MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

This change incorporates Executive Order No. 12550, dated 19 February 1986, published at 51 Fed. Reg. 6497, which amends Executive Order No. 12484, dated 13 July 1984, and Executive Order No. 12473, dated 13 April 1984. Significant amendments include elimination of the remedy of dismissal for "conditions on liberty" (R.C.M. 707(a)); shifting the burden of proving competence to stand trial to the defense (R.C.M. 909); requiring a unanimous finding of guilt of a capital offense as a precondition to imposition of a death sentence (R.C.M. 922 and 1004(a)); authorizing dishonorable discharge of warrant officers who are not commissioned convicted of any offense at general courts-martial (R.C.M. 1003(b) (10) (B)); simplification of post-trial rights advisement (R.C.M. 1010); adoption of the "inevitable discovery" and "good faith" exceptions to the exclusionary rule (M.R.E. 304 and 311); rescission of M.R.E. 704(b); implementation of Article 106a, UCMJ, proscribing espionage (paragraph 30a, Part IV); and numerous refinements in several appendices.

Copies of Executive Order No. 12550 were transmitted to the Congress of the United States in accordance with Section 836 of title 10 of the United States Code on 3 March 1986. *See* 132 Cong. Rec. H-1022 (daily ed. March 11, 1986) (EC-2959); *id.* S-2355 (daily ed. March 10, 1986) (EC-2667).

MCM, 1984, is changed as follows:

1. New and changed material is indicated by a star.

2. Remove old pages and insert new pages as indicated below.

Remove pages	*Insert pages*
	Executive Order 12550
xli and xlii	xli through xlii.1
lvii and lviii	lvii and lviii
II-21 and II-22	II-21 and II-22
II-69 and II-70	II-69 through II-70.1
II-83 through II-86	II-83 through II-86
II-93 and II-94	II-93 and II-94
II-99 and II-100	II-99 and II-100
II-107 and II-108	II-107 and II-108
II-113 and II-114	II-113 and II-114
II-117 and II-118	II-117 through II-118.1
II-129 and II-130	II-129 and II-130
II-135 through II-138	II-135 through II-138
II-141 through II-152	II-141 through II-152
II-155 and II-156	II-155 and II-156
II-169 and II-170	II-169 and II-170
II-187 and II-188	II-187 and II-188
II-201 and II-202	II-201 and II-202
III-3 through III-10	III-3 through III-10.1
III-33 and III-34	III-33 and III-34
III-39 and III-40	III-39 through III-40.1
IV-27 through IV-30	IV-27 through IV-30.1
IV-53 and IV-54	IV-53 through IV-54.3
IV-107 and IV-108	IV-107 and IV-108
IV-141 and IV-142	IV-141 and IV-142
V-1 through V-9	V-1 through V-9
A2-21 through A2-26	A2-21 through A2-26.1
A2-29 and A2-30	A2-29 through A2-30.1
A3-1 and A3-2	A3-1 through A3-16
	A3.1-1 through A3.1-4
A8-1 and A8-2	A8-1 and A8-2
A8-5 and A8-6	A8-5 through A8-6.1
A8-17 through A8-19	A8-17 through A8-19
A11-1 through A12-8	A11-1 through A12-8
A21-13 and A21-14	A21-13 through A21-14.1

Remove pages	*Insert pages*
A21-29 and A21-30	A21-29 through A21-30.1
A21-37 and A21-38	A21-37 through A21-38.1
A21-41 and A21-42	A21-41 through A21-42.1
A21-47 and A21-48	A21-47 through A21-48.1
A21-51 and A21-52	A21-51 through A21-52.1
A21-57 through A21-68	A21-57 through A21-68.2
A21-71 and A21-72	A21-71 through A21-72.1
A21-77 and A21-78	A21-77 and A21-78
A21-89 through A21-92	A21-89 through A21-92.1
A21-103 through A21-106	A21-103 through A21-106.1
A22-1 through A22-51	A22-1 through A22-56
Index 21 and Index 22	Index 21 through Index 22.1

3. File this change sheet and Executive Order 12550 in front of this publication for reference purposes.

DISTRIBUTION:

Army

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★ 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

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c. R.C.M. 903(c)(3) is amended by

★ ★ ★ ★ ★ ★ ★

d. R.C.M. 909 is amended

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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

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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) (1) 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:

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b. Mil.R.Evid. 311 is amended as follows:

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c. Mil.R.Evid. 609(e) is amended by

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d. Mil.R.Evid. 804(a) is amended by

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Section 3. Part IV of the Manual for Courts-Martial, United States, 1984, is amended as follows:

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a. Paragraph 16 is amended

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b. Part IV is amended by inserting the following new paragraph after paragraph 30:

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c. Part IV is amended by adding the following new sentence at the end of paragraph 105e:

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Section 4. Part V of the Manual for Courts-Martial, United States, 1984, is amended as follows:

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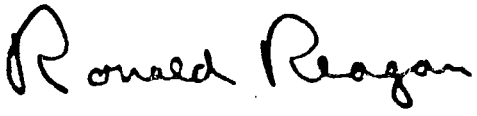
Section 5. The amendments to Mil.R.Evid. 704, which were implemented on 10 April 1985 pursuant to Mil.R.Evid. 1102, are hereby rescinded; *Provided*, That this rescision shall not apply in the trial of any case in which arraignment occurred while such amendments were in effect.

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 imposed 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.

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 from a subordinate 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.

(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 restraint 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

If charges are to be reinstated, pretrial restraint may be reimposed.

(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).

(d) *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

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 the 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)(1) or (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 admissible in any court-martial 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.

Discussion

★ Convening authorities, commanders and members of their immediate staffs should make no statement, oral or written, and take no action which could reasonably be understood to discourage or prevent witnesses from testifying truthfully before a court-martial, or as a threat of retribution for such testimony.

(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, memoranda, 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 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.

Procedures governing refusal to disclose classified information are in Mil. R. Evid. 505. 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.

Note 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 or 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 require 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

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 of one or more physicians for their observation and report as to the mental capacity or mental responsibility, or both, of the accused. Ordinarily at least one member of the board shall be a psychiatrist.

(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 mental disease or defect? (The terms "mental disease or defect" do not include an abnormality manifested only be repeated criminal or otherwise antisocial conduct.)

(B) What is the clinical psychiatric diagnosis?

(C) Did the accused, at the time of the alleged criminal conduct and as a result of such mental disease or defect, lack substantial capacity to appreciate the criminality of the accused's conduct?

(D) Did the accused, at the time of the alleged criminal conduct and as a result of such mental disease or defect, lack substantial capacity to conform the accused's conduct to the requirements of law?

(E) 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) Notice to the accused of preferral of charges under R.C.M. 308; or

(2) The imposition of restraint under R.C.M. 304(a) (2)–(4).

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. However, *see* 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. *See* R.C.M. 301; 307.

(b) *Accountability.*

(1) *In general.* The date on which the accused is notified of the preferral of charges or the date on which pretrial restraint is imposed shall not count for purpose of computing the time under subsection (a) of this rule. The date on which the accused is brought to trial shall count.

(2) *Inception.* If charges are dismissed, if a mistrial is granted, or—when no charges are pending—if the accused is released from pretrial restraint for a significant period, the time under this rule shall run only from the date on which charges or restraint are reinstituted.

(3) *Termination.* An accused is brought to trial within the meaning of this rule when:

(A) A plea of guilty is entered to an offense; or

(B) Presentation to the factfinder of evidence on the merits begins.

(4) *Multiple charges.* When charges are preferred at different times, the inception for each shall be determined from the date on which the accused was notified of preferral or on which restraint was imposed on the basis of that offense.

(c) *Exclusions.* The following periods shall be excluded when determining whether the period in subsection (a) of this rule has run—

(1) Any periods of delay resulting from other proceedings in the case, including:

(A) Any examination into the mental capacity or responsibility of the accused;

(B) Any hearing on the capacity of the accused to stand trial and any time during which the accused lacks capacity to stand trial;

(C) Any session on pretrial motions;

(D) Any appeal filed under R.C.M. 908 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; and

(E) Any petition for extraordinary relief by either party.

(2) Any period of delay resulting from unavailability of a military judge when the unavailability results from extraordinary circumstances.

(3) Any period of delay resulting from a delay in a proceeding or a continuance in the court-martial granted at the request or with the consent of the defense.

(4) Any period of delay resulting from a failure of the defense to provide notice, make a request, or submit any matter in a timely manner as otherwise required by this Manual.

(5) Any period of delay resulting from a delay in the Article 32 hearing or a continuance in the court-martial at the request of the prosecution if:

(A) The delay or continuance is granted because of unavailability of substantial evidence relevant and necessary to the prosecution's case when the Government has exercised due diligence to obtain such evidence and there exists at the time of the delay grounds to believe that such evidence would be available within a reasonable time; or

(B) The continuance is granted to allow the trial counsel additional time to prepare the prosecution's case and additional time is justified because of the exceptional circumstances of the case.

(6) Any period of delay resulting from the absence or unavailability of the accused.

(7) Any reasonable period of delay when the accused is joined for trial with a coaccused as to whom the time for trial has not yet run and there is good cause for not granting a severance.

(8) Any other period of delay for good cause, including unusual operational requirements and military exigencies.

(d) *Arrest or confinement.* When the accused is in pretrial arrest or confinement under R.C.M. 304 or 305, immediate steps shall be taken to bring the accused to trial. No accused shall be held in pretrial arrest or confinement in excess of 90 days for the same or related charges. Except for any periods under subsection (c)(7) of this rule, the periods described in subsection (c) of this rule shall be excluded for the purpose of computing when 90 days has run. The military judge may, upon a showing of extraordinary circumstances, extend the period by 10 days.

Discussion

Ordinarily priority should be given to trial of persons in arrest or confinement.

In addition to the requirements of this rule, judicial decisions have held that when an accused has been in pretrial confinement for more than 90 days (not counting certain deductible periods, *see* discussion below) a presumption arises that the accused's right to a speedy trial under Article 10 has been violated. In such cases, unless the prosecution meets a heavy burden to show that the Government has exercised due diligence, the charges will be dismissed. Under some circumstances, this standard could result in dismissal of charges, despite compliance with this rule.

Periods of delay specifically requested or caused by the defense and reasonable delays for examinations into the mental

capacity or responsibility ordinarily are not included in the 90-day presumption. Other periods which are deductible under R.C.M. 707(c) are charged to the Government for purposes of the presumption.

When an accused in pretrial confinement demands immediate trial, the Government must bring the accused to trial promptly or show adequate cause to excuse the delay.

(e) *Remedy*. Failure to comply with this rule shall result in dismissal of the affected charges upon timely motion by the accused.

(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 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 the 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.

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(2) *Military judge.* When, after the presentation of evidence on the merits has begun in trial before military judge alone, a new military judge is detailed under R.C.M. 505(e)(2) trial may not proceed unless the accused requests, and the military judge approves, trial by military judge alone, and a verbatim record of the testimony and evidence or a stipulation thereof is read to the military judge, or the trial proceeds as if no evidence had been presented.

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 accomodate 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

on which the rehearing on sentence has been directed. Additional challenges for cause may be permitted, and the sentencing procedure shall be the same as at an original trial, except as otherwise provided in this rule. A single sentence shall be adjudged for all offenses.

(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 trail 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 be 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.

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 on 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 stipulation. 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 stipulations.* Unless properly withdrawn or ordered stricken from the record, a stipulation of fact

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 written 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.

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(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).

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(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).

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(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).

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(5) Motions for severance of charges or accused; or

Discussion

See R.C.M. 812; 906(b)(9) and (10).

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(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).

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.

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(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.

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(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).

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(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 the period of time prescribed—either two or three years depending on the offense. *See* Article 43(b) and (c). This period may be tolled (Article 43(d)), extended (Article 43(e)), 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 (for example, wrongful cohabitation) 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.

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 specifications 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.

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(e)(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;

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.

Discussion

See also R.C.M. 916(k).

★(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 not 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 her 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 apporpriate, 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 not guilty or guilty. An accused may plead, by exceptions or by exceptions and substitutions, not guilty to an offense as charged, but guilty to an offense included in that offense. 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. 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).

(2) *Conditional pleas.* With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for Government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the Government.

(b) *Refusal to plead; irregular plea.* If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

Discussion

An irregular plea includes pleas such as guilty without criminality or guilty to a charge but not guilty to all specifications thereunder. When a plea is ambiguous, the military judge should have it clarified before proceeding further.

(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.

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(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 is not represented by counsel, a plea of guilty should not be accepted.

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(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 courts-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 matters 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).

(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 the 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.

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(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.

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(5) *Defense of another.* The principles of self-defense under subsections (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.

(c) *Waiver of objection to improper argument.* Failure to object to improper argument before the military judge begins to instruct the members on findings 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 extraordinary cases improper argument may require a mistrial. *See* R.C.M. 915. The military judge should be alert to improper argument and take appropriate action when necessary.

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 after arguments by counsel 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.

(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 no reasonable doubt; and

(D) The burden of proof to establish the guilt of the accused is upon the Government;

(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 include: 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 or 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. 304(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 in 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) *Number 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) *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 to 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.

(5) *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.

Discussion

Ordinarily a findings worksheet should be provided to the members as an aid to putting the findings in proper form. *See* Appendix 10 for a format for findings. If the military judge examines any writing by the members or otherwise assists them to put findings in proper form, this must be done in an open session and counsel should be given the opportunity to examine such a writing and to be heard on any instructions the military judge may give. *See* Article 39(b).

The president should not disclose any specific number of votes for or against any finding.

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 under 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

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 all those 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.

Discussion

Normally, previous convictions may be proved by use of the personnel records of the accused, by the record of the conviction, or by the order promulgating the result of trial. *See* DD Form 493 (Extract of Military Records of Previous Convictions).

(4) *Evidence in aggravation.* The trail 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 opinion, 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 subsection (c)(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, persons 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 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 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.

Discussion

See also R.C.M. 906(b)(12); 907(b)(3)(B).

The basis of the concept of multiplicity in sentencing is that an accused may not be punished twice for what is, in effect, one offense. Offenses arising out of the same act or transaction may be multiplicious for sentencing depending on the evidence. No single test or formula has been developed which will resolve the question of multiplicity.

The following tests have been used for determining whether offenses are separate. Offenses are not separate if one is included in the other or unless each requires proof of an element not required to prove the other. For example, of an accused is found guilty of escape from confinement (*see* paragraph 19, Part IV) and desertion (*see* paragraph 9, Part IV) which both arose out of the same act or transaction, the offenses would be separate because intent to remain permanently absent is not an element of escape from confinement and a freeing from restraint is not an element of desertion. However, if the accused had been found guilty of unauthorized absence instead of desertion, the offenses

would not be separate because unauthorized absence does not require proof of any element not also required to prove escape.

Even if each offense requires proof of an element not required to prove the other, they may not be separately punishable if the offenses were committed as the result of a single impulse or intent. For example, if an accused found guilty of larceny (*see* paragraph 46, Part IV) and of unlawfully opening mail matter (*see* paragraph 93, Part IV) opened the mail bag for the purpose of stealing money in a letter in the bag, the offenses would not be separately punishable. Also, if there was a unity of time and the existence of a connected chain of events, the offenses may not be separately punishable, depending on all the circumstances, even if each required proof of a different element.

(2) *Based on rank of accused.*

(A) *Commissioned or warrant officers, cadets, and midshipmen.*

(i) A commissioned or warrant officer or a cadet, or midshipman may not be reduced in grade by any court-martial. However, in time of war or national emergency the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned, may commute a sentence of dismissal to reduction to any enlisted grade.

(ii) Only a general court-martial may sentence a commissioned or warrant officer or a cadet, or midshipman to confinement.

(iii) A commissioned or warrant officer or a cadet or midshipman may not be sentenced to hard labor without confinement.

(iv) Only a general court-martial, upon conviction of any offense in violation of the Code, may sentence a commissioned or warrant officer or a cadet or midshipman to be separated from the service with a punitive separation. In the case of commissioned officers, cadets, midshipmen, and commissioned warrant officers, the separation shall be by dismissal. In the case of all other warrant officers, the separation shall be by dishonorable discharge.

(B) *Enlisted persons. See* subsection (b)(9) of this rule and R.C.M. 1301(d).

(3) *Based on other rules.* The maximum limits on punishments in this rule may be further limited by other Rules of Courts-Martial.

Discussion

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 proceeding (*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 bad-conduct 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

(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;

Discussion

See paragraph 23, Part IV, for a definition of "before or in the presence of the enemy."

★(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

(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 complusion, 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;

★(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 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 perpertrator of the killing;

(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.

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 adequatley 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.

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 if 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.

(3) *By convening authority.* When a sentence ajudged by the court-martial is ambiguous or apparently illegal, the convening authority may return the matter to the court-martial for clarification or may approve a sentence no more severe than the legal, unambiguous portions of the adjudged sentence.

(d) *Procedure with members.*

(1) *Instructions.* When a sentence has been reached by members and reconsideration has been initiated under subsection (c) of this rule, the military judge shall instruct the members on the procedure for reconsideration.

(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, after the sentence is announced and before the court-martial is adjourned, the military judge shall inform the accused 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 rights;

(c) The right to apply for relief from the Judge Advocate General if the case is not reviewed by a Court of Military Review; and

(d) The right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

Discussion

★ This does not relieve the defense counsel of post-trial duties set forth in the Discussion of R.C.M. 502(d)(6).

(1) *General courts-martial and special courts-martial in which a bad-conduct discharge was adjudged.* After a general court-martial or after a special court-martial in which a bad-conduct discharge was adjudged, the accused may submit matters under this rule within 30 days after the sentence was announced or within 7 days after a copy of the record of trial is served on the accused under R.C.M. 1104(b)(1), whichever is later. The convening authority may, for good cause, extend the 30-day period for not more than 20 additional days or the 7-day period for not more than 10 additional days.

(2) *Other special courts-martial.* After a special court-martial in which a bad-conduct discharge was not adjudged, the accused may submit matters under this rule within 20 days after the sentence is announced or within 7 days after a copy of the record of trial is served on the accused under R.C.M. 1104(b)(1), whichever is later. The convening authority may, for good cause, extend either period for more than 10 additional days.

(3) *Summary courts-martial.* After a summary court-martial the accused may submit matters under this rule within 7 days after the sentence is announced. The convening authority, for good cause, may extend this period for not more than 10 additional days.

(4) *Post-trial sessions.* A post-trial session under R.C.M. 1102 shall have no effect on the running of any time period in this rule, except when such session results in the announcement of a new sentence, in which case the period shall run from that announcement.

(5) *Good cause.* For purposes of this rule, good cause for an extension ordinarily does not include the need for securing matters which could reasonably have been presented at the court-martial.

(d) *Waiver.*

(1) *Failure to submit matters.* Failure to submit matters within the time prescribed by this rule shall be deemed a waiver of the right to submit such matters.

(2) *Submission of matters.* Submission of any matters under this rule shall be deemed a waiver of the right to submit additional matters unless the right to submit additional matters within the prescribed time limits is expressly reserved in writing.

(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 of 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.*

(1) *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.

(2) *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 matters 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

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.

Discussion

See R.C.M. 1306(b)(2) concerning summary courts-martial.

(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.

(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, verbatim, the action of the convening authority. Subsequent orders shall recite, verbatim, the action or order of the appropriate authority.

(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, 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.

Discussion

See Appendix 17 for sample forms for promulgating orders.

(3) *Order promulgated regardless of the result of trial or nature of the action.* An order promulgating the result of trial by general or special court-martial shall be issued regardless of the result and regardless of the action of the convening or higher authorities.

(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 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 from 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 summary 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.

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 issue 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 ruling 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-incrimination 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 requested 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 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.

(2) *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.

(3) *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.

(d) *Procedure.*

(1) *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.

(2) *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.

(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 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.

(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 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.

(5) *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.

(e) *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.

(1) *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).

(2) *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.

(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 either that the statement was made voluntarily or that the evidence was not obtained by use of the statement.

(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. Corraborating 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.

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 warnings 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 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.

(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 evidence relevant to 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 search or seizure 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.

(g) *Scope of motions and objections challenging probable cause.*

(1) *Generally.* If the defense challenges evidence seized pursuant to a search warrant or search authorization on the grounds that the warrant or authorization was not based upon probable cause, the evidence relevant to the motion is limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer, except as provided in paragraph (2).

(2) *False statements.* If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally 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 request, shall be entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance 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 proving by a preponderance of the evidence, with the

false information set aside, that the remaining information presented to the authorizing officer is sufficient 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 defense motion or objection under this rule is sustained in whole or in part, the members may not be informed of that fact except insofar as the military judge must instruct the members to disregard evidence.

(i) *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 issues under the Fourth Amendment to the Constitution of the United States and Mil. R. Evid. 311-317 with respect to that 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 unclothed 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 following provisions of the Military Rules of Evidence: inspections 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, contraband, 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 institution or its personnel; searches incident to lawful apprehension under Mil. R. Evid. 314(g); emergency searches under Mil. R. Evid. 314(i); and probable cause searches under Mil. R. Evid. 315. An examination of the unclothed body under this rule should be conducted whenever practicable by a person of the same sex as that of the person being examined; 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 nonconsensual physical intrusion into the mouth, nose, and ears may be made when a visual examination of the body under subdivision (b) is permissible. Nonconsensual intrusions into other body cavities may be made:

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 witness 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, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused, or (2) 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 the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death, dishonorable discharge, or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, 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 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

(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 examination. 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 its 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 of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or exception.

(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

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 Transportaiton, 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) *From one not a superior.* Failure to obey the lawful order of one not a superior is an offense under Article 92(2), provided the accused had a duty to obey the order, such as one issued by a sentinel or a member of the armed forces police. *See* 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 willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished. For example, a recruit who has tried earnestly during rifle training and throughout record firing is not derelict in the performance of duties if the recruit fails to qualify with the weapon.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

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

(2) *Violation or 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.

f. *Sample specifications.*

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

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 19 _____, (violate) (fail to obey) a lawful general (order) (regulation), to wit: [paragraph _____, (Army) (Air Force) Regulation _____, dated _____ 19 _____] [Article _____, U.S. Navy Regulations, dated _____ 19 _____] [General Order No. _____, U.S. Navy, dated _____ 19 _____] [_____], 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 to _____, 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, fofeiture 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) (_____).

18. Article 94—Mutiny and sedition

a. *Text.*

"(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 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 peform 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.*

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.

★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, 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)."

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

(d) 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 cryptographic 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 cryptographic 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 advantage of _____, a foreign nation, (attempt to) (communicate) (deliver) (transmit) _____ (description of item), (a document) (a writing) (a code book) (a sketch) (a photograph) (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) (cryptographic 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 _____).

31. Article 107—False official statements

a. *Text.*

"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."

b. *Elements.*

(1) That the accused signed a certain official document or made a certain official statement;

(2) That the document or statement was false in certain particulars;

(3) That the accused knew it to be false at the time of signing it or making it; and

(4) That the false document or statement was made with the intent to deceive.

c. *Explanation.*

(1) *Official documents and statements.* Official documents and official statements include all documents and statements made in the line of duty.

(2) *Status of victim of the deception.* 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 under 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) (_____), to wit: _____] [make to _____, an official statement, to wit: _____], 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;

(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 at _____) (_____) in the amount of $ _____ for (services alleged to have been rendered to the United States by _____ during _____) (_____), 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).

(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 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, cadet, or midshipman or the person's character as a gentleman. 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 _____] [_____].

(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.

[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 after element (*a*): That the accused was so posted (in time of war) (while receiving special pay under 37 U.S.C. § 310)]

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.

d. *Lesser included offenses.*

(1) *Disrespect to a sentinel or lookout.* Article 80—attempts

(2) *Loitering or wrongfully sitting on post by a sentinel or lookout.* Article 80—attempts

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 disrespectful 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 under 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 was actually committed, *see also* paragraph 1.

d. *Lesser included offenses.*

(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.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 19 ____, wrongfully (solicit) (advise) _____ (to disobey a general regulation, to wit: _____) (to steal _____ , of a value of (about) $ _____, the property of _____) (to _____), by _____.

