of trial before authentication | R.C.M. 1103(i) | II–139 |

| Witnesses | R.C.M. 1101(c)(6), (7) | II–136 |
| Deposition Generally | R.C.M. 1113 | II–158 |
| Generally | R.C.M. 1113(c) | II–158 |
| Pretrial investigation | R.C.M. 1113(b) | II–158 |

### Exceptions and substitutions

| Findings by | R.C.M. 918(a) | II–114 |
| Lesser included offenses | IV. Para. 2b(3) | IV–2 |
| Plea, entry by | R.C.M. 910(a) | II–101 |

### Execution of sentence

| Action, statement as to | R.C.M. 1107(f)(4)(B) | II–150 |
| Deferment, effect on | R.C.M. 1101(c)(6), (7) | II–136 |
| Generally | R.C.M. 1113 | II–158 |
| Punishment which may be ordered executed in initial action | R.C.M. 1113(b) | II–158 |
| Punishment which may not be ordered executed in initial action | R.C.M. 1113(c) | II–158 |

**Suspension. See Suspension of sentence.**

### Exhibits

| Generally | R.C.M. 913(c) | II–107 |
| Members, use during deliberations | R.C.M. 921(b) | II–117 |

### Expert witnesses

**See also Evidence, Experts.**

| Employment of | R.C.M. 703(d) | II–65 |
| Opinion testimony by | Mil. R. Evid. 702; 703; 704; 705 | III–34 |
| Explosive, defined | R.C.M. 103(11) | II–1 |
| Exporting controlled substances | IV. Para. 37 | IV–53 |
| Exposure, indecent | IV. Para. 88 | IV–108 |

### Extenuation, matters in

| Investigation, pretrial | R.C.M. 405(f)(11), (h)(1)(C) | II–36; II–39 |
| Presentencing procedure | R.C.M. 1001(c)(1)(A), (2)(A), (3) | II–121 |
| Extortion | IV. Para. 53 | IV–78 |
| Extra duty | V. Paras. 5b(2)(A)(v), (B)(v), c(6); 6b(3) | V–5; V–6; V–8 |

### Extraordinary relief, petition for

<p>| Appellate counsel | R.C.M. 1202(b) | II–163 |
| Reviewed by | R.C.M. 1204(a) | II–166 |
| Court of Military Appeals | R.C.M. 1203(b) | II–164 |</p>
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Speedy trial, effect on</td>
<td>R.C.M. 707(c)(3)(C)</td>
<td>II–73</td>
</tr>
<tr>
<td>Eyewitness identification</td>
<td>Mil. R. Evid. 321</td>
<td>III–16</td>
</tr>
<tr>
<td>Failure to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Afford all practical relief and assistance in combat</td>
<td>IV. Para. 23</td>
<td>IV–32</td>
</tr>
<tr>
<td>Enforce or comply with code</td>
<td>IV. Para. 22</td>
<td>IV–31</td>
</tr>
<tr>
<td>Engage or do utmost to encounter enemy</td>
<td>IV. Para. 23</td>
<td>IV–32</td>
</tr>
<tr>
<td>Enter plea</td>
<td>R.C.M. 910(b)</td>
<td>II–101</td>
</tr>
<tr>
<td>Fulfill terms of pretrial agreement</td>
<td>R.C.M. 705(d)(4)</td>
<td>II–71</td>
</tr>
<tr>
<td>Maintain funds, dishonorable</td>
<td>IV. Para. 68</td>
<td>IV–97</td>
</tr>
<tr>
<td>Obey orders or regulations</td>
<td>IV. Para. 16</td>
<td>IV–23</td>
</tr>
<tr>
<td>Pay debts</td>
<td>IV. Para. 71</td>
<td>IV–99</td>
</tr>
<tr>
<td>Repair</td>
<td>IV. Para. 10</td>
<td>IV–12</td>
</tr>
<tr>
<td>Report, prevent, or suppress mutiny</td>
<td>IV. Para. 18</td>
<td>IV–26</td>
</tr>
<tr>
<td>Secure or report captured or abandoned property</td>
<td>IV. Para. 27</td>
<td>IV–38</td>
</tr>
<tr>
<td>False</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alarm, before enemy</td>
<td>IV. Para. 23</td>
<td>IV–32</td>
</tr>
<tr>
<td>Claim</td>
<td>IV. Para. 58</td>
<td>IV–87</td>
</tr>
<tr>
<td>Discharge certificate</td>
<td>IV. Para. 77</td>
<td>IV–102</td>
</tr>
<tr>
<td>Identification card</td>
<td>IV. Para. 77</td>
<td>IV–102</td>
</tr>
<tr>
<td>Official statement</td>
<td>IV. Para. 31</td>
<td>IV–45</td>
</tr>
<tr>
<td>Pass</td>
<td>IV. Para. 77</td>
<td>IV–102</td>
</tr>
<tr>
<td>Permit</td>
<td>IV. Para. 77</td>
<td>IV–102</td>
</tr>
<tr>
<td>Pretenses</td>
<td>IV. Para. 46c(1)(a)</td>
<td>IV–65</td>
</tr>
<tr>
<td>Obtaining services under</td>
<td>IV. Para. 78</td>
<td>IV–103</td>
</tr>
<tr>
<td>Receipt</td>
<td>IV. Para. 58</td>
<td>IV–87</td>
</tr>
<tr>
<td>See also Fraud, against United States</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Statement, during guilty plea inquiry</td>
<td>R.C.M. 910(c)(5)</td>
<td>II–102</td>
</tr>
<tr>
<td>Statements in support of probable cause</td>
<td>Mil. R. Evid. 311(g)(2)</td>
<td>III–10</td>
</tr>
<tr>
<td>Swearing</td>
<td>IV. Para. 79</td>
<td>IV–103</td>
</tr>
<tr>
<td>Writing See False official statement; Forgery; Fraud against United States</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal courts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Former trial in, effect of</td>
<td>R.C.M. 905(g)</td>
<td>II–94</td>
</tr>
<tr>
<td>Final determination</td>
<td>R.C.M. 907(b)(2)(C)</td>
<td>II–98</td>
</tr>
<tr>
<td>Former jeopardy</td>
<td>R.C.M. 201(d)</td>
<td>II–10</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>R.C.M. 502(d)(3)(A)</td>
<td>II–44</td>
</tr>
<tr>
<td>Members of bar, counsel in courts-martial</td>
<td>R.C.M. 905(c)(5)</td>
<td>II–102</td>
</tr>
<tr>
<td>Rules of evidence in, application to courts-martial</td>
<td>Mil. R. Evid. 101(b)</td>
<td>III–1</td>
</tr>
<tr>
<td>Federal Rules of Evidence, amendments</td>
<td>Mil. R. Evid. 1102</td>
<td>III–41</td>
</tr>
<tr>
<td>Finality of courts-martial</td>
<td>R.C.M. 1209</td>
<td>II–168</td>
</tr>
<tr>
<td>Financial inability, as a defense</td>
<td>R.C.M. 916(i)</td>
<td>II–112</td>
</tr>
<tr>
<td>Findings</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Action by members after reaching</td>
<td>R.C.M. 921(d)</td>
<td>II–118</td>
</tr>
<tr>
<td>Announcement</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Effect on reconsideration</td>
<td>R.C.M. 924(a)</td>
<td>II–119</td>
</tr>
<tr>
<td>Erroneous</td>
<td>R.C.M. 922(d)</td>
<td>II–119</td>
</tr>
<tr>
<td>Examination of worksheets by military judge, effect on</td>
<td>R.C.M. 921(d)</td>
<td>II–118</td>
</tr>
<tr>
<td>Forms of</td>
<td>Appendix 10</td>
<td>A10–1</td>
</tr>
<tr>
<td>Guilty plea, based on</td>
<td>R.C.M. 910(g)</td>
<td>II–102</td>
</tr>
<tr>
<td>Members</td>
<td>R.C.M. 922(b)</td>
<td>II–118</td>
</tr>
<tr>
<td>Military judge</td>
<td>R.C.M. 922(c)</td>
<td>II–119</td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>--------------------</td>
<td>--------</td>
</tr>
<tr>
<td>Basis for</td>
<td>R.C.M. 918(c)</td>
<td>II–115</td>
</tr>
<tr>
<td>Charge, as to</td>
<td>R.C.M. 918(a)(2)</td>
<td>II–114</td>
</tr>
<tr>
<td>Contempt</td>
<td>R.C.M. 918(a)(1)</td>
<td>II–114</td>
</tr>
<tr>
<td>Convening authority, action on</td>
<td>R.C.M. 1107(c), (f)(3)</td>
<td>II–147; II–149</td>
</tr>
<tr>
<td>Deliberations and voting on</td>
<td>R.C.M. 921</td>
<td>II–117</td>
</tr>
<tr>
<td>Exceptions and substitutions</td>
<td>R.C.M. 918(a)(1)</td>
<td>II–114</td>
</tr>
<tr>
<td>General</td>
<td>R.C.M. 918(a)</td>
<td>II–114</td>
</tr>
<tr>
<td>Guilty</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Convening authority, action on</td>
<td>R.C.M. 1107(b)(4)</td>
<td>II–147</td>
</tr>
<tr>
<td>Reconsideration</td>
<td>R.C.M. 924(a), (c)</td>
<td>II–119</td>
</tr>
<tr>
<td>Standard</td>
<td>R.C.M. 918(c)</td>
<td>II–115</td>
</tr>
<tr>
<td>Vote resulting in</td>
<td>R.C.M. 921(c)(2)</td>
<td>II–117</td>
</tr>
<tr>
<td>Guilty plea, based on</td>
<td>R.C.M. 910(g)</td>
<td>II–102</td>
</tr>
<tr>
<td>Impeachment of</td>
<td>R.C.M. 923</td>
<td>II–119</td>
</tr>
<tr>
<td>Instructions on</td>
<td>R.C.M. 920</td>
<td>II–116</td>
</tr>
<tr>
<td>Lesser included offense</td>
<td>R.C.M. 918(a)</td>
<td>II–114</td>
</tr>
<tr>
<td>Not guilty</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Convening authority, action on</td>
<td>R.C.M. 1107(b)(4)</td>
<td>II–147</td>
</tr>
<tr>
<td>Motion for finding of</td>
<td>R.C.M. 917</td>
<td>II–113</td>
</tr>
<tr>
<td>Reconsideration</td>
<td>R.C.M. 924(b)</td>
<td>II–119</td>
</tr>
<tr>
<td>Vote resulting in</td>
<td>R.C.M. 921(c)(3)</td>
<td>II–117</td>
</tr>
<tr>
<td>Not guilty, lack of mental responsibility</td>
<td>R.C.M. 921(c)(4)</td>
<td>II–118</td>
</tr>
<tr>
<td>Reasonable doubt standard</td>
<td>R.C.M. 918(c)</td>
<td>II–115</td>
</tr>
<tr>
<td>Reconsideration</td>
<td>R.C.M. 924</td>
<td>II–119</td>
</tr>
<tr>
<td>Special findings. See Special findings.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Specifications</td>
<td>R.C.M. 918(a)(1)</td>
<td>II–114</td>
</tr>
<tr>
<td>Voting on</td>
<td>R.C.M. 921(c)</td>
<td>II–117</td>
</tr>
<tr>
<td>Fine</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contempt, punishment for</td>
<td>R.C.M. 809(a), (e)</td>
<td>II–83; 84</td>
</tr>
<tr>
<td>Courts-martial, punishment in</td>
<td>R.C.M. 1003(b)(3)</td>
<td>II–123</td>
</tr>
<tr>
<td>Fingerprint cards admissible as hearsay exception</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authentication by comparison</td>
<td>Mil. R. Evid. 901(b)(3)</td>
<td>III–39</td>
</tr>
<tr>
<td>Fingerprints</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fine</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contempt, punishment for</td>
<td>R.C.M. 809(a), (e)</td>
<td>II–83; 84</td>
</tr>
<tr>
<td>Courts-martial, punishment in</td>
<td>R.C.M. 1003(b)(3)</td>
<td>II–123</td>
</tr>
<tr>
<td>Fingerprint cards admissible as hearsay exception</td>
<td>Mil. R. Evid. 803(6), (8)</td>
<td>III–35; III–36</td>
</tr>
<tr>
<td>Firearm</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 103(12)</td>
<td>II–2</td>
</tr>
<tr>
<td>Discharge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Negligent</td>
<td>IV. Para. 80</td>
<td>IV–104</td>
</tr>
<tr>
<td>Willful</td>
<td>IV. Para. 81</td>
<td>IV–104</td>
</tr>
<tr>
<td>Maximum punishment, affecting</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aggravated assault</td>
<td>IV. Para. 54e(8)(a), (9)(a)</td>
<td>IV–82; IV–82</td>
</tr>
<tr>
<td>Larceny, wrongful appropriation</td>
<td>IV. Para. 46e(1)(b), (2)(c)</td>
<td>IV–69; IV–69</td>
</tr>
<tr>
<td>Military property</td>
<td>IV. Para. 32e(1)(b), (3)(b)</td>
<td>IV–48; IV–48</td>
</tr>
<tr>
<td>Robbery</td>
<td>IV. Para. 47e(1)</td>
<td>IV–70</td>
</tr>
<tr>
<td>Fitness reports, members, military judge, counsel</td>
<td>R.C.M. 104(b)</td>
<td>II–5</td>
</tr>
<tr>
<td>Flag, striking the</td>
<td>IV. Para. 24</td>
<td>IV–36</td>
</tr>
<tr>
<td>Fleeing scene of accident</td>
<td>IV. Para. 82</td>
<td>IV–105</td>
</tr>
<tr>
<td>Forcing a safeguard</td>
<td>IV. Para. 26</td>
<td>IV–38</td>
</tr>
<tr>
<td>Foreign law</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial notice of</td>
<td>Mil. R. Evid. 201A(b)</td>
<td>III–2</td>
</tr>
<tr>
<td>Occupied territory</td>
<td>R.C.M. 201f(1)(1)(B)(ii) (b)</td>
<td>II–11</td>
</tr>
<tr>
<td>Foreign nation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interrogation by officials of</td>
<td>Mil. R. Evid. 305(h)(2)</td>
<td>III–8</td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>------------------</td>
<td>------</td>
</tr>
<tr>
<td>Military jurisdiction, in friendly</td>
<td>R.C.M. 201(d)</td>
<td>II-10</td>
</tr>
<tr>
<td>Military jurisdiction, in belligerent</td>
<td>I. Para. 2(a)(3); R.C.M. 201(f)(i)(B)</td>
<td>I-1; II-11</td>
</tr>
<tr>
<td>Search by officials of</td>
<td>Mil. R. Evid. 311(e)(3)</td>
<td>III-9</td>
</tr>
<tr>
<td>Foreign records, authentication of</td>
<td>Mil. R. Evid. 902(3)</td>
<td>III-39</td>
</tr>
<tr>
<td>Forfeiture of pay and allowances</td>
<td></td>
<td></td>
</tr>
<tr>
<td>General courts-martial, power to adjudge</td>
<td>R.C.M. 201(f)(i)(A)(ii)</td>
<td>II-11</td>
</tr>
<tr>
<td>Nonjudicial punishment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Effective date of</td>
<td>V. Para. 5e</td>
<td>V-6</td>
</tr>
<tr>
<td>Enlisted member, imposed upon</td>
<td>V. Para. 5b(2)(A)(ii), (B)(iii)</td>
<td>V-4</td>
</tr>
<tr>
<td>Generally</td>
<td>V. Para. 5c(8)</td>
<td>V-6</td>
</tr>
<tr>
<td>Officer, imposed upon</td>
<td>V. Para. 5b(1)(B)(ii)</td>
<td>V-4</td>
</tr>
<tr>
<td>Sentence to</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Execution of</td>
<td>R.C.M. 1113(b)</td>
<td>II-158</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1003(b)(2)</td>
<td>II-123</td>
</tr>
<tr>
<td>Forgery</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fraud against United States, in connection with</td>
<td>IV. Para. 58</td>
<td>IV-87</td>
</tr>
<tr>
<td>Generally</td>
<td>IV. Para. 48</td>
<td>IV-70</td>
</tr>
<tr>
<td>Former jeopardy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mistrial, effect of</td>
<td>R.C.M. 915(c)</td>
<td>II-109</td>
</tr>
<tr>
<td>Motion to dismiss for</td>
<td>R.C.M. 907(b)(2)(C)</td>
<td>II-98</td>
</tr>
<tr>
<td>Nonjudicial punishment as</td>
<td>V. Para. 1f(1), (5)</td>
<td>V-1; V-2</td>
</tr>
<tr>
<td>Withdrawal of charges, effect of</td>
<td>R.C.M. 604(b)</td>
<td>II-56</td>
</tr>
<tr>
<td>Former punishment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bar to trial</td>
<td>R.C.M. 907(b)(2)(D)(iv)</td>
<td>II-98</td>
</tr>
<tr>
<td>Effect of nonjudicial punishment</td>
<td>V. Para. 1f(1), (5)</td>
<td>V-1; V-2</td>
</tr>
<tr>
<td>Former testimony, admissibility of</td>
<td>Mil. R. Evid. 804(b)(1)</td>
<td>III-37</td>
</tr>
<tr>
<td>Forwarding charges, generally</td>
<td>R.C.M. 401(a)</td>
<td>II-32</td>
</tr>
<tr>
<td>See also Charges and specifications</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fraternization, as offense</td>
<td>IV. Para. 83</td>
<td>IV-105</td>
</tr>
<tr>
<td>Fraud</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Check; Forgery; Larceny.</td>
<td>IV. Para. 58</td>
<td>IV-87</td>
</tr>
<tr>
<td>Against United States</td>
<td>IV. Para. 7</td>
<td>IV-8</td>
</tr>
<tr>
<td>Fraudulent enlistment, appointment, or separation</td>
<td>IV. Para. 8</td>
<td>IV-8</td>
</tr>
<tr>
<td>Frisk</td>
<td>Mil. R. Evid. 314(I)(2)</td>
<td>III-13</td>
</tr>
<tr>
<td>Gambling with subordinate</td>
<td>IV. Para. 84</td>
<td>IV-106</td>
</tr>
<tr>
<td>General article (Art. 134, UCMJ)</td>
<td>IV. Para. 60</td>
<td>IV-91</td>
</tr>
<tr>
<td>General court-martial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also specific topics.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Composition</td>
<td>R.C.M. 501(a)(1)</td>
<td>II-43</td>
</tr>
<tr>
<td>Convening authority</td>
<td>R.C.M. 407; 504(b)(1)</td>
<td>II-41; II-49</td>
</tr>
<tr>
<td>See also Convening authority.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Counsel</td>
<td>R.C.M. 502(d)</td>
<td>II-44</td>
</tr>
<tr>
<td>Jurisdiction of</td>
<td>R.C.M. 201(f)(1)</td>
<td>II-11</td>
</tr>
<tr>
<td>Prerequisites</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pretrial investigation</td>
<td>R.C.M. 405(a)</td>
<td>II-36</td>
</tr>
<tr>
<td>Staff judge advocate advice</td>
<td>R.C.M. 406(a)</td>
<td>II-40</td>
</tr>
<tr>
<td>Procedural guide</td>
<td>Appendix 8</td>
<td>A8-1</td>
</tr>
<tr>
<td>Record of trial</td>
<td>R.C.M. 1103(b)</td>
<td>II-137</td>
</tr>
<tr>
<td>Referral of charges to</td>
<td>R.C.M. 601(e)</td>
<td>II-54</td>
</tr>
<tr>
<td>General order, failure to obey</td>
<td>IV. Para. 16</td>
<td>IV-23</td>
</tr>
<tr>
<td>Government</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appeal by</td>
<td>R.C.M. 908</td>
<td>II-99</td>
</tr>
</tbody>
</table>

Index 37
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fraud against</td>
<td>IV. Para. 58</td>
<td>IV-87</td>
</tr>
<tr>
<td>Government information privilege</td>
<td>Mil. R. Evid. 506</td>
<td>III-27</td>
</tr>
<tr>
<td>Government officials, contempt toward</td>
<td>IV. Para. 12</td>
<td>IV-60</td>
</tr>
<tr>
<td>Graft</td>
<td>IV. Para. 66</td>
<td>IV-96</td>
</tr>
<tr>
<td>Grievous bodily harm, defined</td>
<td>IV. Para. 54(e)(4)(a)(iii)</td>
<td>IV-81</td>
</tr>
<tr>
<td>Identification of accused</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Identification card, false</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Husband-wife privilege</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Housebreaking</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault with intent to commit</td>
<td>IV. Para. 64</td>
<td>IV-94</td>
</tr>
<tr>
<td>Generally</td>
<td>IV. Para. 56</td>
<td>IV-85</td>
</tr>
<tr>
<td>Identification card, false</td>
<td>IV. Para. 77</td>
<td>IV-102</td>
</tr>
<tr>
<td>Identification of accused</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Acts preceding or following offense</td>
<td>Mil. R. Evid. 404(b)</td>
<td>III-19</td>
</tr>
<tr>
<td>By witness</td>
<td>Mil. R. Evid. 505</td>
<td>III-16</td>
</tr>
<tr>
<td>Illness</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Feigning</td>
<td>IV. Para. 40</td>
<td>IV-58</td>
</tr>
<tr>
<td>Good cause for excusal</td>
<td>R.C.M. 505(f)</td>
<td>II-51</td>
</tr>
<tr>
<td>Immunity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attorney General of United States, authorized by</td>
<td>R.C.M. 704(c)(1)</td>
<td>II-68</td>
</tr>
<tr>
<td>Authority to grant</td>
<td>R.C.M. 704(c)</td>
<td>II-68</td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-------------------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>Contents of grant</td>
<td>R.C.M. 704(d)</td>
<td>II–69</td>
</tr>
<tr>
<td>Defense witness, request for</td>
<td>R.C.M. 704(e)</td>
<td>II–69</td>
</tr>
<tr>
<td>Effect</td>
<td>Mil. R. Evid. 301(c)(1); R.C.M.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>704(a), (b)</td>
<td>III–3; II–68</td>
</tr>
<tr>
<td>General court-martial convening authority</td>
<td>R.C.M. 704(c)</td>
<td>II–68</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 704</td>
<td>II–68</td>
</tr>
<tr>
<td>Military judge review of decision whether to grant</td>
<td>R.C.M. 704(c)</td>
<td>II–69</td>
</tr>
<tr>
<td>Motion to dismiss based on grant of, to accused</td>
<td>R.C.M. 907(b)(2)(D)(ii)</td>
<td>II–98</td>
</tr>
<tr>
<td>Notification to accused of</td>
<td>Mil. R. Evid. 301(c)(2)</td>
<td>III–3</td>
</tr>
<tr>
<td>Procedure</td>
<td>R.C.M. 704(d)</td>
<td>II–69</td>
</tr>
<tr>
<td>Self-incrimination, effect on</td>
<td>Mil. R. Evid. 301(c)</td>
<td>III–3</td>
</tr>
<tr>
<td>Types of</td>
<td>R.C.M. 704(a)</td>
<td>II–68</td>
</tr>
</tbody>
</table>

**Improvement**

See also Evidence, Impeachment.

Findings                                                             | R.C.M. 923                           | II–119 |
| Sentence                                                             | R.C.M. 1008                          | II–132 |

**Impersonating a commissioned officer, warrant officer,**

noncommissioned officer, government agent or official                | IV. Para. 86                         | IV–107 |

**Importing controlled substances**                                  | IV. Para. 37                         | IV–53  |

**Inability, as defense**                                             | R.C.M. 916(i)                        | II–112 |
| Generally                                                            | I                                |
| To authorized absence                                               | IV. Para. 10c(6)                    | IV–13  |

**Incapacitation for duty through drunkenness**                       | IV. Para. 76                         | IV–101 |

**Included offenses. See Lesser included offenses.**

**Incrimination. See Self-incrimination.**                           | 

**Indecent**

Acts

- With a child                                                        | IV. Para. 87                         | IV–108 |
- With another                                                        | IV. Para. 90                         | IV–109 |

Assault                                                               | IV. Para. 63                         | IV–94  |

Exposure                                                              | IV. Para. 88                         | IV–108 |

Language                                                              | IV. Para. 89                         | IV–109 |

Liberties with a child                                                | IV. Para. 87                         | IV–108 |

**Individual counsel, generally**                                      | R.C.M. 506(b)                        | II–51  |

See also Counsel; Defense counsel.