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 1), 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) _____,

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 imposable for the offense if tried by general court-martial. Ordinarily, a minor offense is an offense for which the maximum sentence imposable 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 deter-

mines 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 matters 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 may, 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 of 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 only to the basic pay of the person 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 imposable 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. *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) A suspension may be vacated by any nonjudicial punishment authority or commander competent to impose upon the offender concerned punishment of the kind and amount involved in the vacation of suspension. Vacation of suspension may only be based on an offense under the code committed during 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 suspended 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 offense 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 the offense 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 regulations 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.

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 the record in each case 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) (1) There is a United States Court of Military Appeals established under Article I of the Constitution of the United States and located for administrative purposes only in the Department of Defense. The court consists of three judges appointed from civil life by the President, by and with the advice and consent of the Senate, for a term of fifteen years. Not more than two of the judges of the court may be appointed from the same political party, nor is any person eligible for appointment to the court who is not a member of the bar of a Federal court or the highest court of the State. Each judge 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 Court of Appeals, and is eligible for reappointment. The President shall designate from time to time one of the judges to act as chief judge. The chief judge of the court shall have precedence and preside at any session which he attends. The other judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age. The court may prescribe its own rules of procedure and determine the number of judges required to constitute a quorum. A vacancy in the court does not impair the right of the remaining judges to exercise the powers of the court.

(2) Judges of the United States Court of Military Appeals may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office or for mental or physical disability, but for no other cause.

(3) If a judge of the United States Court of Military Appeals is temporarily unable to perform his duties because of illness or other disability, the President may designate a judge of the United States Court of Appeals for the District of Columbia Circuit to fill the office for the period of disability.

(4) Any judge of the United States Court of Military Appeals who is receiving retired pay may become a senior judge, may occupy offices in a Federal building, may be provided with a staff assistant whose compensation shall not exceed the rate prescribed for GS–9 in the General Schedule under section 5332 of title 5, and, with his consent, may be called upon by the chief judge of said court to perform judicial duties with said court for any period or periods specified by such chief judge. A senior judge who is performing judicial duties persuant to this subsection shall be paid the same compensation (in lieu of retired pay) and allowances for travel and other expenses as a judge.

(b) 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.

(c) 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.

(d) 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.

(e) 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.

(f) 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.

(g) (1) A committee consisting of the judges of the Court of Military Appeals, the Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel of the Coast Guard, the Director, Judge Advocate Division, Headquarters, United States Marine Corps, and two members of the public appointed by the Secretary of Defense shall meet at least annually. The committee shall make an annual comprehensive survey of the operation of this chapter. After each such survey, the committee shall report to the Committees on Armed Services of the Senate and of the House of Representatives and to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Transportation, the number and status of pending cases and any recommendations relating to uniformity of policies as to sentences, amendments to this chapter, and any other matters considered appropriate.

(2) Each member of the committee appointed by the Secretary of Defense shall be a recognized authority in military justice or criminal law. Each such member shall be appointed for a term of three years.

(3) The Federal Advisory Committee Act (5 U.S.C. App. I) shall not apply to the committee.

(h) (1) Decisions of the 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 such section any action of the Court of Military Appeals in refusing to grant a petition for review.

(2) 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. 68. 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 Militry 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. If the Judge Advocate General so directs, the record shall be reviewed by a Court of Military Review under section 866 of this title (article 66), but in that event there may be no further review by the Court of Military Appeals except under section 867(b)(2) of this title (article 67(b)(2)).

(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.

§ 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 death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate). A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Military Review and—

(A) the time for the accused to file a petition for review by the Court of Military Appeals has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

(B) such a petition is 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) such a petition is rejected by the Supreme Court; or

(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

(2) If a sentence extends to dismissal or a dishonorable or bad-conduct discharge and if the right of the accused to appellate review is waived, or an appeal is withdrawn, under 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 on 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 petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition.

§ 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

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§ 877. Art. 77. Principals

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.

§ 878. Art. 78. Accessory after the fact

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.

§ 879. Art. 79. Conviction of lesser included offense

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

§ 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.

§ 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.

§ 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.

§ 883. Art. 83. Fraudulent enlistment, appointment, or separation

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 the 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.

§ 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, 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.

§ 886. Art. 86. Absence without leave

Any member of the armed forces who, without authority—

§ 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 driving

Any person subject to this chapter who operates any vehicle while drunk, or in a reckless or wanton manner, shall be punished as a court-martial may direct.

§ 912. Art. 112. Drunk on duty

Any person subject to this chapter other than a sentinel or look-out, 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 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.

§ 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—

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:
(a) DoD Directive 1355.1, "Relationships with the Department of Justice on Grants of Immunity and the Investigation and Prosecution of Certain Crimes," July 21, 1981 (hereby canceled)
(b) Memorandum of Understanding Between the Department of Justice and the Department of Defense 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)"
(e) Manual for Courts-Martial, United States, 1984 (R.C.M. 704)

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.1.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.

3. The Secretaries 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.

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

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 OF 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

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.

b. 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 automatic 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.

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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.

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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 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.

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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.§§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 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)).

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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 Counterintelligence 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."

APPENDIX 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.

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 principles 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 or funds, or is of a similar nature. All such crimes shall be investigated by the Coast Guard unless it receives prompt advise 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 involved 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/ Ramsey Clark
Ramsey Clark
Attorney General

Date: 9 October 1967

/s/ Alan S. Boyd
Alan S. Boyd
Secretary of Transportation

Date: 24 October 1967

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 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.]

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.]

Accounting for parties

[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:_____ .

Reporter 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 prosecution

TC: (I am) (All members of the prosection are) 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 counsel

DC: (All detailed members of the defense are) (I 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.]

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: _____ .

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: _____ .

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.

MJ: 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?

ACC: _____ .

Advice in GCMs and SPCMs in which BCD adjudged

★[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.]

★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 30 days from today or within 7 days after you or your counsel receive a copy of the record of trial, whichever is later.

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 30 days from today or within 7 days after you or your counsel receive a copy of the record of trial, whichever is later. 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 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. Such matters must be submitted within 20 days from today or within 7 days after you or your counsel receive a copy of the record of trial, whichever is later. 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 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 punishment 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.

Article	*Offenses*	*Discharge*	*Confinement*	*Forfeitures*
77	Principals (*see* Part IV, ¶ 1 and pertinent offenses)			
78	Accessory after the fact (*see* Part IV, ¶ 3.e.)			
79	Lesser included offenses (*see* Part IV, ¶ 2 and pertinent offenses)			
80	Attempts (*see* Part IV, ¶ 4.e.)			
81	Conspiracy (*see* Part IV, ¶ 5.e.)			
82	Solicitation			
	If solicited offense committed, or attempted, *see* Part IV, ¶ 6.e.			
	If solicited offense not committed:			
	Solicitation to desert*	DD, BCD	3 yrs.*	Total
	Solicitation to mutiny*	DD, BCD	10 yrs.*	Total
	Solicitation to commit act of misbehavior before enemy*	DD, BCD	10 yrs.*	Total
	Solicitation to commit act of sedition*	DD, BCD	10 yrs.*	Total
83	Fraudulent enlistment, appointment	DD, BCD	2 yrs.	Total
	Fraudulent separation	DD, BCD	5 yrs.	Total
84	Effecting unlawful enlistment, appointment, separation	DD, BCD	5 yrs.	Total
85	Desertion			
	Intent to avoid hazardous duty, shirk important service*	DD, BCD	5 yrs.*	Total
	Other cases			
	Terminated by apprehension	DD, BCD	3 yrs.*	Total
	Otherwise terminated	DD, BCD	2 yrs.*	Total
86	Absence without leave, etc.			
	Failure to go, going from place of duty	None	1 mo.	2/3 1 mo.
	Absence from unit, organization, etc.			
	Not more than 3 days	None	1 mo.	2/3 1 mo.
	More than 3, not more than 30 days	None	6 mos.	2/3 6 mos.
	More than 30 days	DD, BCD	1 yr.	Total
	More than 30 days and terminated by apprehension	DD, BCD	1 yr., 6 mos.	Total
	Absence from guard or watch	None	3 mos.	2/3 3 mos.
	Absence from guard or watch with intent to abandon	BCD	6 mos.	Total
	Absence with intent to avoid maneuvers, field exercises	BCD	6 mos.	Total

*Suspended in time of war

Article	*Offenses*	*Discharge*	*Confinement*	*Forfeitures*
87	Missing movement			
	Through design	DD, BCD	2 yrs.	Total
	Through neglect	BCD	1 yr.	Total
88	Contempt toward officials	Dismissal	1 yr.	Total
89	Disrespect toward superior commissioned officer	BCD	1 yr.	Total
90	Assaulting, willfully disobeying superior commissioned officer			
	Striking, drawing or lifting up any weapon or offering any violence toward superior commissioned officer in execution of duty*	DD, BCD	10 yrs.*	Total
	Willfully disobeying lawful order of superior commissioned officer*	DD, BCD	5 yrs.*	Total
91	Insubordinate conduct toward warrant, noncommissioned, petty officer			
	Striking or assaulting:			
	Warrant officer	DD, BCD	5 yrs.	Total
	Superior noncommissioned officer	DD, BCD	3 yrs.	Total
	Other noncommissioned or petty officer	DD, BCD	1 yr.	Total
	Willfully disobeying:			
	Warrant officer	DD, BCD	2 yrs.	Total
	Noncommissioned or petty officer	BCD	1 yr.	Total
	Contempt, disrespect toward:			
	Warrant Officer	BCD	9 mos.	Total
	Superior noncommissioned or petty officer	BCD	6 mos.	Total
	Other noncommissioned or petty officer	None	3 mos.	2/3 3 mos.
92	Failure to obey order, regulation			
	Violation, failure to obey general order or regulation**	DD, BCD	2 yrs.	Total
	Violation, failure to obey other order**	BCD	6 mos.	Total
	Dereliction in performance of duties			
	Through neglect, culpable inefficiency	None	3 mos.	2/3 3 mos.
	Willful	BCD	6 mos.	Total
93	Cruelty, maltreatment of subordinates	DD, BCD	1 yr.	Total
94	Mutiny & sedition	Death, DD, BCD	Life	Total
95	Resisting apprehension, breach of arrest; escape			
	Resisting apprehension	BCD	1 yr.	Total
	Breaking arrest	BCD	6 mos.	Total
	Escape from custody or confinement	DD, BCD	1 yr.	Total
96	Releasing prisoner without proper authority	DD, BCD	2 yrs.	Total
	Suffering prisoner to escape through neglect	BCD	1 yr.	Total
	Suffering prisoner to escape through design	DD, BCD	2 yrs.	Total

***Suspended in time of war**

****See paragraph 16e(1) & (2) Note, Part IV**

Article	Offenses	Discharge	Confinement	Forfeitures
97	Unlawful detention	DD, BCD	3 yrs.	Total
98	Noncompliance with procedural rules, etc.			
	Unnecessary delay in disposition of case	BCD	6 mos.	Total
	Knowingly, intentionally failing to comply, enforce code	DD, BCD	5 yrs.	Total
99	Misbehavior before enemy	Death, DD, BCD	Life	Total
100	Subordinate compelling surrender	Death, DD, BCD	Life	Total
101	Improper use of countersign	Death, DD, BCD	Life	Total
102	Forcing safeguard	Death, DD, BCD	Life	Total
103	Captured, abandoned property; failure to secure, etc.			
	Of value of $100.00 or less	BCD	6 mos.	Total
	Of value of more than $100.00	DD, BCD	5 yrs.	Total
	Looting, pillaging	DD, BCD	Life	Total
104	Aiding the enemy	Death, DD, BCD	Life	Total
105	Misconduct as prisoner	DD, BCD	Life	Total
106	Spying	Mandatory Death, DD, BCD	Not applicable	Total
★106a	Espionage			
	Cases listed in Art. 106a(a)(1)(A)-(D)	Death, DD, BCD	Life	Total
	Other cases	DD, BCD	Life	Total
107	False official statements	DD, BCD	5 yrs.	Total
108	Military property; loss, damage, destruction, disposition			
	Selling, otherwise disposing			
	Of value of $100 or less	BCD	1 yr.	Total
	Of value of more than $100.00	DD, BCD	10 yrs.	Total
	Any firearm, explosive, or incendiary device	DD, BCD	10 yrs.	Total
	Damaging, destroying, losing or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed:			
	Through neglect, of a value of:			
	$100.00 or less	None	6 mos.	2/3 6 mos.
	More than $100.00	BCD	1 yr.	Total
	Willfully, of a value of:			
	$100.00 or less	BCD	1 yr.	Total
	More than $100.00	DD, BCD	10 yrs.	Total
	Any firearm, explosive, or incendiary device	DD, BCD	10 yrs.	Total
109	Property other than military property of U.S.; loss, damage, destruction, disposition:			
	Wasting, spoiling, destroying, or damaging property of value of:			
	$100.00 or less	BCD	1 yr.	Total
	More than $100.00	DD, BCD	5 yrs.	Total

Article	*Offenses*	*Discharge*	*Confinement*	*Forfeitures*
110	Hazarding a vessel			
	Willfully and wrongfully	Death, DD, BCD	Life	Total
	Negligently	DD, BCD	2 yrs.	Total
111	Drunken driving			
	Resulting in personal injury	DD, BCD	1 yr., 6 mos.	Total
	Other cases	BCD	6 mos.	Total
112	Drunk on duty	BCD	9 mos.	Total
112a	Wrongful use, possession, etc. of controlled substances*			
	—Wrongful use, possession, manufacture, or introduction of:			
	—Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances	DD, BCD	5 yrs.	Total
	—Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances	DD, BCD	2 yrs.	Total
	—Wrongful distribution of, or, with intent to distribute, wrongful possession, manufacture, introduction, or wrongful importation of or exportation of:			
	—Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances	DD, BCD	15 yrs.	Total
	—Phenobarbital and Schedule IV and V controlled substances	DD, BCD	10 yrs.	Total
113	Misbehavior of sentinel or lookout			
	In time of war	Death, DD, BCD	Life	Total
	In other time:			
	While receiving special pay under 37 U.S.C. 310	DD, BCD	10 yrs.	Total
	Other places	DD, BCD	1 yr.	Total
114	Dueling	DD, BCD	1 yr.	Total
115	Malingering			
	Feigning illness, etc.			
	In time of war, or while receiving special pay under 37 U.S.C. 310	DD, BCD	3 yrs.	Total
	Other	DD, BCD	1 yr.	Total
	Intentional self-inflicted injury			
	In time of war, or while receiving special pay under 37 U.S.C. 310	DD, BCD	10 yrs.	Total
	Other	DD, BCD	5 yrs.	Total
116	Riot	DD, BCD	10 yrs.	Total
	Breach of peace	None	6 mos.	2/3 6 mos.
117	Provoking speech, gestures	None	6 mos.	2/3 6 mos.

***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. 310; or in time of war, the maximum period of confinement authorized for such offense shall be increased by 5 years.**

Article	Offenses	Discharge	Confinement	Forfeitures
118	Murder			
	Article 118(1) or (4)	Death, mandatory minimum life, DD, BCD	Life	Total
	Article 118(2) or (3)	DD, BCD	Life	Total
119	Manslaughter			
	Voluntary	DD, BCD	10 yrs.	Total
	Involuntary	DD, BCD	3 yrs.	Total
120	Rape	Death, DD, BCD	Life	Total
	Carnal knowledge	DD, BCD	15 yrs.	Total
121	Larceny			
	Of value of $100.00 or less	BCD	6 mos.	Total
	Of value of more than $100.00, or of aircraft, vessel, vehicle	DD, BCD	5 yrs.	Total
	Wrongful appropriation			
	Of value of $100.00 or less	None	3 mos.	2/3 3 mos.
	Of value of more than $100.00	BCD	6 mos.	Total
	Of vehicle, aircraft, vessel	DD, BCD	2 yrs.	Total
122	Robbery			
	Committed with a firearm	DD, BCD	15 yrs.	Total
	Other cases	DD, BCD	10 yrs.	Total
123	Forgery	DD, BCD	5 yrs.	Total
123a	Checks, etc., insufficient funds, intent to deceive			
	To procure anything of value:			
	$100.00 or less	BCD	6 mos.	Total
	More than $100.00	DD, BCD	5 yrs.	Total
	For payment of past due obligation, and other cases	BCD	6 mos.	Total
124	Maiming	DD, BCD	7 yrs.	Total
125	Sodomy			
	By force and without consent	DD, BCD	20 yrs.	Total
	With child under age of 16 years	DD, BCD	20 yrs.	Total
	Other cases	DD, BCD	5 yrs.	Total
126	Arson			
	Aggravated	DD, BCD	20 yrs.	Total
	Other cases. where property value is:			
	$100.00 or less	DD, BCD	1 yr.	Total
	More than $100.00	DD, BCD	5 yrs.	Total
127	Extortion	DD, BCD	3 yrs.	Total
128	Assaults			
	Simple assault	None	3 mos.	2/3 3 mos.

Article	Offenses	Discharge	Confinement	Forfeitures
	Assault consummated by battery	BCD	6 mos.	Total
	Assault upon commissioned officer of U.S. or friendly power not in execution of office	DD, BCD	3 yrs.	Total
	Assault upon warrant officer, not in execution of office	DD, BCD	1 yr., 6 mos.	Total
	Assault upon noncommissioned or petty officer not in execution of office	BCD	6 mos.	Total
	Assault upon, in execution of office, person serving as sentinel, lookout, security policeman, military policeman, shore patrol, master at arms, or civil law enforcement	DD, BCD	3 yrs.	Total
	Assault consummated by battery upon child under age of 16 yrs.	DD, BCD	2 yrs.	Total
	Assault with dangerous weapon or means likely to produce grievous bodily harm or death:			
	Committed with loaded firearm	DD, BCD	8 yrs.	Total
	Other cases	DD, BCD	3 yrs.	Total
	Assault in which grievous bodily harm is intentionally inflicted:			
	With a loaded firearm	DD, BCD	10 yrs.	Total
	Other cases	DD, BCD	5 yrs.	Total
129	Burglary	DD, BCD	10 yrs.	Total
130	Housebreaking	DD, BCD	5 yrs.	Total
131	Prejury	DD, BCD	5 yrs.	Total
132	Frauds against the United States			
	Offenses under article 132(1) or (2)	DD, BCD	5 yrs.	Total
	Offenses under article 132(3) or (4)			
	$100.00 or less	BCD	6 mos.	Total
	More than $100.00	DD, BCD	5 yrs.	Total
133	Conduct unbecoming officer (*see* Part IV, para. 58e)	Dismissal	1 yr. or as prescribed	Total
134	Abusing public animal	None	3 mos.	2/3 3 mos.
	Adultery	DD, BCD	1 yr.	Total
	Assault, indecent	DD, BCD	5 yrs.	Total
	Assault			
	—With intent to commit murder or rape	DD, BCD	20 yrs.	Total
	—With intent to commit voluntary manslaughter, robbery, sodomy, arson, or burglary	DD, BCD	10 yrs.	Total
	—With intent to commit housebreaking	DD, BCD	5 yrs.	Total
	Bigamy	DD, BCD	2 yrs.	Total
	Bribery	DD, BCD	5 yrs.	Total
	Graft	DD, BCD	3 yrs.	Total
	Burning with intent to defraud	DD, BCD	10 yrs.	Total
	Check, worthless, making and uttering—by dishonorably failing to maintain funds	BCD	6 mos.	Total
	Cohabition, wrongful	None	4 mos.	2/3 4 mos.
	Correctional custody, escape from	DD, BCD	1 yr.	Total
	Correctional custody, breach of	BCD	6 mos.	Total
	Debt, dishonorably failing to pay	BCD	6 mos.	Total
	Disloyal statements	DD, BCD	3 yrs.	Total
	Disorderly conduct			
	—Under such circumstances as to bring discredit	None	4 mos.	2/3 4 mos.

Article	Offenses	Discharge	Confinement	Forfeitures
	—Other cases	None	1 mo.	2/3 1 mo.
	Drunkenness			
	—Aboard ship or under such circumstances as to bring discredit	None	3 mos.	2/3 3 mos.
	—Other cases	None	1 mo.	2/3 1 mo.
	Drunk and disorderly			
	—Aboard ship	BCD	6 mos.	Total
	—Under such circumstances as to bring discredit	None	6 mos.	2/3 6 mos.
	—Other cases	None	3 mos.	2/3 3 mos.
	Drinking liquor with prisoner	None	3 mos.	2/3 3 mos.
	Drunk prisoner	None	3 mos.	2/3 3 mos.
	Drunkenness—incapacitating oneself for performance of duties through prior indulgence in intoxicating liquor or drugs	None	3 mos.	2/3 3 mos.
	False or unauthorized pass offenses			
	—Possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling	DD, BCD	3 yrs.	Total
	—All other cases	BCD	6 mos.	Total
	False pretenses, obtaining services under			
	—Of a value of $100.00 or less	BCD	6 mos.	Total
	—Of a value of more than $100.00	DD, BCD	5 yrs.	Total
	False swearing	DD, BCD	3 yrs.	Total
	Firearm, discharging—through negligence	None	3 mos.	2/3 3 mos.
	Firearm, discharging—willfully, under such circumstances as to endanger human life	DD, BCD	1 yr.	Total
	Fleeing scene of accident	BCD	6 mos.	Total
	Fraternization	Dismissal	2 yrs.	Total
	Gambling with subordinates	None	3 mos.	2/3 3 mos.
	Homicide, negligent	BCD	1 yr.	Total
	Impersonation			
	—With intent to defraud	DD, BCD	3 yrs.	Total
	—All other cases	BCD	6 mos.	Total
	Indecent act, liberties with child	DD, BCD	7 yrs.	Total
	Indecent exposure	BCD	6 mos.	Total
	Indecent language			
	—Communicated to child under 16 yrs.	DD, BCD	2 yrs.	Total
	—Other cases	BCD	6 mos.	Total
	Indecent acts with another	DD, BCD	5 yrs.	Total
	Jumping from vessel into the water	BCD	6 mos.	Total
	Kidnapping	DD, BCD	Life	Total
	Mail, taking, opening, secreting, destroying, or stealing	DD, BCD	5 yrs.	Total
	Mails, depositing or causing to be deposited obscene matters in	DD, BCD	5 yrs.	Total
	Misprison of serious offense	DD, BCD	3 yrs.	Total
	Obstructing justice	DD, BCD	5 yrs.	Total
	Pandering	DD, BCD	5 yrs.	Total
	Prostitution	DD, BCD	1 yr.	Total
	Parole, violation of	BCD	6 mos.	2/3 6 mos.

Article	*Offenses*	*Discharge*	*Confinement*	*Forfeitures*
	Perjury, subornation of	DD, BCD	5 yrs.	Total
	Public record, altering, concealing, removing, mutilating, obliterating, or destroying	DD, BCD	3 yrs.	Total
	Quarantine, breaking	None	6 mos.	2/3 6 mos.
	Requesting commission of an offense, wrongful communication of language	None	4 mos.	2/3 4 mos.
	Restriction, breaking	None	1 mo.	2/3 1 mo.
	Seizure, destruction, removal, or disposal of property to prevent	DD, BCD	1 yr.	Total
	Sentinel, lookout			
	—Disrespect to	None	3 mos.	2/3 3 mos.
	—Loitering or wrongfully sitting on post by			
	—In time of war or while receiving special pay	DD, BCD	2 yrs.	Total
	—Other cases	BCD	6 mos.	Total
	Soliciting another to commit an offense (*see* Part IV, para. 105e)			
	Stolen property, knowingly receiving, buying, concealing			
	Of a value of $100.00 or less	BCD	6 mos.	Total
	Of a value of more than $100.00	DD, BCD	3 yrs.	Total
	Straggling	None	3 mos.	2/3 3 mos.
	Testify, wrongfully refusing to	DD, BCD	5 yrs.	Total
	Threat, bomb, or hoax	DD, BCD	5 yrs.	Total
	Threat, communicating	DD, BCD	3 yrs.	Total
	Unlawful entry	BCD	6 mos.	Total
	Weapon, concealed, carrying	BCD	1 yr.	Total
	Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button	BCD	6 mos.	Total

(d) *How an apprehension may be made.* In subsection (1) the general statement of procedure to make an apprehension is based on paragraph 19*c*, 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, 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.