**Influence**

Command, unlawful

- As offense                                                          | IV. Para. 22                         | IV–31  |
- Generally                                                          | R.C.M. 104                           | II–5   |

Impeachment of sentence                                               | R.C.M. 1008                          | II–132 |

Inquiry of members as to                                              | Mil. R. Evid. 606(b)                 | III–31 |

Outside, on members                                                   | R.C.M. 923; 1008; Mil. R. Evid.      |        |

606(b)                                                                | II–119; II–132; III–31               |

**Informant, identify of, privilege concerning**                      | Mil. R. Evid. 507                    | III–29 |

**Injury**

Grievous bodily harm                                                  | IV. Para. 54(c)(4)(a)(iii)           | IV–81  |

Maiming                                                               | IV. Para. 50                         | IV–75  |

Self-inflicted                                                        | IV. Para. 40                         | IV–58  |

**Innocence, presumption of**                                         | R.C.M. 920(e)(5)(A)                  | II–116 |

**Inquiry, court of. See Court of inquiry.**                          | R.C.M. 303                           | II–20  |

**Inquiry, preliminary**                                              | R.C.M. 303                           | II–20  |

**Insanity. See Mental capacity; Mental responsibility.**            | 

Index 39
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inspect, defined for discovery purposes</td>
<td>R.C.M. 701(b)</td>
<td>II–61</td>
</tr>
<tr>
<td>Inspections</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Search and seizure.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>By court-martial</td>
<td>R.C.M. 913(c)(3)</td>
<td>II–107</td>
</tr>
<tr>
<td>Health and welfare, evidence discovered in</td>
<td>Mil. R. Evid. 313(b)</td>
<td>III–11</td>
</tr>
<tr>
<td>Inspector general, privileged communications</td>
<td>Mil. R. Evid. 506(c)</td>
<td>III–27</td>
</tr>
<tr>
<td>Instruction, extra military</td>
<td>V. Para. 1g</td>
<td>V–2</td>
</tr>
<tr>
<td>Instructions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Deposition, authority who gives</td>
<td>R.C.M. 702(d)(3)</td>
<td>II–62</td>
</tr>
<tr>
<td>In courts-martial, by military judge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accomplice testimony, joint or common trial</td>
<td>Mil. R. Evid. 306</td>
<td>III–8</td>
</tr>
<tr>
<td>Contempt</td>
<td>R.C.M. 809(e)(2)(A)</td>
<td>II–84</td>
</tr>
<tr>
<td>Evidence, limited purpose</td>
<td>Mil. R. Evid. 105</td>
<td>III–2</td>
</tr>
<tr>
<td>Expert testimony</td>
<td>Mil. R. Evid. 702</td>
<td>III–34</td>
</tr>
<tr>
<td>Findings</td>
<td>R.C.M. 920</td>
<td>II–116</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 801(a)(5)</td>
<td>II–75</td>
</tr>
<tr>
<td>Preliminary</td>
<td>R.C.M. 913(a)</td>
<td>II–107</td>
</tr>
<tr>
<td>Sentencing</td>
<td>R.C.M. 1005</td>
<td>II–130</td>
</tr>
<tr>
<td>Pretrial investigation, procedural instruction</td>
<td>R.C.M. 405(c)</td>
<td>II–35</td>
</tr>
<tr>
<td>Referral, convening authority</td>
<td>R.C.M. 601(e)(1)</td>
<td>II–54</td>
</tr>
<tr>
<td>Insubordination. See Contempt; Disobedience of orders; Disrespect.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intelligence, giving to the enemy</td>
<td>IV. Para. 28</td>
<td>IV–40</td>
</tr>
<tr>
<td>Intent</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also specific offenses.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidence of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Acts preceding or following offense</td>
<td>Mil. R. Evid. 404(b)</td>
<td>III–19</td>
</tr>
<tr>
<td>Statements of</td>
<td>Mil. R. Evid. 803(3)</td>
<td>III–35</td>
</tr>
<tr>
<td>To distribute controlled substances</td>
<td>IV. Para. 37c(6)</td>
<td>IV–54</td>
</tr>
<tr>
<td>Interlocutory questions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appeal of</td>
<td>R.C.M. 908</td>
<td>II–99</td>
</tr>
<tr>
<td>Evidence, right to production of</td>
<td>R.C.M. 703(f)</td>
<td>II–67</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 801(e)</td>
<td>II–76</td>
</tr>
<tr>
<td>Rulings on</td>
<td>R.C.M. 801(e)(1)</td>
<td>II–76</td>
</tr>
<tr>
<td>By military judge</td>
<td>R.C.M. 801(e)(2), (3)</td>
<td>II–76</td>
</tr>
<tr>
<td>By president of special court-martial without military judge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confessions and admissions</td>
<td>Mil. R. Evid. 304(d)(4)</td>
<td>III–5</td>
</tr>
<tr>
<td>Evidence of pretrial identification of accused</td>
<td>Mil. R. Evid. 321(f)</td>
<td>III–18</td>
</tr>
<tr>
<td>Evidence seized from accused</td>
<td>Mil. R. Evid. 311(d)(4)</td>
<td>III–9</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 801(a)(4), (e)(1)</td>
<td>II–75; 76</td>
</tr>
<tr>
<td>Standard of proof</td>
<td>R.C.M. 801(e)(4)</td>
<td>II–76</td>
</tr>
<tr>
<td>Witnesses, right to, for determining</td>
<td>R.C.M. 703(b)(1)</td>
<td>II–64</td>
</tr>
<tr>
<td>International law, judicial notice of</td>
<td>Mil. R. Evid. 201A(b)</td>
<td>III–2</td>
</tr>
<tr>
<td>Interpreter</td>
<td></td>
<td></td>
</tr>
<tr>
<td>At investigation, pretrial</td>
<td>R.C.M. 405(d)(3)(C)</td>
<td>II–36</td>
</tr>
<tr>
<td>Detailing</td>
<td>R.C.M. 501(c)</td>
<td>II–43</td>
</tr>
<tr>
<td>Disqualification</td>
<td>R.C.M. 502(e)(2)</td>
<td>II–47</td>
</tr>
<tr>
<td>Duties</td>
<td>R.C.M. 502(e)(3)</td>
<td>II–47</td>
</tr>
<tr>
<td>Oath</td>
<td>R.C.M. 807(b); 901(c)</td>
<td>II–82; II–89</td>
</tr>
<tr>
<td>Payment of</td>
<td>R.C.M. 502(e)(4)</td>
<td>II–47</td>
</tr>
</tbody>
</table>
Subject

Qualifications ...........................................
Testimony given through ...................................

Interrogation. See Self-incrimination.
Interrogatories. See Deposition.

Intoxication

See also Drunkenness.

Intent, effect on ................................................................
Murder, effect on intent in ...........................................
Not defense, generally ...................................................

Introduction of controlled substance ..............................

Investigation, pretrial (Art. 32, UCMJ)

Accused, rights at ......................................................
Authority to direct ......................................................
Court of inquiry, as substitute for ..................................
Defense counsel ..........................................................
Deposition, use at .........................................................
Earlier investigation, as substitute for ............................
Evidence, production of ................................................
General court-martial, requirement for ...........................
Instructions, by commander who directs ........................
Investigating officer

Charges and specifications, no authority to change .......... 
Detailing ........................................................................
Disqualification, to act in any capacity in same trial ........

Recommendation .........................................................
Mental examination of the accused ............................... 
Military Rules of Evidence, not applicable ......................
Motions relating to ....................................................... 
Objections ......................................................................
Personnel ......................................................................
Procedure ......................................................................
Report of ......................................................................
Scope ...........................................................................
Spectator, access to ......................................................
Waiver .........................................................................
Failure to object to defects ...........................................
Generally ......................................................................

Witness, production of ................................................

Investigator. See Law enforcement official.

Involuntary manslaughter .............................................

Jeopardy. See Former jeopardy.
Joint, defined .............................................................
Joint command or task force, jurisdiction ........................
Joint offenses. See Accomplices; Conspiracy; Principals.

Joint trial

Counsel representing more than one accused, inquiry required
Subject | Ref. | Page
--- | --- | ---
Evidence of statement of accused | Mil. R. Evid. 105; 306 | III-2, III-8
Procedure | R.C.M. 812 | II-87
Referrals to | R.C.M. 601(e)(3) | II-55
Rights of accused | R.C.M. 812 | II-87
Sever, motion to | R.C.M. 906(b)(9) | II-96
Joyriding | IV. Para. 46 | IV-65

Judge Advocate, See Military judge.

Judge advocate
- Defined | Art. 1(13), UCMJ; R.C.M. 103 | A2-1; II-1
- Oaths, authority to administer | Art 136(a)(1), UCMJ | A2-28
- Review of record of trial by | R.C.M. 1112 | II-156

Judge Advocate General, The
- Cases examined by | R.C.M. 1201(b)(1) | II-162
- Cases forwarded to Court of Military Review | R.C.M. 1201(a) | II-162
- Cases reviewed by | R.C.M. 1201(b)(2), (3) | II-162
- Certification of military judge | R.C.M. 502(c) | II-44
- Detailing military judge | R.C.M. 503(b)(1) | II-48
- Professional supervisor of military judge, counsel | R.C.M. 104(a)(3)(C); 109 | II-5; II-6
- Remission and suspension of sentence | R.C.M. 1201(c) | II-163
- Review of summary courts-martial | R.C.M. 1306(d) | II-177
- Rules of court, authority to make | R.C.M. 108 | II-6
- Waiver of review, by accused | R.C.M. 1110 | II-154

Judgments of courts-martial, finality of | R.C.M. 1209 | II-168

See also Findings; Sentence.

Judicial notice
- Adjudicative facts | Mil. R. Evid. 201 | III-2
- Of law, foreign and domestic | Mil. R. Evid. 201A | III-2

Jumping from vessel into water | IV. Para. 91 | IV-109

Jurisdiction
- Commander's | I. Para. 2(b)(4); V. Para. 2a | I-1; V-2
- Courts-martial
  - Accused from armed force different from convening authority | R.C.M. 201(e) | II-10
  - Attachment of | R.C.M. 202(c) | II-14
  - Civilians | R.C.M. 202(a) | II-13
  - Composition, affecting | R.C.M. 201(b)(2) | II-9
  - Constructive enlistment | Art. 2(c), UCMJ; R.C.M. 202(a) | A2-1; II-13
  - Contempt power | R.C.M. 201(c) | II-10
  - Convening, as affecting | R.C.M. 201(b)(1) | II-9
  - Discharge, effect on | R.C.M. 202(a), (e) | II-13; II-14
  - Dismissal of charges for lack of | R.C.M. 907(b)(1)(A) | II-97
  - Generally | I. Para. 2(b)(1) | I-1
  - Joint command | R.C.M. 201(e)(2) | II-10
  - Law of war, offense under | R.C.M. 201(a)(3), (f)(1)(B) | II-9; II-11
  - Military offense, exclusive jurisdiction | R.C.M. 201(d)(1) | II-10
  - Motion to dismiss for lack of
    - Burden of proof | R.C.M. 905(c)(2)(B) | II-93
    - Generally | R.C.M. 907(b)(1)(A) | II-97
    - Not waived | R.C.M. 905(b), (e); 907(b)(1)(A) | II-93; II-94; II-97
    - Nature of | R.C.M. 201(a) | II-9
  - Offenses subject to
    - Civilian tribunals, trial in | R.C.M. 201(d) | II-10

Index 42
INDEX
MCM, 1994

Subject Ref. Page
--- --- ----
Generally R.C.M. 203 II–15
Service connection of R.C.M. 203 II–15
Persons subject to

Generally R.C.M. 202(a) II–13
Law of war under R.C.M. 202(b) II–14
Reservists R.C.M. 204 II–16
Place of offense, effect on R.C.M. 201(a)(2) II–9
Place of trial, effect on R.C.M. 201(a)(3) II–9
Reciprocal, between service R.C.M. 201(e) II–10
Referral, as affecting R.C.M. 201(b)(3) II–9
Requisites of R.C.M. 201(b) II–9
Review of, accused in different armed force R.C.M. 201(e)(5) II–11
Subject matter R.C.M. 203 II–15

Courts of inquiry R.C.M. 201(g); I. Para. 2(b)(3) II–12
Exercise of military I. Para. 2 I–1
Foreign nation over visiting force R.C.M. 201(d) II–10
General courts-martial R.C.M. 201(f)(1) II–11
Kinds of military I. Para. 2(a) I–1
Memorandum of understanding concerning Appendix 3 A3–1
Military commission I. Para. 2(b)(2) I–1

Not waivable by

Failure to raise at trial R.C.M. 905(e) II–94
Pretrial agreement R.C.M. 705(c)(1)(B) II–70
Provost courts I. Para. 2(b)(2) I–1
Sources I. Para. 1 I–1
Special court-martial R.C.M. 201(f)(2) II–12
Summary courts-martial R.C.M. 1301(c) II–172

Jury. See Members of a court-martial.

Justification, as a defense R.C.M. 916(c) II–110
Juvenile courts, conviction by, admissibility Mil. R. Evid. 609(d) III–32
Kidnapping IV. Para. 92 IV–110
Killing. See Homicide; Manslaughter; Murder.
Labatory reports, admissibility Mil. R. Evid. 803(6), (8) III–35; III–36
Language, Indecent IV. Para. 89 IV–109

Larceny

Generally IV. Para. 46 IV–121
Of mail IV. Para. 93 IV–110

Law, judicial notice of Mil. R. Evid. 201A III–2

Law enforcement official

Assault on IV. Para. 54 IV–79
Civilian, authority to apprehend persons subject to code R.C.M. 302(a)(2), (b)(3) II–18; II–19
Interrogations by Mil. R. Evid. 305 III–6
Military, authority to apprehend R.C.M. 302(b)(1) II–18
Searches by Mil. R. Evid 311(c) III–8

Law of war

Courts-martial, cases under R.C.M. 201(a)(3), (f)(1)(B) II–9; II–11
Exercise of jurisdiction under I. Para. 2(a)(4), R.C.M. 202(b), 203 II–14

Lawyer. See Counsel; Defense counsel; Trial counsel.

Lawyer-client privilege. Mil. R. Evid. 502 III–21
Leading questions Mil. R. Evid. 611(c) III–32

Legal officer

Index 43
Subject

See also Staff judge advocate.

Defined .................................................. Art. 1(12), UCMJ; R.C.M. 103  .................................. A2–1; II–1
Disqualified

As member .................................................. R.C.M. 912(f)(1)(G) ........................................ II–105
As military judge .......................................... R.C.M. 902(b)(2) ........................................ II–90
Post-trial recommendation ................................ R.C.M. 1106 ................................................ II–144

Lesser included offense

Findings as to

Convening authority action approving ..................... R.C.M. 1107(c)(1) ........................................ II–147
Exceptions and substitutions, by ........................ R.C.M. 918(a)(1) ........................................ II–114
Guilty plea, on .............................................. R.C.M. 910(g)(2) ........................................ II–103
Generally ...................................................... IV. Para. 3 ................................................ IV–3
Instructions ................................................... R.C.M. 920(e)(2) ........................................ II–116
Motions for finding of not guilty, on ......................... R.C.M. 917(e) ........................................ II–113
Plea of guilty .................................................. R.C.M. 910(a) ........................................ II–101
Specific offenses, of ........................................ Part IV ................................................ IV–1
Voting on, by members ..................................... R.C.M. 921(c)(4) ........................................ II–118

Letter of reprimand. See Reprimand.

Letters, authentication of ................................... Mil. R. Evid. 901; 902 ..................................... III–38; III–39
Liberties, indecent, with child .............................. IV. Para. 87 ................................................ IV–108
Liberties, conditions on ..................................... R.C.M. 304(a)(1) ........................................ II–21
See also Restraint, pretrial.

Lineup, identification at .................................... Mil. R. Evid. 321 ........................................ III–16
Liquor. See Drunk.

Logs, as records, admissibility ............................. Mil. R. Evid. 802(6), (8) ................................ III–35; III–36
Loitering on post by sentinel or lookout .................. IV. Para. 104 ........................................ IV–117

Lookout

Assault on .................................................... IV. Para. 54 ................................................ IV–79
Misbehavior as .............................................. IV. Para. 38 ................................................ IV–56
Offenses by or against ..................................... IV. Para. 104 ................................................ IV–117
Looting and pillaging ........................................ IV. Para. 27 ................................................ IV–38
Losing military property .................................... IV. Para. 32 ................................................ IV–46

Loss

Notes of recordings of proceedings, of .................... R.C.M. 1103(f) ........................................ II–139
Records of trial, of ......................................... R.C.M. 1104(c) ........................................ II–142
Lost property, subject to larceny .......................... IV. Para. 46c(1)(b)(i) ................................. IV–68
Magistrate, power to authorize search ................... Mil. R. Evid. 315(d)(2) ............................... III–14

Mail

Obscene matters, depositing in ............................ IV. Para. 94 ................................................ IV–111
Taking, opening, secreting, destroying, or stealing .... IV. Para. 93 ................................................ IV–110

Maiming ....................................................... IV. Para. 50 ................................................ IV–75
Making false claim .......................................... IV. Para. 58 ................................................ IV–87
Malingering ................................................... IV. Para. 40 ................................................ IV–58
Maltreatment of person subject to orders ................ IV. Para. 17 ................................................ IV–25

Manslaughter

See also Homicide; Murder.

Assault with intent to commit voluntary ................ IV. Para. 64 ................................................ IV–94
Generally ..................................................... IV. Para. 44 ................................................ IV–62

Manual for Courts-Martial

Structure and application ................................. I. Para. 4 ................................................ I–1
Use of, by court members ................................ R.C.M. 502(a)(2) ........................................ II–43
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manufacturing controlled substances</td>
<td>I. Para. 2(a)2</td>
<td>I-1</td>
</tr>
<tr>
<td>Marijuana, offenses involving</td>
<td>I. Para. 37</td>
<td>IV-53</td>
</tr>
<tr>
<td>Martial law</td>
<td>I. Para. 37</td>
<td>IV-53</td>
</tr>
<tr>
<td>Mast. See Nonjudicial punishment.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Members of a court-martial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Absence</td>
<td>R.C.M. 813(a)(5)</td>
<td>II-88</td>
</tr>
<tr>
<td>Announcement concerning</td>
<td>R.C.M. 805(b); 901(e)</td>
<td>II-80; II-90</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 502(a)</td>
<td>II-43</td>
</tr>
<tr>
<td>Active duty</td>
<td>R.C.M. 813(a)(4)</td>
<td>II-88</td>
</tr>
<tr>
<td>Announcement of</td>
<td>R.C.M. 503(a)(3)</td>
<td>II-48</td>
</tr>
<tr>
<td>Armed force or command different from convening authority</td>
<td>R.C.M. 503(a)</td>
<td>II-104</td>
</tr>
<tr>
<td>Challenges</td>
<td>R.C.M. 505(c)</td>
<td>II-50</td>
</tr>
<tr>
<td>Change of</td>
<td>R.C.M. 508(c)</td>
<td>II-84</td>
</tr>
<tr>
<td>Contempt, action on</td>
<td>R.C.M. 502(d)(4)(D)</td>
<td>II-45</td>
</tr>
<tr>
<td>Counsel, disqualified to act as</td>
<td>R.C.M. 103(14)</td>
<td>II-2</td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 912(f)</td>
<td>II-105</td>
</tr>
<tr>
<td>Detailing</td>
<td>R.C.M. 502(a)(2)</td>
<td>II-43</td>
</tr>
<tr>
<td>Disqualification</td>
<td>R.C.M. 805(b); 901(e); 921(a); 1006(a)</td>
<td>II-80; II-90; II-117; II-131</td>
</tr>
<tr>
<td>Duties</td>
<td>R.C.M. 901(a)</td>
<td>II-43</td>
</tr>
<tr>
<td>Enlisted</td>
<td>R.C.M. 903</td>
<td>II-91</td>
</tr>
<tr>
<td>Absence of</td>
<td>R.C.M. 805(b)</td>
<td>II-80</td>
</tr>
<tr>
<td>Detailing</td>
<td>R.C.M. 503(a)(2)</td>
<td>II-48</td>
</tr>
<tr>
<td>Request for</td>
<td>R.C.M. 903</td>
<td>II-5</td>
</tr>
<tr>
<td>Evaluation of, limitations</td>
<td>R.C.M. 104(b)(1)</td>
<td>II-5</td>
</tr>
<tr>
<td>Evidence, request for</td>
<td>R.C.M. 913(c)(1)(F)</td>
<td>II-107</td>
</tr>
<tr>
<td>Examination of</td>
<td>R.C.M. 912(d)</td>
<td>II-104</td>
</tr>
<tr>
<td>Excusal</td>
<td>R.C.M. 912(d)</td>
<td>II-104</td>
</tr>
<tr>
<td>General court-martial, number required</td>
<td>R.C.M. 501(a)(1)</td>
<td>II-43</td>
</tr>
<tr>
<td>Influence, unlawful</td>
<td>R.C.M. 805(b); 901(e); 921(a); 1006(a)</td>
<td>II-80; II-90; II-117; II-131</td>
</tr>
<tr>
<td>New members, procedure</td>
<td>R.C.M. 805(b)(1)</td>
<td>II-80</td>
</tr>
<tr>
<td>New trial</td>
<td>R.C.M. 801(b)(1)</td>
<td>II-75</td>
</tr>
<tr>
<td>Notes of</td>
<td>R.C.M. 921(b)</td>
<td>II-117</td>
</tr>
<tr>
<td>Oath</td>
<td>R.C.M. 807(b)(1)</td>
<td>II-82</td>
</tr>
<tr>
<td>Objections to rulings by president</td>
<td>R.C.M. 801(e)(3)</td>
<td>II-76</td>
</tr>
<tr>
<td>Other trial</td>
<td>R.C.M. 810(b)(1)</td>
<td>II-85</td>
</tr>
<tr>
<td>Presence at court-martial</td>
<td>R.C.M. 805(b); 901(e); 921(a); 1006(a)</td>
<td>II-80; II-90; II-117; II-131</td>
</tr>
<tr>
<td>President</td>
<td>R.C.M. 502(b)</td>
<td>II-44</td>
</tr>
<tr>
<td>Pretrial agreement, not informed of</td>
<td>R.C.M. 705(e)</td>
<td>II-71</td>
</tr>
<tr>
<td>Qualifications</td>
<td>R.C.M. 502(a)(1)</td>
<td>II-43</td>
</tr>
<tr>
<td>Rehearings</td>
<td>R.C.M. 810(b)(1)</td>
<td>II-85</td>
</tr>
<tr>
<td>Selection, challenge of</td>
<td>R.C.M. 912(b)</td>
<td>II-104</td>
</tr>
<tr>
<td>Sessions without</td>
<td>R.C.M. 803</td>
<td>II-78</td>
</tr>
<tr>
<td>Special court-martial, number required</td>
<td>R.C.M. 501(a)(2); 805(b)</td>
<td>II-43; II-80</td>
</tr>
<tr>
<td>Waiver of, by accused</td>
<td>R.C.M. 903</td>
<td>II-91</td>
</tr>
<tr>
<td>Pretrial agreement, in</td>
<td>R.C.M. 705(c)(2)(E)</td>
<td>II-70</td>
</tr>
<tr>
<td>Witness, incompetent as</td>
<td>Mil. R. Evid. 606</td>
<td>III-31</td>
</tr>
<tr>
<td>Mental capacity</td>
<td>R.C.M. 909</td>
<td>II-100</td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>--------------</td>
<td>--------</td>
</tr>
<tr>
<td>Inquiry into</td>
<td>R.C.M. 706</td>
<td>II–71</td>
</tr>
<tr>
<td>Lack of, effect on</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Action of convening authority</td>
<td>R.C.M. 1107(b)(5)</td>
<td>II–147</td>
</tr>
<tr>
<td>Appellate review</td>
<td>R.C.M. 1203(c)</td>
<td>II–164</td>
</tr>
<tr>
<td>Death sentence</td>
<td>R.C.M. 1113(d)(1)(B)</td>
<td>II–158</td>
</tr>
<tr>
<td>Speedy trial, effect on</td>
<td>R.C.M. 707(c)(1)</td>
<td>II–73</td>
</tr>
<tr>
<td>Motions relating to</td>
<td>R.C.M. 906(b)(14)</td>
<td>II–97</td>
</tr>
<tr>
<td>Presumption of</td>
<td>R.C.M. 909(b)</td>
<td>II–100</td>
</tr>
<tr>
<td>Standard</td>
<td>R.C.M. 909(c)</td>
<td>II–100</td>
</tr>
</tbody>
</table>

Mental disease or defect. See Mental responsibility.