The discussion restates paragraph 19*d* 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 exlusionary 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 20*a, b,* and *c* of MCM, 1969 (Rev.). Some of the language of the former 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. 317, 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). The discussion notes that pretrial restraint, including conditions on liberty, may not improperly hinder trial preparation. *See United States v. Aycock,* 15 U.S.C.M.A. 158, 35 C.M.R. 130 (1964); *United States v. Wysong,* 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958).

The last sentence of the second paragraph of the discussion in based on *United States v. Weisenmuller,* 17 U.S.C.M.A. 636, 38 C.M.R. 434 (1968); *United States v. Smith,* 17 U.S.C.M.A. 427, 38 C.M.R. 225 (1968); *United States v. Williams,* 16 U.S.C.M.A. 589, 37 C.M.R. 209 (1967). *See also United States v. Nelson,* 5 M.J. 189 (C.M.A. 1978); *United States v. Powell,* 2 M.J. 6 (C.M.A. 1976).

★*February 1986 Amendment:* A fourth 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 21*a* 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 "delegaton," 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 20*d*(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 short of confinement. 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 because 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.

(f) *Punishment prohibited.* This section is based on Article 13; paragraph 18*b*(3) of MCM, 1969 (Rev.); *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 916 (1949). *See also United States v. Bruce,* 14 M.J. 254 (C.M.A. 1982); *United States v. Davidson,* 14 M.J. 81 (C.M.A. 1982); *United States v. Pringle,* 19 U.S.C.M.A. 324, 41 C.M.R. 324 (1970); *United States v. Bayhand,* 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956). *Cf. Bell v. Wolfish,* 441 U.S. 520 (1979). The remedy for a violation of this rule is meaningful sentence relief. *United States v. Pringle, supra; United States v. Nelson,* 18 U.S.C.M.A. 177, 39 C.M.R. 177 (1969).

(g) *Release.* This subsection is based on paragraph 21*d* and on the second and third sentences of paragraph 22 of MCM, 1969 (Rev.).

(h) *Administrative restraint.* This subsection clarifies the scope of this rule.

Rule 305. Pretrial confinement

Introduction. This rule clarifies the bases 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); *Courtney v. Williams,* 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 20*c* 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 19*d* and 174*c* 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. Ellsey,* 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 20*d*(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.

charges, like any other unreferred 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 preferral 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 56*a* of MCM, 1969 (Rev.).

The first sentence of the fourth paragraph is based on the third sentence of paragraph 56*a* 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 56*a* and paragraph 56*d* of MCM, 1969 (Rev.).

(b) *Referral of withdrawn charges.* This rule is based on paragraphs 33*j*(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 56*b* 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 sentence of paragraph 56*b* 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 56*b* of MCM, 1969 (Rev.). Unlike paragraph 56*b*, the current rule 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 third paragraph in the discussion is based on *United States v. Charette, United States v. Blaylock, United States v. Walsh,* and *Petty v. Convening Authority,* all *supra; United States v. Fleming*, 18 U.S.C.M.A. 524, 40 C.M.R. 236 (1969). *See* Article 37.

The fourth paragraph in the discussion is based generally on paragraphs 56*b* and *c* of MCM, 1969 (Rev.), but more specificity is provided as to proper reasons for withdrawal and the effect of 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, 44*h*, and 115*c* 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, 204n.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 judgments 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 truthfinding 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 counsel might be uncertain in many cases as to the extent of the duty to obtain matters not in the trial counsel's immediate possession. A request should indicate with reasonable specificity what materials are sought. When obviously discoverable materials are in the trial counsel's possession, trial counsel should provide them to the defense without a request. "Inspect" includes the right to copy. *See* subsection (h) of this rule.

Fed. R. Crim. P. 16(a)(1)(A) is not included here because the matter is covered in Mil. R. Evid. 304(d)(1). The discussion under subsection (a)(6) of this rule lists other discovery and notice provisions in the Military Rules of Evidence.

Subsection (1) is based on paragraph 44*h* of MCM, 1969 (Rev.). *See also* paragraph 33*i*, *id.* 18 U.S.C. § 3500)(a) is contra; the last sentence of Article 32(b) reflects Congressional intent that the accused receive witness statements before trial.

Subsection (2) is based on paragraph 115*c* of MCM, 1969 (Rev.) and parallels Fed. R. Crim. P. 16(a)(1)(C) and (D).

Subsection (3)(A) is based on the last sentence in the second paragraph of paragraph 44*h* of MCM, 1969 (Rev.) *See also* Appendix 5 at A5−1 of MCM, 1969 (Rev.); *United States v. Webster,* 1 M.J. 216 (C.M.A. 1975). Subsection (3)(B) is based on Fed. R. Crim. P.12.1(b). Fed. R. Crim. P. 12.2 (notice based on mental condition) contains no parallel requirement for disclosure of rebuttal witnesses by the prosecution. The defense will ordinarily have such information because of the accused's participation in any court ordered examination, so the distinction diminishes in practice. In the interest of full disclosure and fairness, subsection (3)(B) requires the prosecution to notify the defense of rebuttal witnesses on mental responsibility. *See also* R.C.M. 706.

Subsection (4) is based on Fed. R. Crim. P. 16(a)(1)(B). The language is modified to make clear that the rule imposes no duty on the trial counsel to seek out prior convictions. (There is an ethical duty to exercise reasonable diligence in doing so, however. *See ABA Code of Professional Responsibility,* DR 6−101(A)(2); EC 6−4 (1975).) The purpose of the rule is to put the defense on notice of prior convictions of the accused which may be used against the accused on the merits. Convictions for use on sentencing are covered under subsection (a)(5). Because of this distinction, under some circumstances the trial counsel may not be able to use a conviction on the merits because of lack of timely notice, but may be able to use it on sentencing.

Subsection (5) is based on paragraph 75*b*(5) of MCM, 1969 (Rev.) *Cf.* Fed. R. Crim. P. 32(c)(3).

Subsection (6) is based on *ABA Standards, The Prosecution Function* § 3−3.11(a) (1979); *ABA Standards, Discovery and Procedure Before Trial* § 11−2.1(c) (1978). *See also United States v. Agurs,* 427 U.S. 97 (1976); *Brady v. Maryland,* 373 U.S. 83 (1963); *United States v. Brickey,* 16 M.J. 258 (C.M.A. 1983); *United States v. Horsey,* 6 M.J. 112 (C.M.A. 1979); *United States v. Lucas,* 5 M.J. 167 (C.M.A. 1978); *ABA Code of Professional Responsibility,* DR 7−103(B) (1975).

(b) *Disclosure by defense.* This subsection is based on Fed. R. Crim. P. 12.1, 12.2, and 16(b)(1)(A) and (B). *See generally Williams v. Florida,* 399 U.S. 78 (1970). The requirement is Fed. R. Crim. P. 12.1 for a written request by the prosecution for notice of an alibi defense was deleted because it would generate unnecessary paperwork. The accused is adequately protected by the opportunity to request a bill of particulars.

(c) *Failure to call witness.* This subsection is based on repealed subsections (a)(4) and (b)(3) of Fed. R. Crim. P. 16. Those subsections were inadvertently left in that rule after the notice of witnesses provisions were deleted by the conference committee. Act of December 12, 1975, Pub. L. No. 94−149, § 5, 89 Stat. 806. *But see* Fed. R. Crim. P. 12.1(f). Because notice of witnesses under R.C.M. 701 is required or otherwise encouraged (*see also* R.C.M. 703), such a provision is necessary in these rules.

(d) *Continuing duty to disclose.* This subsection is based on Fed. R. Crim. P. 16(c). *See also ABA Standards, Discovery and Procedure Before Trial* § 11−4.2 (1978).

(e) *Access to witnesses and other evidence.* This subsection is based on Article 46; paragraphs 42*c* and 48*h* of MCM, 1969 (Rev.); *United States v. Killebrew, supra; Halfacre v. Chambers, supra; United States v. Enloe,* 15 U.S.C.M.A. 256, 35 C.M.R. 228 (1965); *United States v. Aycock,* 15 U.S.C.M.A. 158, 35 C.M.R. 130 (1964). The subsection permits witness (e.g., informant) protection programs and prevents improper interference with preparation of the case. *See United States v. Killebrew* and *United States v. Cumberledge, both supra. See also* subsection (f) of this rule; Mil. R. Evid. 507.

★ *February 1986 Amendment:* The discussion was added, based on *United States v. Treakle,* 18 M.J. 646 (A.C.M.R. 1984). *See also United States v. Tucker,* 17 M.J. 519 (A.F.C.M.R. 1984). *See also United States v. Lowery,* 18 M.J. 695 (A.F.C.M.R. 1984); *United States v. Charles,* 15 M.J. 509 (A.F.C.M.R. 1982); *United States v. Estes,* 28 C.M.R. 501 (A.B.R. 1959).

(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 Jencks 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)(2) is based on Fed. R. Crim. P. 16(d)(1). *Cf.* Mil. R. Evid. 505; 506. *See also ABA Standards, Discovery and Procedure Before Trial* § 11−4.4 (1978).

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).

days. 120 days was selected for courts-martial as a reasonable outside limit given the wide variety of locations and conditions in which courts-martial occur. The rule applies to all cases, not just those in which the accused is in pretrial confinement. The experience with the 90−day rule under *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971) led to the conclusion that 120 days, coupled with greater flexibility in excludable time periods under subsection (c), is an appropriate limit. (*See* the Analysis of subsection (d) for further discussion of the *Burton* rule.).

The time begins to run from notification of preferral of charges or the imposition of restraint under R.C.M. 304. If the accused is under restraint such as correctional custody imposed as nonjudicial punishment the time does not begin to run under this rule. *See United States v. Nash*, 5 M.J. 37 (C.M.A. 1978); *United States v. Miller*, 2 M.J. 77 (C.M.A. 1976); *United States v. Reed*, 2 M.J. 64 (C.M.A. 1976). *See also United States v. Schilf*, 1 M.J. 251 (C.M.A. 1976).

The discussion is based on *United States v. MacDonald*, 456 U.S. 1 (1982); *United States v. Marion*, 404 U.S. 307 (1971). *See also United States v. Lovasco*, 431 U.S. 783 (1977). Delay before restraint or notice of preferral of charges could raise due process issues. *See id.; United States v. Rachels*, 6 M.J. 232 (C.M.A. 1979). *See generally* Pearson and Bowen, *Unreasonable Pre-Preferral Delay*, 10 A.F. JAG Rptr. 73 (June 1981).

★ *February 1986 Amendment:* R.C.M. 707(a) was amended to exclude "conditions on liberty" from the speedy trial rule because the minimal infringement on liberty imposed by such conditions do not warrant imposition of the speedy trial requirements. However, where a form of restraint under R.C.M. 304(a)(2)−(4) is erroneously denominated as a condition on liberty, this will not avoid application of the speedy trial rule.

(b) *Accountability.* Subsection (1) is based on *United States v. Manalo*, 1 M.J. 452 (C.M.A. 1976).

Subsection (2) is based on *ABA Standards, supra* at § 12−2.2(b) and (c). *See also* 18 U.S.C. § 3161(d) and (e). The ABA Standards and 18 U.S.C. § 3161 provide that when charges are dismissed on motion of the defendant—not the prosecution—the Government is accountable only from the time charges are reinstituted. Subsection (b) makes no such distinction as to the movant for the dismissal. In the military, charges may be dismissed by a convening authority without a request or motion by either party. *See* R.C.M. 401(c)(1). To try to identify the "source" of such action by a convening authority would be extremely difficult, and would also tend to inhibit the broad authority a convening authority has to dismiss charges. *See* Article 34. *Cf.* Article 64.

Subsection (3) is based on *ABA Standards, Speedy Trial* (1978). *Cf.* 18 U.S.C. § 3161(c). The ABA Standards do not expressly establish a termination point, but they clearly contemplate commencement of trial as the cut-off point. *See also* Article 10; *United States v. Marell*, 23 U.S.C.M.A. 240, 49 C.M.R. 373 (1974).

Subsection (4) is based on *ABA Standards, supra* at § 12−2.2(a) (1978). *See also United States v. Talavera*, 8 M.J. 14 (C.M.A. 1979); *United States v. Johnson*, 1 M.J. 101 (C.M.A. 1975); *United States v. Marell, supra; United States v. Mladjen*, 19 U.S.C.M.A. 159, 41 C.M.R. 159 (1969).

(c) *Exclusions.* This subsection is taken from *ABA Standards, supra* at § 12−2.3 (1978) with modifications to conform to military procedure and terminology. Only subsection (c)(4) is added, although it is implicit in §§ 12−2.3(a) and (c), *ABA Standards, supra*. The list of exclusions generally parallels those provided in 18 U.S.C. § 3161(h). As to subsection (1)(d), *see* Article 62(c). For a comparison of the exclusions with deductible periods under *United States v. Burton, supra, see* subsection (d) *infra*.

(d) *Arrest or confinement.* This subsection is based on Article 10; *ABA Standards, supra* at § 12−4.2 (1978); and 18 U.S.C. § 3164 (Supp. V 1981). The discussion notes the judicial presumption of an Article 10 violation under *United States v. Burton, supra*. The application of subsection (d) should preclude triggering the 90-day presumption in most cases. *Cf. United States v. Nash, supra; United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976). However, not all of the periods of exclusion under subsection (c) are deductible for purposes of *Burton* under current precedents. Unless *Burton* and its progeny are reexamined (*see infra*), it would be possible to have a *Burton* violation despite compliance with this subsection.

Some of the exclusions in subsection (c) have been held to be deductible in determining whether the *Burton*, presumption is triggered. (Note that subsection (c)(7) does not apply to subsection (d). As to subsection (c)(7) *see United States v. Johnson*, 1 M.J. 294, 296 n.4 (C.M.A. 1976)). Periods which are deductible for *Burton* purposes include those described in: subsection (1)(A) (*see United States v. Leonard*, 3 M.J. 214 (C.M.A. 1977); *United States v. McClain*, 1 M.J. 60 (C.M.A. 1975)); subsection (3) (*see United States v. Roman*, 5 M.J. 385 (C.M.A. 1978); *United States v. Cole*, 3 M.J. 220 (C.M.A. 1977); *United States v. Driver*, 23 U.S.C.M.A. 243, 49 C.M.R. 376 (1974); *United States v. Burton, supra; but cf. United States v. Wolzok*, 1 M.J. 125 (C.M.A. 1975); *United States v. Reitz*, 22 U.S.C.M.A. 584, 48 C.M.R. 178 (1974) (defense acquiescence in trial date not chargeable as defense delay)); subsection (4) (*see United States v. Herron*, 4 M.J. 30 (C.M.A. 1977)); and subsection (6) (*see United States v. Reed, supra; United States v. Brooks*, 23 U.S.C.M.A. 1, 48 C.M.R. 257 (1974); *United States v. O'Brien*, 22 U.S.C.M.A. 557, 48 C.M.R. 42 (1973); *but see United States v. Keaton*, 18 U.S.C.M.A. 500, 40 C.M.R. 212 (1969)). It is unclear whether periods under subsection (2) are deductible for *Burton* purposes; periods of delay resulting from unavailability of a military judge generally are not deductible. *See United States v. Wolzok, supra*. The periods described in subsections (5) and (8) are not deductible under *Burton* (*but see United States v. Talavera, supra* (Cook, J.)) but they may be grounds for overcoming the *Burton* presumption despite pretrial confinement in excess of 90 days. *See United States v. Talavera, supra; United States v. Cole, supra; United States v. Marshall*, 22 U.S.C.M.A. 431, 47 C.M.R. 409 (1973). *But see United States v. Perry*, 2 M.J. 113 (C.M.A. 1977); *United States v. Henderson*, 1 M.J. 421 (C.M.A. 1976); *United States v. Dinkins*, 1 M.J. 185 (C.M.A. 1975). As to subsection (1)(c) *see United States v. Talavera, supra; see also United States v. Cabatic*, 7 M.J. 438, 439−40 (C.M.A. 1979) (Cook, J., concurring in the result).

The *Burton* rule has undergone considerable evolution in a short time. *Compare United States v. Talavera, supra with United States v. Henderson, supra*. The rule has been questioned by at least one judge. *See United States v. Roman, supra* at 389 (Fletcher, C.J., concurring in

the result); *United States v. Henderson, supra* at 427 (Fletcher, C.J. dissenting). Subsection (d), together with the speedy trial requirements of this rule provides a basis for further reexamination of the *Burton* presumption.

The last paragraph in the discussion is based on *United States v. Marshall* and *United States v. Burton*, both *supra*. *See also United States v. Johnson*, 1 M.J. 101 (C.M.A. 1975). It does not appear that a dismissal is the sole rememdy for a violation of this prong of *Burton*. *See id.; United States v. Terry*, 2 M.J. 915 (A.C.M.R.), *pet. denied*, 2 M.J. 187 (C.M.A. 1976); *United States v. Herrington*, 2 M.J. 807 (A.C.M.R.), *pet. denied*, 5 M.J. 1109 (C.M.A. 1976).

(e) *Remedy*. This subsection is based on *ABA Standards, supra* at § 12–4.1 (1978). *See also* Article 10; paragraphs 68*i* and 215*e* of MCM, 1969 (Rev.). *See generally Barker v. Wingo, supra; United States v. Rowsey*, 14 M.J. 151 (C.M.A. 1982). 18 U.S.C. § 3162 provides dismissal as a sanction for speedy trial violations, but permits the judge to dismiss with or without prejudice. The *ABA Standards, supra*, point out that dismissal without prejudice is largely meaningless and especially inapposite as a sanction for speedy trial violations. Dismissal without prejudice merely creates additional delay in disposing of a case already found to have been unreasonably. Such a remedy is particularly inappropriate in courts-martial.

CHAPTER VIII. TRIAL PROCEDURE GENERALLY

Rule 801. Military judge's responsibility; other matters

(a) *Responsibilities of military judge*. This subsection is based on paragraphs 39*b* and 40*b*(2) and the first sentence of paragraph 57*a* 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 39*b*, 40*b*(2), and 53*g* 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.

(c) *Obtaining evidence*. This subsection is taken from paragraph 54*b* of the MCM, 1969 (Rev.). Some of the language in paragraph 54*b* has been placed in the discussion.

(d) *Uncharged offenses*. This subsection is taken from paragraph 55*a* of MCM, 1969 (Rev.). The discussion is designed to accomplish the same purpose as paragraph 55*b* of MCM, 1969 (Rev.), although the language is no longer in terms which could be construed as jurisdictional.

(e) *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 (C.G.B.R. 1958).

Subsection (3) is based on Articles 51(b) and 52(c) and is derived from paragraph 57*c, d, f,* and *g* of MCM, 1969 (Rev.). Some language from paragraph 57*g* has been placed in the discussion.

Subsection (4) is taken from paragraph 57*g*(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 67*e* 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 questions of fact and questions of law. It is taken, substantially, from paragraph 57*b* of MCM, 1969 (Rev.). As to the distinction between questions of fact and questions of law, *see United States v. Carson*, 15 U.S.C.M.A. 407, 35 C.M.R. 379 (1965). The discussion of issues which involve both interlocutory questions and questions determinative of guilt is based on *United States v. Bailey*, 6 M.J. 965 (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 57*b* 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 questions of fact, must be decided by the factfinder 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. McDonagh,* 14 M.J. 415 (C.M.A. 1983). Thus, it would be possible, in a case where larceny

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.

Military cases also recognize that an accused may expressly waive the right to be present, *United States v. Blair*, 36 C.M.R. 750 (N.B.R. 1965), *rev'd on other grounds*, 16 U.S.C.M.A. 257, 36 C.M.R. 413 (1966). *See e.g., United States v. Holly*, 48 C.M.R. 990 (A.F.C.M.R. 1974). *Cf. United States v. Cook*, 20 U.S.C.M.A. 504, 43 C.M.R. 344 (1971). Some earlier military cases indicated that accused's counsel could waive the accused's right to be present. This is contrary to present authority. *See United States v. Holly, supra.*

Subsection (1) is similar to paragraph 11*c* of MCM, 1969 (Rev.). The language in MCM, 1969 (Rev.) which indicated that an absence had to be unauthorized has beem 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).

Subsection (2) is the same as Fed. R. Crim. P. 43(b)(2) except for changes in terminology. The rule and much of the discussion are based on *Illinois v. Allen*, 397 U.S. 337 (1970). The discussion also draws heavily on *ABA Standards, Special Functions of the Trial Judge* § 6–3.8 and commentary (1978). With respect to binding an accused, *see United States v. Gentile*, 1 M.J. 69 (C.M.A. 1975). *See also United States v. Henderson*, 11 U.S.C.M.A. 556, 29 C.M.R. 372 (1960).

(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 39*d* of MCM, 1969 (Rev.).

(b) *Members.* This subsection is based on paragraphs 41*c* and 41*d*(1) and (2) and the first sentence of the second paragraph 62*b* of MCM, 1969 (Rev.) and on Article 29(c). *See also United States v. Colon*, 6 M.J. 73 (C.M.A. 1978).

★ *February 1986 Amendment:* References to R.C.M. "911" were changed to R.C.M. "912" to correct an error in MCM, 1984.

(c) *Counsel.* This subsection modifies paragraphs 44*c* and 46*c* which required the express permission of the convening authority or the military judge for counsel to be absent. The rule now states only the minimum requirement to proceed. The discussion notes that proceedings ordinarily should not be conducted in the absence of any defense or assistant defense counsel unless the accused consents. The second sentence in the discussion is based on *Ungar v. Sarafite*, 376 U.S. 575 (1964); *United States v. Morris*, 23 U.S.C.M.A. 319, 49 C.M.R. 653 (1975); *United States v. Kinard*, 21 U.S.C.M.A. 300, 45 C.M.R. 74 (1972); *United States v. Hampton*, 50 C.M.R. 531 (N.C.M.R.), *pet. denied*, 23 U.S.C.M.A. 663 (1975); *United States v. Griffiths*, 18 C.M.R. 354 (A.B.R.), *pet. denied*, 6 U.S.C.M.A. 808, 19 C.M.R. 413 (1955). *See also Morris v. Slappy*, 461 U.S. 1 (1983); *Dennis v. United States*, 340 U.S. 887 (1950) (statement of Frankfurter, J.); *United States v. Batts*, 3 M.J. 440 (C.M.A. 1977); 17 AM. Jur. 2d §§ 34–37 (1964).

(d) *Effect of replacement of member or military judge.* This subsection is based on Article 29(b), (c), and (d) and on paragraphs 39*e* and 41*e* and *f* 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 53*e* 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 court-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. Czarnecki*, 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. Sielaff*, 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 (2d 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, Sielaff, 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 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(j). Article 39(a) 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.*

With respect to methods of dealing with the effects of publicity on criminal trials, as treated in the discussion, *see Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *United States v. Calley*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973); *Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). *See also ABA Standards, Fair Trial and Free Press* part III (1972).

(c) *Photography and broadcasting prohibited.* This subsection is based on Fed. R. Crim. P. 53, and is consistent with paragraph 53*e* 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 courtrooms 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 81–1892 (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 112*a* 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 112*b* and *c* of MCM, 1969

United States v. Morris, supra at 324, 49 C.M.R. at 658. 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.*

★*February 1986 Amendment:* Subsection (3) was amended to clearly reflect that requests for trial by military judge alone need not be written.

(d) *Right to withdraw request.* Subsection (1) is based on *United States v. Stipe*, 23 U.S.C.M.A. 11, 48 C.M.R. 267 (1974).

Subsection (2) is based on the fifth sentence of paragraph 39*e* and on paragraph 53*d* (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. Thorpe*, 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).

Despite dicta in *United States v. Bryant, supra* at 328, 49 C.M.R. at 662 n. 2, that withdrawal must be in writing, the rule prescribes no format from withdrawal. *Cf.* Article 16(1)(B), as amended, *see* Military Justice Act of 1983, Pub. L. No. 98−209, § 3(a), 97 Stat. 1393 (1983).

Rule 904. Arraignment

This rule is based on Fed. R. Crim, P. 10 and paragraph 65*a* 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 66*b* 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 67*c* 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 67*c* and the fourth sentence of paragraph 69*a* of MCM, 1969 (Rev.). The last sentence in this subsection is based on the third sentence of paragraph 67*c* 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), *aff d*, 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 (h) 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 67*b* of MCM, 1969 (Rev.). Subsection (3) is consistent with Mil. R. Evid. 304(d)(2)(A); 311(d)(2)(A); 321(c)(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 46*d* and 48*b*(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 57*g*(1) and 67*e* of MCM, 1969 (Rev.). The assignment of the burden of persuasion to the moving party is a minor change from the language in paragraph 67*e* 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 68*b*(1), 68*c*, and 215*e* 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 and 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 67*e* 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 67*f* of MCM, 1969 (Rev.).

(e) *Effect of failure to raise defenses or objections.* The first two sentences in this subsection are taken from Fed. R. Crim. P. 12(f) and are consistent with paragraph 67*b* of MCM, 1969 (Rev.). The third sentence is based on paragraph 67*a* 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 dismissal 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 foreclosing the other defenses 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 judgement 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*, 391 F.2d 378 (2d Cir. 1968), *cert. denied*, 404 U.S. 867 (1969). *See generally United States ex. rel. DiGiangiemo v. Regan*, 528 F.2d 1262 (2d Cir. 1975). Decisions of the United States Court of Military Appeals are generally consistent with this approach. *See United States v. Troxell*, 12 U.S.C.M.A. 6,30 C.M.R. 6(1960) [statute of limitations may be waived]; *United States v. Schilling*, 7 U.S.C.M.A. 482, 22 C.M.R. 272 (1957) (former jeopardy may be waived). *Contra United States v. Johnson*, 2 M.J. 541 (A.C.M.R. 1976).

(f) *Reconsideration.* This subsection is new and makes clear that the military judge may reconsider rulings except as noted. 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).

(g) *Effect of final determinations.* Except as noted below, this subsection is based on paragraph 71*b* of MCM, 1969 (Rev.) and on *Ashe v. Swenson*, 397 U.S. 436 (1970); *Oppenheimer v. United States*, 242 U.S. 85 (1916); *United States v. Marks*, 21 U.S.C.M.A. 281, 45 C.M.R. 55 (1972); *Restatement of Judgements*, Chapter 3 (1942). *See also Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948); *United States v. Moser*, 266 U.S. 236 (1924); *United States v. Washington*, 7 M.J. 78 (C.M.A. 1979); *United States v. Hart*, 19 U.S.C.M.A. 438, 42 C.M.R. 40 (1970); *United States v. Smith*, 4 U.S.C.M.A. 369, 15 C.M.R. 369 (1954).

Subsection (g) differs from paragraph 71*b* 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* ¶ 0.441[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 72*b* of MCM (Army), 1949; paragraph 71*b* of MCM, 1951; paragraph 71*b* 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*, ¶ 0.441[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 71*b* 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 Judgements, 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 66*b* 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. Red. 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).

Rule 906. Motions for appropriate relief

(a) *In general.* This subsection is based on the first sentence of paragraph 69*a* 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 69*a* 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 of 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 69 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 (1) and the accompanying discussion are based on Article 40 and paragraphs 58*b* and *c* of MCM, 1969 (Rev.). The rule provides that only a military judge may grant a continuance. Paragraph 58*a* 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

Subsection (2)(D) is based on paragraph 68*e f, g*, and *h* of MCM, 1969 (Rev.). As to subsection (iv) *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 subsections (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 paragraph 69*b*(3) of MCM, 1969 (Rev.).

Subsection (3)(B) is based on paragraph 26*b*, 74*b*(4), and 76*a*(5) of MCM, 1969 (Rev.); *United States v. Gibson*, 11 M.J. 435 (C.M.A. 1981); *United States v. Stegall*, 6 M.J. 176 (C.M.A. 1979); *United States v. Williams*, 18 U.S.C.M.A. 78, 39 C.M.R. 78 (1968).

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, § 5(c)(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 United States v. Rowel*, 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 every 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 head 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 docket 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 how to proceed as to any unaffected charges and specifications under subsection (4).

Subsection (4) is necessary because, unlike in Federal civilian trial (*see* Fed. R. Crim. P. 8(a)), unrelated offenses may be and often 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 halts further proceedings. It does not necessarily have the same effect on other charges and specifications. 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. Crist v. Bretz*, 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 (e); 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(i)(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.

(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 909. Capacity of the accused to stand trial by court-martial

This rule is based on paragraphs 120*a* 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.2d972 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977); *United States v. Makris,* 535 F.2d 899 (5th Cir. 1976), *cert. denied,* 430 U.S. 954 (1977).

★*February 1986 Amendment:* Following passage of the Insanity Defense Reform Act, ch. IV, Pub. L. No. 98-473 98 Stat. 2058 (1984), the rule was changed pursuant to Article 36, to conform to 18 U.S.C § 4241(d).

Rule 910. Pleas

Introduction. This rule is based generally on Article 45; paragraph 70 of MCM, 1969 (Rev.); and on Fed. R. Crim. P. 11. *See also* H. Rep. No. 491, 81st Cong., 1st Sess. 23–24 (1949); S. Rep. No. 486, 81st Cong., 1st Sess. 20–21 (1949). The format generally follows that of Fed. R. Crim. P. 11.

(a) *In general.* Subsection (1) is based on Article 45 and paragraph 70*a* 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* ¶ 11.07[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 of Fed. R. Crim. P. 11(a) is covered under subsection (b) of this rule insofar as it pertains to military practice.

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 whether an accused could preserve some issues for appellate review despite a plea of guilty. *See e.g., United States v. Schaffer,* 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 a matter which can only be 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 70*a* 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 70*a* of MCM, 1969 (Rev.).

(c) Advice of accused. This subsection is taken from Fed. R. Crim. P. 11(c) and is consistent with paragraph 70*b*(2) of MCM, 1969 (Rev.). *See*

supra; United States v. Scott, 437 U.S. 82 (1978); *Arizona v. Washington, United States v. Dinitz, Illinois v. Somerville,* and *United States v. Jorn,* all *supra; Gori v. United States,* 367 U.S. 364 (1961); *United States v. Richardson, supra.* Subsection (2) notes, as paragraph 56*e* of MCM, 1969 (Rev.) did not, that a declaration of a mistrial after findings does not trigger double jeopardy protections. *See United States v. Richardson, supra.* Moreover subsection (2) notes that certain types of prosecutorial misconduct resulting in mistrial will trigger double jeopardy protections. *See United States v. Jorn, and United States v. Gori,* both *supra. See also United States v. Dinitz* and *Illinois v. Somerville,* both *supra.*

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 122*a* 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.*

(c) *Justification.* This subsection and the discussion are based on paragraph 216*a* of MCM, 1969 (Rev.). *See also United States v. Evans.* 17 U.S.C.M.A. 238, 38 C.M.R. 36 (1967); *United States v. Regalado,* 13 U.S.C.M.A. 480, 33 C.M.R. 12 (1963); *United States v. Hamilton,* 10 U.S.C.M.A. 130, 27 C.M.R. 204 (1959). The last sentence in the discussion is based on the second sentence of paragraph 195*b* of MCM (1951).

(d) *Obedience to orders.* This subsection is based on paragraph 216*d* of MCM, 1969 (Rev.); *United States v. Calley,* 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973); *United States v. Cooley,* 16 U.S.C.M.A. 24, 36 C.M.R. 180 (1966). *See also United States v. Calley,* 46 C.M.R. 1131 (A.C.M.R. 1973).

(e) *Self-defense.* Subsection (1) is based on the first paragraph of paragraph 216*c* of MCM, 1969 (Rev.). The discussion is based on the second paragraph of paragraph 216*c* of MCM, 1969 (Rev.). *See also United States v. Jackson,* 15 U.S.C.M.A. 603, 36 C.M.R. 101 (1966).

Subsection (2) is new and is based on *United States v. Acosta-Vargas,* 13 U.S.C.M.A. 388, 32 C.M.R. 388 (1962).

Subsection (3) is based on the fourth paragraph of paragraph 216*c* of MCM, 1969 (Rev.). *See also United States v. Sawyer,* 4 M.J. 64 (C.M.A. 1977). The second paragraph in the discussion is based on *United States v. Jones,* 3 M.J. 279 (1977). *See also United States v. Thomas,* 11 M.J. 315 (C.M.A. 1981).

★ *February 1986 Amendment:* Reference to subsections "(c)(1) or (2)" was changed to "(e)(1) or (2)" to correct an error in MCM, 1984.

Subsection (4) is based on the third paragraph of paragraph 216*c* of MCM, 1969 (Rev.). *See also United States v. Yabut,* 20 U.S.C.M.A. 393, 43 C.M.R. 233 (1971); *United States v. Green,* 13 U.S.C.M.A. 545, 33 C.M.R. 77 (1963); *United States v. Brown,* 13 U.S.C.M.A. 485, 33 C.M.R. 17 (1963). The second paragraph in the discussion is based on *United States v. Smith,* 13 U.S.C.M.A. 471, 33 C.M.R. 3 (1963).

Subsection (5) is based on paragraph 216*c* 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 C.M.R. 822 (A.F.B.R. 1955). *But see* R. Perkins, *Criminal Law* 1018–1022 (2d ed. 1969).

(f) *Accident.* This subsection and the discussion are based on paragraph 216*b* of MCM, 1969 (Rev.). *See also United States v. Tucker,* 17 U.S.C.M.A. 551, 38 C.M.R. 349 (1968); *United States v. Redding,* 14 U.S.C.M.A. 242, 24 C.M.R. 22 (1963); *United States v. Sandoval,* 4 U.S.C.M.A. 61, 15 C.M.R. 61 (1954); *United States v. Small,* 45 C.M.R. 700 (A.C.M.R. 1972).

(g) *Entrapment.* This subsection and the discussions are based on paragraph 216*e* 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 216*f* of MCM, 1969 (Rev.). Paragraph 216*f* 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.*

(i) *Inability.* This subsection is based on paragraph 216*g* of MCM, 1969 (Rev.). *See United States v. Cooley, supra; United States v. Pinkston,* 6 U.S.C.M.A. 700, 21 C.M.R. 22 (1956); *United States v. Heims,* 3 U.S.C.M.A. 418, 12 C.M.R. 174 (1953).

(j) *Ignorance or mistake of fact.* This subjection is based on paragraph 216*i* of MCM, 1969 (Rev.); *United States v. Jenkins,* 22 U.S.C.M.A. 365, 47 C.M.R. 120 (1973); *United States v. Hill,* 13 U.S.C.M.A. 158, 32 C.M.R. 158, (1962); *United States v. Greenwood,* 6 U.S.C.M.A. 209, 19 C.M.R. 335 (1955); *United States v. Graham,* 3 M.J. 962 (N.C.M.R.), *pet denied,* 4 M.J. 124 (1977); *United States v. Coker,* 2 M.J. 304 (A.F.C.M.R. 1976), *rev'd on other grounds,* 4 M.J. 93 (C.M.A. 1977). *See also United States v. Calley,* 46 C.M.R. 1131, 1179 (A.C.M.R. 1973), *aff d,* 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973).

(k) *Lack of mental responsibility.* Subsection (1) is taken from paragraph 120*b* of MCM, 1969 (Rev.). *See also United States v. Frederick,* 3 M.J. 230 (C.M.A. 1977).

Subsection (2) is taken from paragraph 120*c* of MCM, 1969 (Rev.). *See also United States v. Higgins,* 4 U.S.C.M.A. 143, 15 C.M.R. 143 (1954).

Subsection (3)(A) and the discussion are based on paragraph 122*a* of MCM, 1969 (Rev.). Several matters in paragraph 122*a* are covered in other parts of this subsection or in R.C.M. 909.

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).

(l) *Not defenses generally.*

Subsection (1) is based on the first sentence of paragraph 216*j* of MCM, (Rev.). The discussion is based on the remainder of paragraph 216*j* of MCM, 1969 (Rev.); R. Perkins, *supra* at 920–38. *See also United States v. Sicley,* 6 U.S.C.M.A. 402, 20 C.M.R. 118 (1955); *United States v. Bishop,* 2 M.J. 741 (A.F.C.M.R.), *pet. denied,* 3 M.J. 184 (1977).

Subsection (2) is based on paragraph 216*h* of MCM, 1969 (Rev.). *See also United States v. Hernandez,* 20 U.S.C.M.A. 219, 43 C.M.R. 59 (1970); *United States v. Ferguson,* 17 U.S.C.M.A. 441, 38 C.M.R. 239 (1968); *United States v. Garcia,* 41 C.M.R. 638 (A.C.M.R. 1969). *See United States v. Santiago-Vargas,* 5 M.J. 41 (C.M.A. 1978) (pathological intoxication).

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 71*a* of MCM, 1969 (Rev.). Paragraph 71*a* did not expressly provide for a motion for 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 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 71*a* 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 71*a* of MCM, 1969 (Rev.).

(d) *Standard.* This subsection is based on the fourth sentence of the second paragraph of paragraph 71*a* of MCM, 1969 (Rev.). *See also Jackson v. Virginia,* 443 U.S. 307 (1979); *United States v. Varkonyi,* 645 F.2d 453 (5th Cir. 1981); *United States v. Beck,* 615 F.2d 441 (7th Cir. 1980).

(e) *Motion as to greater offense.* This subsection is new and is intended to resolve the problem noted in *United States v. Spearman,* 23 U.S.C.M.A. 31, 48 C.M.R. 405 (1974). *See Government of Virgin Islands v. Josiah,* 641 F.2d 1103, 1108 (3d Cir. 1981).

(f) *Effect of ruling.* This subsection is based on the third sentence of Article 51(b) 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 71*a* 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 74*b* 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,* 47 C.M.R. 172 (A.C.M.R. 1973).

(b) *Special findings.* This subsection is based on Article 51(d), paragraph 74*i* of MCM, 1969 (Rev.); *United States v. Gerard,* 11 M.J. 440 (C.M.A. 1981). *See also United States v. Pratcher* 14 M.J. 819 (A.C.M.R. 1982); *United States v. Burke,* 4. M.J. 530 (N.C.M.R. 1977); *United States v. Hussey,* 1 M.J. 804 (A.F.C.M.R. 1976); *United States v. Baker* 47 C.M.R. 506 (A.C.M.R. 1973); *United States v. Falin,* 43 C.M.R. 702 (A.C.M.R. 1971); *United States v. Robertson,* 41 C.M.R. 457 (A.C.M.R. 1969); Schinasi, *Special Findings: Their Use at Trial and on Appeal,* 87 Mil. L. Rev. 73 (Winter 1980).

The requirement that a request for special findings be made before general findings are announced is based on the fifth sentence of paragraph 74*i* 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 specifically provide 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 the 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 74*a* 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. Salley*, 9 M.J. 189 (C.M.A. 1980). *See also Holland v. United States*, 348 U.S. 121, 140−41 (1954); *United States v. Previte*, 648 F.2d 73 (1st Cir. 1981); *United States v. De Vincent*, 632 F.2d 147 (1st Cir.), *cert denied*, 449 U.S. 986 (1980); *United States v. Cortez*, 521 F.2d 1 (5th Cir. 1975); *United States v. Zeigler*, 14 M.J. 860 (A.C.M.R. 1982); *United States v. Sauer*, 11 M.J. 872 (N.C.M.R.), *pet. granted*, 12 M.J. 320 (1981); *United States v. Crumb*, 10 M.J. 520 (A.C.M.R. 1980); E. Devitt and C. Blackmar, *Federal Jury Practice Instructions*, § 11.14 (3d ed. 1977). As to instructions concerning accomplice testimony, *see United States v. Lee*, 6 M.J. 96 (C.M.A. 1978); *United States v. Moore*, 8 M.J. 738 (A.F.C.M.R. 1980), *aff'd*, 10 M.J. 405 (C.M.A. 1981) (regarding corroboration).

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 sentence of paragraph 72*a* of MCM, 1969 (Rev.).

(b) *Contents.* This subsection is based on the first sentence of the second paragraph of paragraph 72*b* of MCM, 1969 (Rev.). The discussion is based on paragraphs 72*a* and *b* of MCM, 1969 (Rev.). *See also* paragraphs 44*g* and 48*c* of MCM, 1969 (Rev.); *Griffin v. California*, 380 U.S. 609 (1965) (comment on accused's failure to testify); *United States v. Saint John*, 23 U.S.C.M.A. 20, 48 C.M.R. 312 (1974) (comment on unrebutted nature of prosecution evidence); *United States v. Horn*, 9 M.J. 429 (C.M.A. 1980) (repeated use of "I think" improper but not prejudicial); *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977) (personal opinion of counsel); *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976) (inflammatory argument); *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975) (comment on Article 32 testimony of accused permitted; inflammatory argument; misleading argument); *United States v. Reiner*, 15 M.J. 38 (C.M.A. 1983); *United States v. Fields*, 15 M.J. 34 (C.M.A. 1983); *United States v. Fitzpatrick*, 14 M.J. 394 (C.M.A. 1983) (bringing to members' attention that had opportunity to hear the evidence at the Article 32 hearing is permissible); *United States v. Boberg*, 17 U.S.C.M.A. 401, 38 C.M.R. 199 (1968); *United States v. Cook*, 11 U.S.C.M.A. 99, 28 C.M.R. 323 (1959) (comment on community relations); *United States v. McCauley*, 9 U.S.C.M.A. 65, 25 C.M.R. 327 (1958) (citation of authority to members). *See generally ABA Standards, The Prosecution Function* § 3−5.8 (1979), *The Defense Function* § 4−7.8 (1979). *See also United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983).

(c) *Waiver of objection to improper argument.* This subsection is based on Fed. R. Crim. P. 29.1 and is generally consistent with a current practice. *See United States v. Grandy*, 11 M.J. 270 (C.M.A. 1981). *See also United States v. Doctor*, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1956). *But see United States v. Knickerbocker, United States v. Shamberger,* and *United States v. Nelson* all *supra; United States v. Ryan*, 21 U.S.C.M.A. 9, 44 C.M.R. 63 (1971); *United States v. Wood*, 18 U.S.C.M.A. 291, 40 C.M.R. 3 (1969) (military judge had duty to act on improper argument sua sponte where error was plain). As to the discussion, *see United States v. Knickerbocker*, and *United States v. Nelson*, both *supra; United States v. O'Neal*, 16 U.S.C.M.A. 33, 36 C.M.R. 189 (1966); *United States v. Carpenter*, 11 U.S.C.M.A. 418, 29 C.M.R. 234 (1960).

Rule 920. Instructions on findings

(a) *In general.* This subsection is based on the first sentence of paragraph 73*a* of MCM, 1969 (Rev.). The discussion is based on the first paragraph of paragraph 73*a* of MCM, 1969 (Rev.). *See United States v. Buchana*, 19 U.S.C.M.A. 394, 41 C.M.R. 394 (1970); *United States v. Harrison*, 19 U.S.C.M.A. 179, 41 C.M.R. 179 (1970); *United States v. Moore*, 16 U.S.C.M.A. 375, 36 C.M.R. 531 (1966); *United States v. Smith*, 13 U.S.C.M.A. 471, 33 C.M.R. 3 (1963). *See also United States v. Gere*, 662 F.2d 1291 (9th Cir. 1981).

(b) *When given.* This subsection is based on the first sentence of paragraph 73*a* and on paragraph 74*e* 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. Ricketts*, 1 M.J. 78 (C.M.A. 1975).

(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 73*d* of MCM, 1969 (Rev.). The discussion is based on the remainder of paragraph 73*d*.

(d) *How given.* The first sentence of this subsection is based on the last paragraph of paragraph 73*a* 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. Slubowski*, 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. Slubowski, 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 73*a* 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. Read*, 658 F.2d 1225 (7th Cir. 1981); *United States v. Calabrase*, 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 73*a* of MCM, 1969 (Rev.). *See also United States v. Steinruck*, 11 M.J. 322 (C.M.A. 1981); *United States v. Moore, supra; United States v. Clark*, 1 U.S.C.M.A. 201, 2 C.M.R. 107 (1952). As to whether the defense may affirmatively waive certain instructions (e.g., lesser included offenses) which might *otherwise be required, see United States v. Johnson*, 1 M.J. 137 (C.M.A. 1975); *United States v. Mundy*, 2 U.S.C.M.A. 500, 9 C.M.R. 130 (1953). *See generally Cooper, The Military Judge: More Than a Mere Referee*, The Army Lawyer (Aug. 1976) 1; Hilliard, *The Waiver Doctrine: Is It Still Viable?*, 18 A.F.L. Rev. 45 (Spring 1976).

February 1986 Amendment: Subsection (2) was amended to require the accused to waive the bar of the statute of limitations if the accused desires instructions on any lesser included offense otherwise barred. *Spaziano v. Florida*, _____ U.S. _____, 52 U.S.L.W. 5030 (1984). This overturns the holdings in *United States v. Wiedemann*, 16 U.S.C.M.A. 356, 36 C.M.R. 521 (1966) and *United States v. Cooper*, 16 U.S.C.M.A. 390, 37 C.M.R. 10 (1966). The same rule applies in trials by military judge alone. Article 51(d). This is consistent with Article 79 because an offense raised by the evidence but barred by the statute of limitations is not "necessarily included in the offense charged," unless the accused waives the statute of limitations.

The first paragraph in the discussion is based on *United States v. Jackson*, 12 M.J. 163 (C.M.A. 1981); *United States v. Waldron*, 11 M.J. 36 (C.M.A. 1981); *United States v. Evans*, 17 U.S.C.M.A. 238, 38 C.M.R. 36 (1967); *United States v. Clark, supra. See United States v. Johnson*, 637 F.2d 1224 (9th Cir. 1980); *United States v. Burns*, 624 F.2d 95 (10th Cir.), *cert. denied*, 449 U.S. 954 (1980).

The third paragraph in the discussion is based on paragraph 73*a* of MCM, 1969 (Rev.) and on *Military Judges Benchbook*, DA PAM 27–9 Appendix A, (May 1982). *See also United States v. Thomas*, 11 M.J. 388 (C.M.A. 1981); *United States v. Fowler*, 9 M.J. 149 (C.M.A. 1980); *United States v. James*, 5 M.J. 382 (C.M.A. 1978) (uncharged misconduct); *United States v. Robinson*, 11 M.J. 218 (C.M.A. 1981) (character evidence); *United States v Wahnon*, 1 M.J. 144 (C.M.A. 1975) (effect of guilty plea on other charges); *United States v. Minter*, 8 M.J. 867 (N.C.M.R.), *aff'd*, 9 M.J. 397 (C.M.A. 1980); *United States v. Prowell*, 1 M.J. 612 (A.C.M.R. 1975) (effect of accused's absence from trial); *United States v. Jackson*, 6 M.J. 116 (C.M.A. 1979); *United States v. Farrington*, 14 U.S.C.M.A. 614, 34 C.M.R. 394 (1964) (accused's failure to testify). The list is not exhaustive.

The fourth paragraph in the discussion is based on paragraph 73*c* of MCM, 1969 (Rev.). *See also United States v. Grandy*, 11 M.J. 270 (C.M.A. 1981).

(f) *Waiver.* This subsection is based on the last two sentences in Fed. R. Crim. P. 30. *See also United States v. Grandy,* supra; *United States v. Salley*, 9 M.J. 189 (C.M.A. 1980).

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 74*d*(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.* The first sentence of this subsection is based on the fourth sentence of paragraph 74*d*(1) of MCM, 1969 (Rev.). The second sentence is new but conforms to current practice. *See United States v. Hurt*, 9 U.S.C.M.A. 735, 27 C.M.R. 3 (1958); *United States v. Christensen*, 30 C.M.R. 959 (A.F.B.R. 1961). The third sentence is based on *United States v. Jackson*, 6 M.J. 116, 117 (C.M.A. 1979) (Cook, J., concurring in part and dissenting in part); *United States v. Smith*, 15 U.S.C.M.A. 416, 35 C.M.R. 388 (1965). *See also* paragraph 54*b* of MCM, 1969 (Rev.); *United States v. Ronder*, 639 F.2d 931 (2d Cir. 1981).