Mental examination

Discovery of

By defense                                R.C.M. 701(a)(2)(B) | II–58
By prosecution                           R.C.M. 701(b)(4)   | II–59
Of accused                               R.C.M. 706       | II–71
Speedy trial, effect on                  R.C.M. 707(c)(1)  | II–73

Mental responsibility

Discovery of defense of                   R.C.M. 701(b)(2) | II–59
Disease or defect, defined               R.C.M. 916(k)(1) | II–112
Failure to disclose intent to raise      R.C.M. 701(g)(3) | II–60
Generally                                Art. 50a, UCMJ; R.C.M. 916(k) | A2–13; II–112
Inquiry into                             R.C.M. 706       | II–71
Motions relating to                      R.C.M. 906(b)(14) | II–97
Notice of defense involving              R.C.M. 701(b)(2) | II–59
Partial                                  R.C.M. 916(k)(2) | II–112
Presumption of                           R.C.M. 916(k)(3)(A) | II–112
Withdrawn, effect of                     R.C.M. 701(b)(5) | II–60

Midshipman

Conduct unbecoming and officer and gentleman IV. Para. 59 | IV–91
Jurisdiction of courts-martial, subject to Art. 2(a)(2), UCMJ; R.C.M. 202(a) | A2–1; II–13
Summary courts-martial, not subject to trial by R.C.M. 1301(c) | II–172

Military commission

Aiding the enemy, trial by              IV. Para. 28   | IV–40
Concurrent jurisdiction, other military tribunals R.C.M. 201(g) | II–12
Contempt                                 Art. 48, UCMJ | A2–13
Exercise of jurisdiction                I. Para. 2(b)(2) | I–1
Procedure                                I. Para. 2(b)(2) | I–1
Spying, trial by                         IV. Para. 30   | IV–43

Military government                     I. Para. 2(a)(3) | I–1

Military judge

Absence of, effect                      R.C.M. 805(a) | II–80
Accused, advice to concerning          |              |        |
Appellate rights                        R.C.M. 1010    | II–133
Counsel rights                          R.C.M. 901(d)(4) | II–89

Alone, trial by                          |              |        |
Capital case, prohibited                 R.C.M. 201(f)(1)(C); 903(a)(2) | II–12; II–91
Request for                              R.C.M. 903    | II–91
Waiver of right to                      |              |        |
Generally                                R.C.M. 903(e) | II–92
Prettrial agreement, in                  R.C.M. 705(c)(2)(E) | II–70
Announcement of                          R.C.M. 813(a)(3); 901(b) | II–87; II–89
Armed force different from accused or convening authority R.C.M. 201(e)(4) | II–10

Index 46
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assembly, announcement of</td>
<td>R.C.M. 911</td>
<td>II-103</td>
</tr>
<tr>
<td>Authentication of record of trial</td>
<td>R.C.M. 1104(a)(2)</td>
<td>II-141</td>
</tr>
<tr>
<td>Challenge of</td>
<td>R.C.M. 902</td>
<td>II-90</td>
</tr>
<tr>
<td>Change of</td>
<td>R.C.M. 505(e)</td>
<td>II-51</td>
</tr>
<tr>
<td>Conferences, with parties</td>
<td>R.C.M. 802</td>
<td>II-78</td>
</tr>
<tr>
<td>Confinement, pretrial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authority to order release from</td>
<td>R.C.M. 305(g)</td>
<td>II-23</td>
</tr>
<tr>
<td>Review of</td>
<td>R.C.M. 305(j)</td>
<td>II-25</td>
</tr>
<tr>
<td>Contempt, authority to exercise</td>
<td>R.C.M. 801(b)(2); 809(c)</td>
<td>II-75; II-84</td>
</tr>
<tr>
<td>Control of proceedings</td>
<td>R.C.M. 801(a)(3); 804(b)</td>
<td>II-75; II-79</td>
</tr>
<tr>
<td>Counsel</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Disqualification of</td>
<td>R.C.M. 901(d)(3)</td>
<td>II-89</td>
</tr>
<tr>
<td>Disqualified to act as</td>
<td>R.C.M. 502(d)(4)(C)</td>
<td>II-45</td>
</tr>
<tr>
<td>Oath, administering</td>
<td>R.C.M. 901(d)(5)</td>
<td>II-90</td>
</tr>
<tr>
<td>Defense counsel, permission to withdraw</td>
<td>R.C.M. 506(c)</td>
<td>II-52</td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 103(15)</td>
<td>II-2</td>
</tr>
<tr>
<td>Deposition</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authority to order</td>
<td>R.C.M. 702(b)</td>
<td>II-61</td>
</tr>
<tr>
<td>Authority to prohibit</td>
<td>R.C.M. 702(i)</td>
<td>II-64</td>
</tr>
<tr>
<td>Detail</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Failure to in special court-martial</td>
<td>R.C.M. 201(f)(2)(B)(ii)(b)</td>
<td>II-12</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 503(b)</td>
<td>II-48</td>
</tr>
<tr>
<td>Discovery, authority to regulate</td>
<td>R.C.M. 701(g)</td>
<td>II-60</td>
</tr>
<tr>
<td>Disqualification</td>
<td>R.C.M. 902</td>
<td>II-90</td>
</tr>
<tr>
<td>Docketing</td>
<td>R.C.M. 801(a)(1)</td>
<td>II-75</td>
</tr>
<tr>
<td>Duties generally</td>
<td>R.C.M. 801</td>
<td>II-75</td>
</tr>
<tr>
<td>Evaluation of</td>
<td>R.C.M. 104(b)(2)</td>
<td>II-5</td>
</tr>
<tr>
<td>Guilty plea inquiry</td>
<td>R.C.M. 910(c)</td>
<td>II-101</td>
</tr>
<tr>
<td>Instruction. See Instructions.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interlocutory questions, rulings on</td>
<td>R.C.M. 801(a)(4)</td>
<td>II-75</td>
</tr>
<tr>
<td>Investigation, pretrial, review of evidence and witness</td>
<td></td>
<td></td>
</tr>
<tr>
<td>production by</td>
<td>R.C.M. 405(g)(2)</td>
<td>II-37</td>
</tr>
<tr>
<td>Mistrial</td>
<td>R.C.M. 915</td>
<td>II-109</td>
</tr>
<tr>
<td>Motions. See Motions.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New trial</td>
<td>R.C.M. 810(b)(2)</td>
<td>II-85</td>
</tr>
<tr>
<td>Oath</td>
<td>R.C.M. 807(b)(1)</td>
<td>II-82</td>
</tr>
<tr>
<td>Other trial</td>
<td>R.C.M. 810(b)(2)</td>
<td>II-85</td>
</tr>
<tr>
<td>Power to authorize search</td>
<td>Mil. R. Evid. 315(d)(2)</td>
<td>III-14</td>
</tr>
<tr>
<td>Presence of, required</td>
<td>R.C.M. 805(a)</td>
<td>II-80</td>
</tr>
<tr>
<td>Pretrial agreement inquiry</td>
<td>R.C.M. 910(f)</td>
<td>II-102</td>
</tr>
<tr>
<td>Questions of law, ruling on</td>
<td>R.C.M. 801(a)(4)</td>
<td>II-75</td>
</tr>
<tr>
<td>Rehearings</td>
<td>R.C.M. 810(b)(2)</td>
<td>II-85</td>
</tr>
<tr>
<td>Reopening case</td>
<td>R.C.M. 913(c)(5)</td>
<td>II-108</td>
</tr>
<tr>
<td>Restraint of accused at trial</td>
<td>R.C.M. 804(c)(3)</td>
<td>II-80</td>
</tr>
<tr>
<td>Review of pretrial confinements</td>
<td>R.C.M. 305(j)</td>
<td>II-25</td>
</tr>
<tr>
<td>Rules of court</td>
<td>R.C.M. 108</td>
<td>II-6</td>
</tr>
<tr>
<td>Rulings by</td>
<td>R.C.M. 801(e)(1)</td>
<td>II-76</td>
</tr>
<tr>
<td>Session, call to order</td>
<td>R.C.M. 901(a)</td>
<td>II-89</td>
</tr>
<tr>
<td>Special court-martial without</td>
<td>R.C.M. 201(f)(2)(B)(ii)</td>
<td>II-12</td>
</tr>
<tr>
<td>Stipulation</td>
<td>R.C.M. 811</td>
<td>II-86</td>
</tr>
<tr>
<td>Supervision of</td>
<td>R.C.M. 109</td>
<td>II-6</td>
</tr>
<tr>
<td>Unavailability, effect on speedy trial</td>
<td>R.C.M. 707(c)(2)</td>
<td>II-73</td>
</tr>
</tbody>
</table>

Index 47
Subject

Views or inspections .................................................. R.C.M. 913(c)(3) .......... II-107
Witness

Disqualified from acting as ........................................... R.C.M. 902(b)(3) .......... II-90
Incompetent ........................................................................ Mil. R. Evid. 605 .......... III-31
Military law

Generally ................................................................. I. Para. 2(a)(1) ................. I-1
Nature and purpose .................................................... I. Para. 3 ........................................ I-1
Military police. See Law enforcement official.

Military property. sale. loss. damage. destruction. or wrongful

disposition of ................................................................. IV. Para. 32 .......... IV-46
Military records, authentication of ....................................... Mil. R. Evid. 901; 902 .......... III-38; III-39

Military Rules of Evidence

See also Evidence.

Military tribunals

Concurrent jurisdiction .................................................. R.C.M. 201(g) ............... II-12
Kinds of ............................................................................ I. Para. 2(b) .......... I-1
Minor offenses

Generally ................................................................. V. Para. 1e .................... V-1
Prior punishment for, barring trial ............................. R.C.M. 907(b)(2)(D)(iv) .......... II-98
Minors, competence as witnesses .......................... Mil. R. Evid. 601 .......... III-30
Misbehavior before the enemy ................................. IV. Para. 23 .......... IV-32

Misbehavior of sentinel or lookout ........................ IV. Para. 38 .......... IV-38

Misconduct

Prisoner of war ........................................................ IV. Para. 29 .......... IV-42
Uncharged

Action by court-martial on ........................................ R.C.M. 801(d) .......... II-75
Admissibility of ................................................................. Mil. R. Evid. 404(b) .......... III-19
Instruction ......................................................................... Mil. R. Evid. 105 .......... III-2
Miscarriage of criminal justice ............................ IV. Para. 95 .......... IV-112
Missed movement ........................................................ IV. Para. 11 .......... IV-15

Mistake of fact

Checks, insufficient funds ........................................ IV. Para. 49c(18) .......... IV-74
Generally ................................................................. R.C.M. 916(j) .......... II-112

Mistake of fact

R.C.M. 916(b)(1) ................................................ II-113

Mistrial

Effect ....................................................................... R.C.M. 915(c) .......... II-109

Grounds for ................................................................. R.C.M. 915(a) .......... II-109
Partial ................................................................................ R.C.M. 915(a) .......... II-109
Procedure ........................................................................ R.C.M. 915(b) .......... II-109
Remedy for failure to produce statement ................ R.C.M. 914(e) .......... II-108

Mitigation

Evidence in sentencing .................................................. R.C.M. 1001(c)(1)(B) .......... II-121

Modification of initial action ........................................ R.C.R. 1107(f)(2) .......... II-149

Motions

Appropriate relief .......................................................... R.C.R. 906(b)(6) .......... II-96

Charges and specifications ......................................... R.C.R. 905(b)(1); 906(b)(4) .......... II-93; II-96
Continuance ...................................................................... R.C.R. 906(b)(1) .......... II-93
Counsel ........................................................................... R.C.R. 905(b)(6); 906(b)(2) .......... II-93; II-95
Defined ........................................................................... R.C.R. 906(a) .......... II-95
Discovery ........................................................................ R.C.R. 905(b)(4); 906(b)(7); 914 .......... II-93; II-96; II-108
Evidence, admissibility of ........................................ R.C.R. 906(b)(13) .......... II-97

Index 48
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Generally</td>
<td>R.C.M. 906</td>
<td>II–95</td>
</tr>
<tr>
<td>Investigation, pretrial</td>
<td>R.C.M. 905(b)(1); 906(b)(3)</td>
<td>II–93; II–95</td>
</tr>
<tr>
<td>Mental capacity</td>
<td>R.C.M. 906(b)(14)</td>
<td>II–97</td>
</tr>
<tr>
<td>Mental responsibility</td>
<td>R.C.M. 906(b)(14)</td>
<td>II–97</td>
</tr>
<tr>
<td>Multiplicity</td>
<td>R.C.M. 906(b)(12)</td>
<td>II–97</td>
</tr>
<tr>
<td>Place of trial, change of</td>
<td>R.C.M. 906(b)(11)</td>
<td>II–97</td>
</tr>
<tr>
<td>Pretrial advice</td>
<td>R.C.M. 905(b)(1); 906(b)(3)</td>
<td>II–93; II–95</td>
</tr>
<tr>
<td>Severance of Accused</td>
<td>R.C.M. 905(b)(5); 906(b)(9)</td>
<td>II–93; II–96</td>
</tr>
<tr>
<td>Charges</td>
<td>R.C.M. 905(b)(5); 906(b)(10)</td>
<td>II–93; II–97</td>
</tr>
<tr>
<td>Duplicate specification</td>
<td>R.C.M. 905(b)(5)</td>
<td>II–96</td>
</tr>
<tr>
<td>Burden of proof</td>
<td>R.C.M. 905(c)</td>
<td>II–93</td>
</tr>
<tr>
<td>Convening authority, submission to</td>
<td>R.C.M. 905(j)</td>
<td>II–95</td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 905(a)</td>
<td>II–93</td>
</tr>
<tr>
<td>Final determination, effect of</td>
<td>R.C.M. 905(g)</td>
<td>II–94</td>
</tr>
<tr>
<td>For finding of not guilty</td>
<td>R.C.M. 917</td>
<td>II–113</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 905</td>
<td>II–93</td>
</tr>
<tr>
<td>Pretrial</td>
<td>R.C.M. 905(b)</td>
<td>II–93</td>
</tr>
<tr>
<td>Reconsideration</td>
<td>R.C.M. 905(f)</td>
<td>II–94</td>
</tr>
<tr>
<td>Res judicata</td>
<td>R.C.M. 905(g)</td>
<td>II–94</td>
</tr>
<tr>
<td>Rulings on</td>
<td>R.C.M. 905(d)</td>
<td>II–93</td>
</tr>
<tr>
<td>Scheduling</td>
<td>R.C.M. 810(a)(3)</td>
<td>II–75</td>
</tr>
<tr>
<td>Selection of members</td>
<td>R.C.M. 912(b)(1)</td>
<td>II–104</td>
</tr>
<tr>
<td>Special findings</td>
<td>R.C.M. 905(d)</td>
<td>II–93</td>
</tr>
</tbody>
</table>

*See also Special findings.*

| Speedy trial, exclusion of time for To dismiss                          | R.C.M. 707(c)(1)                          | II–73      |
| Constructive condonation of desertion                                  | R.C.M. 907(b)(2)(D)(iii)                 | II–98      |
| Defined                                                                | R.C.M. 907(a)                            | II–97      |
| Former jeopardy                                                        | R.C.M. 907(b)(2)(C)                      | II–98      |
| Grounds generally                                                      | R.C.M. 907(b)                            | II–97      |
| Immunity                                                               | R.C.M. 907(b)(2)(D)(ii)                  | II–98      |
| Jurisdiction                                                           | R.C.M. 905(c)(2)(B); 907(b)(1)(A)        | II–93; II–97|
| Multiplicity                                                           | R.C.M. 907(b)(3)(B)                      | II–99      |
| Nonwaivable ground                                                     | R.C.M. 907(b)(1)                         | II–97      |
| Pardon                                                                 | R.C.M. 907(b)(2)(D)(i)                   | II–98      |
| Prior punishment                                                       | R.C.M. 907(b)(2)(D)(iv)                  | II–98      |
| Specification                                                          | R.C.M. 907(b)(3)(A)                      | II–99      |
| Defective                                                              | R.C.M. 907(b)(1)(B)                      | II–97      |
| Failure to state offense                                               | R.C.M. 905(c)(2)(B); 907(b)(2)(A)        | II–93; II–98|
| Speedy trial                                                           | R.C.M. 905(c)(2)(B); 907(b)(2)(B)        | II–93; II–98|
| Statue of limitations                                                  | R.C.M. 907(b)(2)                         | II–98      |

**To suppress**

| Procedure concerning Confessions and admissions                         | Mil. R. Evid. 304                        | III–4      |
| Eyewitness identification                                               | Mil. R. Evid. 321                        | III–16     |
| Search and seizure                                                     | Mil. R. Evid. 311                        | III–8      |
| Production of statements for                                            | R.C.M. 905(k)                            | II–95      |
| Time for                                                               | R.C.M. 905(b)(3)                         | II–93      |
| Waiver                                                                 | R.C.M. 910(a)(2)                         | II–101     |

*Index* 49
## Subject

<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Action by superior authority</td>
<td>V. Para. 7f</td>
<td>V-9</td>
</tr>
<tr>
<td>Format of</td>
<td>V. Para. 7c</td>
<td>V-8</td>
</tr>
<tr>
<td>Generally</td>
<td>V. Para. 7a</td>
<td>V-8</td>
</tr>
<tr>
<td>Legal review</td>
<td>V. Para. 7e</td>
<td>V-8</td>
</tr>
<tr>
<td>Time limit</td>
<td>V. Para. 7d</td>
<td>V-8</td>
</tr>
<tr>
<td>Who may act on</td>
<td>V. Para. 7b</td>
<td>V-8</td>
</tr>
<tr>
<td>Authority, commander's</td>
<td>I. Para. 2(b)(4); V. Para. 1a; 2a</td>
<td>I-1; V-1; V-2</td>
</tr>
<tr>
<td>Double punishment prohibited</td>
<td>V. Para. 1f(1)</td>
<td>V-1</td>
</tr>
<tr>
<td>Effect of errors</td>
<td>V. Para. 1h</td>
<td>V-2</td>
</tr>
<tr>
<td>Generally</td>
<td>Part V</td>
<td>V-1</td>
</tr>
<tr>
<td>Increase in punishment prohibited</td>
<td>V. Para. 1f(2)</td>
<td>V-1</td>
</tr>
<tr>
<td>Limitations on</td>
<td>V. Para. 1f</td>
<td>V-1</td>
</tr>
<tr>
<td>Minor offenses</td>
<td>V. Para. 1e</td>
<td>V-1</td>
</tr>
<tr>
<td>Trial by court-martial barred</td>
<td>R.C.M. 907(b)(2)(D)(iv)</td>
<td>II-98</td>
</tr>
<tr>
<td>Mitigation of punishment</td>
<td>V. Para. 6b</td>
<td>V-7</td>
</tr>
<tr>
<td>Nature</td>
<td>V. Para. 1b</td>
<td>V-1</td>
</tr>
<tr>
<td>Offense, disposition of</td>
<td>R.C.M. 306(c)(3); V. Para. 1</td>
<td>II-27; V-1</td>
</tr>
<tr>
<td>Policy</td>
<td>V. Para. 1d</td>
<td>V-1</td>
</tr>
<tr>
<td>Procedure</td>
<td>V. Para. 4</td>
<td>V-2</td>
</tr>
<tr>
<td><strong>Punishments</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Admonition</td>
<td>V. Para. 5c(1)</td>
<td>V-5</td>
</tr>
<tr>
<td>Arrest in quarters</td>
<td>V. Para. 5c(3)</td>
<td>V-5</td>
</tr>
<tr>
<td>Combinations, limitations</td>
<td>V. Para. 5d</td>
<td>V-6</td>
</tr>
<tr>
<td>Confinement on bread and water or diminished rations</td>
<td>V. Para. 5c(5)</td>
<td>V-6</td>
</tr>
<tr>
<td>Correctional custody</td>
<td>V. Para. 5c(4)</td>
<td>V-5</td>
</tr>
<tr>
<td>Extra duties</td>
<td>V. Para. 5c(6)</td>
<td>V-6</td>
</tr>
<tr>
<td>Forfeiture of pay</td>
<td>V. Para. 5c(8)</td>
<td>V-6</td>
</tr>
<tr>
<td>Limitations on</td>
<td>V. Para. 1f</td>
<td>V-1</td>
</tr>
<tr>
<td>Maximum authorized</td>
<td>V. Para. 5b</td>
<td>V-4</td>
</tr>
<tr>
<td>Reduction in grade</td>
<td>V. Para. 5c(7)</td>
<td>V-6</td>
</tr>
<tr>
<td>Reprimand</td>
<td>V. Para. 5c(1)</td>
<td>V-5</td>
</tr>
<tr>
<td>Restriction</td>
<td>V. Para. 5c(2)</td>
<td>V-5</td>
</tr>
<tr>
<td>Purpose</td>
<td>V. Para. 1c</td>
<td>V-1</td>
</tr>
<tr>
<td>Records of punishment</td>
<td>V. Para. 8</td>
<td>V-9</td>
</tr>
<tr>
<td>Remission of punishment</td>
<td>V. Para. 6c</td>
<td>V-8</td>
</tr>
<tr>
<td>Setting aside punishment</td>
<td>V. Para. 6d</td>
<td>V-8</td>
</tr>
<tr>
<td>Suspension of punishment</td>
<td>V. Para. 6a</td>
<td>V-7</td>
</tr>
<tr>
<td>Trial by court-martial, right to demand</td>
<td>V. Para. 3</td>
<td>V-2</td>
</tr>
<tr>
<td>Vessel, attached to or embarked in</td>
<td>V. Para. 3</td>
<td>V-2</td>
</tr>
<tr>
<td>Who may impose</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commander</td>
<td>V. Para. 2a</td>
<td>V-2</td>
</tr>
<tr>
<td>Officer in charge</td>
<td>V. Para. 2b</td>
<td>V-2</td>
</tr>
<tr>
<td>Principal assistant</td>
<td>V. Para. 2c</td>
<td>V-2</td>
</tr>
<tr>
<td>Nonmilitary property, waste, spoilage, or destruction</td>
<td>IV. Para. 33</td>
<td>IV-33</td>
</tr>
<tr>
<td>Nonprivileged communications</td>
<td>Mil. R. Evid. 510</td>
<td>III-30</td>
</tr>
<tr>
<td>Not guilty, plea of</td>
<td>R.C.M. 910(a)</td>
<td>II-101</td>
</tr>
<tr>
<td><strong>Notice</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>See also</em> Disclosure and discovery.</td>
<td>R.C.M. 910(f)(2)</td>
<td>II-102</td>
</tr>
<tr>
<td>To military judge of pretrial agreement</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oaths</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Affirmation, included in</td>
<td>R.C.M. 807(a)</td>
<td>II-82</td>
</tr>
</tbody>
</table>

Index 51
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authority to administer</td>
<td>Art. 136, UCMJ</td>
<td>A2–28</td>
</tr>
<tr>
<td>Defense counsel</td>
<td>R.C.M. 807(b)</td>
<td>II–82</td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 807(a)</td>
<td>II–82</td>
</tr>
<tr>
<td>Deposition witness</td>
<td>R.C.M. 702(f)(4)</td>
<td>II–62</td>
</tr>
<tr>
<td>Escort</td>
<td>R.C.M. 807(b)</td>
<td>II–82</td>
</tr>
<tr>
<td>False swearing</td>
<td>IV. Para. 79</td>
<td>IV–103</td>
</tr>
<tr>
<td>Forms of</td>
<td>R.C.M. 807(b)(2)</td>
<td>II–82</td>
</tr>
<tr>
<td>Fraud against United States, in connection with</td>
<td>IV. Para. 58</td>
<td>IV–87</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 807</td>
<td>II–82</td>
</tr>
<tr>
<td>Guilty plea, accused</td>
<td>R.C.M. 910(e)(5)</td>
<td>II–102</td>
</tr>
<tr>
<td>Interpreter</td>
<td>R.C.M. 807(b)</td>
<td>II–82</td>
</tr>
<tr>
<td>Investigation, pretrial, witnesses</td>
<td>R.C.M. 405(b)(1)</td>
<td>II–30</td>
</tr>
<tr>
<td>Members</td>
<td>R.C.M. 807(b)</td>
<td>II–82</td>
</tr>
<tr>
<td>Military judge</td>
<td>R.C.M. 807(b)</td>
<td>II–82</td>
</tr>
<tr>
<td>Perjury</td>
<td>IV. Para. 57</td>
<td>IV–85</td>
</tr>
<tr>
<td>Preferral of charges</td>
<td>R.C.M. 307(b)</td>
<td>II–28</td>
</tr>
<tr>
<td>Probable cause information, not required</td>
<td>Mil. R. Evid. 315(b)(2)</td>
<td>III–13</td>
</tr>
<tr>
<td>Procedure</td>
<td>R.C.M. 807(b)(2)</td>
<td>II–82</td>
</tr>
<tr>
<td>Regulations of Secretary concerned</td>
<td>Art. 42(a), UCMJ; R.C.M. 807(b)</td>
<td>A2–12; II–82</td>
</tr>
<tr>
<td>Reporter</td>
<td>R.C.M. 807(b)</td>
<td>II–82</td>
</tr>
<tr>
<td>Trial counsel</td>
<td>R.C.M. 807(b)</td>
<td>II–82</td>
</tr>
<tr>
<td>Witnesses</td>
<td>R.C.M. 807(b); Mil. R. Evid. 603</td>
<td>II–82; III–31</td>
</tr>
<tr>
<td><strong>Obedience to orders, as a defense</strong></td>
<td>R.C.M. 916(d)</td>
<td>II–110</td>
</tr>
<tr>
<td><strong>Objection</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Evidence, Objections, Motions.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>To evidence at pretrial investigation</td>
<td>R.C.M. 405(g)(4), (5)</td>
<td>II–38</td>
</tr>
<tr>
<td>To trial by summary court-martial</td>
<td>R.C.M. 1303</td>
<td>II–173</td>
</tr>
<tr>
<td>Waiver, generally</td>
<td>R.C.M. 905(e); Mil. R. Evid. 103(a)</td>
<td>II–94; III–1</td>
</tr>
<tr>
<td><strong>Obscene</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Indecent</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mail</td>
<td>IV. Para. 94</td>
<td>IV–111</td>
</tr>
<tr>
<td><strong>Obstructing justice</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>IV. Para. 96</td>
<td>IV–112</td>
</tr>
<tr>
<td>Solicitation distinguished</td>
<td>IV. Para. 6c(3)</td>
<td>IV–7</td>
</tr>
<tr>
<td><strong>Occupied territory</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Military jurisdiction exercised in</td>
<td>J. Para. 2(a)(3)</td>
<td>I–1</td>
</tr>
<tr>
<td>Violation of laws of</td>
<td>R.C.M. 201(f)(1)(B)</td>
<td>II–11</td>
</tr>
<tr>
<td><strong>Offenses</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also specific offenses.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Disposition of</td>
<td>R.C.M. 306</td>
<td>II–26</td>
</tr>
<tr>
<td>Failure to report</td>
<td>IV. Para. 2c(2)</td>
<td>IV–3</td>
</tr>
<tr>
<td>Joinder of</td>
<td>R.C.M. 601(e)(2)</td>
<td>II–55</td>
</tr>
<tr>
<td>Jurisdiction of courts-martial over</td>
<td>R.C.M. 203</td>
<td>II–15</td>
</tr>
<tr>
<td>Minor, disposition by nonjudicial punishment</td>
<td>V. Para. 1e</td>
<td>V–1</td>
</tr>
<tr>
<td>Report of</td>
<td>R.C.M. 301</td>
<td>II–18</td>
</tr>
<tr>
<td>Uncharged, action on</td>
<td>R.C.M. 801(d)</td>
<td>II–75</td>
</tr>
<tr>
<td><strong>Offer of proof</strong></td>
<td>Mil. R. Evid. 103(a)(2), (b)</td>
<td>III–1</td>
</tr>
<tr>
<td><strong>Office hours. See Nonjudicial Punishment.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Officer</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commissioned</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Commissioned officer.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused as, composition of court-martial</td>
<td>R.C.M. 502(a)(1)</td>
<td>II–43</td>
</tr>
</tbody>
</table>

Index 52
Orders

Opening mail

Orderly

Detailing

Disqualification

Duties

Qualifications

Orders

See also Convening orders; Promulgating orders.