(c) *Voting.* Subsection (1) is based on the first sentence of Article 51(a) and on the first sentence of paragraph 73*d*(2) of MCM, 1969 (Rev.).

Subsection (2) is based on Article 52(a) and on the first two sentences of paragraph 74*d*(3) of MCM, 1969 (Rev.). *See also United States v. Guilford*, 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 74*d*(3) of MCM, 1969 (Rev.).

Subsection (3) is based on the fourth sentence of paragraph 74*d*(3) of MCM, 1969 (Rev.).

Subsection (4) is new to the Manual but it conforms to practice generally followed in courts-martial. Paragraph 74*d*(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 74*d*(2) of MCM, 1969 (Rev.). *See also United States v. Dilday*, 47 C.M.R. 172 (A.C.M.R. 1973).

(d) *Action after findings are reached.* This subsection and the discussion are based on paragraphs 74*f*(1) and 74*g* of MCM. 1969 (Rev.). *See United States v. Justice*, 3 M.J. 451 (C.M.A. 1977); *United States v. Ricketts*, 1 M.J. 78 (C.M.A. 1975); *United States v. McAllister*, 19 U.S.C.M.A. 420, 42 C.M.R. 22 (1970). The use of findings worksheets is encouraged. *See United States v. Henderson*, 11 M.J. 395 (C.M.A. 1981); *United States v. Barclay*, 6 M.J. 785 (A.C.M.R. 1978), *pet. denied*, 7 M.J. 71 (1979).

★*February 1986 Amendment:* The word "sentence" was changed to "findings" to correct an error in MCM, 1984.

Rule 922. Announcement of findings

(a) *In general.* This subsection is based on Article 53 and on the first sentence of paragraph 74*g* 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 74*g* of MCM, 1969 (Rev.). The last sentence is based on the last sentence of paragraph 70*b* of MCM, 1969 (Rev.).

★*February 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 70*b* and on the second paragraph of paragraph 74*g* of MCM, 1969 (Rev.) *See also* Article 39(a).

(d) *Erroneous announcement.* This subsection is based on the third and fourth sentences of paragraph 74*g* of MCM, 1969 (Rev.).

(e) *Polling prohibited.* This subsection is based on the requirement in Article 51(a) for voting by secret written ballot. This distinguishes military from civilian practice (*see* Fed. R. Crim. P. 31(d)). Mil. R. Evid. 606(b) permits adequately broad questioning to ascertain whether a finding is subject to impeachment due to extraneous factors. To permit general injury into other matters, including actual votes of members, would be contrary to Article 51(a) and Article 39(b). *See United States v. Bishop*, 11 M.J. 7 (C.M.A. 1981); *United States v. West*, 23 U.S.C.M.A. 77, 48 C.M.R. 548 (1974) (Duncan, C. J.); *United States v. Nash*, 5 U.S.C.M.A. 550, 555, 18 C.M.R. 174, 179 (1955) (Brosman, J. concurring); *United States v. Connors*, 23 C.M.R. 636 (A.B.R. 1957); *United States v. Tolbert*, 14 C.M.R. 613 (A.F.B.R. 1953). *Contra Caldwell, Polling the Military Jury*, 11 The Advocate 53 (Mar–Apr, 1979); Feld, *A Manual for Courts-Martial Pracice and Appeal* § 72 (1957). *See also United States v. Hendon, supra.*

Rule 923. Impeachment of findings

This rule is based on *United States v. Bishop*, 11 M.J. 7 (C.M.A. 1981); *United States v. West*, 23 U.S.C.M.A. 77, 48 C.M.R. 548 (1974). *See also United States v. Witherspoon*, 12 M.J. 588 (A.C.M.R. 1981), *pet. granted*, 13 M.J. 210 (C.M.A. 1982); *United States v. Hance*, 10 M.J. 622 (A.C.M.R. 1980); *United States v. Zinsmeister*, 48 C.M.R. 931, 935 (A.F.C.M.R.), *pet. denied*, 23 U.S.C.M.A. 620 (1974); *United States v. Perez-Pagan*, 47 C.M.R. 719 (A.C.M.R. 1973); *United States v. Connors*, 23 C.M.R. 636 (A.B.R. 1957); Mil. R. Evid. 606(b).

As to inconsistent findings, *see Harris v. Rivera*, 454 U.S. 339 (1981); *Dunn v. United States*, 284 U.S. 390 (1932); *United States v. Gaeta*, 14 M.J. 383, 391 n. 10 (C.M.A. 1983); *United States v. Ferguson*, 21 U.S.C.M.A. 200, 44 C.M.R. 254 (1972); *United States v. Jules*, 15 C.M.R. 517 (A.B.R. 1954). *But see United States v. Reid*, 12 U.S.C.M.A. 497, 31 C.M.R. 83 (1961); *United States v. Butler*, 41 C.M.R. 620 (A.C.M.R. 1969).

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*, 20 U.S.C.M.A. 140, 42 C.M.R. 332 (1970); *United States v. Ford*, 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 74*d*(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 74*d*(3) of MCM, 1969 (Rev.). *See also United States v. Boland*, 20 U.S.C.M.A. 83, 42 C.M.R. 275 (1970).

(c) *Military judge sitting alone.* This subsection is new to the Manual, although the power of a 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).

CHAPTER X. SENTENCING

Rule 1001. Presentencing 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* Articles 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 report, 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)(5) 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 53*h* 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.

★ *February 1986 Amendment*: The word "age" in subsection (1) was deleted to correct 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.

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 an adjudication of guilt in a civilian forum is a conviction will depend on the law in that jurisdiction.

★ *February 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. Dep't 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. Taliaferro*, 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 sitpulation 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 76*a*(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 sentence 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 76*a*(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 in 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 127*c*(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 some which are prohibited. This approach is simpler and should eliminate questions about what punishments a court-martial may adjudge.

Subsection (1) is based on paragraph 126*f* of MCM, 1969 (Rev.). Admonition has been deleted as unnecessary.

Subsection (2) is based on paragraphs 126*h*(1) and (2) of MCM, 1969 (Rev.).

Subsection (3) is based on paragraph 126*h*(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 126*h*(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 126*i* of MCM, 1969 (Rev.).

Subsection (5) is based on the second paragraph of paragraph 126*e* 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 126*e* of MCM, 1969 (Rev.).

Subsection (6) is based on paragraph 126*g* and on the ninth sentence of the second paragraph of paragraph 127*c*(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 127*c*(2) of MCM, 1969 (Rev.). *See also* Article 20.

Subsection (7) and the discussion are based on paragraph 126*k* of MCM, 1969 (Rev.). The last sentence in the rule is new and is based on the table of equivalent punishments at paragraph 127*c*(2) of MCM, 1969 (Rev.) *See also* Article 20.

Subsection (8) is based on paragraph 126*j* of MCM, 1969 (Rev.). Matters in the second paragraph of paragraph 126*j* 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 127*c*(2) of MCM, 1969 (Rev.).

Subsection (10)(A) is based on the second paragraph of paragraph 126*d* of MCM, 1969 (Rev.). Subsections (10)(B) and (C) are based on paragraphs 76*a*(3) and (4) and 127*c*(4) of MCM, 1969 (Rev.).

★ *February 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 126*d* 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 127*c*(2) of MCM, 1969 (Rev.) unnecessary and it has 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.

(c) *Limits on punishments.* Subsections (1)(A) and (B) are based on paragraph 127*c*(1) of MCM, 1969 (Rev.). Subsection (1)(C) is based on the first 3 sentences and the last sentence of paragraph 76*a*(5) of MCM, 1969 (Rev.). *See Blockburger v. United States,* 284 U.S. 299 (1932); *United States v. Washington,* 1 M.J. 473 (C.M.A. 1976). *See also Missouri v. Hunter.* 459 U.S. 359 (1983); *United States v. Baker,* 14 M.J. 361 (C.M.A. 1983). The discussion is based on paragraph 76*a*(5) of MCM, 1969 (Rev.). As to the third paragraph in the discussion, *see, e.g., United States v. Posnick,* 8 U.S.C.M.A. 201, 24 C.M.R. 11 (1957). *Cf. United States v. Stegall,* 6 M.J. 176 (C.M.A. 1979). As to the fourth

paragraph in the discussion, *see United States v. Harrison*, 4 M.J. 332 (C.M.A. 1978); *United States v. Irving*, 3 M.J. 6 (C.M.A. 1977); *United States v. Hughes*, 1 M.J. 346 (C.M.A. 1976); *United States v. Burney*, 21 U.S.C.M.A. 71, 44 C.M.R. 125 (1971).

Subsection (2)(A) is based on paragraph 126*d* of MCM, 1969 (Rev.). Paragraph 127*a* 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 126*d* 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 127*b* 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.

(d) *Circumstances permitting increased punishments.* This subsection is based on Section B of the Table of Maximum Punishments, paragraph 127*c* of MCM, 1969 (Rev.). *See also United States v. Timmons*, 13 M.J. 431 (C.M.A. 1982). The last two sentences in the discussion are based on *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980); *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977), *vacated in part*, 5 M.J. 246 (C.M.A. 1978). *Cf. United States v. Cofield*, 11 M.J. 422 (C.M.A. 1981).

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), *cert. for review field*, 16 M.J. 160 (1983) (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). *Cf. 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); *Proffitt 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 Supreme Court has not decided whether *Furman v. Georgia, supra*, and subsequent decisions concerning capital punishment apply to courts-martial. *See Schick v. Reed*, 419 U.S. 256 (1974). *But see Furman v. Georgia, supra* at 412 (Blackmun, J., dissenting); *id.* at 417–18 (Powell, J., dissenting). *See generally* Pfau and Milhizer, *The Military Death Penalty and the Constitution: There Is Life After Furman*, 97 Mil. L. Rev. 35 (1982); Pavlick, *The Constitutionality of the U.C.M.J. Death Penalty Provisions*, 97 Mil. L. Rev. 81 (1982); Comment, *The Death Penalty in Military Courts: Constitutionally Imposed?* 30 UCLA L. Rev. 366 (1982); Dawson, *Is the Death Penalty in the Military*

Cruel and Unusual?, 31 JAG J. (Navy) 53 (1980); English, *The Constitutionality of the Court-Martial Death Sentence*, 21 A.F.L. Rev. 552 (1979).

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, sec. 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 Subcomm. of the House Comm. 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 Dobbert v. Florida*, 432 U.S. 282 (1977).

R.C.M. 1004 is based on the recognition that, in courts-martial, as in civilian prosecutions, 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.

★*February 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.

★*February 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 circumstances 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 depositions are not admissible for this purpose. *See* Article 49(d).

Subsection (3) is based on *Eddings v. Oklahoma* and *Lockett v. Ohio*, both *supra, Cf. 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 to 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 circumstance in extenuation or mitigation.

Subsection (4)(A) establishes the second "threshold" which must be passed before death may be adjudged. The requirement that at least one specific aggravating circumstance be found beyond a reasonable doubt is common to many state statutory schemes for capital punishment. *See, e.g.*, Del. Code Ann. tit. 11, § 4209(d)(1977); Ark. Stat. Ann. § 41−1302(1977); Ill. Ann. Stat. Ch. 38, § 9−1(f)(Smith-Hurd 1979), La. Code Crim. Proc. § 905.3 (West Supp 1982); Md. Ann. Code Art. 27 § 413(d)(1982); Ind. Code Ann. § 35−50−2−9(a)(Burns 1979). *See generally United States v. Matthews, supra.*

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 circumstances. 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 extenuation and mitigation 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).

★*February 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 circumstances, 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 a 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 ultimate 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 Jul 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. Trottier*, 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.

★*February 1986 Amendment*: R.C.M. 1004(c)(2) was changed in conjunction with the enactment of the new Article 106a.

Subsection (4) is similar to an aggravating circumstance in many states. *See, e.g.*, Neb. Rev. Stat. § 29–2523(1)(f) (1979); Miss. Code. Ann. § 99–19–101(5)(c) (1981 Supp.); Ga. Code Ann. § 17–10–30(b) (1982). This circumstance applies to all capital offenses (except rape) under the code; rape is excluded based on *Coker v. Georgia, supra.*

★*February 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 Article 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 justifies 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 1751. 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.*

★*February 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 S. 1765, 98th Cong., 1st Sess. (1983).

Subsection (9) is based on the holding in *Coker v. Georgia, supra*, that the death penalty is unconstitutional for the rape of an adult woman, at least where she is not otherwise harmed.

Subsection (10) is based on Article 18. *See also Trial of the Major War Criminals Before the International Military Tribunal* (International Military Tribunal, Nurenberg, 1947); *Trials of War Criminals Before the Nurenberg Military Tribunals*, (U.S. Gov't Printing Off., 1950–51); *In re Yamashita*, 327 U.S. 1 (1946).

★*February 1986 Amendment*: R.C.M. 1004(c)(11) was added to implement the statutory aggravating factors found in new Article 106a. The aggravating factors in R.C.M. 1004(c)(11) were also considered appropriate for violations of Article 104. It is intended that the phrase "imprisonment for life was authorized by statute" in Article 106a(c)(1) include offenses for which the President has authorized confinement for life in this Manual as authorized in Articles 18 and 55 (10 U.S.C. § § 818 and 855).

(d) *Spying*. This subsection is based on Article 106. Congress recognized that in case of spying, no separate sentencing determination is required. *See* Article 52(a)(1). The rule provides for sentencing proceedings to take place, so that reviewing authorities will have the benefit of any additional relevant information.

The Supreme Court has held a mandatory death penalty to be unconstitutional for murder. *Woodson v. North Carolina, supra; Roberts (Stanislaus) v. Louisiana, supra*. It has not held that a mandatory death penalty is unconstitutional for *any* offense. *See Roberts (Harry) v. Louisiana, supra* at 637 n. 5.

In holding a mandatory death sentence for murder to be unconstitutional, the plurality in *Woodson* emphasized that the prevailing view before *Furman v. Georgia, supra*, was decidedly against mandatory death for murder. Contrarily, death has consistently been the sole penalty for spying in wartime since 1806. *See* W. Winthrop, *Military Law and Precedents* 765–66 (2d ed. 1920 reprint). Before 1920 the statue making spying in time of war triable by court-martial and punishable by death was not part of the Articles of War. *Id. See* A.W. 82 (Act of 4 June 1920, Ch. 227, 41 Stat. 804).

(e) *Other penalties*. The second sentence of this subsection is based on the second sentence of the third paragraph of paragraph 126*a* of MCM, 1969 (Rev.), which was in turn based on JAGA 1946/10582; SPJGA 1945/9511; *United States v. Brewster*, CM 238138, 24 B.R. 173 (1943). As to the third sentence of this subsection, *see also United States v. Bigger*, 2 U.S.C.M.A. 297, 8 C.M.R. 97 (1953); W. Winthrop, *supra* at 428, 434.

Rule 1005. Instructions on sentence

Introduction. Except as noted below, this rule and the discussion are taken from paragraph 76*b*(1) of MCM, 1969 (Rev.).

(a) *In general*. Regarding the discussion *see generally United States v. Mamaluy*, 10 U.S.C.M.A. 102, 106–07, 27 C.M.R. 176, 180–81 (1959). *See also United States v. Lania*, 9 M.J. 100 (C.M.A. 1980) (use of general deterrence); *United States v. Smalls*, 6 M.J. 346 (C.M.A. 1979); *United States v. Slaton*, 6 M.J. 254 (C.M.A. 1979) (mental impairment as matter in mitigation); *United States v. Keith*, 22 U.S.C.M.A. 59, 46 C.M.R. 59 (1972) (recommendation for clemency); *United States v. Condon*, 42 C.M.R. 421 (A.C.M.R. 1970) (effect of accused's absence); *United States v. Larochelle*, 41 C.M.R. 915 (A.F.C.M.R. 1969) (Vietnam service).

(b) *When given*. *See* Fed. R. Crim. P. 30 and paragraph 74*e* of MCM, 1969 (Rev.).

(c) *Requests for instructions*. *See* Fed. R. Crim. P. 30 and *United States v. Neal*, 17 U.S.C.M.A. 363, 38 C.M.R. 161 (1968). The discussion is based on Fed. R. Crim P. 30 and paragraph 73*d* 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 81*d*(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. Givens*, 11 M.J. 694, 696 (N.M.C.M.R. 1981). The discussion under subsection (4) is based on the third sentence of paragraph 76*b*(1) of MCM, 1969 (Rev.) and on *United States v. Davidson*, 14 M.J. 81 (C.M.A. 1982).

(f) *Waiver*. 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 76*b*(2) and (3) of MCM, 1969 (Rev.).

(a) *In general*. The first sentence is based on the first sentence of paragraph 76*b*(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. Lampani*, 14 M.J. 22 (C.M.A. 1982).

(c) *Proposal of sentences*. The second clause of the second sentence of this subsection is new and recognizes the unitary sentence concept. *See United States v. Gutierrez*, 11 M.J. 122, 123 (C.M.A. 1981). *See generally Jackson v. Taylor*, 353 U.S. 569 (1957).

(d) *Voting*. As to subsection (3)(A) *see United States v. Hendon*, 6 M.J. 171, 172–73 (C.M.A. 1979); *United States v. Cates*, 39 C.M.R. 474 (A.B.R. 1968).

As to subsection (d)(5), the second sentence of the third paragraph of paragraph 76*b*(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 76*c*.

Rule 1007. Announcement of sentence

Introduction. Except as noted below, this rule and the discussion are based on paragraph 76*c* of MCM, 1969 (Rev.).

(a) *In general.* The discussion is based on *United States v. Henderson*, 11 M.J. 395 (C.M.A. 1981); *United States v. Crawford*, 12 U.S.C.M.A. 203, 30 C.M.R. 203 (1961).

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(e).

Rule 1008. Impeachment of sentence

This rule is based on Mil. R. Evid. 606(b) and *United States v. West*, 23 U.S.C.M.A. 77, 48 C.M.R. 548 (1974). *See United States v. Bishop*, 11 M.J. 7 (C.M.A. 1981).

Rule 1009. Reconsideration of sentence

Introduction. Except as noted below, this rule and discussion are based on Articles 52(c) and 62 and paragraphs 76*c* 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 charged circumstances, as long as the case remains 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 76*c*, 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.

★*February 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.

Rule 1011. Adjournment

This rule is based on paragraph 77*b* 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 44*e* of MCM, 1969 (Rev.).

(b) *Post-trial confinement.* Subsection (1) is based on Article 57(b) and on the last sentence of paragraph 44*e* 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 21*d* of MCM, 1969 (Rev.). The person who orders the accused into confinement need not be the convening authority. *See Reed v. Ohman*, 19 U.S.C.M.A. 110, 41 C.M.R. 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.*

(h) Security classification. This subsection is based on the first sentence of paragraph 82*d* 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 82*e* of MCM, 1969 (Rev.).

Subsection (1)(B) is based on the first sentence of the second paragraph of paragraph 82*e* 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 82*e* of MCM, 1969 (Rev.). *See also United States v. Anderson, supra* at 197. The second paragraph of the discussion is based on *United States v. Anderson, supra. See also United States v. Averett*, 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 82*e* 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 regulations 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 of 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 is 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 82*f* 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. Cruz-Rijos*, 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.*

(b) *Service.* Subsection (1)(A) is based on Article 54(d) and the first sentence of paragraph 82*g*(1) of MCM, 1969 (Rev.). *See also* H.R. Rep. No. 2498, 81st Cong., 1st Sess. 1048 (1949).

Subsection (1)(B) is based on the third through fifth sentences of the first paragraph of paragraph 82*g*(1) of MCM, 1969 (Rev.).

Subsection (1)(C) is based on H.R. Rep. No. 549, 98th Cong., 1st Sess. 15 (1983); *United States v. Cruz-Rijos, supra.* Service of the record of trial is now effectively a prerequisite to further disposition of the case. *See* Article 60(b) and (c)(2). As a result, inability to serve the accused could bring the proceeding to a halt. Such a result cannot have been intended by Congress. Article 60(b) and (c)(2) are intended to ensure that the accused and defense counsel have an adequate opportunity to present matters to the convening authority, and that they will have access to the record in order to do so. Cong. Rec. § 5612 (daily ed. April 28, 1983) (statement of Sen. Jepsen). As a practical matter, defense counsel, rather than the accused, will perform this function in most cases. *See* Article 38(c). Consequently, service of the record on defense counsel, as provided in this subsection, fulfills this purpose without unduly delaying further disposition. *See United States v. Cruz-Rijos, supra.* Note that if the accused had no counsel, or if the accused's counsel could not be served, the convening authority could take action without serving the accused only if the accused was absent without authority. *See* R.C.M. 1105(d)(4) and Analysis.

Subsection (1)(D) is based on the third and fourth paragraphs of paragraph 82*g*(1) of MCM, 1969 (Rev.).

(c) *Loss of record.* This subsection is based on paragraph 82*h* of MCM, 1969 (Rev.). Note that if more than one copy of the record is authenticated then each may sere as the record of trial, even if the original is lost.

(d) *Correction of record after authentication; certificate of correction.* Subsection (1) and the discussion are based on paragraph 86*c* of MCM, 1969 (Rev.). *See also* the first paragraph of paragraph 95 of MCM, 1969. (Rev.). Subsection (2) is new and is based on *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 based on *United States v. Anderson, supra.* Subsection (3) is based on the second paragraph of paragraph 82*g*(1) and paragraph 86*c* of MCM, 1969 (Rev.).

(e) *Forwarding.* This subsection is based on Article 60. The code no longer requires the convening authority to review the record. However, a record of trial must be prepared before the convening authority takes action. *See* Article 60(b)(2) and (3), and (d). Therefore, it is appropriate to forward the record, along with other required matters, to the convening authority. This subsection is consistent with the first two sentences of paragraph 84*a* of MCM, 1969 (Rev.).

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*k*(2) and 77*a* 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* paragraphs 48*k*(3) and 77*a* 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 v. 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-announcement 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 days 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 85*a* of MCM, 1969 (Rev.) was similar.

(b) *Disqualification.* This subsection is based on Article 6(c) and on the second paragraph of paragraph 85*a* of MCM, 1969 (Rev.). Legal officers have been included in its application based on Article 60(d). The discussion notes additional circumstances which have been held to disqualify a staff judge advocate. The first example is based on *United States v. Thompson,* 3 M.J. 966 (N.C.M.R. 1977), *rev'd on other grounds,* 6 M.J. 106 (C.M.A. 1978), *petition dismissed,* 7 M.J. 477 (C.M.A. 1979). The second example is based on *United States v. Choice,* 23 U.S.C.M.A. 329, 49 C.M.R. 663 (1975). *See also United States v. Cansdale,* 7 M.J. 143 (C.M.A. 1979); *United States v. Conn,* 6 M.J. 351 (C.M.A. 1979); *United 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.

★ *February 1986 Amendment:* The phrase "or any reviewing officer" was changed to "to any reviewing officer" to correct an error in MCM, 1984.

Rule 1114. Promulgating orders

(a) *In general.* Subsections (1) and (2) are based on the first paragraph of paragraph 90*a* of MCM, 1969 (Rev.). Subsection (3) is based on paragraph 90*e* 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 90*b*(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. Shulthise*, 14 U.S.C.M.A. 31, 33 C.M.R. 243 (1963) (actions equivalent to publication). Subsection (2) is based on paragraphs 90*b*(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. Subsection (2) is based on the third, fourth, and fifth paragraphs of paragraph 90*a* 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) (date of publication). Subsection (3) is based on the first sentence of the second paragraph of paragraph 90*a* of MCM, 1969 (Rev.).

★ *February 1986 Amendment*: Reference to "subsequent actions" was changed to "subsequent orders" to correct an error in MCM, 1984.

(d) *Orders containing classified information.* This subsection is based on the first two paragraphs of paragraph 90*c* of MCM, 1969 (Rev.). The second sentence of the first paragraph 90*c* 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 90*d* 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.

(c) *Remission and suspension.* This subsection is based on Article 74. *See United States v. Russo*, 11 U.S.C.M.A. 352, 29 C.M.R. 168 (1960); *United States v. Sood*, 42 C.M.R. 635 (A.C.M.R.), *pet. denied*, 42 C.M.R. 356 (1970).