Failure to obey

General orders, disobedience of

Lawfulness

Obedience to, as defense

In charge

Authority to impose nonjudicial punishment

Defined

Noncommissioned. See Noncommissioned and petty officer.

Warrant. See Warrant officer.

Official communications, privileges

Official documents

See also Evidence.

False

Official records

See also Evidence.

Absence of, evidence

Admissibility as evidence, general rule

Attesting certificates

Authentication

Extract copies

Logs

Military records

Morning report

Notes or memoranda, composed from

Official publication of

Self-authentication

Service record

Summaries of official records

Unit personnel diary

Officials, contempt toward

Official statement, false

Opening mail

Opinion evidence. See Evidence, Opinion.

Apprehend, authority to

Assault on

In execution of office

Not in execution of office

Conduct unbecoming

Dismissal by general court-martial

Dismissal by President, right to request trial by court-martial

Disobedience of superior

Disrespect toward superior

Restraint of, pretrial

Subject

Ref.

R.C.M. 302(b)(2)

IV. Para. 14

IV. Para. 54

IV. Para. 59

R.C.M. 1003(b)(10)(A)

IV. Para. 14

IV. Para. 13

R.C.M. 304(b)

V. Para. 2b

Art. 1(4), UCMJ; R.C.M. 103(20)

R.C.M. 502(b)

IV. Para. 14

IV. Para. 59

IV. Para. 91

R.C.M. 107

IV. Para. 14

IV. Para. 17

R.C.M. 304(b)

A2–1; II–2

IV. Para. 31

V–2

IV–23; III–27

IV–45

III–35; III–36

III–35; III–36

III–40

III–38; III–39

III–41

III–35; III–36

III–35; III–36

III–35; III–36

III–35; III–36

III–35; III–36

III–35; III–36

III–35; III–36

III–35; III–36

III–35; III–36

III–35; III–36

III–35; III–36

III–35; III–36

IV–16

IV–45

IV–110

II–19

IV–18

IV–79

IV–91

II–124

II–6

IV–18

IV–17

II–21
MCM, 1994

<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Willful disobedience</td>
<td>IV. Paras. 14; 15</td>
<td>IV–18; IV–21</td>
</tr>
</tbody>
</table>

Other trial

| Action on | R.C.M. 1107(f)(5)(A) | II–150 |
| Convening authority ordering | R.C.M. 1107(c)(2) | II–149 |
| Defined | R.C.M. 810(e) | II–86 |
| Procedure | R.C.M. 810(a), (b), (c) | II–85 |
| Sentence limitations | R.C.M. 810(d) | II–86 |

Overt acts

| Attempts | IV. Para. 4c(1), (2) | IV–4; IV–4 |
| Conspiracy | IV. Para. 5c(4) | IV–6 |

Pandering

| Generally | IV. Para. 97 | IV–113 |
| Solicitation distinguished | IV. Para. 6c(3) | IV–7 |

Pardon, motion to dismiss based on

| R.C.M. 907(b)(2)(D)(i) | II–98 |

Parole, improper use of

| IV. Para. 25 | IV–37 |

Party

| To conspiracy | IV. Para. 5c(1) | IV–5 |
| To court-martial, defined | R.C.M. 103(16) | II–2 |
| To offense | IV. Para. 1b(1), (2) | IV–1; IV–1 |

Pass, false or unauthorized

| IV. Para. 77 | IV–102 |

Patient-doctor, no privileged communication

| Mil. R. Evid. 501(d) | III–21 |

Peace, breach of

| IV. Para. 41 | IV–59 |

Peremptory challenges

| R.C.M. 912(g) | II–106 |

Perjury

*See also False swearing.*

| Generally | IV. Para. 57 | IV–85 |
| Guilty plea inquiry, statements during | R.C.M. 910(c)(5) | II–102 |
| Immunity, not extending to | R.C.M. 704(b) | II–68 |
| New trial, grounds for | R.C.M. 1210(f)(3) | II–170 |
| Subornation of | IV. Para. 98 | IV–114 |

Permits, false or unauthorized

| IV. Para. 77 | IV–102 |

Perpetrator

*See also Principals.*

| Defined | IV. Para. 1b(2)(a) | IV–1 |

Personnel of courts-martial

*See also specific topics.*

| Announcement of | R.C.M. 813 | II–87 |
| Censure of, prohibited | R.C.M. 104 | II–5 |
| Changes of | R.C.M. 505 | II–50 |
| Detail of | R.C.M. 503 | II–48 |
| Generally | R.C.M. 501 | II–43 |
| Qualification and duties | R.C.M. 502 | II–43 |

Personnel records, admissibility

| Mil. R. Evid. 803(6), (8) | III–35; III–36 |

Petty officer

| Apprehend, authority to | R.C.M. 302(b)(2) | II–19 |
| Assault on | | |
| In execution of office | IV. Para. 15 | IV–21 |
| Not in execution of office | IV. Para. 54 | IV–79 |
| Contempt toward | IV. Para. 15 | IV–21 |
| Disobedience | IV. Para. 15 | IV–21 |
| Disrespect toward | IV. Para. 15 | IV–21 |

Photographs

Index 54
Subject | Ref. | Page
--- | --- | ---
Defined | Mil. R. Evid. 1001(2) | III-40
Disclosure by defense | R.C.M. 701(b)(3) | II-59
Disclosure upon defense request | R.C.M. 701(a)(2)(A) | II-58
Taking in courtroom, prohibited | R.C.M. 806(c) | II-82

Physical examination | Disclosure by defense | R.C.M. 701(b)(4) | II-59
| Disclosure upon defense request | R.C.M. 701(a)(2)(B) | II-58
| Not an unlawful search | Mil. R. Evid. 312(f) | III-11

Physical inability, as a defense | R.C.M. 916(i) | II-112

Physician, no privileged communication to | Mil. R. Evid. 501(d) | III-21

Pillaging | IV. Paras. 23; 27 | IV-32; IV-38

Place of court-martial | Change of | R.C.M. 906(b)(11) | II-97
| Convening authority | | |
| Designating | R.C.M. 504(d)(1), (2) | II-50
| Responsibility | R.C.M. 504(e) | II-50
| Jurisdiction, not affected | R.C.M. 201(a)(3) | II-9

Plain error | R.C.M. 103(d) | III-I

Plan or design of accused, evidence of | Mil. R. Evid. 404(b) | III-19

Pleadings. See Charges and specifications.

Pleas | Alternatives | R.C.M. 910(a) | II-101
| Arraignment | R.C.M. 904 | II-92
| Article 39(a) session, taking at | R.C.M. 901(e) | II-102
| Capital case | R.C.M. 910(a)(1) | II-101
| Change | R.C.M. 910(h)(1) | II-103
| Conditional guilty | R.C.M. 910(a)(2) | II-101
| Defenses and objections before entered | R.C.M. 905(b) | II-101
| Exceptions and substitutions | R.C.M. 910(a)(1) | II-101
| Failure to plead | R.C.M. 910(b) | II-101
| Generally | R.C.M. 910 | II-101

Guilty | Accuracy, determination of | R.C.M. 910(e) | II-102
| Advice to accused | R.C.M. 910(c) | II-101
| Capital cases, prohibited in | R.C.M. 910(a)(1) | II-101
| Effect of | R.C.M. 910(c) | II-101
| Factual basis required | R.C.M. 910(e) | II-102
| False statements during inquiry | R.C.M. 910(c)(5) | II-102
| Findings | R.C.M. 910(g) | II-102
| Generally | R.C.M. 910(c), (d), (e) | II-101; II-102
| Improvidently entered | R.C.M. 910(d), (e) | II-102
| Inconsistent matters after plea | R.C.M. 910(e) | II-102
| Inconsistent statements after findings | R.C.M. 910(h)(2) | II-102
| Inquiry | R.C.M. 910(c), (d), (e) | II-101; II-102
| Oath | R.C.M. 910(c)(5) | II-102
| Prertrial agreement inquiry | R.C.M. 910(f), (h)(3) | II-102; II-103

Procedure | Consultation with counsel | R.C.M. 502(d)(6) | II-46
| Explanation to accused of effect | R.C.M. 910(c) | II-101
| Record of explanation and reply | R.C.M. 910(i) | II-103
| Rehearings, changing | R.C.M. 810(a)(2)(B) | II-85

Index 55
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inadmissible on merits</td>
<td>Mil. R. Evid. 410</td>
<td>III–19</td>
</tr>
<tr>
<td>Inconsistent with plea</td>
<td>R.C.M. 910(b)(2)</td>
<td>II–103</td>
</tr>
<tr>
<td>Summary courts-martial</td>
<td>R.C.M. 1304(b)(2)(D)(ii)</td>
<td>II–175</td>
</tr>
<tr>
<td>Voluntariness</td>
<td>R.C.M. 910(d)</td>
<td>II–102</td>
</tr>
<tr>
<td>Vote, necessity of</td>
<td>R.C.M. 910(g)(3)</td>
<td>II–103</td>
</tr>
<tr>
<td>Waiver of objections by</td>
<td>R.C.M. 910(i)</td>
<td>II–103</td>
</tr>
<tr>
<td>Withdrawal after findings</td>
<td>R.C.M. 910(b)(1)</td>
<td>II–103</td>
</tr>
<tr>
<td>Irregular</td>
<td>R.C.M. 910(b)</td>
<td>II–101</td>
</tr>
<tr>
<td>Nondisclosure of guilty plea negotiations</td>
<td>Mil. R. Evid. 410</td>
<td>III–19</td>
</tr>
<tr>
<td>Refusal to enter</td>
<td>R.C.M. 910(b)</td>
<td>II–101</td>
</tr>
<tr>
<td>Rehearings</td>
<td>R.C.M. 810(a)(1), (2)(B)</td>
<td>II–85</td>
</tr>
<tr>
<td>Summary courts-martial</td>
<td>R.C.M. 1304(b)(2)(D)</td>
<td>II–175</td>
</tr>
<tr>
<td>Entry of pleas</td>
<td>R.C.M. 1304(b)(1)(H)</td>
<td>II–174</td>
</tr>
<tr>
<td>Explanation to accused</td>
<td>R.C.M. 1304(b)(1)(H)</td>
<td>II–174</td>
</tr>
<tr>
<td>Plunder</td>
<td>IV. Para. 23</td>
<td>IV–32</td>
</tr>
<tr>
<td>Police. See Law enforcement official.</td>
<td>Mil. R. Evid. 508</td>
<td>III–30</td>
</tr>
<tr>
<td>Political vote, privilege</td>
<td>R.C.M. 922(e); 1007(c)</td>
<td>II–119; II–132</td>
</tr>
<tr>
<td>Exception</td>
<td>Mil. R. Evid. 606</td>
<td>III–31</td>
</tr>
<tr>
<td>Polygamy, testimony of spouse</td>
<td>Mil. R. Evid. 504</td>
<td>III–22</td>
</tr>
<tr>
<td>Possession of controlled substance</td>
<td>IV. Para. 37</td>
<td>IV–53</td>
</tr>
<tr>
<td>Post-trial confinement</td>
<td>R.C.M. 1101(b)</td>
<td>II–135</td>
</tr>
<tr>
<td>Post-trial procedure</td>
<td>See also Confinement</td>
<td></td>
</tr>
<tr>
<td>Disposition of record of trial</td>
<td>R.C.M. 1111</td>
<td>II–156</td>
</tr>
<tr>
<td>Generally</td>
<td>II. Chapter XI</td>
<td>II–135</td>
</tr>
<tr>
<td>Matters submitted by accused</td>
<td>R.C.M. 1105(b)</td>
<td>II–143</td>
</tr>
<tr>
<td>Contents</td>
<td>R.C.M. 1105(a)</td>
<td>II–143</td>
</tr>
<tr>
<td>Right to</td>
<td>R.C.M. 1105(c)</td>
<td>II–143</td>
</tr>
<tr>
<td>Time periods</td>
<td>R.C.M. 1105(d)</td>
<td>II–144</td>
</tr>
<tr>
<td>Review by a judge advocate</td>
<td>R.C.M. 1112</td>
<td>II–156</td>
</tr>
<tr>
<td>Summary courts-martial</td>
<td>R.C.M. 1306</td>
<td>II–176</td>
</tr>
<tr>
<td>Post-trial recommendation</td>
<td>R.C.M. 1106</td>
<td>II–144</td>
</tr>
<tr>
<td>See also Staff judge advocate</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Post-trial sessions</td>
<td>R.C.M. 1102(b)(2)</td>
<td>II–137</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1102</td>
<td>II–137</td>
</tr>
<tr>
<td>Matters precluded from</td>
<td>R.C.M. 1102(c)</td>
<td>II–137</td>
</tr>
<tr>
<td>Procedure</td>
<td>R.C.M. 1102(e)(2)</td>
<td>II–137</td>
</tr>
<tr>
<td>Action by military judge, members</td>
<td>R.C.M. 1102(e)(1)</td>
<td>II–137</td>
</tr>
<tr>
<td>Personnel</td>
<td>R.C.M. 1102(e)(3)</td>
<td>II–137</td>
</tr>
<tr>
<td>Record</td>
<td>R.C.M. 1102(b)(1)</td>
<td>II–136</td>
</tr>
<tr>
<td>Proceedings in revision</td>
<td>R.C.M. 1102(d)</td>
<td>II–137</td>
</tr>
<tr>
<td>When directed</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preferential of charges</td>
<td>R.C.M. 202(c)(2)</td>
<td>II–15</td>
</tr>
<tr>
<td>Attachment of jurisdiction, effecting</td>
<td>R.C.M. 307(c)(2)</td>
<td>II–28</td>
</tr>
<tr>
<td>Charge, defined</td>
<td>R.C.M. 702(a)</td>
<td>II–61</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 307</td>
<td>II–27</td>
</tr>
</tbody>
</table>

Index 56
### Subject

| Pretrial advice | R.C.M. 406 | II-40 |

*See also Advice, pretrial.*

#### Pretrial agreements

- **Action pursuant to** (Ref: R.C.M. 705(b)(2)(E)) II-70
- **Authority to enter** (Ref: R.C.M. 705(a), (d)(4)) II-69
- **Conditional guilty plea** (Ref: R.C.M. 910(b)(2)) II-101
- **Confessional stipulation** (Ref: R.C.M. 705(b)(1)) II-69
- **Disclosure of**
  - Plea negotiations, prohibited (Ref: Mil. R. Evid. 410) III-19
  - To members, prohibited (Ref: R.C.M. 705(e)) II-71
  - To military judge before plea (Ref: R.C.M. 910(b)(3)) II-102
- **Generally** (Ref: R.C.M. 705) II-69
- **Inquiry by military judge** (Ref: R.C.M. 910(f)(4), (b)(3)) II-102-II-103
- **Nature of** (Ref: R.C.M. 705(b)) II-69
- **Notice of, to military judge** (Ref: R.C.M. 910(f)(2)) II-102

#### Procedure to obtain

- **Acceptance** (Ref: R.C.M. 705(a)(4)) II-71
- **Formal submission** (Ref: R.C.M. 705(a)(3)) II-71
- **Negotiation** (Ref: R.C.M. 705(a)(2)) II-70
- **Offer** (Ref: R.C.M. 705(a)(1)) II-70

- **Referral pursuant to** (Ref: R.C.M. 705(b)(2)(A), (B)) II-69-II-70
- **Sentence, effect at rehearing** (Ref: R.C.M. 810(d)(2)) II-86

#### Terms and conditions

- **Generally** (Ref: R.C.M. 705(c)) II-70
- **Permissible terms** (Ref: R.C.M. 705(c)(2)) II-70
- **Prohibited terms** (Ref: R.C.M. 705(c)(1)) II-70

#### Withdrawal of

- **Charges pursuant to** (Ref: R.C.M. 705(b)(2)(C)) II-70
- **Parties to** (Ref: R.C.M. 705(d)(4)) II-71

#### Pretrial confinement

*See Confinement, pretrial.*

#### Pretrial investigation

*See Investigation, pretrial.*

#### Principal assistant, delegation to

- **Excuse members** (Ref: R.C.M. 505(c)(1)(B)) II-50
- **Nonjudicial punishment authority** (Ref: V. Para. 2c) V-2

#### Principals

- **Accessory after the fact, relationship** (Ref: IV. Para. 2c(1), (4), (5)) IV-2
- **Aider and abettor** (Ref: IV. Para. 1b(1)) IV-1
- **Generally** (Ref: IV. Para. 1b) IV-1
- **Perpetrator** (Ref: IV. Para. 1b(1), (2)(a)) IV-1; IV-1

- **Pleading** (Ref: R.C.M. 307(c)(3)(H)(i)) II-29

#### Prior testimony, admissibility

*See Mil. R. Evid. 804(b)(1) III-37

#### Prisoner

*See Confinement.*

- **Authority to release**
  - From post-trial confinement (Ref: R.C.M. 1101(b)(2)) II-135
  - From pretrial confinement (Ref: R.C.M. 305(g)) II-23
- **Drinking liquor with** (Ref: IV. Para. 74) IV-101
- **Drunk** (Ref: IV. Para. 75) IV-101
- **Jurisdiction over** (Ref: Art. 2(a)(7), UCMJ; R.C.M. 202(a) A2-1; II-13
- **Release of, without proper authority** (Ref: IV. Para. 20) IV-30
- **Suffering to escape** (Ref: IV. Para. 20) IV-30

---

Index 58
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prisoner of war</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jurisdiction over</td>
<td>Art. 2(a)(9), UCMJ, R.C.M. 202(a)</td>
<td>A2–2; II–13</td>
</tr>
<tr>
<td>Misconduct as</td>
<td>IV. Para. 29</td>
<td>IV–42</td>
</tr>
<tr>
<td>Privileged matter. See Evidence, Privileges.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Probable cause</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Search and seizure.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Apprehension</td>
<td>R.C.M. 302(c)</td>
<td>II–19</td>
</tr>
<tr>
<td>Confinement</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pending vacation of suspension</td>
<td>R.C.M. 1109(c)(3)</td>
<td>II–152</td>
</tr>
<tr>
<td>Pretrial</td>
<td>R.C.M. 305(d), (h)(2)(B)</td>
<td>II–21; II–23</td>
</tr>
<tr>
<td>Restraint, pretrial</td>
<td>R.C.M. 304(c)</td>
<td>II–21</td>
</tr>
<tr>
<td>Search</td>
<td>Mil. R. Evid. 315(f)</td>
<td>III–14</td>
</tr>
<tr>
<td>Seizure</td>
<td>Mil. R. Evid. 316(b)</td>
<td>III–15</td>
</tr>
<tr>
<td><strong>Probation</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Suspension of sentence.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1108</td>
<td>II–151</td>
</tr>
<tr>
<td>Pretrial agreement</td>
<td>R.C.M. 705(c)(2)(D)</td>
<td>II–70</td>
</tr>
<tr>
<td>Proceedings in revision</td>
<td>R.C.M. 1102(b)(1)</td>
<td>II–136</td>
</tr>
<tr>
<td>Procuring another to commit offense</td>
<td>IV. Para. 1</td>
<td>IV–1</td>
</tr>
<tr>
<td><strong>Production of witnesses and evidence</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Witness.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidence</td>
<td>R.C.M. 703(a), (f)</td>
<td>II–64; II–67</td>
</tr>
<tr>
<td>Expert witnesses</td>
<td>R.C.M. 703(d)</td>
<td>II–65</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 703</td>
<td>II–64</td>
</tr>
<tr>
<td>Interlocutory questions</td>
<td>R.C.M. 703(b), (c)</td>
<td>II–64; II–64</td>
</tr>
<tr>
<td>Investigation, pretrial</td>
<td>R.C.M. 405(g)</td>
<td>II–36</td>
</tr>
<tr>
<td>Merits</td>
<td>R.C.M. 703(b), (c)</td>
<td>II–64</td>
</tr>
<tr>
<td>Procedure</td>
<td>R.C.M. 703(e), Appendix 7</td>
<td>II–65</td>
</tr>
<tr>
<td>Sentencing</td>
<td>R.C.M. 703(b)(2); 1001(e)</td>
<td>II–64; II–122</td>
</tr>
<tr>
<td>Statements of witnesses</td>
<td>R.C.M. 914</td>
<td>II–108</td>
</tr>
<tr>
<td>Unavailable evidence</td>
<td>R.C.M. 703(f)(2)</td>
<td>II–67</td>
</tr>
<tr>
<td>Unavailable witness</td>
<td>R.C.M. 703(b)(3)</td>
<td>II–64</td>
</tr>
<tr>
<td><strong>Professional supervision, military judges and counsel</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Promulgating orders</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authentication</td>
<td>R.C.M. 1114(e)</td>
<td>II–160</td>
</tr>
<tr>
<td>Classified information</td>
<td>R.C.M. 1114(d)</td>
<td>II–160</td>
</tr>
<tr>
<td>Contents</td>
<td>R.C.M. 1114(c)</td>
<td>II–160</td>
</tr>
<tr>
<td>Distribution</td>
<td>R.C.M. 1114(f)</td>
<td>II–161</td>
</tr>
<tr>
<td>Forms for</td>
<td>Appendix 17</td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1114</td>
<td>II–160</td>
</tr>
<tr>
<td>Summary court-martial, not issued for</td>
<td>R.C.M. 1114(a)(3)</td>
<td>II–160</td>
</tr>
<tr>
<td>Who issues</td>
<td>R.C.M. 1114(b)</td>
<td>II–160</td>
</tr>
<tr>
<td><strong>Property</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Captured or abandoned, offenses concerning</td>
<td>IV. Para. 27</td>
<td>IV–38</td>
</tr>
<tr>
<td>Military, offenses concerning</td>
<td>IV. Para. 32</td>
<td>IV–46</td>
</tr>
<tr>
<td>Nonmilitary, offenses concerning</td>
<td>IV. Para. 33</td>
<td>IV–48</td>
</tr>
<tr>
<td>Preventing seizure of</td>
<td>IV. Para. 103</td>
<td>IV–116</td>
</tr>
<tr>
<td><strong>Prosecutor. See Counsel; Trial counsel.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Prosecutorial discretion</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commander</td>
<td>R.C.M. 306</td>
<td>II–26</td>
</tr>
<tr>
<td>Convening authority</td>
<td>R.C.M. 401</td>
<td>II–32</td>
</tr>
<tr>
<td>Trial counsel</td>
<td>R.C.M. 502(d)(5)</td>
<td>II–45</td>
</tr>
</tbody>
</table>