Rule 1202. Appellate counsel

(a) *In general.* This subsection is based on Article 70(a) and paragraph 102*a* of MCM, 1969 (Rev.).

(b) *Duties.* This subsection is based on Article 70(b) and (c). *See also* the first two paragraphs of paragraph 102*b* of MCM, 1969 (Rev.). The penultimate sentence in the rule is based on the penultimate sentence in the fourth paragraph of paragraph 102*b* of MCM, 1969 (Rev.). The last sentence in the fourth paragraph of paragraph 102*b* 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*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977). *See generally* 9 J. Moore, B. Ward, and J. Lucas, *Moore's Federal Practice* ¶ 221.03 (2d ed. 1982).

The first two paragraphs in the discussion modify the third and fourth paragraphs of paragraph 102*b* 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 errors 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. Grostefon*, 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(h) 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 100*a* and paragraph 100*d* 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 100*a* and the first paragraph of paragraph 100*b* 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 *Dettinger 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*, 511 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*(2) and the first sentence of paragraph 100*c*(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 100*b*(3) of MCM, 1969 (Rev.).

Subsection (3) modifies paragraph 100*c*(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. 97–81; 95 Stat. 1090.

Subsection (4) is based on the first paragraph of paragraph 105*b* 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.

(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 100*c*(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 100*c*(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 100*c*(1)(b) of MCM, 1969 (Rev.). *See* Article 71(b). Subsection (2) is based on the last sentence of paragraph 100*c*(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

(a) *Cases reviewed by the Court of Military Appeals.* This subsection is based on the ninth sentence of Article 67(a)(1), on Article 67(b), and on the second sentence in Article 69. It generally repeats the first paragraph in paragraph 101 of MCM, 1969 (Rev.) except insofar as that paragraph provided for mandatory review by the Court of Military Appeals of cases affecting general and flag officers. *See* Article 67(b)(1), as amended by the Military Justice Act of 1983, Pub. L. No. 98–209, § 7(d), 97 Stat. 1393 (1983). The first paragraph in the discussion is based on Article 67(a), (d), and (e), which were repeated in the second and third paragraphs of paragraph 101 of MCM, 1969 (Rev.). The second paragraph in the discussion is based on *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966); 28 U.S.C. § 1651(a). *See also Noyd v. Bond*, 395 U.S. 683, 695 n. 7 (1969); *United States v. Augenblick*, 393 U.S. 348 (1969); *Dobzynski v. Green* 16 M.J. 84 (C.M.A. 1983); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Labella*, 15 M.J. 228 (C.M.A. 1983); *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982); *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981); *Cooke v. Ellis*, 12 M.J. 17 (C.M.A. 1981); *Vorbeck v. Commanding Officer*, 11 M.J. 480 (C.M.A. 1981); *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981); *United States v. Strow*, 11 M.J. 75 (C.M.A. 1981); *Stewart v. Stevens*, 5 M.J. 220 (C.M.A. 1978); *Corley v. Thurman*, 3 M.J. 192 (C.M.A. 1977); *McPhail v. United States*, 1 M.J. 457 (C.M.A. 1976); *Brookins v. Cullins*, 23 U.S.C.M.A. 216, 49 C.M.R. 5 (1974); *Chenoweth v. Van Arsdall*, 22 U.S.C.M.A. 183, 46 C.M.R. 183 (1973); *Petty v. Moriarty*, 20 U.S.C.M.A. 438, 43 C.M.R. 278 (1971); *Zamora v. Woodson*, 19 U.S.C.M.A. 403, 42 C.M.R. 5 (1970); *United States v. Snyder*, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969); *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968); *Gale v. United States*, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967).

(b) *Petition by the accused for review by the Court of Military Appeals.* Subsection (1) is based on the last paragraph of paragraph 102*b* 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.

(e) Knowledge. See United States v. Pettigrew, 19 U.S.C.M.A. 191, 41 C.M.R. 191 (1970); *United States v. Oisten*, 13 U.S.C.M.A. 656, 33 C.M.R. 188 (1963).

(g) Time for compliance. See United States v. Stout, 1 U.S.C.M.A. 639, 5 C.M.R. 67 (1952); *United States v. Squire*, 47 C.M.R. 214 (N.C.M.R. 1973); *United States v. Clowser*, 16 C.M.R. 543 (A.F.B.R. 1954).

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

c. Explanation. (1) *In general.* This subparagraph is based on paragraph 170 of MCM, 1969 (Rev.) and paragraph 170 of MCM, 1951; a review of the legislative history of Article 91; *United States v. Ransome*, 1 M.J. 1005 (N.C.M.R. 1976); *United States v. Balsarini*, 36 C.M.R. 809 (C.G.B.R. 1965). Paragraph 170 of MCM, 1951 and MCM, 1969 (Rev.) discussed Article 91 as if Congress had required a superior-subordinate relationship in Article 91. *See Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951*, at 257. *Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised edition)*, DA PAM 27−2, at 28−6. This was in error and all references thereto have been removed. An amendment to Article 91 was suggested by The Judge Advocate General of the Army (*see Hearings on S.857 and H. R. 4080 Before a Subcommittee of the Senate Armed Services Committee*, 81st Cong., 1st Sess. 274 (1949)) to conform Article 91 to Articles 89 and 90, which explicitly require superiority, and was later offered, but it was not acted on. *See* Congressional 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 consistent with the unambiguous language of Article 91 and its predecessors. *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 relevant to congressional intent).

The remaining subparagraphs are all taken from paragraph 170 of MCM, 1969 (Rev.) and the discussion paragraphs of other articles.

e. Maximum punishment. Subparagraphs (2) and (7) are based on the aggravating circumstance that the victim is also superior to the accused. When this factor exists in a given case, the superiority 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 offenses, 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 coverage 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 punishment for disrespect toward warrant officers was adjusted to conform to these changes.

16. Article 92—Failure to obey order or regulation

c. Explanation. This paragraph is taken from paragraph 171 of MCM, 1969 (Rev.). The requirement that actual knowledge be an element of an Article 92(3) offense is based on *United States v. Curtin*, 9 U.S.C.M.A. 427, 26 C.M.R. 207 (1958).

As to publication under subparagraph c(1)(a), *see United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982).

Subparagraph (1)(e) *Enforceability* is new. This subparagraph is based on *United States v. Nardell*, 21 U.S.C.M.A. 327, 45 C.M.R. 101 (1972); *United States v. Hogsett*, 8 U.S.C.M.A. 681, 25 C.M.R. 185 (1958). The general order or regulation violated must, when examined as a whole, demonstrate that it is intended to regulate the conduct of individual servicemembers, and the direct application of sanctions for violations of the regulation must be self-evident. *United States v. Nardell, supra* at 329, 45 C.M.R. at 103. *See United States v. Wheeler*, 22 U.S.C.M.A. 149, 46 C.M.R. 149 (1973); *United States v. Scott*, 22 U.S.C.M.A. 25, 46 C.M.R. 24 (1972); *United States v. Woodrum*, 20 U.S.C.M.A. 529, 43 C.M.R. 369 (1971); *United States v. Brooks*, 20 U.S.C.M.A. 42, 42 C.M.R. 220 (1970); *United States v. Baker*, 18 U.S.C.M.A. 504, 40 C.M.R. 216 (1969); *United States v. Tassos*, 18 U.S.C.M.A. 12, 39 C.M.R. 12 (1968); *United States v. Farley*, 11 U.S.C.M.A. 730, 29 C.M.R. 546 (1960); DiChiara, *Article 92: Judicial Guidelines for Identifying Punitive Orders and Regulations*, 17 A.F.L. Rev. Summer 1975 at 61.

e. Maximum punishment. The maximum punishment for willful dereliction of duty was increased from 3 months to 6 months confinement and to include a bad-conduct discharge because such offenses involve a flaunting of authority and are more closely analogous to disobedience offenses.

★ *February 1986 Amendment:* The rule was revised to add constructive knowledge as an alternative to the actual knowledge requirement in paragraph (*b*)(3)(*b*) and the related explanation in subparagraph c(3)(b). In reviewing these provisions, it was concluded that the reliance of the drafters of the 1984 revision on the *Curtin* case was misplaced because the pertinent portion of that case dealt with failure to obey under Article 92(2), not dereliction under Article 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.); *United States v. Dickey*, 20 C.M.R. 486 (A.B.R. 1956). The phrase "subject to the Code or not" was added to reflect the fact that the victim could be someone other than a member of the military. The example of sexual harassment was added because some forms of such conduct are nonphysical maltreatment.

18. Article 94—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 Punishments or elsewhere under Article 134 in that Manual. Article of War 67 included this offense, but Article 94 excludes it. The drafters of paragraph 173 of MCM, 1951 noted the change. To fill the gap they referred to Article 134. Instead, they should have referred 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. Paragraphs 174*b, c,* and *d* of MCM, 1969 (Rev.), provided that the accused be "duly" placed in arrest, custody, or confinement. "Duly" was deleted from the elements of these offenses. Instead, the elements specify that the restraint be imposed by one with authority to impose it. This was done to clarify the meaning of the word "duly" and the burden of going forward on the issues of authority to order 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 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. Delgado*, 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 "duly" as an element but did not because the prosecution must show that restraint was "duly" 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 "duly" 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).

"Duly" 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, supra; United States v. Yerger*, 1 U.S.C.M.A. 288, 3 C.M.R. 22 (1952); *United States v. Delgado, supra. Cf. United States v. Mackie*, 16 U.S.C.M.A. 14, 36 C.M.R. 170 (1966); *United States v. Gray, supra. But see United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976). This construction also avoids unnecessary litigation of a collateral issue and eliminates the necessity for the introduction of uncharged misconduct, except when the door is opened by the defense. *Cf. United States v. Yerger, supra; United States v. Mackie, supra.*

c. Explanation (1) *Resisting apprehension.*

(a) Apprehension. This subparagraph is taken from Article 7.

(b) Authority to apprehend. See Analysis, R.C.M. 302(b). The last two sentences are based on paragraph 57*b* of MCM, 1969 (Rev.); *United States v. Carson, supra.*

(c) Nature of the resistance. This subparagraph is taken from paragraph 174*a* of MCM, 1969 (Rev.).

(d) Mistake. This subparagraph is taken from paragraph 174*a* of MCM, 1969 (Rev.). *See also United States v. Nelson*, 17 U.S.C.M.A. 620, 38 C.M.R. 418 (1968).

(e) Illegal apprehension. The first sentence of this subparagraph is taken from paragraph 174*a* 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 174*a* 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 19*b*. 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 174*b* of MCM, 1969 (Rev.). *See also* Analysis, paragraph 19*b*.

(d) Breaking. This subparagraph is based on paragraph 174*b* of MCM, 1969 (Rev.).

(e) Illegal arrest. The first sentence in this subparagraph is based on paragraph 174*b* 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 19*b* and 19*c*(1)(e). The third sentence is based on *United States v. Carson, supra.*

(3) *Escape from custody.*

(a) Custody. This subparagraph is taken from paragraph 174*d* of MCM, 1969 (Rev.). As to the distinction between escape from custody and escape from confinement, *see United States v. Ellsey,* 16 U.S.C.M.A. 455, 37 C.M.R. 75 (1966). *But see United States v. Felty,* 12 M.J. 438 (C.M.A. 1982).

(b) Authority to apprehend. See Analysis, paragraph 19*c*(1)(b).

(c) Escape. This cross-reference is based on paragraph 174*c* of MCM, 1969 (Rev.).

(d) Illegal custody. The first sentence in this subparagraph is based on paragraph 174*b* 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 19*b* and 19*c*(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 5*c*, Part V.

(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 174*c* 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 174*b* 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 19*b* and 19*c*(1)(e). The third sentence is based on *United States v. Carson, supra.*

20. Article 96—Releasing prisoner without proper authority

c. Explanation. 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 (1961). Subparagraphs (1)(c) and (d) have been modified to conform to rules elsewhere in this Manual and restated for clarity.

21. Article 97—Unlawful detention

c. Explanation. 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. Explanation. 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 127*c* 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

c. Explanation. This paragraph is based on paragraphs 178 and 183*a* of MCM, 1969 (Rev.); *United States v. Sperland,* 1 U.S.C.M.A. 661, 5 C.M.R. 89 (1952) (discussion of "before or in the presence of the enemy"); *United States v. Parker,* 3 U.S.C.M.A. 541, 13 C.M.R. 97 (1953) (discussion of "running away"); *United States v. Monday,* 36 C.M.R. 711 (A.B.R. 1966), *pet. denied,* 16 U.S.C.M.A. 659, 37 C.M.R. 471 (1966) (discussion of "the enemy") (*see also United States v. Anderson,* 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968)); *United*

States v. Yarborough, 1 U.S.C.M.A. 678, 5 C.M.R. 106 (1952) (discussion of "fear"); *United States v. Presley,* 18 U.S.C.M.A. 474, 40 C.M.R. 186 (1969); *United States v. King,* 5 U.S.C.M.A. 3, 17 C.M.R. 3 (1954) (discussion of illness as a defense to a charge of cowardice); *United States v. Terry,* 36 C.M.R. 756 (N.B.R. 1965), *aff'd,* 16 U.S.C.M.A. 192, 36 C.M.R. 348 (1966) (discussion of "false alarm"); *United States v. Payne,* 40 C.M.R. 516 (A.B.R. 1969), *pet. denied,* 18 U.S.C.M.A. 636, 40 C.M.R. 327 (1969) (discussion of failure to do utmost).

24. Article 100—Subordinate compelling surrender

c. Explanation. This paragraph is taken from paragraph 179 of MCM, 1969 (Rev.).

25. Article 101—Improper use of countersign

c. Explanation. This paragraph is based on paragraph 180 of MCM, 1969 (Rev.).

26. Article 102—Forcing a safeguard

c. Explanation. 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. Explanation. 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 140—Aiding the enemy

c. Explanation. This paragraph is based on paragraph 183 of MCM, 1969 (Rev.). *See also United States v. Olson,* 7 U.S.C.M.A. 460, 22 C.M.R. 250 (1957); *United States v. Batchelor,* 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956); *United States v. Dickenson,* 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955).

29. Article 105—Misconduct as a prisoner

c. Explanation. This paragraph is based on paragraph 184 of MCM, 1969 (Rev.). *See also United States v. Batchelor,* 7 U.S.C.M.A. 354, 22 C.M.R. 144 (1956); *United States v. Dickenson,* 7 U.S.C.M.A. 438, 20 C.M.R. 154 (1955).

30. Article 106—Spies

c. Explanation. This paragraph is taken from paragraph 185 of MCM, 1969 (Rev.). *See generally* W. Winthrop, *Military Law and Precedents* 766–771 (2d ed. 1920 reprint). Subparagraphs (4) and (6)(b) are also based on Annex to Hague Convention No. IV, Respecting the law and customs of war on land, Oct. 18, 1907, Arts. XXIX and XXXI, 36 Stat. 2303, T.S. No. 539, at 33.

30a. Article 106a—Espionage

Article 106a was added to the UCMJ in the Department of Defense Authorization Act, 1986, Pub. L. No. 99–145, § 534, 99 Stat. 583, 634–35 (1985).

c. Explanation. The explanation is based upon H.R. Rep. No. 235, 99th Cong., 1st Sess. (1985), containing the statement of conferees with respect to the legislation establishing Article 106a. *See also* 1985 U.S. Code Cong. & Ad. News 472, 577–79.

31. Article 107—False official statements

c. Explanation. (1) *Official documents and statements.* This subparagraph is based on paragraph 186 of MCM, 1969 (Rev.); *United States v. Cummings,* 3 M.J. 246 (C.M.A. 1977). *See also United States v. Collier,* 23 U.S.C.M.A. 173, 48 C.M.R. 789 (1974) regarding voluntary false statement to military police).

(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).

(3) *Intent to deceive.* This subparagraph is based on paragraph 186 of MCM, 1969 (Rev.); *United States v. Hutchins,* 5 U.S.C.M.A. 422, 18 C.M.R. 46 (1955).

(4) *Material gain.* This subparagraph is based on paragraph 186 of MCM, 1969 (Rev.).

(5) *Knowledge that the document or statement was false.* This subparagraph is based on the language of Article 107 and on *United States v. Acosta,* 19 U.S.C.M.A. 341, 41 C.M.R. 341 (1970), and clarifies—as paragraph 186 of MCM, 1969 (Rev.), did not—that actual knowledge of the falsity is necessary. *See also United States v. DeWayne,* 7 M.J. 755 (A.C.M.R. 1979); *United States v. Wright,* 34 C.M.R. 518 (A.B.R. 1963); *United States v. Hughes,* 19 C.M.R. 631 (A.F.B.R. 1955).

(6) *Statements made during an interrogation.* This subparagraph is based on paragraph 186 of MCM, 1969 (Rev.); *United States v. Davenport,* 9 M.J. 364 (C.M.A. 1980); *United States v. Washington,* 9 U.S.C.M.A. 131, 25 C.M.R. 393 (1958); *United States v. Aronson,* 8 U.S.C.M.A. 525, 25 C.M.R. 29 (1957).

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

c. Explanation. This paragraph is based on paragraph 187 of MCM, 1969 (Rev.). *See also United States v. Bernacki,* 13 U.S.C.M.A. 641, 33 C.M.R. 173 (1963); *United States v. Harvey,* 6 M.J. 545 (N.C.M.R. 1978); *United States v. Geisler,* 37 C.M.R. 530 (A.B.R. 1966). The last sentence in subparagraph (c)(1) is based on *United States v. Schelin,* 15 M.J. 218 (C.M.A. 1983).

d. Lesser included offense. See United States v. Mizner, 49 C.M.R. 26 (A.C.M.R. 1974).

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

c. Explanation. Subparagraph (1) is based on *United States v. Hoog,* 504 F.2d 45 (8th Cir. 1974), *cert. denied,* 420 U.S. 961 (1975). *See also* 2 E. Devitt and C. Blackmar, *supra* at § 43.05.

Subparagraph (2) is based on *United States v. DeLaMotte,* 434F.2d 289 (2d Cir. 1970), *cert. denied,* 401 U.S. 921 (1971); *United States v. Perkins, supra. See generally* 1 Am. Jur. 2d *Abduction and Kidnapping* § 2 (1962).

Subparagraph (3) is based on *Chatwin v. United States, supra;* 2 E. Devitt and C. Blackmar, *supra* at § 43.09. *See also Hall v. United States,* 587 F.2d 177 (5th Cir.), *cert. denied,* 441 U.S. 961 (1979); *Military Judges' Benchbook, supra,* paragraph 3−190.

Subparagraphs (4) and (5) are based on 18 U.S.C. § 1201; 2 E. Devitt and C. Blackmar, *supra* §§ 43.05, 43.06, 43.10. *See also United States v. Hoog, supra.* The second sentence in subparagraph (4) is also based on *United States v. Healy, supra. See also United States v. Smith, supra.* The second sentence in subparagraph (5) is based on *United States v. Picotte, supra. See also United States v. Martin,* 4 M.J. 852 (A.C.M.R. 1978). The last sentence in subsection (5) is based on 18 U.S.C. § 1201. A parent taking a child in violation of a custody decree may violate state law or 18 U.S.C. § 1073. *See* 18 U.S.C.A. § 1073 Historical and Revision Note (West Supp. 1982). *See also* paragraph 60*c*(4).

e. Maximum punishment. The maximum punishment is based on 18 U.S.C. § 1201. *See also United States v. Jackson, supra.*

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)

c. Explanation. This paragraph is new and is based on *United States v. Holt,* 12 U.S.C.M.A. 471, 31 C.M.R. 57 (1961); *United States v. Linyear,* 3 M.J. 1027 (N.C.M.R. 1977). *See also Hamling v. United States,* 418 U.S. 87 (1974); *Miller v. California,* 413 U.S. 15 (1973).

f. Sample specifications. "Lewd" and "lascivious" were eliminated because they are synonymous with "obscene." *See* Analysis, paragraph 90*c*.

95. Article 134 (Misprison of serious offense)

c. Explanation. This paragraph is based on paragraph 213*f*(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. Daddano,* 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)

c. Explanation. This paragraph is new and is based on *United States v. Favors,* 48 C.M.R. 873 (A.C.M.R. 1974). *See also* 18 U.S.C. §§ 1503, 1505, 1510, 1512, 1513; *United States v. Chodkowski,* 11 M.J. 605 (A.F.C.M.R. 1981).

97. Article 134 (Pandering and prostitution)

c. Explanation. This paragraph is new and is based on *United States v. Adams,* 18 U.S.C.M.A. 310, 40 C.M.R. 22 (1969); *United States v. Bohannon,* 20 C.M.R. 870 (A.F.B.R. 1955).

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 U.S.C.M.A. 540, 34 C.M.R. 320 (1964) (res judicata); *United States v. Smith,* 49 C.M.R. 325 (N.C.M.R. 1974) (pleading).

99. Article 34 (Public record: altering, concealing, removing mutilating, obliterating, or destroying)

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. 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. 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. Sample specification 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)

Introduction. This offense is new to the Manual for Courts-Martial, and is based on *United States v. Benton,* 7 M.J. 606 (N.C.M.R. 1979), *pet. denied,* 8 M.J. 227 (1980).

c. Explanation. This paragraph is based on *United States v. Benton, supra. See also United States v. Oakley,* 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. Oakley, supra.*

102. Article 134 (Restriction; 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 paragraph 20*b*, 126*g*, 131*c*, and 174*b* 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)

Introduction. This offense is new. It is based on 18 U.S.C. § 2232. *See generally United States v. Gibbons,* 463 F.2d 1201 (3d Cir. 1972); *United States v. Bernstein,* 287 F.Supp. 84 (S.D. Fla. 1968); *United States v. Fishel,* 12 M.J. 602 (A.C.M.R. 1981), *pet. denied,* 13 M.J. 20. *See also* the opinion in *United States v. Gibbons,* 331 F. Supp. 970 (D. Del. 1971).

c. Explanation. The second sentence is based on *United States v. Gibbons, supra. Cf. United States v. Ferrone,* 438 F.2d 381 (3d Cir.), *cert. denied,* 402 U.S. 1008 (1971).

e. Maximum punishment. The maximum punishment is based on 18 U.S.C. § 2232.

104. Article 134 (Sentinel or lookout: offenses against or by)

c. Explanation. This paragraph is new. *See* Analysis, paragraph 13 and Analysis, paragraph 38. The definition of "loiter" is taken from *United States v. Muldrow,* 48 C.M.R. 63, 65 n. 1 (A.F.C.M.R. 1973).

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)

b. Elements. See United States v. Mitchell, 15 M.J. 214 (C.M.A. 1983); the Analysis, paragraph 6. *See also* paragraph 101.

c. Explanation. See the Analysis, paragraph 6.

d. Lesser included offenses. See United States v. Benton, 7 M.J. 606 (N.C.M.R. 1979), *pet. denied, 8* M.J. 227 (1980).

e. Maximum punishment. See United States v. Benton, supra.

★ *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)

c. Explanation. This paragraph is based on paragraph 213*f*(14) of MCM, 1969 (Rev.). and *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). *See United States v. Rokoski,* 30 C.M.R. 433 (A.B.R. 1960) concerning knowledge. *See also United States v. Bonavita,* 21 U.S.C.M.A. 407, 45 C.M.R. 181 (1972), concerning this offense in general.

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)

c. Explanation. This paragraph is new and is based on *United States v. Kirsch,* 15 U.S.C.M.A. 84, 35 C.M.R. 56 (1964). *See also United States v. Quarles,* 50 C.M.R. 514 (N.C.M.R. 1975).

f. Sample specification. "Duly appointed" which appeared in from 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.A. 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)

c. Explanation. This paragraph is taken from paragraph 213*f*(10) of MCM, 1969 (Rev.). *See also United States v. Gilluly, 13 U.S.C.M.A. 458, 32 C.M.R. 458 (1963); United States v. Frayer,* 11 U.S.C.M.A. 600, 29 C.M.R. 416 (1960).