Index 59
# INDEX

<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prostitution</strong></td>
<td>IV. Para. 97</td>
<td>IV–113</td>
</tr>
<tr>
<td><strong>Protecting the enemy</strong></td>
<td>IV. Para. 28</td>
<td>IV–40</td>
</tr>
<tr>
<td><strong>Provoking speech and gestures</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Breach of peace</td>
<td>IV. Paras. 41; 42c(1)</td>
<td>IV–59; IV–60</td>
</tr>
<tr>
<td>Generally</td>
<td>IV. Para. 42</td>
<td>IV–60</td>
</tr>
<tr>
<td><strong>Provost courts</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contempt power</td>
<td>Art. 48, UCMJ</td>
<td>A2–13</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Concurrent with other tribunals</td>
<td>R.C.M. 201(g)</td>
<td>II–12</td>
</tr>
<tr>
<td>Generally</td>
<td>I. Para. 2(b)(2)</td>
<td>I–1</td>
</tr>
<tr>
<td><strong>Psychiatrist, mental examination of accused by</strong></td>
<td>R.C.M. 706(c)(1)</td>
<td>II–72</td>
</tr>
<tr>
<td><strong>Public record, offenses concerning</strong></td>
<td>IV. Para. 99</td>
<td>IV–115</td>
</tr>
<tr>
<td><strong>See also Evidence.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Public trial</strong></td>
<td>R.C.M. 806</td>
<td>II–81</td>
</tr>
<tr>
<td><strong>Punishments</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>See also specific topics.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Courts-martial</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authorized</td>
<td>R.C.M. 1003(b)</td>
<td>II–123</td>
</tr>
<tr>
<td>Confinement</td>
<td>R.C.M. 1003(b)(8)</td>
<td>II–124</td>
</tr>
<tr>
<td>Confinement on bread and water or diminished rations</td>
<td>R.C.M. 1003(b)(9)</td>
<td>II–124</td>
</tr>
<tr>
<td>Death</td>
<td>R.C.M. 1003(b)(11)</td>
<td>II–125</td>
</tr>
<tr>
<td>Fine</td>
<td>R.C.M. 1003(b)(3)</td>
<td>II–123</td>
</tr>
<tr>
<td>Forfeiture of pay and allowances</td>
<td>R.C.M. 1003(b)(2)</td>
<td>II–123</td>
</tr>
<tr>
<td>General courts-martial</td>
<td>R.C.M. 201(f)(1)(A)(ii), (B)(i)</td>
<td>II–11; II–11</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1003</td>
<td>II–123</td>
</tr>
<tr>
<td>Hard labor without confinement</td>
<td>R.C.M. 1003(b)(7)</td>
<td>II–124</td>
</tr>
<tr>
<td>Increase in, circumstances permitting</td>
<td>R.C.M. 1003(d)</td>
<td>II–127</td>
</tr>
<tr>
<td>Law of war</td>
<td>R.C.M. 1003(b)(12)</td>
<td>II–125</td>
</tr>
<tr>
<td>Limits</td>
<td>R.C.M. 1003(c)</td>
<td>II–125</td>
</tr>
<tr>
<td>Loss of numbers</td>
<td>R.C.M. 1003(b)(4)</td>
<td>II–123</td>
</tr>
<tr>
<td>Maximum punishment chart</td>
<td>Appendix 12</td>
<td>A12–1</td>
</tr>
<tr>
<td>Punitive separation</td>
<td>R.C.M. 1003(b)(10)</td>
<td>II–124</td>
</tr>
<tr>
<td>Reduction in grade</td>
<td>R.C.M. 1003(b)(5)</td>
<td>II–123</td>
</tr>
<tr>
<td>Reprimand</td>
<td>R.C.M. 1003(b)(1)</td>
<td>II–123</td>
</tr>
<tr>
<td>Restitution</td>
<td>R.C.M. 201(a)</td>
<td>II–9</td>
</tr>
<tr>
<td>Pretrial agreement, permissible condition</td>
<td>R.C.M. 705(c)(2)(C)</td>
<td>II–70</td>
</tr>
<tr>
<td>Restriction to specified limits</td>
<td>R.C.M. 1003(b)(6)</td>
<td>II–124</td>
</tr>
<tr>
<td>Special courts-martial</td>
<td>R.C.M. 201(f)(2)(B)</td>
<td>II–12</td>
</tr>
<tr>
<td>Summary courts-martial</td>
<td>R.C.M. 1301(c), (d)</td>
<td>II–172</td>
</tr>
<tr>
<td><strong>Nonjudicial. See Nonjudicial punishment.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prior, for minor offense, barring court-martial</td>
<td>R.C.M. 907(b)(2)(D)(iv)</td>
<td>II–98</td>
</tr>
<tr>
<td><strong>Punitive articles</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>See also specific offenses.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Punitive discharge. See Bad-conduct discharge; Dishonorable discharge.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Qualifications</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assistant counsel</td>
<td>R.C.M. 502(d)(2)</td>
<td>II–44</td>
</tr>
<tr>
<td>Associate defense counsel</td>
<td>R.C.M. 502(d)(1)</td>
<td>II–44</td>
</tr>
<tr>
<td>Bailiff</td>
<td>R.C.M. 502(e)(1)</td>
<td>II–47</td>
</tr>
<tr>
<td>Clerk</td>
<td>R.C.M. 502(e)(1)</td>
<td>II–47</td>
</tr>
<tr>
<td>Counsel</td>
<td>R.C.M. 502(d)</td>
<td>II–44</td>
</tr>
</tbody>
</table>

Index 60
**INDEX**

<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defense Counsel</td>
<td>R.C.M. 502(d)(1), (3)</td>
<td>II-44</td>
</tr>
<tr>
<td>Deposition officer</td>
<td>R.C.M. 702(d)(1)</td>
<td>II-62</td>
</tr>
<tr>
<td>Escort</td>
<td>R.C.M. 502(e)(1)</td>
<td>II-47</td>
</tr>
<tr>
<td>Individual counsel</td>
<td>R.C.M. 502(d)(3)</td>
<td>II-44</td>
</tr>
<tr>
<td>Interpreter</td>
<td>R.C.M. 502(e)(1); Mil. R. Evid. 604</td>
<td>II-47; III-31</td>
</tr>
<tr>
<td>Lack of action on discovery</td>
<td>R.C.M. 502(f)</td>
<td>II-47</td>
</tr>
<tr>
<td>Members</td>
<td>R.C.M. 502(a)(1)</td>
<td>II-43</td>
</tr>
<tr>
<td>Military judge</td>
<td>R.C.M. 502(c)</td>
<td>II-44</td>
</tr>
<tr>
<td>Orderly</td>
<td>R.C.M. 502(e)(1)</td>
<td>II-47</td>
</tr>
<tr>
<td>President of court-martial</td>
<td>R.C.M. 502(b)(1)</td>
<td>II-44</td>
</tr>
<tr>
<td>Reporter</td>
<td>R.C.M. 502(e)(1)</td>
<td>II-47</td>
</tr>
<tr>
<td>Trial counsel</td>
<td>R.C.M. 502(d)(1), (2)</td>
<td>II-44</td>
</tr>
<tr>
<td><strong>Quarantine, medical, breaking</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Questions</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Testimony; Witness.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ambiguous and misleading</td>
<td>Mil. R. Evid. 611(a)</td>
<td>III-32</td>
</tr>
<tr>
<td>Control by military judge</td>
<td>Mil. R. Evid. 611(a)</td>
<td>III-32</td>
</tr>
<tr>
<td>Degrading</td>
<td>Mil. R. Evid. 303; 611(a)</td>
<td>III-4; III-32</td>
</tr>
<tr>
<td>Improper, insulting</td>
<td>Mil. R. Evid. 611(a)</td>
<td>III-32</td>
</tr>
<tr>
<td>Interlocutory. See Interlocutory questions.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Leading</td>
<td>Mil. R. Evid. 611(c)</td>
<td>III-32</td>
</tr>
<tr>
<td>Refusal to answer, as offense</td>
<td>IV. Para. 108</td>
<td>IV-119</td>
</tr>
<tr>
<td>Suggesting inadmissible matter</td>
<td>Mil. R. Evid. 611(a)</td>
<td>III-32</td>
</tr>
<tr>
<td>Questions of law, rulings on</td>
<td>R.C.M. 801(a)(4), (e)(1), (2)</td>
<td>II-75; II-76</td>
</tr>
<tr>
<td>Quitting guard</td>
<td>IV. Para. 10</td>
<td>IV-12</td>
</tr>
<tr>
<td>See also Sentinel or lookout.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Quitting place of duty to avoid hazardous duty</td>
<td>IV. Para. 9</td>
<td>IV-9</td>
</tr>
<tr>
<td>Quitting place of duty to plunder or pillage</td>
<td>IV. Para. 23</td>
<td>IV-32</td>
</tr>
<tr>
<td>Radio, broadcasting from courtroom</td>
<td>R.C.M. 806(c)</td>
<td>II-82</td>
</tr>
<tr>
<td>Rape</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault with intent to commit</td>
<td>IV. Para. 64</td>
<td>IV-94</td>
</tr>
<tr>
<td>Generally</td>
<td>IV. Para. 45</td>
<td>IV-64</td>
</tr>
<tr>
<td>Murder while committing</td>
<td>IV. Para. 43</td>
<td>IV-60</td>
</tr>
<tr>
<td>“Rape shield”</td>
<td>Mil. R. Evid. 412</td>
<td>III-20</td>
</tr>
<tr>
<td>Reasonable doubt</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Guilt, basis for finding of</td>
<td>R.C.M. 918(c)</td>
<td>II-115</td>
</tr>
<tr>
<td>Instruction on</td>
<td>R.C.M. 920(c)(5)</td>
<td>II-116</td>
</tr>
<tr>
<td>Rebuttal, evidence in</td>
<td>R.C.M. 913(c)(1)(C); 1001(d)</td>
<td>II-107; II-121</td>
</tr>
<tr>
<td>Receipt</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delivering less than amount called for by</td>
<td>IV. Para. 58</td>
<td>IV-87</td>
</tr>
<tr>
<td>False</td>
<td>IV. Para. 58</td>
<td>IV-87</td>
</tr>
<tr>
<td>Making or delivering, without knowledge of facts</td>
<td>IV. Para. 58</td>
<td>IV-87</td>
</tr>
<tr>
<td>Receiving stolen property</td>
<td>IV. Para. 106</td>
<td>IV-118</td>
</tr>
<tr>
<td>Recess, announcement of personnel after</td>
<td>R.C.M. 813(b)</td>
<td>II-88</td>
</tr>
<tr>
<td>Reciprocal jurisdiction</td>
<td>R.C.M. 201(e)</td>
<td>II-10</td>
</tr>
<tr>
<td>Recklessly operating vehicle</td>
<td>IV. Para. 35</td>
<td>IV-51</td>
</tr>
<tr>
<td>Recollection refreshed</td>
<td>Mil. R. Evid. 612</td>
<td>III-33</td>
</tr>
<tr>
<td>Recommendation of staff judge advocate or legal officer on posttrial action</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Disqualification</td>
<td>R.C.M. 1106(b)</td>
<td>II-144</td>
</tr>
<tr>
<td>Form and content</td>
<td>R.C.M. 1106(d)</td>
<td>II-144</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1106</td>
<td>II-144</td>
</tr>
</tbody>
</table>

Index 61
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guilty, no findings of</td>
<td>R.C.M. 1106(e)</td>
<td>II-145</td>
</tr>
<tr>
<td>Service on defense counsel</td>
<td>R.C.M. 1106(f)</td>
<td>II-145</td>
</tr>
<tr>
<td>Reconsideration</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Findings</td>
<td>R.C.M. 924</td>
<td>II-119</td>
</tr>
<tr>
<td>Rulings by military judge</td>
<td>R.C.M. 905(f)</td>
<td>II-94</td>
</tr>
<tr>
<td>Sentence</td>
<td>R.C.M. 1009</td>
<td>II-133</td>
</tr>
<tr>
<td>Record of nonjudicial punishment</td>
<td>V. Para. 8</td>
<td>V-9</td>
</tr>
<tr>
<td>Record of trial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Acquittal</td>
<td>R.C.M. 1103(e)</td>
<td>II-139</td>
</tr>
<tr>
<td>Appeal by United States, prepared in</td>
<td>R.C.M. 908(b)(5)</td>
<td>II-99</td>
</tr>
<tr>
<td>Audiotape</td>
<td>R.C.M. 1103(j)</td>
<td>II-176</td>
</tr>
<tr>
<td>Authentication</td>
<td>R.C.M. 1104(a)</td>
<td>II-141</td>
</tr>
<tr>
<td>Contempt proceedings</td>
<td>R.C.M. 809(d)</td>
<td>II-84</td>
</tr>
<tr>
<td>Copies</td>
<td></td>
<td></td>
</tr>
<tr>
<td>General and special courts-martial</td>
<td>R.C.M. 1103(g)(1)</td>
<td>II-139</td>
</tr>
<tr>
<td>Summary court-martial</td>
<td>R.C.M. 1305(b)</td>
<td>II-176</td>
</tr>
<tr>
<td>Correction, certificate of</td>
<td>R.C.M. 1104(d)</td>
<td>II-142</td>
</tr>
<tr>
<td>Disposition of after action</td>
<td>R.C.M. 1111</td>
<td>II-156</td>
</tr>
<tr>
<td>Examination and correction before authentication</td>
<td></td>
<td></td>
</tr>
<tr>
<td>By defense counsel</td>
<td>R.C.M. 1103(j)(1)(B)</td>
<td>II-140</td>
</tr>
<tr>
<td>By summary court-martial</td>
<td>R.C.M. 1103(j)(2); 1305(b)</td>
<td>II-140</td>
</tr>
<tr>
<td>By trial counsel</td>
<td>R.C.M. 1103(j)(1)(A)</td>
<td>II-139</td>
</tr>
<tr>
<td>Forwarding</td>
<td>R.C.M. 1104(e)</td>
<td>II-141</td>
</tr>
<tr>
<td>General courts-martial, contents</td>
<td>R.C.M. 1103(b)(2)</td>
<td>II-137</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1103; 1104</td>
<td>II-137; II-141</td>
</tr>
<tr>
<td>Guide for preparing summarized record</td>
<td>Appendix 13</td>
<td>A13-1</td>
</tr>
<tr>
<td>Guide for preparing verbatim records</td>
<td>Appendix 14</td>
<td>A14-1</td>
</tr>
<tr>
<td>Guilty plea, requirements</td>
<td>R.C.M. 910(c)</td>
<td>II-103</td>
</tr>
<tr>
<td>Loss of notes or recordings</td>
<td>R.C.M. 1103(f)</td>
<td>II-139</td>
</tr>
<tr>
<td>Loss of records</td>
<td>R.C.M. 1104(c)</td>
<td>II-142</td>
</tr>
<tr>
<td>New trial, use at</td>
<td>R.C.M. 810(c)</td>
<td>II-85</td>
</tr>
<tr>
<td>Not guilty, lack of mental responsibility</td>
<td>R.C.M. 1103(e)</td>
<td>II-139</td>
</tr>
<tr>
<td>Other trial, use at</td>
<td>R.C.M. 810(e)</td>
<td>II-85</td>
</tr>
<tr>
<td>Preparation of</td>
<td>R.C.M. 1103</td>
<td>II-137</td>
</tr>
<tr>
<td>Recommendation of staff judge advocate or legal officer, before</td>
<td></td>
<td></td>
</tr>
<tr>
<td>action on</td>
<td>R.C.M. 1106</td>
<td>II-144</td>
</tr>
<tr>
<td>Rehearing</td>
<td>R.C.M. 810(a)(2), (c)</td>
<td>II-85</td>
</tr>
<tr>
<td>Security classification</td>
<td>R.C.M. 1103(h)</td>
<td>II-139</td>
</tr>
<tr>
<td>Service</td>
<td>R.C.M. 1104(b)</td>
<td>II-141</td>
</tr>
<tr>
<td>Special courts-martial, contents</td>
<td>R.C.M. 1103(c)</td>
<td>II-138</td>
</tr>
<tr>
<td>Summary courts-martial, contents</td>
<td>R.C.M. 1305; Appendix 15</td>
<td>II-175; A15-1</td>
</tr>
<tr>
<td>Termination prior to findings</td>
<td>R.C.M. 1103(e)</td>
<td>II-139</td>
</tr>
<tr>
<td>Trial counsel</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Examination</td>
<td>R.C.M. 1103(j)(1)(A)</td>
<td>II-139</td>
</tr>
<tr>
<td>Responsibility for</td>
<td>R.C.M. 808; 1103(b)(1)</td>
<td>II-83; II-137</td>
</tr>
<tr>
<td>Verbatim</td>
<td>R.C.M. 1103(b)(2)(B), (c)(1)</td>
<td>II-137; II-138</td>
</tr>
<tr>
<td>Videotape</td>
<td>R.C.M. 1103(j)</td>
<td>II-140</td>
</tr>
<tr>
<td>Views and inspections</td>
<td>R.C.M. 913(c)(3)</td>
<td>II-107</td>
</tr>
<tr>
<td>Record, public, altering, concealing, removing, mutiliating,</td>
<td>IV. Para. 99</td>
<td>IV-115</td>
</tr>
<tr>
<td>obliterating, destroying</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Recusal of military judge</td>
<td>R.C.M. 902</td>
<td>II-90</td>
</tr>
<tr>
<td>Redress of grievances</td>
<td>Art. 138, UCMJ</td>
<td>A2-29</td>
</tr>
</tbody>
</table>

Index 62
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Referral of charges</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accuser, disqualified</td>
<td>R.C.M. 601(c)</td>
<td>II–54</td>
</tr>
<tr>
<td>Authority to</td>
<td>R.C.M. 601(b)</td>
<td>II–54</td>
</tr>
<tr>
<td>Basis for</td>
<td>R.C.M. 601(d)(1)</td>
<td>II–54</td>
</tr>
<tr>
<td>Capital offense</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Referred as noncapital</td>
<td>R.C.M. 201(f)(1)(A)(iii)(b)</td>
<td>II–11</td>
</tr>
<tr>
<td>To special court-martial</td>
<td>R.C.M. 201(f)(2)(C)</td>
<td>II–12</td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 601(a)</td>
<td>II–54</td>
</tr>
<tr>
<td>Disqualification</td>
<td>R.C.M. 601(c)</td>
<td>II–54</td>
</tr>
<tr>
<td>Instructions</td>
<td>R.C.M. 601(e)(1)</td>
<td>II–54</td>
</tr>
<tr>
<td>General courts-martial</td>
<td>R.C.M. 407(a)(6); 601(d)(2)</td>
<td>II–41; II–54</td>
</tr>
<tr>
<td>Joiner of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused</td>
<td>R.C.M. 601(e)(3)</td>
<td>II–55</td>
</tr>
<tr>
<td>Offenses</td>
<td>R.C.M. 601(e)(2)</td>
<td>II–55</td>
</tr>
<tr>
<td>Jurisdictional requisite, as</td>
<td>R.C.M. 201(b)(3)</td>
<td>II–9</td>
</tr>
<tr>
<td>Motion as to defect in</td>
<td>R.C.M. 905(b)(1), (e)</td>
<td>II–93; II–94</td>
</tr>
<tr>
<td>National security, affecting</td>
<td>R.C.M. 401(d); 407(b)</td>
<td>II–33; II–41</td>
</tr>
<tr>
<td>Order of</td>
<td>R.C.M. 601(e)(1)</td>
<td>II–54</td>
</tr>
<tr>
<td>Pretrial agreement concerning</td>
<td>R.C.M. 705(b)(2)(A), (B)</td>
<td>II–69; II–70</td>
</tr>
<tr>
<td>Procedure</td>
<td>R.C.M. 601(e)</td>
<td>II–54</td>
</tr>
<tr>
<td>Special courts-martial</td>
<td>R.C.M. 404(d); 601(d)(1)</td>
<td>II–34; II–54</td>
</tr>
<tr>
<td>Summary courts-martial</td>
<td>R.C.M. 403(b)(4); 601(d)(1)</td>
<td>II–34; II–54</td>
</tr>
<tr>
<td>Superior convening authority, powers regarding</td>
<td>R.C.M. 601(f)</td>
<td>II–55</td>
</tr>
<tr>
<td>War, effect on</td>
<td>R.C.M. 401(d); 407(b)</td>
<td>II–33; II–41</td>
</tr>
<tr>
<td>Withdrawn charges</td>
<td>R.C.M. 694(b)</td>
<td>II–57</td>
</tr>
<tr>
<td>Withholding, authority to</td>
<td>R.C.M. 601(b)</td>
<td>II–54</td>
</tr>
<tr>
<td>Refreshing recollection</td>
<td>Mil. R. Evid. 612</td>
<td>III–33</td>
</tr>
<tr>
<td>Refusal to testify, wrongful</td>
<td>IV. Para. 108</td>
<td>IV–119</td>
</tr>
<tr>
<td>Regulations, failure to obey</td>
<td>IV. Para. 16</td>
<td>IV–23</td>
</tr>
<tr>
<td>Rehearing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Action on</td>
<td>R.C.M. 1107(f)(5)</td>
<td>II–150</td>
</tr>
<tr>
<td>Former testimony, admissibility at</td>
<td>Mil. R. Evid. 804(b)(1)</td>
<td>III–37</td>
</tr>
<tr>
<td>Ordering</td>
<td>R.C.M. 1107(e)(2)(B), (e)(1)</td>
<td>II–147; II–148</td>
</tr>
<tr>
<td>Procedure</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Composition</td>
<td>R.C.M. 810(b)</td>
<td>II–75</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 810</td>
<td>II–85</td>
</tr>
<tr>
<td>Record, examination of</td>
<td>R.C.M. 810(c)</td>
<td>II–85</td>
</tr>
<tr>
<td>Sentence limitations</td>
<td>R.C.M. 810(d)</td>
<td>II–86</td>
</tr>
<tr>
<td>Pretrial agreement, effect of</td>
<td>R.C.M. 810(d)(2)</td>
<td>II–86</td>
</tr>
<tr>
<td>Releasing prisoner without proper authority</td>
<td>IV. Para. 20</td>
<td>IV–30</td>
</tr>
<tr>
<td>Relevancy. See Evidence.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Relief, not affording, before enemy</td>
<td>IV. Para. 23</td>
<td>IV–32</td>
</tr>
<tr>
<td>Religious beliefs or opinions, not subject to inquiry</td>
<td>Mil. R. Evid. 610</td>
<td>III–32</td>
</tr>
<tr>
<td>Remission of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nonjudicial punishment</td>
<td>V. Para. 6c</td>
<td>V–8</td>
</tr>
<tr>
<td>Sentence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1108(a)</td>
<td>II–151</td>
</tr>
<tr>
<td>Of suspension</td>
<td>R.C.M. 1108(e)</td>
<td>II–152</td>
</tr>
<tr>
<td>Who may remit</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Convening authority</td>
<td>R.C.M. 1108(b)</td>
<td>II–151</td>
</tr>
<tr>
<td>Judge Advocate General, The</td>
<td>R.C.M. 1201(c)</td>
<td>II–163</td>
</tr>
<tr>
<td>Service Secretary</td>
<td>R.C.M. 1206(b)(1)</td>
<td>II–168</td>
</tr>
</tbody>
</table>

Index 63
Subject | Ref. | Page
---|---|---
Report of<br>Failure to make<br>Generally<br>Result of trial | R.C.M. 1101(a) | II–18
| R.C.M. 301 | II–18
| R.C.M. 301 | II–135

Res judicata
Resisting apprehension Resignation, quitting post or duties before notification of Reserve personnel, eligibility for court-martial duty Rescission of deferment of confinement Requesting commission of offense Reputation Reproachful speech or gestures Repressing commission of offense Rescission of deferment of confinement Reserve personnel, eligibility for court-martial duty Resignation, quitting post or duties before notification of acceptance, as desertion Resisting apprehension Res judicata Restoration Generally To duty, as condonation of desertion Restraint Attachment of jurisdiction, effecting During trial Pretrial<br>See also Confinement, pretrial.<br>Authority to order<br>Generally<br>Grounds<br>Limitations<br>Types of<br>Restriction Administrative Attachment of jurisdiction, effect of Breaking Defined Nonjudicial punishment Pretrial<br>See also Confinement, pretrial.
R.C.M. 304(b)<br>R.C.M. 304; 305; 804(c)(2)<br>R.C.M. 304(c).<br>R.C.M. 304(f)<br>R.C.M. 304(a)<br>R.C.M. 304(h)<br>R.C.M. 302(c)(2)<br>V. Para. 5(c)(2)<br>V. Para. 5c(2)<br>R.C.M. 1101(c)(6)(D), (7)<br>R.C.M. 502(e)(2), (f)<br>R.C.M. 502(e)(3)(B)<br>R.C.M. 807(b); 901(c)<br>R.C.M. 1003(b)(1)<br>R.C.M. 104(a)(1)<br>V. Para. 5c(1)<br>R.C.M. 1003(b)(1)<br>R.C.M. 1003(b)(1)<br>R.C.M. 1208<br>R.C.M. 905(g)<br>R.C.M. 1208<br>R.C.M. 907(b)(2)(D)(iii)<br>R.C.M. 202(c)(2)<br>R.C.M. 804(c)(3) | II–21<br>II–20; II–22; II–80<br>II–21<br>II–22<br>II–20<br>II–22<br>II–22<br>II–15<br>II–166<br>II–98<br>II–15<br>II–80
| IV–28 | IV–116
| II–136 | IV–9
| IV–9 | IV–116
| IV–116 | I–28
| II–94 | II–168
| II–98 | II–15
| II–80

Index 64
Search and Seizure

Safety of command, unit, place, or military property endangering Sale, unlawful, military property

Scene of accident, fleeing

Sanity

Robbery

Analysis

Routine practice, evidence of

Robbery

Assault with intent to commit

Generally

Murder while committing

Routine practice, evidence of

Rules for Courts-Martial (R.C.M.)