111. Article 134 (Unlawful entry)

c. Explanation. This paragraph is new and is based on *United States v. Breen,* 15 U.S.C.M.A. 658, 36 C.M.R. 156 (1966); *United States v. Gillin,* 8 U.S.C.M.A. 669, 25 C.M.R. 173 (1958); *United States v. Love,* 4 U.S.C.M.A. 260, 15 C.M.R. 260 (1954). *See also United States v. Wickersham,* 14 M.J. 404 (C.M.A. 1983) (storage area); *United States v. Taylor,* 12 U.S.C.M.A. 44, 30 C.M.R. 44 (1960) (aircraft); *United States v. Sutton,* 21 U.S.C.M.A. 344, 45 C.M.R. 118 (1972) (tracked vehicle); *United States v. Selke,* 4 M.J. 293 (C.M.A. 1978) (summary disposition) (Cook, J., dissenting).

112. Article 134 (Weapon: concealed, carrying)

c. Explanation. This paragraph is new and is based on *United States v. Tobin,* 17 U.S.C.M.A. 625, 38 C.M.R. 423 (1968); *United States v. Bluel,* 10 U.S.C.M.A. 67, 27 C.M.R. 141 (1958); *United States v. Thompson,* 3 U.S.C.M.A. 620, 14 C.M.R. 38 (1954). Subsection (3) is based on *United States v. Bishop,* 2 M.J. 741 (A.F.C.M.R. 1977), *pet. denied,* 3 M.J. 184 (1977).

113. Article 134 (Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button).

e. Maximum punishment. The maximum punishment has been increased to include a bad-conduct discharge because this offense often involves deception.

PART V
NONJUDICIAL PUNISHMENT PROCEDURE

1. General

*c. Purpose.*This paragraph is based on the legislative history of Article 15, both as initially enacted and as modified in 1962. *See generally* H.R. Rep. No. 491, 81st Cong., 1st Sess. 14−15 (1949); S. Rep. No. 1911, 87th Cong., 2d Sess. (1962).

d. Policy. Subparagraph (1) is based on paragraph 129*a* of MCM, 1969 (Rev.). Subparagraph (2) is based on the last sentence of paragraph 129*a* of MCM, 1969 (Rev.) and on service regulations. *See, e.g.,* AR 27−10, para. 3−4*b* (1 Sep. 1982); JAGMAN sec. 0101. *Cf.* Article 37. Subparagraph (3) is based on the second paragraph 129*b* of MCM, 1969 (Rev.).

e. Minor offenses. This paragraph is derived from paragraph 128*b* of MCM, 1969 (Rev.), service regulations concerning "minor offenses" (*see, e.g.,* AR 27−10, para. 3−3*d* (1 Sep. 1982); AFR 111−9, para. 3*a*(3) (31 Aug. 1979)); *United States v. Fretwell* 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960). The intent of the paragraph is to provide the commander with enough latitude to appropriately resolve a disciplinary problem. Thus, in some instances, the commander may decide that nonjudicial punishment may be appropriate for an offense that could result in a dishonorable discharge or confinement for more than 1 year if tried by general court-martial, e.g., failure to obey an order or regulation. On the other hand, the commander could refer a case to a court-martial that would ordinarily be considered at nonjudicial punishment, e.g., a short unauthorized absence, for a servicemember with a long history of short unauthorized absences, which nonjudicial punishment has not been successful in correcting.

f. Limitations on nonjudicial punishment. (1) *Double punishment prohibited.* This subparagraph is taken from the first paragraph of paragraph 128*d* 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 reimposition of punishment and service of punishment not previously served.

(2) *Increase in punishment prohibited.* This paragraph is taken from the second paragraph of paragraph 128*d* of MCM, 1969 (Rev.).

(3) *Multiple punishment prohibited.* This paragraph is based on the guidance for court-martial offenses, found in paragraphs 30*g* and 33*h* 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.,* AR27−10, 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 128*c* 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 128*a* 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. 1911, 87th Cong. 2d Sess. 4 (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.

★ *February 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 where 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)4 is also based on S. Rep. 1911, 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 131*d* 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).

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 ensure 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 133*c* 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 are 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 to 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 investigative 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, ¶ 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 ¶ 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 1102, 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 ¶ 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 ¶ 137, MCM, 1969 (Rev.), not reflected in Rule 101 is found in other rules, *see, e.g.,* Rules 104, 401, 403. The reference in ¶ 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 a party" in place of the Federal Rule's "a substantial right of party is affected" is 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, prevails over the general rule of Rule 103(a). Because Section III of these Rules embodies constitutional rights, two standards of error may be at issue; one involving the Military Rules of Evidence, and one involving the underlying constitutional rule. In such a case, the standard of error more advantageous to the accused will apply.

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); (c) *Record of offer and ruling: 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.), ¶ 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, ¶ 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 Rules 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 ite 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 unchanged 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 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 sponte, or to instruct, cannot be so considered in light of current case law.

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 ¶ 140*a*, 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 ¶ 140*a*(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.), ¶ 147*a*. 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. SALTZBURG & K. REDDEN, *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 ¶ 147*a*, MCM, 1969 (Rev.), will normally be inappropriate under this Rule. Rule 902(4) & (10) will, however, usually yield the same result as under ¶ 147*a*.

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 ¶ 147*a*, 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 ¶ 147*a* except that references to the law of space has 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 of 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 eye-witness 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, ¶ 150*b* 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 of 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 force 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.*, ¶ 150*b* 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 ¶ 150*b*, 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 ¶ 150*b* of MCM, 1969 (Rev.) to warn an

informed 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 ¶ 150*b*, 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 ¶ 150*b* but the language has been rephrased. The present Manual's language states that the witness can be required to answer if for "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 tha 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 ¶ 150*b* 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 ¶ 149*b*(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* ¶ 149*b*(1), MCM, 1969 (Rev.) and Rule 608(b).

The last sentence of the third subparagraph of ¶ 149*b*(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(e) restates without significant change the sixth sentence of the third subparagraph of ¶ 149*b*(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 ¶ 150*b*, 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" maters—*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 accsused. 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.

(3) *Pretrial.* Rule 301(f) (3) is taken generally from ¶ 140*a*(4), MCM, 1969 (Rev.) and follows the decisions of the United States Supreme Court in *United States v. Hale*, 422 U.S. 171 (1975) and *Doyle v. Ohio*, 426 U.S. 610 (1976). *See also United States v. Brooks*, 12 U.S.C.M.A. 423, 31 C.M.R. 9 (1961); *United States v. McBride*, 50 C.M.R. 126 (A.F.C.M.R. 1975). The prior 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 150*b*, 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 ¶ 150*b* 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. Babbidge*, 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 Procedures, FED. R. CRIM. P. 12-2, and MCM, 1969 (Rev.). ¶ 140*a*, 122*b*, 150*b*. 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 *Babbidge* 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 *Babbidge* 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 *Babbidge, 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 ¶ 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 accused during the examination. Together, these provisions would adequately protect the accused from disclosure of any statements made during the examination. This would encourage the accused to cooperate fully in the examination while protecting the Fifth Amendment and Article 31 rights of the accused.

Paragraph 121 was retitled to eliminate "Before Trial" and was thus made applicable before and during trial. Pursuant to paragraph 121, an individual's belief or observations, reflecting possible need for a mental examination of the accused, should have been submitted to the convening authority with immediate responsibility for the disposition of the charges or, after referral, to the military judge or president of a special court-martial without a military judge. The submission could, but needed not, be accompanied by a formal application for a mental examination. While the convening authority could act on a submission under paragraph 121 after referral, he or she might do so only when a military judge was not reasonably available.

Paragraph 121 was revised to reflect the new test for insanity set forth in *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977), and to require sufficient information for the fact finder to be able to make an intelligent decision rather than necessarily relying solely upon an expert's conclusion. Further questions, tailored to the individual case, could also be propounded. Thus, in an appropriate case, the following might be asked:

Did the accused, at the time of the alleged offense and as a result of such mental disease or defect, lack substantial capacity to (possess actual knowledge), (entertain a specific intent), (premeditate a design to kill)?

What is the accused's intelligence level?

Was the accused under the influence of alcohol or other drugs at the time of the offense? If so, what was the degree of intoxication and was it voluntary? Does the diagnosis of alcoholism, alcohol or drug induced organic brain syndrome or pathologic intoxication apply?

As the purpose of the revision of paragraph 121 and the creation of Rule 302 was purely to protect the privilege against self-incrimination of an accused undergoing a mental examination related to a criminal case, both paragraph 121 and Rule 302 were inapplicable to proceedings not involving criminal consequences.

The order to the sanity board required by paragraph 121 affects only members of the board and other medical personnel. Upon request by a commanding officer of the accused, that officer shall be furnished a copy of the board's full report. The commander may then make such use of the report as may be appropriate (including consultation with a judge advocate) subject only to the restriction on release to the trial counsel and to Rule 302. The restriction is fully applicable to all persons subject to the Uniform Code of Military Justice. Thus, it is intended that the trial counsel receive only the board's conclusions unless the defense should choose to disclose specific matter. The report itself shall be released to the trial counsel, minus any statements made by the accused, when the defense raises a sanity issue at trial and utilizes an expert witness in its presentation. Rule 302(c).

Although Rule 302(c) does not apply to determinations of the competency of the accused to stand trial, paragraph 121 did prohibit access to the sanity board report by the trial counsel except as specifically authorized. In the event that the competency of an accused to stand trial was 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 any person 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 explicity 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* ¶ 122*b*, 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 will be available to the prosecution by determining the nature of the defense to be made. If the accused fails to present an insanity defense or does so only through lay testimony, for example, the trial counsel will not receive access to the report. If the accused presents a defense, however, which includes specific incriminating statements made by the accused to the sanity board, the military judge may order disclosure to the trial counsel of "such statement . . . as may be necessary in the interest of justice."

Inasmuch as the revision of paragraph 121 and the creation of Rule 302 were intended primarily, to deal with the situation in which the accused denies committing an offense and only raises an insanity defense as an alternative defense, the defense may consider that it is appropriate to disclose the entire sanity report to the trial counsel in a case in which the defense concedes the commission of the offense but is raising as its sole defense the mental state of the accused.

(d) *Non-compliance by the accused.* Rule 302(d) restates prior law and is in addition to any other lawful sanctions. As Rule 302 and the revised paragraph 121 adequately protect the accused's right against self-incrimination at a sanity board, sanctions other than that found in Rule 302(d) should be statutorily and constitutionally possible. In an unusual case these sanctions might include prosecution of an accused for disobedience of a lawful order to cooperate with the sanity board.

(e) *Procedure.* Rule 302(e) recognizes that a violation of paragraph 121 or Rule 302 is in effect a misuse of immunized testimony—the coerced testimony of the accused at the sanity board—and thus results in an involuntary statement which may be challenged under Rule 304.

Rule 303. Degrading questions

Rule 303 restates Article 31 (c). The content of ¶ 150*a*, MCM, 1969 (Rev.) has been omitted.

A specific application of Rule 303 is in the area of sexual offenses. 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 relevance at best. Rule 412 of the Military Rules of Evidence now prohibits such questioning, but Rule 412 is, however, not applicable to Article 32 hearings as it is only a rule of evidence; 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 apparent that Article 31(c) was intended to apply to courts-of-inquiry, 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 compelled 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 the victim to refuse to supply such degrading information at an Article 32 for use by the defense 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-examination formerly typical of sexual cases would have intended to permit the identical examination at a military preliminary hearing that is not even presided over by a legally trained individual. Thus public policy fully supports the application of Article 31(c) in this case.

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 140*a*(6) and 150*b*, 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 ¶ 150*b* of the 1969 Manual attempts 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 acting 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 indicated 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 obtained from statements which were the product of coercion, unlawful 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 evidence 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 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.

(b) *Exceptions.* Rule 304(b)(1) adopts *Harris v. New York*, 401 U.S. 222 (1971) insofar as it would allow use for impeachment or at a later trial for perjury, false swearing or the making of a false official statement, or statements taken in violation of the counsel warnings required under Rule 305(d)-(e). Under ¶¶ 140*a*(2)and 153*b*, MCM, 1969 (Rev.), use of such statements was not permissible. *United States v. Girard*, 23 U.S.C.M.A. 263, 49 C.M.R. 438 (1975); *United States v. Jordan*, 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971). The Court of Military Appeals has recognized expressly the authority of the President to adopt the holding in *Harris* on impeachment. *Jordan, supra,* 20 U.S.C.M.A. 614, 617, 44 C.M.R. 44, 47, and Rule 304(b) adopts *Harris* to military law. A statement obtained in violation of Article 31(b), however, remains inadmissible for all purposes, as is a statement that is otherwise involuntary under Rules 302, 304(b)(3) or 305(a). It was the intent of the Committee to permit use of a statement which is involuntary because the *waiver of counsel* rights under Rule 305(g) was absent or improper which is implicit in Rule 304(b)'s reference to Rule 305(d).

★ *February 1986 Amendment*: Rule 304(b)(2) was added to incorporate the "inevitable discovery" exception to the exclusionary rule based on *Nix v. Williams*, _____ U.S. _____ , 104 S.Ct. 2501 (1984); *see also United States v. Kozak*, 12 M.J. 389 (C.M.A 1982); Analysis of Rule 311(b)(2).

(c) *Definitions.*

(1) *Confession and admission.* Rules 304(c)(1) and (2) express without change the definitions found in ¶ 140*a*(1), MCM, 1969 (Rev.).

Silence may constitute an admission when it does not involve a reliance on the privilege against self-incrimination or related rights. 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(h)(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 ¶ 140*a*(2), MCM, 1969 (Rev.). The examples in ¶ 140*a*(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 ¶ 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 ¶ 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:

Infliction 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;

Promises of reward or benefit, or threats of disadvantage likely to induce the accused to make the confession of admission.

There is no change in the principle, set forth in the fifth paragraph of ¶ 140*a*(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 Rules 304(c)(3) and 305(a) (emphasis added).

(d) *Procedure.* Rule 304(d) makes a significant change in prior procedure. Under ¶ 140*a*(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 of

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 (¶ 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.

Litigation 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 permitting 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 dispite 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 ¶ 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).[1]

That despite the accused's express refusal to make a statement, she was questioned and made and admission.[2]

That the accused requested counsel but was interrogated by the military police without having seen counsel.[3]

That the accused was induced to make a statement by a promise of leniency by his squadron commander.[4]

That an accused was threatened with prosecution of her husband if she failed to make a statement.[5]

That the accused was held incommunicado and beaten until she confessed.[6]

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.[7]

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

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[1]Rule 305(d); *United States v. Templa*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

[2]*See e.g.*, Rule 305(f), *Michigan v. Mosely*, 423 U.S. 96; *United States v. Westmore*, 17 U.S.C.M.A. 406, 38 C.M.R. 204 (1968).

[3]*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)

[4]*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).

[5]*See e.g.*, Rule 304(b)(3), *Jarriel v. State*, 317 So. 2d 141 (Fla. App. 1975).

[6]*See, e.g.*, Rule 304(b)(3), *Payne v. Arkansas*, 356 U.S. 560 (1958).

[7]*See, e.g.*, Rule 304(b)(3), *United States v. Seay*, 1 M.J. 201 (C.M.A. 1978).

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 any potential 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.

(5) *Effect of guilty plea.* Rule 304(d)(5) restates prior law; *see, e.g., United States v. Dusenberry*, 23 U.S.C.M.A 287, 49 C.M.R. 536 (1975).

(e) *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 know 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 such a case, 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 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 preponderence of the evidence (*Nix v. Williams*, _____ U.S. _____ , 104 S.Ct. 2501 (1984)).

(f) *Defense evidence.* Rule 304(f) generally restates prior law as found in ¶ 140*a*(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 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 matter on which he or she so testifies" permits otherwise proper and relevant impeachment of the accused. *See, e.g.*, Rules 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 instruction. *United States v. Seigle*, 22 U.S.C.M.A. 403, 47 C.M.R. 340 (1973). The holding in *Seigle* is 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 140*a*(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 proper impeachment.

(2) *Completeness.* Rule 30(h)(2) is taken without significant change from 1969 Manual paragraph 140*a*(6). Although Rule 106 allows a party to require an adverse party to complete an 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 either Rule 106 or 304(h)(2) to complete a written statement.

(3) *Certain admission by silence.* Rule 304(h)(3) is taken from ¶ 140*a*(4) of the 1969 Manual. That part of the remainder of ¶ 140*a*(4) dealing with the existence of the privilege against self-incrimination is now set forth in Rule 301(f)(3). The remainder of ¶ 140*a*(4) has been set forth in the Analysis to subdivision (d)(2), dealing with an admission by silence, or has been ommited as being unnecessary.

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.*, ¶ 140*a*(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 ¶ 140*a*(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 statements.* 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 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 then "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 US 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 ¶ 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 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. Dionivio*, 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. 21 1, 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(b)(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 iterrogation;

(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 jurisdictions 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 preferral 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).

(2) *Counsel*. Rule 305(d)(2) sets forth the basic right to counsel at interrogations required under 1969 Manual ¶ 140*a*(2). The Rule rejects the interpretation of ¶ 140*a*(2) set forth in *United States v. Hofbauer*, 5 M.J. 409 (C.M.A. 1978) and *United States v. Clark*, 22 U.S.C.M.A. 570, 48 C.M.R. 77 (1974) which held that the Manual only provided a right to military counsel at an interrogation in the event of financial indigency—minimum *Miranda* rule.

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 vs. 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 award. 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 ¶ 140*a*(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 acknowledgement 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 declination. 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.* ¶ 140*a*(2) of the 1969 Manual, which governed civilian interrogations of military personnel basically restated the holding of *Miranda v. Arizona*, 384 U.S. (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 interrogation 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 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 several accused

Rule 306 is taken from the fifth subparagraph ¶ 140*b* 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 severance.

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

Rules 311–317 express the manner in which the Fourth Amendment to the Constitution of the United States applies to trials by court-martial, *Cf. Parker v. Levy*, 417 U.S. 733 (1974).

(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 ¶ 152 of the 1969 Manual although much of the language of ¶152 has been deleted for purposes of both clarity and brevity. The Rule requires supression 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 ¶ 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 supress 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 ¶ 152 of the 1969 Manual. The Committee viewed the Supreme Court decision in *Rakas v. Illinois*, 439 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 seizure. 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 provison 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 *Walder v. United States*, 347 U.S. 62 (1954), and restates with minor change the rule as found in ¶ 152 of the 1969 Manual.

February 1986 Amendment: Rule 311(b)(2) was added to incorporate the "inevitable discovery" exception to the exclusionary rule of *Nix v. Williams*, _____ U.S. _____, 104 S.Ct. 2501 (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*, _____ U.S. _____, n.2. *See also United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982); *United States v. Yandell*, 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*, _____ U.S. _____, 104 S.Ct. 3405 (1984) and *Massachusetts v. Sheppard*, _____ U.S. _____, 104 S.Ct. 3424 (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. Ezell*, 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 *Ezell* 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 effected 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.

(1) *Military personnel.* Rule 311(c)(1) generally restates prior law. A violation of a military regulation alone will not require exclusion of any resulting evidence. However, a violation of such a regulation that gives rise to a reasonable expectation of privacy may require exclusion. *Compare United States v. Dillard*, 8 M.J. 213 (C.M.A. 1980) *with United States v. Caceres*, 440 U.S. 741 (1979).

(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 subdivison 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 ¶ 150*b* 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 Consitutional protections by using foreign personnel to conduct a search or seizure that would have been unlawful if conducted by Americans. Thus 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 potential 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.

(e) *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*, _____ U.S. _____, 104 S.Ct. 2501 (1984) and *United States v. Leon*, _____ U.S. _____, 104 S.Ct. 3405 (1984), respectively.

(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.

(i) *Effect of guilty plea.* Rule 311(i) restates prior law. *See, e.g., United States v. Hamil*, 15 U.S.C.M.A. 110, 35 C.M.R. 82 (1964).

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 cavities 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. Supp. 1354, 1362–67 (N.D.N.Y. 1977); *Hodges v. Klein*, 412 F. Supp. 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 e.g., 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. Supp. 1354 (N.D.N.Y. 1977); *Hodges v. Klein*, 412 F. Supp. 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 *Rochin 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 subsections (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, recognizes 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 the 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 ¶ 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 persons 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 the Secretaries concerned to prescribe the medical qualifications 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 ¶ 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 considered 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, organization, 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. Levy*, 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 v. 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 analagous to that which protects the health of those in a civilian environment, and, by ensuring the presence and proper condition of armed forces personnel, equipment, 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 requirement is 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, 530–31 (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 BOQ sacrosanct and off 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. Unrue*, 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. Brashears*, 45 C.M.R. 438 (A.C.M.R. 1972), *rev'd on other grounds*, 21 C.M.A. 522, 45 C.M.R. 326 (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. Unrue*, 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. Unrue*, 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 a diminished expectation of privacy, and that inspections for such contraband are "reasonable" within the meaning of the Fourth Amendment. *See, e.g., Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975). Although there are a number of decisions of the Court of Military Appeals that have called the legality of inspections for unlawful drugs into question, *see 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 evidence of crime, and the high risk that inspections may be used for subterfuge searches. The new Rule is intended to resolve these matters fully. The Rule, as part of an express Executive Order, supplies the explicit authorization for inspections then lacking. Secondly, the Rule is intended to make plain the fact that an inspection that has as its object the prevention and correction of conditions harmful to readiness is far more than a hunt for evidence. Indeed, it is the express judgment of the Committee that the uncontrolled use of unlawful drugs within the armed forces creates a readiness crisis and that continued use of such drugs is totally incompatible with the possibility of effectively fielding military forces capable of accomplishing their assigned mission. 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 as to eliminate any reasonable probability that the inspection is being used as a subterfuge, *i.e.*, that it is being used to search 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 any 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.

The fourth sentence is new. The Military Rules of Evidence did not previously expressly address *production* of body fluids, perhaps because of *United States v. Ruiz*, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974). *Ruiz* was implicitly overruled in *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980). Uncertainty concerning the course of the law of inspections may also have contributed to the drafter's silence on the matter. *See United States v. Roberts*, 2 M.J. 31 (C.M.A. 1976); *United States v. Thomas*, 1 M.J. 397 (C.M.A. 1976). Much of the uncertainty in this area was dispelled in *United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981). *See also Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).

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., cateterization, 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 the 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 safeguards 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 the 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 a 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 Instrusions, 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, e.g.,* Rule 311(a)(2), it is more usually expressed as a nonprobable 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 ¶ 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 unreasonable search, such as an owner, bailee, tenant, or occupant as the case may be under the circumstances [is lawful.]
>
> If the justification for using evidence obtained as a result of a search is that there was a freely given consent to the search, that consent must be shown by clear and positive evidence.

Although Rule 314(e) generally restates prior law without substantive change, the language has been recast. The basic rule for consent searches is taken from *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

(2) *Who may consent.* The Manual language illustrating when third parties may consent to searches has been omitted as being insufficient and potentially misleading and has been replaced by Rule 314(e)(2). The Rule emphasizes the degree of control that an individual has over property and is intended to deal with circumstances in which third parties may be asked to grant consent. *See e.g., Frazier v. Cupp,* 394 U.S. 731 (1969); *Stoner v. California* 376 U.S. 483 (1964); *United States v. Mathis,* 16 C.M.A. 511, 37 C.M.R. 142 (1967). It was the Committee's intent to restate prior law in this provision and not to modify it in any degree. Consequently, whether an individual may grant consent to a search of property not his own is a matter to be determined on a case by case basis.

(3) *Scope of consent.* Rule 314(e)(3) restates prior law. *See e.g., United States v. Castro,* 23 C.M.A. 166, 48 C.M.R. 782 (1974); *United States v. Cady,* 22 C.M.A. 408, 47 C.M.R. 345 (1973).

(4) *Voluntariness.* Rule 314(e)(3) requires that consent by voluntary to be valid. The second sentence is taken in substance from *Schneckloth v. Bustamonte,* 412 U.S. 218, 248–49 (1973).

The specific inapplicability of Article 31(b) warnings follows *Schneckloth* and complies with *United States v. Morris,* 1 M.J. 352 (C.M.A. 1976) (opinion by Chief Judge Fletcher with Judge Cook concurring in the result). Although not required, such warnings are, however, a valuable indication of a voluntary consent. The Committee does not express an opinion as to whether rights warnings are required prior to obtaining an admissible statement as to ownership or possession of property from a suspect when that admission is obtained via a request for consent to search.