Analysis

Construction

Purpose

Scope

Title

Rules of court

Authority to make

Enforcement

Safeguard, forcing

Safety of command, unit, place, or military property, endangering

Sale, unlawful, military property

Sanity. See Mental capacity; Mental responsibility.

Scene of accident, fleeing

Search and Seizure

Abandoned property, seizure of

Adequate interest to challenge

Anal searches

Apprehension

Authorization, when required

Defined

Entry to, requirements for

Grounds

How made

Power to apprehend (Art. 7, UCMJ)

Probable cause to

Search incident to

Generally

Scope

Warrant, when required

Attenuation

Authorization to

Apprehend, when required

Search
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basis</td>
<td>Mil. R. Evid. 315(f)</td>
<td>III-14</td>
</tr>
<tr>
<td>Defined</td>
<td>Mil. R. Evid. 315(b)(1)</td>
<td>III-13</td>
</tr>
<tr>
<td>Execution of</td>
<td>Mil. R. Evid. 315(h)</td>
<td>III-15</td>
</tr>
<tr>
<td>Power to grant</td>
<td>Mil. R. Evid. 315(d)</td>
<td>III-14</td>
</tr>
<tr>
<td>Power to search</td>
<td>Mil. R. Evid. 315(e)</td>
<td>III-14</td>
</tr>
<tr>
<td>Rules of evidence not applicable to determination</td>
<td>Mil. R. Evid. 1101(d)</td>
<td>III-41</td>
</tr>
<tr>
<td>Scope</td>
<td>Mil. R. Evid. 315(c)</td>
<td>III-13</td>
</tr>
<tr>
<td>Seize</td>
<td>Mil. R. Evid. 316(d)(4)(A)</td>
<td>III-15</td>
</tr>
<tr>
<td><strong>Automobile searches</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Based upon probable cause</td>
<td>Mil. R. Evid. 315(g)(3)</td>
<td>III-15</td>
</tr>
<tr>
<td>Incident to apprehension</td>
<td>Mil. R. Evid. 314(g)(2)</td>
<td>III-13</td>
</tr>
<tr>
<td>On less than probable cause</td>
<td>Mil. R. Evid. 314(f)(3)</td>
<td>III-13</td>
</tr>
<tr>
<td><strong>Blood samples. See Body views and intrusions, this heading.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Body views and intrusions</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Extraction of body fluid</td>
<td>Mil. R. Evid. 312(d)</td>
<td>III-11</td>
</tr>
<tr>
<td>Generally</td>
<td>Mil. R. Evid. 312(a)</td>
<td>III-10</td>
</tr>
<tr>
<td><strong>Inspections</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Body view during</td>
<td>Mil. R. Evid. 312(b)(2)</td>
<td>III-10</td>
</tr>
<tr>
<td>Urine production</td>
<td>Mil. R. Evid. 313(b)</td>
<td>III-11</td>
</tr>
<tr>
<td>Intrusions for medical purposes</td>
<td>Mil. R. Evid. 312(f)</td>
<td>III-11</td>
</tr>
<tr>
<td>Intrusions, generally</td>
<td>Mil. R. Evid. 312(c)</td>
<td>III-10</td>
</tr>
<tr>
<td>Intrusions into body cavities</td>
<td>Mil. R. Evid. 312(g)</td>
<td>III-10</td>
</tr>
<tr>
<td>Medical qualifications</td>
<td>Mil. R. Evid. 312(g)</td>
<td>III-11</td>
</tr>
<tr>
<td>Visual examination of the body</td>
<td>Mil. R. Evid. 312(b)</td>
<td>III-10</td>
</tr>
<tr>
<td><strong>Border searches</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>General</td>
<td>Mil. R. Evid. 314(b)</td>
<td>III-12</td>
</tr>
<tr>
<td><strong>Burden of proof</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>General</td>
<td>Mil. R. Evid. 311(e)</td>
<td>III-9</td>
</tr>
<tr>
<td>Government's burden enhanced</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Consent, voluntariness</td>
<td>Mil. R. Evid. 314(e)(5)</td>
<td>III-13</td>
</tr>
<tr>
<td>Inspections</td>
<td>Mil. R. Evid. 313(b)</td>
<td>III-11</td>
</tr>
<tr>
<td>On the accused</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adequate interest, standing</td>
<td>Mil. R. Evid. 311(a)(2)</td>
<td>III-8</td>
</tr>
<tr>
<td>False statements, challenging probable cause</td>
<td>Mil. R. Evid. 311(g)(2)</td>
<td>III-10</td>
</tr>
<tr>
<td><strong>Commander</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Neutral and detached</td>
<td>Mil. R. Evid. 315(d)</td>
<td>III-14</td>
</tr>
<tr>
<td>Power to authorize search</td>
<td>Mil. R. Evid. 315(d)(1)</td>
<td>III-14</td>
</tr>
<tr>
<td><strong>Confinement facilities, searches within</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confinement facilities, searches within</td>
<td>Mil. R. Evid. 314(h)</td>
<td>III-13</td>
</tr>
<tr>
<td><strong>Consent</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Body views</td>
<td>Mil. R. Evid. 312(b)(1)</td>
<td>III-10</td>
</tr>
<tr>
<td>Entry to apprehend</td>
<td>R.C.M. 302(e)(2)(A)</td>
<td>II-20</td>
</tr>
<tr>
<td>To search</td>
<td>Mil. R. Evid. 314(e)</td>
<td>III-12</td>
</tr>
<tr>
<td>To seize</td>
<td>Mil. R. Evid. 316(d)(2)</td>
<td>III-15</td>
</tr>
<tr>
<td>Voluntariness, burden of proof</td>
<td>Mil. R. Evid. 314(e)(5)</td>
<td>III-13</td>
</tr>
<tr>
<td>Who can consent</td>
<td>Mil. R. Evid. 314(e)(2)</td>
<td>III-12</td>
</tr>
<tr>
<td><strong>Derivative evidence</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Persons</td>
<td>Mil. R. Evid. 314(f)(1)</td>
<td>III-13</td>
</tr>
<tr>
<td>Property</td>
<td>Mil. R. Evid. 316(d)(5)</td>
<td>III-16</td>
</tr>
<tr>
<td>Disclosure</td>
<td>Mil. R. Evid. 311(d)(1)</td>
<td>III-9</td>
</tr>
<tr>
<td>Eavesdropping</td>
<td>Mil. R. Evid. 317</td>
<td>III-16</td>
</tr>
<tr>
<td>Emergency searches</td>
<td>Mil. R. Evid. 314(i)</td>
<td>III-13</td>
</tr>
<tr>
<td><strong>Entry and exit points</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
INDEX

Subject
Inspections at
Overseas, searches
Entry to apprehend, requirements for
Exclusionary rule
General
Wire and oral communications
Existent circumstances
Entry to apprehend
Search
Seize
False statement in support of probable cause
Foreign officials, search by
Frisk
Government property
Search of
Seizure of
Guilty plea
Conditional to preserve motions
Waiver by
Impeachment by contradiction, using illegally seized evidence
for
Incident to apprehension
Independent source
Inevitable discovery
Informant, identity of, privilege
Inspections
Generally
Visual examination of the body
Intrusions, body cavities
 Inventories
Investigative detentions. See Stops, investigative, this heading.
Jails, confinement facilities, searches within
Law enforcement officials, nonmilitary
Magistrate, power to authorize searches
Medical qualifications, persons searching or seizing from body
Military judge, power to authorize searches
Motion to suppress
See also Motions.
Generally
Testimony upon a preliminary matter
Neutral and detached
Objections, evidence unlawfully seized
Offer of proof, false statements
Open fields or woodlands, search of
Oral communications, interception of
Plain view seizures
Private dwelling, entry to apprehend
Probable cause
Challenging the determination of
False statements
Generally
Searches not requiring

Ref.
Mil. R. Evid. 313(b)
Mil. R. Evid. 314(c)
R.C.M. 302(e)(2)
Mil. R. Evid. 311(a)
Mil. R. Evid. 317
R.C.M. 302(e)(2)(B)
Mil. R. Evid. 310(a)(2)
Mil. R. Evid. 311(b)
Mil. R. Evid. 314(g)
Mil. R. Evid. 311(e)(2)
Mil. R. Evid. 311(e)(2)
Mil. R. Evid. 507
Mil. R. Evid. 313(b)
Mil. R. Evid. 312(b)(2)
Mil. R. Evid. 312(c)
Mil. R. Evid. 313(c)
Mil. R. Evid. 314(h)
Mil. R. Evid. 311(e)(2)
Mil. R. Evid. 315(d)(2)
Mil. R. Evid. 312(g)
Mil. R. Evid. 315(d)(2)
Mil. R. Evid. 311(a)(1), (d)
Mil. R. Evid. 311(f)
Mil. R. Evid. 315(d)
Mil. R. Evid. 311(a)(1)
Mil. R. Evid. 311(g)(2)
Mil. R. Evid. 314(j)
Mil. R. Evid. 317
Mil. R. Evid. 316(d)(4)(C)
R.C.M. 302(e)(2)
Mil. R. Evid. 311(g)(2)
Mil. R. Evid. 311(g)(2)
Mil. R. Evid. 314

Page
III–11
III–12
II–20
III–8
III–16
II–20
III–14
III–15
III–10
III–9
III–13
III–12
III–9
III–29
III–11
III–10
III–12
III–13
III–8
III–10
III–13
III–16
III–15
II–20
III–10
III–12

Index 67
Subject

Searches requiring ........................................... III–13
To apprehend ................................................ III–19
To confine before trial ....................................... II–23
To restrain before trial ....................................... II–21
To search ................................................... III–14
To seize .................................................... III–15

Search
Authorization ................................................ III–13
Execution of ................................................ III–15
Power to conduct ............................................ III–14
Probable cause not required ................................ III–12
Probable cause required ..................................... III–13
Unlawful, defined ............................................. III–8
Warrant, defined ............................................... III–13

Search Authorization to, this heading.

Seizure
Consent ..................................................... III–15
Generally ..................................................... III–15
Plain view ..................................................... III–15
Power to seize ............................................... III–16
Probable cause to seize ..................................... III–15
Unlawful, defined ............................................. III–8
Standing to contest search or seizure ................ III–8
Generally ...................................................... III–14

Seizure
Consent ..................................................... III–15
Generally ..................................................... III–15
Plain view ..................................................... III–15
Power to seize ............................................... III–16
Probable cause to seize ..................................... III–15
Unlawful, defined ............................................. III–8
Standing to contest search or seizure ................ III–8
Generally ...................................................... III–14

Stops, investigative
Friskssubsequent to .......................................... III–13
Generally ..................................................... III–13
Property detention ........................................... III–16
Search of vehicle subsequent to ......................... III–13
Treaty obligations, effect of ........................ III–14

Vaginal search ................................................ III–10

Vehicles, search of
Upon probable cause ........................................ III–15
Upon reasonable suspicion of weapons ........ III–13
Search of ................................................ III–10

Visual examination of the body ............................... III–12

Voluntariness of consent ....................................... III–12

Waiver
Conditional guilty pleas ..................................... II–101
Failure to raise by timely motion ........................ III–9
Guilty plea .................................................... III–10

Warrant, search
Defined ........................................................ III–13
Required for entry to apprehend ........................ III–19

Wire and oral communications, interception ........ II–16

Secretary, Service

Convening courts-martial .......................... Arts. 22, 23, 24, UCMJ; R.C.M. A2–6; A2–7; 
504(b)(1), (2), 1302(a) II–49; II–173
Powers and responsibilities concerning review of courts-martial R.C.M. 1206 II–168

Secret Information, privilege .......................... Mil. R. Evid. 505 III–23

Security

Index 68
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Courtroom</td>
<td>R.C.M. 806(b)</td>
<td>II–81</td>
</tr>
<tr>
<td>National. See National security.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Police. See Law enforcement official.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Record of trial, classification</td>
<td>R.C.M. 1103(h)</td>
<td>II–139</td>
</tr>
<tr>
<td>Sedition</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>IV. Para. 18</td>
<td>IV–26</td>
</tr>
<tr>
<td>Solicitation to commit</td>
<td>IV. Para. 6</td>
<td>IV–7</td>
</tr>
<tr>
<td>Seizure of evidence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Search and seizure.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Destruction to prevent</td>
<td>IV. Para. 103</td>
<td>IV–116</td>
</tr>
<tr>
<td>Generally</td>
<td>Mil. R. Evid. 316</td>
<td>III–15</td>
</tr>
<tr>
<td>Self-defense</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aggravated assault</td>
<td>R.C.M. 916(e)(1), (2)</td>
<td>II–110</td>
</tr>
<tr>
<td>Defense of another</td>
<td>R.C.M. 916(e)(5)</td>
<td>II–111</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 916(e)</td>
<td>II–110</td>
</tr>
<tr>
<td>Homicide</td>
<td>R.C.M. 916(e)(1)</td>
<td>II–110</td>
</tr>
<tr>
<td>Loss of right</td>
<td>R.C.M. 916(e)(4)</td>
<td>II–111</td>
</tr>
<tr>
<td>Other assaults</td>
<td>R.C.M. 916(e)(3)</td>
<td>II–110</td>
</tr>
<tr>
<td>Self-incrimination</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused's failure to testify</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>Mil. R. Evid. 301(f)(1)</td>
<td>III–3</td>
</tr>
<tr>
<td>Instructions concerning</td>
<td>Mil. R. Evid. 301(g)</td>
<td>III–4</td>
</tr>
<tr>
<td>Admissions. See Confessions and admissions, this heading.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Advice to witnesses</td>
<td>Mil. R. Evid. 301(b)(2)</td>
<td>III–3</td>
</tr>
<tr>
<td>Applicability of privilege against</td>
<td>Mil. R. Evid. 301(a)</td>
<td>III–2</td>
</tr>
<tr>
<td>Burden of proof</td>
<td>Mil. R. Evid. 304(e)</td>
<td>III–5</td>
</tr>
<tr>
<td>Confessions and admissions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Admissibility</td>
<td>Mil. R. Evid. 304(a)</td>
<td>III–4</td>
</tr>
<tr>
<td>Admission defined</td>
<td>Mil. R. Evid. 304(c)(2)</td>
<td>III–5</td>
</tr>
<tr>
<td>Admissions by silence or failure to deny accusations of wrongdoing</td>
<td>Mil. R. Evid. 304(h)(3)</td>
<td>III–6</td>
</tr>
<tr>
<td>Admissions made during plea or plea discussion</td>
<td>Mil. R. Evid. 410</td>
<td>III–19</td>
</tr>
<tr>
<td>Burden of proof for admissibility</td>
<td>Mil. R. Evid. 304(e)</td>
<td>III–5</td>
</tr>
<tr>
<td>Coercion, effect of</td>
<td>Mil. R. Evid. 304(c)(3)</td>
<td>III–5</td>
</tr>
<tr>
<td>Confession defined</td>
<td>Mil. R. Evid. 304(c)(1)</td>
<td>III–5</td>
</tr>
<tr>
<td>Corroboration required</td>
<td>Mil. R. Evid. 304(g)</td>
<td>III–6</td>
</tr>
<tr>
<td>Joint trial, effect on co-accused</td>
<td>Mil. R. Evid. 306</td>
<td>III–8</td>
</tr>
<tr>
<td>Oral confessions and admissions</td>
<td>Mil. R. Evid. 304(h)(1)</td>
<td>III–6</td>
</tr>
<tr>
<td>Standing to challenge</td>
<td>Mil. R. Evid. 304(a)</td>
<td>III–4</td>
</tr>
<tr>
<td>Use of admissions made at conferences</td>
<td>R.C.M. 802(e)</td>
<td>II–78</td>
</tr>
<tr>
<td>Corroboration of confessions</td>
<td>Mil. R. Evid. 304(g)</td>
<td>III–6</td>
</tr>
<tr>
<td>Counsel rights and warnings</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Effect of request for counsel</td>
<td>Mil. R. Evid. 305(f)</td>
<td>III–6</td>
</tr>
<tr>
<td>Notice to counsel</td>
<td>Mil. R. Evid. 305(e)</td>
<td>III–5</td>
</tr>
<tr>
<td>Right to counsel</td>
<td>Mil. R. Evid. 305(d)(2)</td>
<td>III–5</td>
</tr>
<tr>
<td>Waiver of counsel rights</td>
<td>Mil. R. Evid. 305(g)(2)</td>
<td>III–6</td>
</tr>
<tr>
<td>When counsel rights warnings are required</td>
<td>Mil. R. Evid. 305(G)(1)</td>
<td>III–5</td>
</tr>
<tr>
<td>Degrading questions</td>
<td>Mil. R. Evid. 303</td>
<td>III–4</td>
</tr>
<tr>
<td>Derivative evidence</td>
<td>Mil. R. Evid. 304(e)(3)</td>
<td>III–5</td>
</tr>
<tr>
<td>Disclosure by prosecution</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused's statements</td>
<td>Mil. R. Evid. 304(d)(1)</td>
<td>III–5</td>
</tr>
<tr>
<td>Immunity or leniency to a prosecution witness</td>
<td>Mil. R. Evid. 301(c)(2)</td>
<td>III–3</td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>---------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>Effect of claiming privilege against</td>
<td>Mil. R. Evid. 301(f)</td>
<td>III-3</td>
</tr>
<tr>
<td>Exclusionary rules</td>
<td>Mil. R. Evid. 304(a); 305(a)</td>
<td>III-4; III-6</td>
</tr>
<tr>
<td>Exception for impeachment</td>
<td>Mil. R. Evid. 304(b)</td>
<td>III-4</td>
</tr>
<tr>
<td>Exercise of privilege against</td>
<td>Mil. R. Evid. 301(c)</td>
<td>III-3</td>
</tr>
<tr>
<td>Guilty plea</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conditional, to preserve motions</td>
<td>R.C.M. 910(a)(2)</td>
<td>II-101</td>
</tr>
<tr>
<td>Waiver by</td>
<td>Mil. R. Evid. 311(i)</td>
<td>III-10</td>
</tr>
<tr>
<td>Immunity</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Effect of grant</td>
<td>Mil. R. Evid. 301(c)(1)</td>
<td>III-3</td>
</tr>
<tr>
<td>Notice to accused</td>
<td>Mil. R. Evid. 301(c)(2)</td>
<td>III-3</td>
</tr>
<tr>
<td>Impeachment by contradiction, using involuntary statements</td>
<td>Mil. R. Evid. 304(b)</td>
<td>III-4</td>
</tr>
<tr>
<td>Inadmissibility of accused's pretrial claim of privilege against</td>
<td>Mil. R. Evid. 301(f)(3)</td>
<td>III-3</td>
</tr>
<tr>
<td>Interrogation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>By foreign officials</td>
<td>Mil. R. Evid. 305(h)(2)</td>
<td>III-8</td>
</tr>
<tr>
<td>By nonmilitary officials</td>
<td>Mil. R. Evid. 305(h)(1)</td>
<td>III-7</td>
</tr>
<tr>
<td>Custodial</td>
<td>Mil. R. Evid. 305(d)(1)</td>
<td>III-7</td>
</tr>
<tr>
<td>Defined</td>
<td>Mil. R. Evid. 305(b)(2)</td>
<td>III-6</td>
</tr>
<tr>
<td>Notice to counsel</td>
<td>Mil. R. Evid. 305(e)</td>
<td>III-7</td>
</tr>
<tr>
<td>Persons subject to UCMJ, defined</td>
<td>Mil. R. Evid. 305(b)(1)</td>
<td>III-6</td>
</tr>
<tr>
<td>Involuntary statements</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Burden of proof concerning</td>
<td>Mil. R. Evid. 304(e)</td>
<td>III-5</td>
</tr>
<tr>
<td>Defined</td>
<td>Mil. R. Evid. 304(c)(3); 305(a)</td>
<td>III-5; III-6</td>
</tr>
<tr>
<td>Use of certain involuntary statements to impeach</td>
<td>Mil. R. Evid. 304(b)</td>
<td>III-4</td>
</tr>
<tr>
<td>Mental examination of accused, privilege concerning</td>
<td>Mil. R. Evid. 302(b)</td>
<td>III-4</td>
</tr>
<tr>
<td>Exceptions</td>
<td>Mil. R. Evid. 302(a)</td>
<td>III-4</td>
</tr>
<tr>
<td>Generally</td>
<td>Mil. R. Evid. 302(d)</td>
<td>III-4</td>
</tr>
<tr>
<td>Noncompliance by accused</td>
<td>Mil. R. Evid. 302(e)</td>
<td>III-4</td>
</tr>
<tr>
<td>Procedure for claiming</td>
<td>Mil. R. Evid. 302(c)</td>
<td>III-4</td>
</tr>
<tr>
<td>Release of evidence</td>
<td>Mil. R. Evid. 302(c)</td>
<td>III-4</td>
</tr>
<tr>
<td>Motion to suppress</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Motions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Effect of guilty plea</td>
<td>Mil. R. Evid. 304(d)(5)</td>
<td>III-5</td>
</tr>
<tr>
<td>Generally</td>
<td>Mil. R. Evid. 304(d)(2)</td>
<td>III-5</td>
</tr>
<tr>
<td>Rulings by military judge</td>
<td>Mil. R. Evid. 304(d)(4)</td>
<td>III-5</td>
</tr>
<tr>
<td>Specificity required</td>
<td>Mil. R. Evid. 304(d)(3)</td>
<td>III-5</td>
</tr>
<tr>
<td>Testimony upon a preliminary matter</td>
<td>Mil. R. Evid. 304(f)</td>
<td>III-6</td>
</tr>
<tr>
<td>Notice to accused of leniency or immunity given a prosecution witness</td>
<td>Mil. R. Evid. 301(c)(2)</td>
<td>III-3</td>
</tr>
<tr>
<td>Notice to counsel of intended interrogation</td>
<td>Mil. R. Evid. 305(e)</td>
<td>III-7</td>
</tr>
<tr>
<td>Rights warnings</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 31, UCMJ</td>
<td>Mil. R. Evid. 305(c)</td>
<td>III-7</td>
</tr>
<tr>
<td>Counsel warnings</td>
<td>Mil. R. Evid. 305(d)</td>
<td>III-7</td>
</tr>
<tr>
<td>Effect of failure to warn</td>
<td>Mil. R. Evid. 305(a)</td>
<td>III-6</td>
</tr>
<tr>
<td>Standing to assert privilege against</td>
<td>Mil. R. Evid. 301(b)(1)</td>
<td>III-3</td>
</tr>
<tr>
<td>Statements of co-accused</td>
<td>Mil. R. Evid. 306</td>
<td>III-8</td>
</tr>
<tr>
<td>Striking testimony after assertion of privilege against</td>
<td>Mil. R. Evid. 301(f)(2)</td>
<td>III-3</td>
</tr>
<tr>
<td>Testimony by accused on preliminary matter</td>
<td>Mil. R. Evid. 304(f)</td>
<td>III-6</td>
</tr>
<tr>
<td>Voluntariness</td>
<td>Mil. R. Evid. 304(c)(3)</td>
<td>III-5</td>
</tr>
<tr>
<td>Waiver of privilege against</td>
<td>Mil. R. Evid. 301(e)</td>
<td>III-3</td>
</tr>
<tr>
<td>By accused</td>
<td>Mil. R. Evid. 301(d)</td>
<td>III-3</td>
</tr>
<tr>
<td>By witness</td>
<td>Mil. R. Evid. 301(d)</td>
<td>III-3</td>
</tr>
</tbody>
</table>
Subject
 Waiver of rights
   Conditional guilty plea .................................................. R.C.M. 910(a)(2) II–101
   Failure to move to suppress ............................................. Mil. R. Evid. 304(d)(2)(A) III–5
   Generally ................................................................. Mil. R. Evid. 305(g) III–7
   Guilty plea, effect of .................................................... Mil. R. Evid. 304(d)(5) III–5
Self-injury, infliction of .................................................. IV. Para. 40 IV–58
Selling military property, unlawfully ................................... IV. Para. 32 IV–46
Senec
   Extraction of ................................................................. Mil. R. Evid. 312(d); 406 III–11; III–19
   Source of ............................................................................. Mil. R. Evid. 412(b)(2)(A) III–20
Sentence
   See also specific topics.
   Announcement of
     Findings, effect on reconsideration of ................................ R.C.M. 924(a), (c) II–119
     Generally ................................................................. R.C.M. 1007 II–132
     Authorized punishments ......................................................... R.C.M. 1003(b) II–123
     Capital cases ........................................................................ R.C.M. 1004 II–127
     Confinement, credit for illegal pretrial .................................... R.C.M. 305(j)(2), (k) II–25; II–25
     Contempt, sentence for ....................................................... R.C.M. 809(c)(2)(C), (e) II–84
   Convening authority’s action on
     Generally ............................................................................. R.C.M. 1107(d) II–147
     Modification of initial action ..................................................... R.C.M. 1107(f)(2) II–149
     Summary court-martial ......................................................... R.C.M. 1306(b) II–176
   Deliberations ............................................................................. R.C.M. 1006 II–131
   Determination of .................................................................... R.C.M. 1002 II–122
   Execution ............................................................................... R.C.M. 1113 II–158
   Forms of .................................................................................. Appendix 11 A11–1
   Impeachment of ........................................................................ R.C.M. 1008 II–132
   Instructions on ......................................................................... R.C.M. 1005 II–130
   Maximum limitations
     Chart of maximum punishments ................................................ Appendix 12 A12–1
     Circumstances affecting increase ............................................... R.C.M. 1003(d) II–127
     General court-martial ............................................................. R.C.M. 201(f)(1) II–11
     Generally ............................................................................. R.C.M. 1003 II–123
     New trial ................................................................................ R.C.M. 810(d) II–86
     Other trial ............................................................................. R.C.M. 810(d) II–86
     Rehearing ............................................................................. R.C.M. 810(d) II–86
     Special court-martial ............................................................. R.C.M. 201(f)(2)(B) II–12
     Summary court-martial ......................................................... R.C.M. 1301(d) II–172
   Multiplicity ............................................................................... R.C.M. 1003(c)(1)(C) II–125
   Procedure ................................................................................ R.C.M. 1009 II–133
   Reconsideration of .................................................................... R.C.M. 1009 II–133
   Unexecuted portion .................................................................. R.C.M. 1108(b) II–151
   Voting ...................................................................................... R.C.M. 1006(d) II–131

Sentence proceedings. See Presentencing procedure.
Sentinel or lookout
   Assault on ............................................................................... IV. Para. 64 IV–94
   Misbehavior as ........................................................................ IV. Para. 38 IV–56
   Offenses against or by ............................................................ IV. Para. 104 IV–117
Separation
   See also Bad conduct-discharge; Dishonorable discharge;
   Dismissal.
### MCM, 1994

#### INDEX

<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Fraudulent</strong></td>
<td>IV. Para. 7</td>
<td>IV–8</td>
</tr>
<tr>
<td><strong>Unlawful, effecting</strong></td>
<td>IV. Para. 8</td>
<td>IV–9</td>
</tr>
<tr>
<td><strong>Serious offense, misprision of</strong></td>
<td>IV. Para. 95</td>
<td>IV–112</td>
</tr>
<tr>
<td>Charges, of</td>
<td>R.C.M. 602</td>
<td>II–55</td>
</tr>
<tr>
<td>Record of trial, of</td>
<td>R.C.M. 1104(b)</td>
<td>II–141</td>
</tr>
<tr>
<td>Subpoena, of</td>
<td>R.C.M. 703(e)(2)(D), (E)</td>
<td>II–66</td>
</tr>
<tr>
<td>Written motion, of</td>
<td>R.C.M. 905(i)</td>
<td>II–95</td>
</tr>
<tr>
<td><strong>Services, obtaining under false pretenses</strong></td>
<td>IV. Para. 78</td>
<td>IV–103</td>
</tr>
<tr>
<td><strong>Sessions</strong></td>
<td>R.C.M. 803</td>
<td>II–78</td>
</tr>
<tr>
<td>Closed</td>
<td>R.C.M. 806(b)</td>
<td>II–81</td>
</tr>
<tr>
<td>Control of spectators</td>
<td>R.C.M. 921(a)</td>
<td>II–117</td>
</tr>
<tr>
<td>Deliberations and vote, findings</td>
<td>R.C.M. 1006(a)</td>
<td>II–131</td>
</tr>
<tr>
<td>Deliberations and vote, sentence</td>
<td>R.C.M. 801(e)(3)(C)</td>
<td>II–76</td>
</tr>
<tr>
<td>Objections to rulings of president</td>
<td>R.C.M. 901</td>
<td>II–89</td>
</tr>
<tr>
<td>Opening</td>
<td>R.C.M. 1102</td>
<td>II–136</td>
</tr>
<tr>
<td>Post-trial</td>
<td>V. Para. 6d</td>
<td>V–8</td>
</tr>
<tr>
<td><strong>Setting aside nonjudicial punishment</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Severance</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charges, of</td>
<td>R.C.M. 908(b)(4)</td>
<td>II–99</td>
</tr>
<tr>
<td>Appeal of United States, effect of</td>
<td>R.C.M. 905(b)(5); 906(b)(10)</td>
<td>II–93; II–97</td>
</tr>
<tr>
<td>Motion for</td>
<td>R.C.M. 905(b)(5); 906(b)(9)</td>
<td>II–93; II–96</td>
</tr>
<tr>
<td>Co-accused, of</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Sexual offense, evidence of character of victim</strong></td>
<td>Mil. R. Evid. 412</td>
<td>III–20</td>
</tr>
<tr>
<td><strong>Ship</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See Vessel</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Shore patrol</strong></td>
<td>IV. Para. 31</td>
<td>IV–45</td>
</tr>
<tr>
<td>See Law enforcement official</td>
<td>IV. Para. 58</td>
<td>IV–87</td>
</tr>
<tr>
<td><strong>Signing false official document or statement</strong></td>
<td>IV. Para. 104</td>
<td>IV–117</td>
</tr>
<tr>
<td><strong>Signing receipt without knowledge of facts</strong></td>
<td>IV. Para. 38</td>
<td>IV–56</td>
</tr>
<tr>
<td><strong>Sitting on post, sentinel or lookout</strong></td>
<td>IV. Para. 64</td>
<td>IV–94</td>
</tr>
<tr>
<td><strong>Sleeping on post, sentinel or lookout</strong></td>
<td>IV. Para. 51</td>
<td>IV–76</td>
</tr>
<tr>
<td><strong>Sodomy</strong></td>
<td>IV. Para. 43</td>
<td>IV–60</td>
</tr>
<tr>
<td>Assault with intent to commit</td>
<td>IV. Para. 64</td>
<td>IV–94</td>
</tr>
<tr>
<td>Generally</td>
<td>IV. Para. 64</td>
<td>IV–94</td>
</tr>
<tr>
<td>Murder while committing</td>
<td>IV. Para. 51</td>
<td>IV–76</td>
</tr>
<tr>
<td>Solicitation</td>
<td>IV. Para. 4c(4)</td>
<td>IV–5</td>
</tr>
<tr>
<td><strong>Attempt distinguished</strong></td>
<td>IV. Para. 6</td>
<td>IV–7</td>
</tr>
<tr>
<td>Desertion</td>
<td>IV. Para. 6</td>
<td>IV–7</td>
</tr>
<tr>
<td>Misbehavior before the enemy</td>
<td>IV. Para. 6</td>
<td>IV–7</td>
</tr>
<tr>
<td>Mutiny</td>
<td>IV. Para. 6</td>
<td>IV–7</td>
</tr>
<tr>
<td>Other offenses</td>
<td>IV. Para. 105</td>
<td>IV–118</td>
</tr>
<tr>
<td>Pandering distinguished</td>
<td>IV. Para. 6c(3)</td>
<td>IV–7</td>
</tr>
<tr>
<td>Sedition</td>
<td>IV. Para. 6</td>
<td>IV–7</td>
</tr>
<tr>
<td><strong>Special court-martial</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Specific topics.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Composition</td>
<td>R.C.M. 501(a)(2)</td>
<td>II–43</td>
</tr>
<tr>
<td><strong>Counsel</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Detail to</td>
<td>R.C.M. 501(b)</td>
<td>II–43</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 502(d)</td>
<td>II–44</td>
</tr>
<tr>
<td>Required to adjudge bad-conduct discharge</td>
<td>R.C.M. 201(f)(2)(B)(ii) (a)</td>
<td>II–12</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>R.C.M. 201(f)(2)</td>
<td>II–12</td>
</tr>
<tr>
<td>Personnel of</td>
<td>R.C.M. 501</td>
<td>II–43</td>
</tr>
<tr>
<td>President of, without military judge</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Index 72
INDEX

Subject
Defined ........................................ R.C.M. 103(15) .............. II–2
Duties ........................................... R.C.M. 502(b)(2) ............ II–44
Procedural guide ............................. Appendix 8 ................... A8–1
Record of trial ............................... R.C.M. 1103(c) .......... II–138
Referral of charges ......................... R.C.M. 404(d); 601 ......... II–34; III–31

Special defenses. See Defenses.

Special findings
In conjunction with general findings ........ R.C.M. 918(b) ............. II–114
Requirement for essential findings of fact in ruling on
Motions, generally ............................ R.C.M. 905(d) ............. II–93
Motions to suppress ----------------------
Confessions and admissions ................. Mil. R. Evid. 304(d)(4) .... III–5
Evidence of eyewitness identification .... Mil. R. Evid. 321(f) ........ III–18
Product of search and seizure ............. Mil. R. Evid. 311(d)(4) .... III–9

Specifications. See Charges and specifications.

Spectators
Access to court-martial ..................... R.C.M. 806(a) ............. II–81
Control of ..................................... R.C.M. 806(b) ............. II–81
Witnesses as ................................. Mil. R. Evid. 615 ............ III–33

Speech, provoking ........................... IV. Para. 42 ............. IV–60

Speedy trial
Accountability ----------------------------
Inception of time period ................... R.C.M. 707(b)(1) .......... II–73
Termination of time period ............... R.C.M. 707(b)(1) .......... II–73

Arrest -------------------------------
Effect of ..................................... R.C.M. 707(a)(2) .......... II–73
Release from ................................. R.C.M. 707(b)(3)(B) .... II–73

Confinement, pretrial -------------------
Effect of ..................................... R.C.M. 707(a)(2) .......... II–73
Release from ................................. R.C.M. 707(b)(3)(B) .... II–73

Dismissal of charges .....................
Effect of ..................................... R.C.M. 707(b)(3)(A) .... II–73
Motion for .................................... R.C.M. 905(c)(2)(B); 907(b)(2)(A) II–93; II–98
Remedy for violation ......................... R.C.M. 707(d) .......... II–74

Excluded periods ............................. R.C.M. 707(c) .......... II–73

Generally .................................... R.C.M. 707 ........... II–72

Imposition of restraint, effect of .......... R.C.M. 707(a)(2) .......... II–73
Mistrial, effect of ............................. R.C.M. 707(b)(3)(A) .... II–73

Motion concerning ...
Burden of proof .............................. R.C.M. 905(c)(2)(B) .... II–93

Grounds ......................................... R.C.M. 907(b)(2)(A) .... II–98

Multiple charges, effect of ............... R.C.M. 707(b)(2) .......... II–73
Preferral of charges, effect of ............ R.C.M. 707(b)(2) .......... II–73
Pretrial agreement, waiver of right not permitted .... R.C.M. 705(c)(1)(B) ... II–70
Remedy for denial of ......................... R.C.M. 707(d) .......... II–74

Time periods ................................. R.C.M. 707(a), (d) .... II–72; II–74

Spies. See Spying.

Spontaneous exclamation ................... Mil. R. Evid. 803(2) .... III–35
Spouses, privilege as to ..................... Mil. R. Evid. 504 .... III–22

Spying
Generally ...................................... IV. Para. 30 ........ IV–43
Votes required to convict ................. R.C.M. 921(c)(2)(A) .... II–117

Index 73
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Staff judge advocate</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Advice, pretrial.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charges and specifications, amendment by</td>
<td>R.C.M. 603(b)</td>
<td>II-56</td>
</tr>
<tr>
<td>Communications with</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Convening authority</td>
<td>R.C.M. 105(a)</td>
<td>II-5</td>
</tr>
<tr>
<td>Judge Advocate General, The</td>
<td>R.C.M. 105(b)</td>
<td>II-5</td>
</tr>
<tr>
<td>Staff judge advocates</td>
<td>R.C.M. 105(b)</td>
<td>II-5</td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 103(17)</td>
<td>II-2</td>
</tr>
<tr>
<td>Execution of sentence, advice on</td>
<td>R.C.M. 1113(c)(1)</td>
<td>II-158</td>
</tr>
<tr>
<td>Member, ineligible to serve as</td>
<td>R.C.M. 912(f)(1)(G), (H)</td>
<td>II-105</td>
</tr>
<tr>
<td>Military judge, disqualified after acting as</td>
<td>R.C.M. 902(b)(2)</td>
<td>II-90</td>
</tr>
<tr>
<td>Pretrial agreement, negotiations</td>
<td>R.C.M. 705(d)(1)</td>
<td>II-70</td>
</tr>
<tr>
<td>Recommendations, post-trial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Disqualification</td>
<td>R.C.M. 1106(b)</td>
<td>II-144</td>
</tr>
<tr>
<td>Form and content</td>
<td>R.C.M. 1106(d)</td>
<td>II-144</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1106</td>
<td>II-144</td>
</tr>
<tr>
<td>No findings of guilty</td>
<td>R.C.M. 1106(e)</td>
<td>II-145</td>
</tr>
<tr>
<td>Not guilty, lack of mental responsibility</td>
<td>R.C.M. 1106(e)</td>
<td>II-145</td>
</tr>
<tr>
<td>Service on defense counsel</td>
<td>R.C.M. 1106(f)</td>
<td>II-145</td>
</tr>
<tr>
<td><strong>Standing. See Search and seizure; Self-incrimination.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>State law</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial notice of</td>
<td>Mil. R. Evid. 201A</td>
<td>III-2</td>
</tr>
<tr>
<td>Offenses under</td>
<td>IV. Para. 60c(4)(e)</td>
<td>IV-93</td>
</tr>
<tr>
<td><strong>Statements</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused in presentencing proceedings</td>
<td>R.C.M. 1001(c)(2)</td>
<td>II-121</td>
</tr>
<tr>
<td>Closing, by counsel</td>
<td>R.C.M. 919</td>
<td>II-115</td>
</tr>
<tr>
<td>Coercion of</td>
<td>Mil. R. Evid. 304(c)(3)</td>
<td>III-5</td>
</tr>
<tr>
<td>Disclosure by trial counsel</td>
<td>R.C.M. 701(a)(1)(C)</td>
<td>II-58</td>
</tr>
<tr>
<td>Disloyal</td>
<td>IV. Para. 72</td>
<td>IV-100</td>
</tr>
<tr>
<td>False</td>
<td>IV. Paras. 31; 57</td>
<td>IV-45; IV-85</td>
</tr>
<tr>
<td><strong>Hearsay. See Evidence, Hearsay.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Inconsistent, for impeachment</td>
<td>Mil. R. Evid. 613</td>
<td>III-33</td>
</tr>
<tr>
<td>Investigation, pretrial, use in</td>
<td>R.C.M. 405(g)(4)</td>
<td>II-38</td>
</tr>
<tr>
<td>Limited admissibility</td>
<td>Mil. R. Evid. 105</td>
<td>III-2</td>
</tr>
<tr>
<td>Opening, by counsel</td>
<td>R.C.M. 913(b)</td>
<td>II-107</td>
</tr>
<tr>
<td>Production, after testimony</td>
<td>R.C.M. 914</td>
<td>II-108</td>
</tr>
<tr>
<td>Unsworn, by accused</td>
<td>R.C.M. 1001(c)(2)(C)</td>
<td>II-121</td>
</tr>
<tr>
<td><strong>State records, authentication of</strong></td>
<td>Mil. R. Evid. 901; 902</td>
<td>III-38; III-39</td>
</tr>
<tr>
<td><strong>Statutes, judicial notice of</strong></td>
<td>Mil. R. Evid. 201A</td>
<td>III-2</td>
</tr>
<tr>
<td><strong>Statutes of limitations (Art. 43, UCMJ)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Motion to dismiss</td>
<td>R.C.M. 905(c)(2)(B)</td>
<td>II-93</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 907(b)(2)(B)</td>
<td>II-98</td>
</tr>
<tr>
<td>Tolling</td>
<td>R.C.M. 403(a)</td>
<td>II-33</td>
</tr>
<tr>
<td><strong>Statutory rape (Art. 120(b), UCMJ)</strong></td>
<td>IV. Para. 45</td>
<td>IV-64</td>
</tr>
<tr>
<td><strong>Steal. See Larceny.</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Stipulations</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confessional</td>
<td>R.C.M. 705(b)(1)</td>
<td>II-69</td>
</tr>
<tr>
<td>Effect</td>
<td>R.C.M. 811(e)</td>
<td>II-87</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 811</td>
<td>II-86</td>
</tr>
<tr>
<td>Investigation, pretrial, use at</td>
<td>R.C.M. 405(g)(4)(A)(v)</td>
<td>II-38</td>
</tr>
<tr>
<td>Kinds</td>
<td>R.C.M. 811(a)</td>
<td>II-87</td>
</tr>
</tbody>
</table>

Index 74
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Military judge</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authority to reject</td>
<td>R.C.M. 811(b)</td>
<td>II–86</td>
</tr>
<tr>
<td>Inquiry</td>
<td>R.C.M. 811(c)</td>
<td>II–86</td>
</tr>
<tr>
<td>Military Rules of Evidence, applicability</td>
<td>R.C.M. 811(e)</td>
<td>II–87</td>
</tr>
<tr>
<td>Pretrial agreement, term or condition of</td>
<td>R.C.M. 705(c)(2)</td>
<td>II–70</td>
</tr>
<tr>
<td>Procedure</td>
<td>R.C.M. 811(f)</td>
<td>II–87</td>
</tr>
<tr>
<td>Withdrawal from</td>
<td>R.C.M. 811(d)</td>
<td>II–87</td>
</tr>
<tr>
<td>Stolen property, receiving, buying, concealing</td>
<td>IV. Para. 106</td>
<td>IV–118</td>
</tr>
<tr>
<td>Stragglng</td>
<td>IV. Para. 107</td>
<td>IV–119</td>
</tr>
<tr>
<td>Striking</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Assault</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Colors or flag (Art. 100, UCMJ)</td>
<td>IV. Para. 24</td>
<td>IV–36</td>
</tr>
<tr>
<td>Commissioned officer (Art. 90, UCMJ)</td>
<td>IV. Para. 14</td>
<td>IV–18</td>
</tr>
<tr>
<td>Noncommissioned, petty, or warrant officer (Art. 91, UCMJ)</td>
<td>IV. Para. 15</td>
<td>IV–21</td>
</tr>
<tr>
<td>Sua sponte, defined</td>
<td>R.C.M. 103(18)</td>
<td>II–2</td>
</tr>
<tr>
<td>Subordinate compelling surrender (Art. 100, UCMJ)</td>
<td>IV. Para. 24</td>
<td>IV–36</td>
</tr>
<tr>
<td>Subpoena (Art. 46 and 47, UCMJ)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidence</td>
<td>R.C.M. 703(f)(4)(B)</td>
<td>II–67</td>
</tr>
<tr>
<td>Form</td>
<td>Appendix 7</td>
<td></td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 703</td>
<td>II–64</td>
</tr>
<tr>
<td>Right to</td>
<td>R.C.M. 703(a)</td>
<td>II–64</td>
</tr>
<tr>
<td>Witnesses</td>
<td>R.C.M. 703(e)(2)</td>
<td>II–65</td>
</tr>
<tr>
<td>Successor in command, included in “convening authority”</td>
<td>R.C.M. 103(6)</td>
<td>II–1</td>
</tr>
<tr>
<td>Summary court-martial (Art. 17, UCMJ)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Applicability of Military Rules of Evidence</td>
<td>R.C.M. 1304(b)(2)(E)</td>
<td>II–175</td>
</tr>
<tr>
<td>Composition</td>
<td>R.C.M. 1301(a)</td>
<td>II–172</td>
</tr>
<tr>
<td>Convening</td>
<td></td>
<td></td>
</tr>
<tr>
<td>By accuser</td>
<td>R.C.M. 1302(b)</td>
<td>II–173</td>
</tr>
<tr>
<td>Procedure</td>
<td>R.C.M. 1302(c)</td>
<td>II–173</td>
</tr>
<tr>
<td>Who may convene</td>
<td>R.C.M. 1302(a)</td>
<td>II–173</td>
</tr>
<tr>
<td>Convening authority’s action</td>
<td>R.C.M. 1306(b)</td>
<td>II–176</td>
</tr>
<tr>
<td>Counsel, right to</td>
<td>R.C.M. 1301(e)</td>
<td>II–172</td>
</tr>
<tr>
<td>Evidence, production of</td>
<td>R.C.M. 1301(f)</td>
<td>II–173</td>
</tr>
<tr>
<td>Function</td>
<td>R.C.M. 1301(b)</td>
<td>II–172</td>
</tr>
<tr>
<td>Generally</td>
<td>II. Chapter XIII</td>
<td>II–172</td>
</tr>
<tr>
<td>Jurisdiction over persons and offenses</td>
<td>R.C.M. 1301(c)</td>
<td>II–172</td>
</tr>
<tr>
<td>Military judge, included in definition of</td>
<td>R.C.M. 103(15)</td>
<td>II–2</td>
</tr>
<tr>
<td>Noncapital offenses</td>
<td>R.C.M. 1301(c)</td>
<td>II–172</td>
</tr>
<tr>
<td>Objection to trial by</td>
<td>R.C.M. 1303</td>
<td>II–173</td>
</tr>
<tr>
<td>Procedural guide</td>
<td>Appendix 9</td>
<td>A9–1</td>
</tr>
<tr>
<td>Procedure</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Post-trial</td>
<td>R.C.M. 1306</td>
<td>II–176</td>
</tr>
<tr>
<td>Pretrial</td>
<td>R.C.M. 1304(a)</td>
<td>II–173</td>
</tr>
<tr>
<td>Trial</td>
<td>R.C.M. 1304(b)</td>
<td>II–174</td>
</tr>
<tr>
<td>Punishments</td>
<td>R.C.M. 1301(d)</td>
<td>II–172</td>
</tr>
<tr>
<td>Record of trial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authentication</td>
<td>R.C.M. 1305(c)</td>
<td>II–176</td>
</tr>
<tr>
<td>Format</td>
<td>Appendix 15</td>
<td>A15–1</td>
</tr>
<tr>
<td>Forwarding copies</td>
<td>R.C.M. 1305(e)</td>
<td>II–176</td>
</tr>
<tr>
<td>Preparation</td>
<td>R.C.M. 1103(d); 1305</td>
<td>II–139; II–175</td>
</tr>
<tr>
<td>Review by summary court-martial</td>
<td>R.C.M. 1103(i)(2); 1305(a)</td>
<td>II–140; II–175</td>
</tr>
<tr>
<td>Referral of charges to</td>
<td>R.C.M. 403(b)(4); 601(d)(1)</td>
<td>II–34; II–54</td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Basis</td>
<td>R.C.M. 601(d)(1)</td>
<td>II-54</td>
</tr>
<tr>
<td>By general court-martial convening authority</td>
<td>R.C.M. 407(a)(4)</td>
<td>II-41</td>
</tr>
<tr>
<td>By special court-martial convening authority</td>
<td>R.C.M. 404(d)</td>
<td>II-34</td>
</tr>
<tr>
<td>By summary court-martial convening authority</td>
<td>R.C.M. 403(b)(4)</td>
<td>II-34</td>
</tr>
<tr>
<td>Review</td>
<td></td>
<td></td>
</tr>
<tr>
<td>By a judge advocate</td>
<td>R.C.M. 1306(c)</td>
<td>II-177</td>
</tr>
<tr>
<td>By The Judge Advocate General</td>
<td>R.C.M. 1306(d)</td>
<td>II-177</td>
</tr>
<tr>
<td>Subpoena, authority to issue</td>
<td>R.C.M. 703(c)(2)(C), 1301(f)</td>
<td>II-66; II-</td>
</tr>
<tr>
<td>Vacation of suspended sentence</td>
<td>R.C.M. 1109(e)</td>
<td>II-154</td>
</tr>
<tr>
<td>Witnesses, production</td>
<td>R.C.M. 1301(f)</td>
<td>II-173</td>
</tr>
<tr>
<td>Supreme Court, Appeal of courts-martial (Art. 67(h), UCMJ)</td>
<td>R.C.M. 1205</td>
<td>II-167</td>
</tr>
<tr>
<td>Surrender</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Shameful (Art. 99, UCMJ)</td>
<td>IV. Para. 23</td>
<td>IV-32</td>
</tr>
<tr>
<td>Subordinate compelling (Art. 100, UCMJ)</td>
<td>IV. Para. 24</td>
<td>IV-36</td>
</tr>
<tr>
<td>Suspension of military judge, counsel</td>
<td>R.C.M. 109</td>
<td>II-6</td>
</tr>
<tr>
<td>Suspension of nonjudicial punishment</td>
<td>V. Para. 6a</td>
<td>V-7</td>
</tr>
<tr>
<td>Suspension of sentence</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conditions of suspension</td>
<td>R.C.M. 1108(c)</td>
<td>II-151</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1108</td>
<td>II-151</td>
</tr>
<tr>
<td>Limitations</td>
<td>R.C.M. 1108(d)</td>
<td>II-151</td>
</tr>
<tr>
<td>Termination by remission</td>
<td>R.C.M. 1108(e)</td>
<td>II-152</td>
</tr>
<tr>
<td>Vacation of suspension</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confinement pending</td>
<td>R.C.M. 1109(c)</td>
<td>II-152</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1109</td>
<td>II-152</td>
</tr>
<tr>
<td>Procedure</td>
<td>R.C.M. 1109(d), (e)</td>
<td>II-153; II-154</td>
</tr>
<tr>
<td>Report of proceedings</td>
<td>Appendix 18</td>
<td>A18-1</td>
</tr>
<tr>
<td>Time for</td>
<td>R.C.M. 1109(b)</td>
<td>II-152</td>
</tr>
<tr>
<td>Who may suspend</td>
<td>R.C.M. 1108(b)</td>
<td>II-151</td>
</tr>
<tr>
<td>Swearing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Oaths.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>False</td>
<td>IV. Para. 79</td>
<td>IV-103</td>
</tr>
<tr>
<td>Taking, wrongful</td>
<td>IV. Para. 46</td>
<td>IV-65</td>
</tr>
<tr>
<td>See also Larceny.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Telephone, tapping</td>
<td>Mil. R. Evid. 317</td>
<td>III-16</td>
</tr>
<tr>
<td>Television, broadcasting from courtroom prohibited</td>
<td>R.C.M. 806(c)</td>
<td>II-82</td>
</tr>
<tr>
<td>Testify</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused, failure to</td>
<td>Mil. R. Evid. 301(f)(1), (g)</td>
<td>III-3; III-4</td>
</tr>
<tr>
<td>Wrongful refusal</td>
<td>IV. Para. 108</td>
<td>IV-119</td>
</tr>
<tr>
<td>Testimony</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Expert. See Evidence, Expert.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>False</td>
<td>IV. Para. 57</td>
<td>IV-85</td>
</tr>
<tr>
<td>See also Perjury.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>How taken in court-martial</td>
<td>R.C.M. 913(c)(2)</td>
<td>II-107</td>
</tr>
<tr>
<td>Interpreter, given through</td>
<td>Mil. R. Evid. 604</td>
<td>III-31</td>
</tr>
<tr>
<td>Investigation, pretrial, alternatives</td>
<td>R.C.M. 405(g)(4)</td>
<td>II-38</td>
</tr>
<tr>
<td>Offer of proof</td>
<td>Mil. R. Evid. 103(a)(2)</td>
<td>III-1</td>
</tr>
<tr>
<td>Prior proceeding, admissibility</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court-martial, at</td>
<td>Mil. R. Evid. 804(b)(1)</td>
<td>III-37</td>
</tr>
<tr>
<td>Investigation, pretrial at</td>
<td>R.C.M. 405(g)(4)(A)(iii), B(iii)</td>
<td>II-38</td>
</tr>
<tr>
<td>Privileged, See Evidence, Privileges.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spouse of accused</td>
<td>Mil. R. Evid. 504</td>
<td>III-22</td>
</tr>
<tr>
<td>Stipulation of expected</td>
<td>R.C.M. 811</td>
<td>II-86</td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-----------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Theft. See Larceny.</td>
<td>R.C.M. 805(c)</td>
<td>II–80</td>
</tr>
<tr>
<td>Threat</td>
<td>R.C.M. 813(a)(6); 901(b)</td>
<td>II–89</td>
</tr>
<tr>
<td>Bomb</td>
<td>R.C.M. 501(b); 502(d)(2); 503(c)</td>
<td>II–43; II–44; II–48</td>
</tr>
<tr>
<td>Communicating</td>
<td>R.C.M. 502(d)(5)</td>
<td>II–45</td>
</tr>
<tr>
<td>Time of war. See War.</td>
<td>R.C.M. 807(b)(1)</td>
<td>II–82</td>
</tr>
<tr>
<td>Travel order, form</td>
<td>R.C.M. 502(d)(2)</td>
<td>II–44</td>
</tr>
<tr>
<td>Treaties, judicial notice of</td>
<td>R.C.M. 912(c)</td>
<td>II–104</td>
</tr>
<tr>
<td>Trial counsel</td>
<td>R.C.M. 505(d)(1)</td>
<td>II–51</td>
</tr>
<tr>
<td>Absence of</td>
<td>R.C.M. 603</td>
<td>II–56</td>
</tr>
<tr>
<td>Announcement of</td>
<td>R.C.M. 602</td>
<td>II–55</td>
</tr>
<tr>
<td>Assistant</td>
<td>R.C.M. 702(d)(2)</td>
<td>II–62</td>
</tr>
<tr>
<td>Detailing</td>
<td>R.C.M. 503(c)</td>
<td>II–48</td>
</tr>
<tr>
<td>Charges and specifications</td>
<td>R.C.M. 501(b); 502(d)(2); 503(c)</td>
<td>II–43; II–44; II–48</td>
</tr>
<tr>
<td>Authority to change</td>
<td>R.C.M. 502(d)(4), (f); 901(d)(3)</td>
<td>II–45; II–47; II–89</td>
</tr>
<tr>
<td>Service</td>
<td>R.C.M. 502(e)(2)(D)</td>
<td>II–47</td>
</tr>
<tr>
<td>Disclosure, attached for</td>
<td>R.C.M. 502(d)(5)</td>
<td>II–45</td>
</tr>
<tr>
<td>Detailing</td>
<td>R.C.M. 703(f)</td>
<td>II–67</td>
</tr>
<tr>
<td>Disciplinary examination, disclosure of results to members</td>
<td>R.C.M. 706(c)(3), (5)</td>
<td>II–72</td>
</tr>
<tr>
<td>Oath</td>
<td>R.C.M. 807(b)(1)</td>
<td>II–82</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 901(d)(5)</td>
<td>II–90</td>
</tr>
<tr>
<td>Unsworn previously</td>
<td>R.C.M. 913(b)</td>
<td>II–107</td>
</tr>
<tr>
<td>Opening statement</td>
<td>R.C.M. 803; 805</td>
<td>II–78; II–80</td>
</tr>
<tr>
<td>Presence at court-martial</td>
<td>R.C.M. 502(d)(1)</td>
<td>II–89</td>
</tr>
<tr>
<td>Qualifications</td>
<td>R.C.M. 502(d)(1)</td>
<td>II–44</td>
</tr>
<tr>
<td>Announcement of</td>
<td>R.C.M. 502(d)(2)</td>
<td>II–44</td>
</tr>
<tr>
<td>General court-martial</td>
<td>R.C.M. 1103(c)(1)</td>
<td>II–139</td>
</tr>
<tr>
<td>Special court-martial</td>
<td>R.C.M. 808; 1103(b)(1), (e)</td>
<td>II–83, II–137, II–138</td>
</tr>
<tr>
<td>Record of trial</td>
<td>R.C.M. 1104(b)</td>
<td>II–141</td>
</tr>
<tr>
<td>Examination</td>
<td>R.C.M. 1101(a)</td>
<td>II–135</td>
</tr>
<tr>
<td>Responsibility</td>
<td>R.C.M. 602</td>
<td>II–55</td>
</tr>
<tr>
<td>Service</td>
<td>R.C.M. 502(d)(2)</td>
<td>II–44</td>
</tr>
<tr>
<td>Result of trial, report</td>
<td>R.C.M. 703(c), (d), (e)</td>
<td>II–64; II–65</td>
</tr>
<tr>
<td>Service of charges</td>
<td>IV. Para. 10</td>
<td>IV–12</td>
</tr>
<tr>
<td>Witnesses, production of</td>
<td>IV. Para. 113</td>
<td>IV–121</td>
</tr>
<tr>
<td>Unauthorized absence</td>
<td>IV. Para. 77</td>
<td>IV–102</td>
</tr>
</tbody>
</table>

Index 77
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Action with presented to court-martial</td>
<td>R.C.M. 801(d)</td>
<td>II–75</td>
</tr>
<tr>
<td>Evidence, when admissible</td>
<td>Mil. R. Evid. 404(b); 608(b)</td>
<td>III–19; III–31</td>
</tr>
<tr>
<td>Instruction on</td>
<td>Mil. R. Evid. 105</td>
<td>III–2</td>
</tr>
<tr>
<td><strong>Uniform</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>For courts-martial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused, responsibility for</td>
<td>R.C.M. 804(c)(1)</td>
<td>II–80</td>
</tr>
<tr>
<td>Military judge, determination</td>
<td>R.C.M. 801(a)(1)</td>
<td>II–75</td>
</tr>
<tr>
<td>Wearing unauthorized insignia, badge, ribbon, device, or lapel button</td>
<td>IV. Para. 113</td>
<td>IV–121</td>
</tr>
<tr>
<td><strong>Uniform Code of Military Justice (UCMJ)</strong></td>
<td>Appendix 2</td>
<td>A2–1</td>
</tr>
<tr>
<td>Failure to enforce or comply with</td>
<td>IV. Para. 22</td>
<td>IV–31</td>
</tr>
<tr>
<td>Unit, separate or detached, defined</td>
<td>R.C.M. 504(b)(2)(A)</td>
<td>II–49</td>
</tr>
<tr>
<td><strong>Unlawful apprehension</strong></td>
<td>IV. Para. 21</td>
<td>IV–31</td>
</tr>
<tr>
<td><strong>Unlawful detention</strong></td>
<td>IV. Para. 21</td>
<td>IV–31</td>
</tr>
<tr>
<td><strong>Unlawful enlistment, appointment, separation</strong></td>
<td>IV. Paras. 7; 8</td>
<td>IV–8; IV–9</td>
</tr>
<tr>
<td><strong>Unlawful entry</strong></td>
<td>IV. Para. 111</td>
<td>IV–121</td>
</tr>
<tr>
<td>Unsworn charges</td>
<td>R.C.M. 603(d)</td>
<td>II–56</td>
</tr>
<tr>
<td>Preferral</td>
<td>R.C.M. 307(b)</td>
<td>II–28</td>
</tr>
<tr>
<td><strong>Unsworn statement</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused</td>
<td>R.C.M. 1001(c)(2)(C)</td>
<td>II–121</td>
</tr>
<tr>
<td>Presentencing proceeding, right to make</td>
<td>R.C.M. 405(f)(12)</td>
<td>II–36</td>
</tr>
<tr>
<td>Investigation, pretrial, objection to use at</td>
<td>R.C.M. 405(g)(4)(A)(vi)</td>
<td>II–38</td>
</tr>
<tr>
<td>Use, wrongful, of controlled substance</td>
<td>IV. Para. 37</td>
<td>IV–53</td>
</tr>
<tr>
<td>Uttering forged instrument</td>
<td>IV. Para. 48</td>
<td>IV–70</td>
</tr>
<tr>
<td>Uttering worthless check</td>
<td>IV. Para. 49</td>
<td>IV–72</td>
</tr>
<tr>
<td><strong>Vacation of suspended punishment</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Confinement, pending</td>
<td>R.C.M. 1109(c)</td>
<td>II–152</td>
</tr>
<tr>
<td>General court-martial sentence</td>
<td>R.C.M. 1109(d)</td>
<td>II–153</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 1109</td>
<td>II–152</td>
</tr>
<tr>
<td>Nonjudicial punishment</td>
<td>V. Para. 6a(4)</td>
<td>V–7</td>
</tr>
<tr>
<td>Report of proceedings</td>
<td>Appendix 18</td>
<td>A18–1</td>
</tr>
<tr>
<td>Special court-martial, bad-conduct discharge</td>
<td>R.C.M. 1109(d)</td>
<td>II–153</td>
</tr>
<tr>
<td>Special court-martial sentence, no bad-conduct discharge</td>
<td>R.C.M. 1109(e)</td>
<td>II–154</td>
</tr>
<tr>
<td>Summary court-martial</td>
<td>R.C.M. 1109(e)</td>
<td>II–154</td>
</tr>
<tr>
<td><strong>Value, discussed under larceny</strong></td>
<td>IV. Para. 46c(1)(g)</td>
<td>IV–67</td>
</tr>
<tr>
<td><strong>Vehicle</strong></td>
<td>R.C.M. 103</td>
<td>II–1</td>
</tr>
<tr>
<td>Driving recklessly or while drunk</td>
<td>IV. Para. 35</td>
<td>IV–51</td>
</tr>
<tr>
<td><strong>Venue</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See Place of court-martial</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Veracity, impeachment of witnesses. See Evidence, Impeachment.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Verbatim record</strong></td>
<td>R.C.M. 1103(b)(2)(B), (c)(1)</td>
<td>II–137; II–138</td>
</tr>
<tr>
<td>Verdict. See Findings</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Vessel</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hazarding</td>
<td>IV. Para. 34</td>
<td>IV–49</td>
</tr>
<tr>
<td>Jumping from</td>
<td>IV. Para. 91</td>
<td>IV–109</td>
</tr>
<tr>
<td>Videotaped record of trial</td>
<td>R.C.M. 1103(j)</td>
<td>II–140</td>
</tr>
<tr>
<td>Views and inspections, by court-martial</td>
<td>R.C.M. 913(c)(3)</td>
<td>II–107</td>
</tr>
<tr>
<td>Violence, offering to superior commissioned officer</td>
<td>IV. Para. 14</td>
<td>IV–18</td>
</tr>
<tr>
<td><strong>Voir dire</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Challenges.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Subject</td>
<td>Ref.</td>
<td>Page</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-----------------</td>
<td>-------</td>
</tr>
<tr>
<td>Members</td>
<td>R.C.M. 912(d)</td>
<td>II-104</td>
</tr>
<tr>
<td>Military judge</td>
<td>R.C.M. 902(d)(2)</td>
<td>II-91</td>
</tr>
<tr>
<td>Use of questionnaire</td>
<td>R.C.M. 912(a)(1)</td>
<td>II-104</td>
</tr>
<tr>
<td>Voluntary manslaughter</td>
<td>IV. Para. 44</td>
<td>IV-62</td>
</tr>
<tr>
<td>Voting</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charges and specifications</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defects in</td>
<td>R.C.M. 905(b)(2)</td>
<td>II-93</td>
</tr>
<tr>
<td>Reading</td>
<td>R.C.M. 904</td>
<td>II-92</td>
</tr>
<tr>
<td>Unsworn</td>
<td>R.C.M. 603(d)</td>
<td>II-56</td>
</tr>
<tr>
<td>Waiver</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appellate review</td>
<td>R.C.M. 1110</td>
<td>II-154</td>
</tr>
<tr>
<td>Form for waiver</td>
<td>Appendix 19</td>
<td>A19–1</td>
</tr>
<tr>
<td>Argument, objections to</td>
<td>R.C.M. 918(c)</td>
<td>II-115</td>
</tr>
<tr>
<td>By pretrial agreement</td>
<td>R.C.M. 705(c)(2)(E)</td>
<td>II-70</td>
</tr>
<tr>
<td>Challenges</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cause</td>
<td>R.C.M. 912(f)(4)</td>
<td>II-105</td>
</tr>
<tr>
<td>Peremptory</td>
<td>R.C.M. 912(g)(2)</td>
<td>II-106</td>
</tr>
<tr>
<td>Selection of members</td>
<td>R.C.M. 912(b)(3)</td>
<td>II-104</td>
</tr>
<tr>
<td>Conditional guilty plea, effect on</td>
<td>R.C.M. 910(a)(2)</td>
<td>II-101</td>
</tr>
<tr>
<td>Deposition</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Objections in</td>
<td>R.C.M. 702(h)</td>
<td>II-63</td>
</tr>
<tr>
<td>Request for</td>
<td>R.C.M. 702(o)(3)(D)</td>
<td>II-62</td>
</tr>
<tr>
<td>Enlisted members, request for</td>
<td>R.C.M. 903(e)</td>
<td>II-92</td>
</tr>
<tr>
<td>Evidence, admissibility and objections</td>
<td>Mil. R. Evid. 103</td>
<td>III-1</td>
</tr>
<tr>
<td>Guilty plea, effect of</td>
<td>R.C.M. 910(c)(4), (j)</td>
<td>II-102; II-103</td>
</tr>
<tr>
<td>Instructions, objection to</td>
<td>R.C.M. 920(f); 1005(f)</td>
<td>II-117; II-131</td>
</tr>
<tr>
<td>Military judge alone, request for trial by</td>
<td>R.C.M. 903(e)</td>
<td>II-92</td>
</tr>
<tr>
<td>Motions, generally</td>
<td>R.C.M. 905(e); 907(b)(2)</td>
<td>II-94; II-98</td>
</tr>
<tr>
<td>Objections, generally</td>
<td>R.C.M. 801(g); Mil. R. Evid. 103</td>
<td>II-77; III-1</td>
</tr>
<tr>
<td>Recommendation of staff judge advocate, defect in, objections to</td>
<td>R.C.M. 1106(f)(6)</td>
<td>II-146</td>
</tr>
<tr>
<td>Self-incrimination</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accused</td>
<td>Mil. R. Evid. 301(e)</td>
<td>III-3</td>
</tr>
<tr>
<td>Witness</td>
<td>Mil. R. Evid. 301(d)</td>
<td>III-3</td>
</tr>
<tr>
<td>War</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial notice of</td>
<td>Mil. R. Evid. 201</td>
<td>III-2</td>
</tr>
<tr>
<td>Prosecution, case affecting</td>
<td>R.C.M. 401(d); 407(b)</td>
<td>II-33; II-41</td>
</tr>
<tr>
<td>Time of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defined</td>
<td>R.C.M. 103(19)</td>
<td>II-2</td>
</tr>
<tr>
<td>Element of offense</td>
<td>IV. Paras. 25; 29;30</td>
<td>IV-37; IV-42; IV-43</td>
</tr>
<tr>
<td>Maximum punishment</td>
<td>IV. Paras. 6; 9;14; 38; 40</td>
<td>IV-7; IV-9; IV-18; IV-56; IV-58</td>
</tr>
<tr>
<td>Warrant of attachment</td>
<td>R.C.M. 703(e)(2)(G)</td>
<td>II-66</td>
</tr>
<tr>
<td>Warrant officer</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Apprehension by</td>
<td>R.C.M. 302(b)(2)</td>
<td>II-19</td>
</tr>
<tr>
<td>Assault on</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In execution of office</td>
<td>IV. Para. 15</td>
<td>IV-21</td>
</tr>
<tr>
<td>Not in execution of office</td>
<td>IV. Para. 54</td>
<td>IV-79</td>
</tr>
<tr>
<td>Dishonorable discharge</td>
<td>R.C.M. 1003(b)(10)(B)</td>
<td>II-125</td>
</tr>
<tr>
<td>Dismissal of commissioned</td>
<td>R.C.M. 1003(b)(10)(A)</td>
<td>II-124</td>
</tr>
<tr>
<td>Disobedience of</td>
<td>IV. Para. 15</td>
<td>IV-21</td>
</tr>
</tbody>
</table>

Index 79
<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disrespect toward</td>
<td>IV. Para. 15</td>
<td>IV-21</td>
</tr>
<tr>
<td>Member of court-martial</td>
<td>R.C.M. 502(a)(1)(B)</td>
<td>II-43</td>
</tr>
<tr>
<td>Restraint of, pretrial</td>
<td>R.C.M. 304(b)(1)</td>
<td>II-21</td>
</tr>
<tr>
<td>Warrant, search. See Search and seizure</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Waste or spoilage, nonmilitary property</td>
<td>IV. Para. 33</td>
<td>IV-48</td>
</tr>
<tr>
<td>Weapon</td>
<td></td>
<td></td>
</tr>
<tr>
<td>See also Assault; Firearm</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carrying concealed</td>
<td>IV. Para. 112</td>
<td>IV-121</td>
</tr>
<tr>
<td>Wearing unauthorized insignia, decoration, badge, ribbon, device or</td>
<td></td>
<td></td>
</tr>
<tr>
<td>lapel button</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wife, Husband, privileged communication</td>
<td>IV. Para. 113</td>
<td>IV-121</td>
</tr>
<tr>
<td>Willful disobedience of orders</td>
<td>Mil. R. Evid. 504</td>
<td>III-22</td>
</tr>
<tr>
<td>Wiretapping, evidence</td>
<td>IV. Paras. 14; 15</td>
<td>IV-18; IV-21</td>
</tr>
<tr>
<td>Withdrawal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appellate review waiver, of</td>
<td>R.C.M. 1110</td>
<td>II-154</td>
</tr>
<tr>
<td>Charges, of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authority to</td>
<td>R.C.M. 604(a)</td>
<td>II-56</td>
</tr>
<tr>
<td>Effect of</td>
<td>R.C.M. 604(b)</td>
<td>II-57</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 604</td>
<td>II-56</td>
</tr>
<tr>
<td>Mistrial</td>
<td>R.C.M. 915(c)(1)</td>
<td>II-109</td>
</tr>
<tr>
<td>Pretrial agreement, term of</td>
<td>R.C.M. 705(b)(2)(C)</td>
<td>II-70</td>
</tr>
<tr>
<td>From conspiracy</td>
<td>IV. Para. 5c(6)</td>
<td>IV-6</td>
</tr>
<tr>
<td>From offense, as principal</td>
<td>IV. Para. 1b(7)</td>
<td>IV-1</td>
</tr>
<tr>
<td>From pretrial agreement</td>
<td>R.C.M. 705(b)(4)</td>
<td>II-71</td>
</tr>
<tr>
<td>Guilty plea, of</td>
<td>R.C.M. 910(b)(1)</td>
<td>II-103</td>
</tr>
<tr>
<td>Witness</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Access to, by parties</td>
<td>R.C.M. 701(e)</td>
<td>II-60</td>
</tr>
<tr>
<td>Appear, neglect or refusal to</td>
<td>R.C.M. 703(c)(2)(G)</td>
<td>II-66</td>
</tr>
<tr>
<td>Competency</td>
<td>Mil. R. Evid. 601</td>
<td>III-30</td>
</tr>
<tr>
<td>Discovery. See Disclosure and discovery.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Examination. See Questions; Testimony.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Expert, employment of</td>
<td>R.C.M. 703(d)</td>
<td>II-65</td>
</tr>
<tr>
<td>Failure to call</td>
<td>R.C.M. 701(c)</td>
<td>II-60</td>
</tr>
<tr>
<td>Immunity. See Immunity.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Impeachment. See Evidence, Impeachment.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Members, disqualified as</td>
<td>R.C.M. 912(f)(1)(D)</td>
<td>II-105</td>
</tr>
<tr>
<td>Military judge, disqualified as</td>
<td>R.C.M. 902(b)(3)</td>
<td>II-90</td>
</tr>
<tr>
<td>Oath</td>
<td>R.C.M. 807(b)</td>
<td>II-82</td>
</tr>
<tr>
<td>Perjury</td>
<td>IV. Para. 57</td>
<td>IV-85</td>
</tr>
<tr>
<td>Pretrial agreement concerning</td>
<td>R.C.M. 705(c)(2)(B), (E)</td>
<td>II-70</td>
</tr>
<tr>
<td>Privileges. See Evidence, Privileges.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Production of</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Determination</td>
<td>R.C.M. 703(c)</td>
<td>II-64</td>
</tr>
<tr>
<td>Generally</td>
<td>R.C.M. 703</td>
<td>II-64</td>
</tr>
<tr>
<td>Motion for</td>
<td>R.C.M. 905(b)(4), 906(b)(7)</td>
<td>II-93; II-96</td>
</tr>
<tr>
<td>Pretrial investigation</td>
<td>R.C.M. 405(g)</td>
<td>II-36</td>
</tr>
<tr>
<td>Procedure for</td>
<td>R.C.M. 703(e), Appendix 7</td>
<td>II-65; A7-1</td>
</tr>
<tr>
<td>Rights of parties, court-martial</td>
<td>R.C.M. 703(b)</td>
<td>II-64</td>
</tr>
<tr>
<td>Sentencing</td>
<td>R.C.M. 1001(e)</td>
<td>II-122</td>
</tr>
<tr>
<td>Subpoena</td>
<td>R.C.M. 703(c)(2), Appendix 7</td>
<td>II-65; A7-1</td>
</tr>
<tr>
<td>Trial counsel, responsibility</td>
<td>R.C.M. 703(c)(1), (2)(D)</td>
<td>II-64; II-65</td>
</tr>
<tr>
<td>Statements of, production</td>
<td>R.C.M. 914</td>
<td>II-108</td>
</tr>
</tbody>
</table>
INDEX

MCM, 1994

<table>
<thead>
<tr>
<th>Subject</th>
<th>Ref.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unavailable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court-martial</td>
<td>R.C.M. 703(b)(3)</td>
<td>II–64</td>
</tr>
<tr>
<td>Pretrial investigation</td>
<td>R.C.M. 405(g)(1)</td>
<td>II–36</td>
</tr>
<tr>
<td>Worthless checks. See Checks.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Writings</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authentication of</td>
<td>Mil. R. Evid. 901; 902</td>
<td>III–38; III–39</td>
</tr>
<tr>
<td>Best evidence rule. See Evidence, Contents of writings, recordings, and photographs.</td>
<td>Mil. R. Evid. 612</td>
<td>III–33</td>
</tr>
<tr>
<td>Used to refresh memory</td>
<td>IV. Para. 46</td>
<td>IV–65</td>
</tr>
<tr>
<td>Wrongful appropriation</td>
<td>IV. Para. 69</td>
<td>IV–98</td>
</tr>
<tr>
<td>Wrongful cohabitation</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>