(5) *Burden of proof.* Although not constitutionally required, the burden of proof in ¶ 152 of the 1969 Manual for consent searches has been retained in a slightly different form—"clear and convincing" in place of "clear and positive"—on the presumption that the basic nature of the military structure renders consent more suspect than in the civilian community: "Clear and convincing evidence" is intended to create a burden of proof between the preponderance and beyond a reasonable doubt standards. The Rule expressly rejects a different burden for custodial consents. The law is this area evidences substantial confusion stemming initially from language used in *United States v. Justice,* 13 C.M.A. 31, 34, 32 C.M.R. 31, 34 (1962): "It [the burden of proof] is an especially heavy obligation if the accused was in custody . . . ", which was taken in turn from a number of civilian federal court decisions. While custody should be a factor resulting in an especially careful scrutiny of the circumstances surrounding a possible consent, there appears to be no legal or policy reason to require a higher burden of proof.

(f) *Frisks incident to a lawful stop.* Rule 314(f) recognizes a frisk as a lawful search when performed pursuant to a lawful stop. The primary authority for the stop and frisk doctrine is *Terry v. Ohio,* 392 U.S. 1 (1968), and the present Manual lacks any reference to either stops or frisks. Hearsay may be used in deciding to stop and frisk. *See, e.g., Adams v. Williams,* 407 U.S. 143 (1972).

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).

1984 Amendment: Subsection (f)(3) was added based on *Michigan v. Long,* 463 U.S. 1032 (1983).

(g) *Searches incident to a lawful apprehension.* The 1969 Manual rule was found in paragraph 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—whether 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 protect 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 apprehending individuals. Any search must be directed towards the finding of such persons and not evidence.

An unlawful apprehension of the accused may make any subsequent statement by the accused inadmissible, *Dunaway v. New York,* 442 U.S. 200 (1979).

(h) *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 e.g., United States v. Maglito,* 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 e.g., 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 revived 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. 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 ¶ 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 do so is thus a function of position rather than rank.

The Rule also allows persons 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 estabish 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).

(2) *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 pracrice 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 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 ¶ 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 ¶ 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 tests will differ, however, depending upon circumstances. The following examples are illustrative:

(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 is 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 eyesight 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 (f)(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*, _____ U.S. _____, 104 S.Ct. 2085 (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 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 "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 otherwise inadmissible under the Rules. Rule 316 recognizes that searches are distinct from seizures. Although rare, a seizure need not be proceeded by a search. Property may, for example, be seized after being located pursuant to plain view, *see* subdivision (d)(4)(C). Consequently, the propriety of a seizure must be considered independently of any preceding search.

(b) *Seizure of property*. Rule 316(b) defines probable cause in the same fashion as defined by Rule 315 for probable cause searches. *See* the Analysis of Rule 315(f)(2). The justifications for seizing property are taken from 1969 Manual ¶ 152. Their number has, however, been reduced for reason of brevity. No distinction is made between "evidence of crime" and "instrumentalities or fruits of crime." Similarly the proceeds of crime are also "evidence of crime."

1984 Amendment: The second sentence of subsection (b) was deleted based on *Illinois v. Gates*, 462 U.S. 213 (1983). *See* Analysis, Mil. R. Evid. 315(f)(1), *supra*.

(c) *Apprehension*. Apprehensions are, of course, seizures of the person and unlawful apprehensions may be challenged as an unlawful seizure. *See e.g. Dunaway v. New York*, 442 U.S. 200 (1979); *United States v. Texidor-Perez*, 7 M.J. 356 (C.M.A. 1979).

(d) *Seizure of property or evidence.*

(1) *Abandoned property.* Rule 316(d) restates prior law, not addressed specifically by the 1969 Manual chapter, by providing that abandoned property may be seized by anyone at any time.

(2) *Consent.* Rule 316(d)(2) permits seizure of property with appropriate consent pursuant to Rule 314(e). The prosecution must demonstrate a voluntary consent by clear and convincing evidence.

(3) *Government property.* Rule 316(d)(3) permits seizure of government property without probable cause unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of seizure. In this regard note Rule 314(d) and its analysis.

(4) *Other property.* Rule 316(d)(4) provides for seizure of property or evidence not otherwise addressed by the Rule. There must be justification to exercise control over the property. Although property may have been lawfully located, it may not be seized for use at trial unless there is a reasonable belief that the property is of a type discussed in Rule 316(b). Because the Rule is inapplicable to seizures unconnected with law enforcement, it does not limit the seizure of property for a valid administrative purpose such as safety.

Property or evidence may be seized upon probable cause when seizure is authorized or directed by a search warrant or authorization, Rule 316(d)(4)(A); when exigent circumstances pursuant to Rule 315(g) permit proceeding without such a warrant or authorization; or when the property or evidence is in plain view or smell, Rule 316(d)(4)(C).

Although most plain view seizures are inadvertent, there is no necessity that a plain view discovery be inadvertent—notwithstanding dicta, in some court cases; *see e.g., Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The Rule allows a seizure pursuant to probable cause when made as a result of plain view. The language used in Rule 316(d)(4)(C) is taken from the ALI MODEL CODE OF PREARRAIGNMENT PROCEDURES § SS 260.6 (1975). The Rule requires that the observation making up the alleged plain view be "reasonable." Whether intentional observation from outside a window, via flashlight or binocular, for example, is observation 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).

(e) *Power to seize.* Rule 316(e) conforms with Rule 315(e) and has its origin in ¶ 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 members 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 from 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 nonconsenual 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 paragraph 153*a*, 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 concerning 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 that basic exclusionary rule for eyewitness identification testimony. The substance of the Rule is taken from prior Manual paragraph 153*a* 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 lineups 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.

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*, 432 U.S. 98 (1977). 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 showed 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*, 409 U.S. 188 (1972).

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 Rules 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 generally considered "lineups"; *cf. United States ex rel Ragazzin v. Brierley*, 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. LEDERER, 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 an identification of the accused any later identification is considered a result of the prior lineup as a matter of law unless the military judge determines by clear and convincing evidence that the latter identification is not the result of the first lineup. Subdivision (d)(1) is taken in substance from 1969 Manual paragraph 153*a*.

(2) *Unnecessarily suggestive identification.* Rule 321(d)(2) deals with an alleged unnecessarily suggestive identification or with any other alleged violation of due process. The subdivision 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 providers 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 paragraph 153*a* and *Kirby v. Illinois*, 406 U.s. 682 (1972).

(e) *Defense evidence.* Rule 321(e) is identical with the analagous provisions in Rules 304 and 311 and generally restates prior law.

(f) *Rulings.* Rule 321(f) is identical with the analagous 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 analagous 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 ¶ 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.g.* E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN & F. LEDERER, 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 "materiality" in favor of a single standard of "relevance." 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."

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 ¶ 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, e.g.*, 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. Grassi*, 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 ¶ 138*f* 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 ¶ 138*f* 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 receipt 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 subtantially similar to the 1969 Manual rule found in ¶ 138*g*. 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 ¶ 138*g*(4), remain effective. Such a purpose would, for example, be an acceptable one. Rule 404(b), like Manual ¶ 138*g*, expressly allows use of evidence of misconduct not amounting to conviction. Like ¶ 138*g*, 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 ¶ 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, e.g.*, ¶ 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 ¶ 146*b* 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 ¶ 138*f*(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 wind, 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 ¶ 138*h* 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, e.g.*, Rule 405 and the Analysis to that Rule.

Rule 407. Subsequent remedial measures

Rule 407 is taken from the Federal Rule 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. Inadmissability 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, 40 C.M.R. 247 (1969). Subsection (b) was added to the Rule in recognition of the unique possibility of administrative disposition, usually separation, in lieu of court-martial. Denominated 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 in uncertain. It is the Committee's intent that Rule 411 be appplicable 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 Rule. 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 best 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 ¶ 153*b*(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 a 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 only 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. Military life requires that large numbers of young men and women live and work together in close quarters which are often highly isolated. The deterrence of sexual offenses in such circumstances is critical to military efficiency. There is thus no justification for limiting the socpe 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 circumstances in which this language may be applicable, *see, e.g.*, S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 92-93 (2d ed. Supp. 1979), giving examples 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 ¶ 153*a* 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, e.g.*, Rule 801(d)(1)(B), or fits within an exception to the hearsay rule. *See, e.g.*, subdivisions (1), (2), (3), (4), and (24) of Rule 803.

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-lawyer 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 provilege 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 Rule of Evidence 501 with some limitations. Specific privileges are generally taken from those 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 cased 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 ¶ 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 ¶ 151*c*. The privilege expressed in Rule 302 and its conforming Manual change in ¶ 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 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 ¶ 151*b*(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 mere 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 ¶ 151*b*(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 ¶ 151*b*(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 believes 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* ¶ 151*b*(2) of the 1969 Manual.

(4) *Confidential communication.* Rule 502(b)(4) defines a "confidential" communication in terms of the intention of the party making the communication. The Rule is similar to the substance of 1969 Manual ¶ 151*b*(2) which omitted certain communications from privileged status. The new Rule is somewhat broader than the 1969 Manual's provision in that it protects information which is obtained by a third party through accident or design when the person claiming the privilege was not aware that a third party had access to the communication. *Compare* Rule ¶ 151*a* of the 1969 Manual. The broader rule has been adopted for the reasons set forth in the Advisory Committee's notes on proposed Federal Rule 504(a)(4). The provision permitting disclosure to persons in furtherance of legal services or reasonably necessary for the transmission of the communication is similar to the provision in the 1969 Manual for communications through agents.

Although ¶ 151*c* of the 1969 Manual precluded a claim of the privilege when there is transmission through wire or radio communications, the new Rules protect statements made via telephone, or, "if use of such means of communication is necessary and in furtherance of the communication," by other "electronic means of communication." Rule 511(b).

(c) *Who may claim the privilege.* Rule 502(c) is taken from proposed Federal Rule 503(b) and expresses who may claim the lawyer-client privilege. The Rule is similar to but slightly broader than ¶ 151*b*(2) of the 1969 Manual. The last sentence of the subdivision states that "the authority of the lawyer to claim the privilege is presumed in the absence of evidence to the contrary."

The lawyer may claim the privilege on behalf of the client unless authority to do so has been withheld from the lawyer or evidence otherwise exists to show that the lawyer lacks the authority to claim the privilege.

(d) *Exceptions.* Rule 502(d) sets forth the circumstances in which the lawyer-client privilege will not apply notwithstanding the general application of the privilege.

Subdivision (d)(1) excludes statements contemplating the future commission of crime or fraud and combines the substance of 1969 Manual ¶ 151*b*(2) with proposed Federal Rule of Evidence 503(d). Under the exception a lawyer may disclose information given by a client when it was part of a "communication [which] clearly contemplated the future commission of a crime or fraud," and a lawyer may also disclose information when it can be objectively said that the lawyer's services "were sought or obtained to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." The latter portion of the exception is likely to be applicable only after the commission of the offense while the former is applicable when the communication is made.

Subdivisions (d)(2) through (d)(5) provide exceptions with respect to claims through the same deceased client, breach of duty by lawyer of client, documents attested by lawyers, and communications to an attorney in a matter of common interest among joint clients. There were no parallel provisions in the 1969 Manual for these rules which are taken from proposed Federal Rule 503(d). The provisions are included in the event that the circumstances described therein arise in the military practice.

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 paragraph 151*b*(2). Like the 1969 Manual, the Rule protects communications to a clergyman'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 clergyman'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* Rules 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 paragraph 151*b*(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* Rules 502(c); 504(b)(3); 505(c); 506(c).

Rule 504. Husband-wife privilege

(a) *Spousal incapacity.* Rule 504(a) is taken generally from *Trammel v. United States*, 445 U.S. 40 (1980) and significantly changes military law in this area. Under prior law, *see* 1969 Manual paragraph 148*e*, 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 fro 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 paragraph 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 paragraph 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 paragraph 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 paragraph 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 paragraphs 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.

(s) *General rule of privilege.* Rule 505(a) is derived from *United States v. Reynolds*, 345 U.S. 1 (1953) and 1969 Manual paragraph 151. Classified information is only privileged when its "disclosure would be detrimental to the national security."

(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 paragraph 151 of the 1969 Manual and is consistent with similar provisions in the other privilege rules. *See, e.g.*, 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 absense 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.

(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 (i). 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 (3) 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.

(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 prohibition on the use of the information involved.

(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 the in camera session, the military judge may order the government to release the information for use during the proceeding or face the sanctions under subdivision (i)(4)(E).

(j) *Introduction of classified information.* Rule 505(j) is derived from section 8 of H.R. 4745 and *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

(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 priviledge 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 paragraphs 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*, 418 U.S. 683 (1974).

(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).

(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 paragraphs (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 paragraph 151 and the Supreme Court's decision in *United States v. Nixon*, 418 U.S. 683 (1974). 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 paragraph 151*b*(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 paragraph 151*b*(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 repesentative.

(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 paragraph 151*b*(1) of the 1969 Manual.

(2) *Testimony on the issue of guilt or innocence.* Rule 507(c)(2) is taken from 1969 Manual paragraph 151*b*(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 (1967) (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 ¶ 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 paragraphs 151*a* 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 510(b) is taken from ¶ 151*b*(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, e.g.*, 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* ¶ 151*b*(1), MCM, 1969 (Rev.). Such disclosures are generally safeguarded against via the definition of "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 paragraph 151*b*(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

(a) *Comment or inference not permitted.* Rule 512(a) is derived from proposed Federal Rule 513. The Rule is new to military law but is generally in accord with the Analysis of Contents of the 1969 Manual; United States Department of the Army, Pamphlet No. 27−2, Analysis of Contents, Manual for Courts-Martial 1969, Revised Edition, 27−33, 27−38 (1970).

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.

(b) *Claiming privilege without knowledge of members.* Rule 512(b) is intended to implement subdivision (a). Where possible, claims of privilege should be raised at an Article 39(a) session or, if practicable, at sidebar.

(c) *Instruction.* Rule 512(c) requires that relevant instructions be given "upon request." *Cf.* Rule 105. The military judge does not have a duty to instruct sua sponte.

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 ¶ 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, e.g., 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 ¶ 138*d*, MCM, 1969 (Rev.). Although the 1969 Manual expressly allowed an individual to testify to his or her own age or date of birth, the Rule is silent on the issue.

Notwithstanding that silence, however, it appears that it is within the meaning of the Rule to allow such testimony. Rule 804(b)(4) [Hearsay Exceptions; Declarant Unavailable—Statement of Personal or Family History] expressly permits a hearsay statement "concerning the declarant's own birth. . . or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated." It seems evident that if such a hearsay statement is admisible, in-court testimony by the declarant should be no less admissible. It is probably that the expression "personal knowledge" in Rule 804(b)(4) is being used in the sense of "first hand knowledge" while the expression is being used in Rule 602 in a somewhat broader sense to include those matters which an individual could be considered to reliably know about his or her personal history.

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 ¶ 141, MCM, 1969 (Rev.). The oath found in ¶ 114*e*, 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 605(b) is new and is not found within the Federal Rules of Evidence. It was added because of the unique nature of the military judiciary in which military judges often control their own dockets without clerical assistance. In view of the military's stingent speedy trial roles, *see, e.g., United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971), it was necessary to preclude expressly any interpretation of Rule 605 that would prohibit the military judge from placing on the record details relating to docketing in order to avoid prejudice to a party. Rule 605(b) is consistent with present military law.

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.*, ¶¶ 62*f* 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 of this Rule under ¶ 74*d*(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 ¶ 153*b*(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 character of the witness for truthfulness has been attacked. The Rule is similar to ¶ 153*b* of the 1969 Manual except that the Rule, unlike ¶ 153*b*, applies to all witnesses and does not distinguish between the accused and other witnesses.

(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 ¶ 153*b*(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 ¶ 153*b*(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). *See also* Rule 613 (Prior statements of witnesses). When the witness has testified as to the character of another witness, the witness may be cross-examined as to the character of that witness. The remainder of Rule 608(b) indicates that testimony relating only to credibility does not waive the privilege against self-incrimination. *See generally* Rule 301.

Although 608(b) allows examination into specific acts, counsel should not, as a matter of ethics, attempt to elicit evidence of misconduct unless there is a reasonable basis for the question. *See generally* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Prosecution Function 5.7(d); Defense Functions 7.6(d) (Approved draft 1971).

(c) *Evidence of bias.* Rule 608(c) is taken from 1969 Manual ¶ 153*d* and is not found within the Federal Rule. Impeachment by bias was apparently accidentally omitted from the Federal Rule, *see, e.g.,* S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 313, 14(2d ed. 1977), but is acceptable under the Federal Rules; *see e.g., United States v. Leja,* 568 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 techniques 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,* 559 F.2d 1155 (9th Cir. 1977); Rule 412. Thus, impeachment by contradiction, *see also* Rules 304(a)(2); 311(j), 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 ¶ 153*b*(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 maximum punishment imposable if the offense had been tried by general court-martial.

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 ¶ 153*b*(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 ¶ 153*b*(2)(b) of the 1969 Manual. The list of potential convictions expressed in ¶ 153*b*(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 ¶ 153*b*(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. SALTZBURG & 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 futher 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.

(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 ¶ 153*b*(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 ¶ 153*b*(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 ¶ 149*a* and that part of ¶ 137 dealing with cumulative evidence. It is within the military judge's discretion to control methods 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, ¶ 54*a*, MCM, 1969 (Rev.).

(b) *Scope of cross-examination.* Rule 611(b) is taken from the Federal Rule without change and replaces ¶ 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) (effect of claiming the privilege against self-incrimination on cross-examination); Rule 303 (Degrading 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 ¶ 149*c* 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 Act, 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, ¶ 57*a*, MCM, 1969 (Rev.).

Rule 612 codifies the doctrine of past recollection refreshed and replaces that portion of ¶ 146*a* 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, e.g.*, 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 ¶ 153*b*(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 ¶ 54*a* and ¶ 149*a* 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 military judge alter the question only to the extent necessary to ensure compliance with these Rules and Manual. When trial is by special court-martial without a military judge, 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.*, ¶ 53*f*, 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 ¶ 53*f*. 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 ¶ 138*e*, 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 ¶ 138*e*, MCM, 1969 (Rev.) dealing with expert testimony. Although the Rule is similar to the prior Manual rule, it may be broader and *may* supersede *Frye v. Unites States*, 293 F. 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 this 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.

¶ 142*e* 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. ¶ 142*e* stated, "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 ¶ 138*e* 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 Mil. R. Evid. 704(b) on 10 April 1985. The Joint-Service Committee on Military Justice considers Fed. R. Evid. 704(b) an integral part of the Insanity Defense Reform Act, ch. IV, Pub. L. No. 98-473, 98 Stat. 2067–68 (1984), (hereafter, the Act). Because proposed legislation to implement those provisions of the Act relating to insanity as an affirmative defense had not yet been enacted in the UCMJ by the date of this Executive Order, the Committee recommended that the President rescind the application of Fed. R. Evid. 704(b) to the military. Even though in effect since 10 April 1985, this change was never published in the Manual.

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 ¶ 138*e* 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 ¶¶ 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 ¶ 116, MCM, 1969 (Rev.).

(b) *Disclosure of employment.* Rule 706(b) is taken from Fed. R. Evid. 706(c) without change. The 1969 Manual was silent on the issue, but the subdivision should not change military practice.

(c) *Accused's expert of own selection.* Rule 706(c) is similar in intent to subdivision (d) of the Federal Rule and adapts that Rule to military practice. The subdivision makes it clear that the defense may call its own expert witnesses at its own expense without the necessity of recourse to ¶ 116.

Section VIII. Hearsay

Rule 801. Definitions

(a) *Statement.* Rule 801(a) is taken from the Federal Rule without change and is similar to ¶ 139*a* 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 ¶ 139*a*, 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 Rule's 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 unadopted by the testifying witness, is inadmissible hearsay notwithstanding the fact that the declarant is now on the stand and able to be cross-examined, ¶ 139*a; 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 adequately tested by cross-examination because of the time differential between the making of the statement and the giving of the in-court testimony. The Federal Rules of Evidence Advisory Committee rejected this view in part believing both that later cross-examination is sufficient to ensure reliability and that earlier statements are usually preferable to later ones because of the possibility of memory loss. *See generally,* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(*d*)(1)[01] (1978). Rule 801(d)(1) thus not only makes an important 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 inadmissible 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 deposition." The Rule does not require that the witness have been subject 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 proceeding" is uncertain, it is apparent that the Rule was intended to include grand jury testimony and may be extremely broad in scope. *See, e.g., United States v. Castro-Ayon,* 537 F.2d 1055 (9th Cir.), *cert. denied,* 429 U.S. 983 (1976) (tape recorded statements 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 foundation 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 recent 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. Dominquez,* 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 evidence of fresh complaint in prosecution of sexual offenses. Although limited to circumstances in which there is a charge, for example, 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 identification 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)(1), these statements would have come within the exceptions to the hearsay rule as recognized in the 1969 Manual. Consequently, their "reclassification" is a matter of academic interest only. No practical differences results. 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 statement made in either the party's individual or representative capacity. This was treated as an admission or confession under ¶ 140*a* 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 hearsay rule. *Cf.* ¶ 140(*a*)(4) of the 1969 Manual. While silence may be treated as an admission on the facts of a given case, *see e.g.,* 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 admissible, 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 subject." While this was not expressly dealt with by the 1969 Manual, it would be admissible under prior law as an admission; *cf.* ¶ 140*b,* 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 interpreters, as by an individual serving as a translator for a service member in a foreign nation who is, for example, attempting to consummate 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-conspirator of a party during the course and in furtherance of the conspiracy." This is similar to the military hearsay exception found in ¶ 140*b* 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-conspirator evidence. *See generally,* Comment, *Restructuring the Independent Evidence Requirement of the Coconspirator Hearsay Exception,* 127 U. Pa. L. Rev. 1439 (1979). For example, the burden of proof placed on the proponent is unclear although a preponderance appears to be the developing Article III trend. Similarly, there is substantial confusion surrounding the question of whether statements of an alleged co-conspirator may themselves 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,* 590 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 indorsement 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 wrongfully 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 ¶ 139*a* 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 adapation to military practice. Overall, the Rule is similar to practice under Manual ¶¶ 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 ¶ 142*b* 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 ¶ 142*d* 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 complaint 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 ¶ 142*d* 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*, 4J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 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 ¶¶ 146*a* and 149*c*(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 ¶ 144*d*, 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* ¶ 144*c*, 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 the 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 ¶ 144*d* 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. Strangstalien*, 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 144*d* 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 ¶ 144*d* 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 ¶ 144*c* 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 ¶¶ 143*a*(2)(h) and 143*b*(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 enforcement capacity. The language involved is taken generally from ¶ 144*b* 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 ¶ 144*d* 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 by police officers" was intended to prevent use of the exception for evaluative reports as the House Committee believed them to be unreliable. Because of the explicit language of the exclusion, normal statutory construction leads to the conclusion that reports which would be within Federal or Military Rule 803(8) but for the exclusion in (8)(B) are not otherwise admissible under Rule 803(6). Otherwise the inclusion of the limitation would serve virtually no purpose whatsoever. There is no contradiction between the exclusion in Rule 803(8)(B) and the specific documents made admissible in Rule 803(8) (and Rule 803(6)) because those documents are not matters "observed by police officers and other personnel acting in a law enforcement capacity." To the extent that they might be so considered, the specific language included by the Committee is expressly intended to reject the subdivision (8)(B) limitation. Note, however, that all forms of evidence not within the specific item listing of the Rule but within the (8)(B) exclusion will be admissible insofar as Rule 803(8) is concerned, whether the evidence is military or civilian in origin.

A question not answered by Rule 803(8) is the extent to which a regulation or directive may circumscribe Rule 803(8). Thus, if a regulation establishes a given format or procedure for a report which is not followed, is an otherwise admissible piece of evidence inadmissible for lack of conformity with the regulation or directive? The Committee did not address this issue in the context of adopting the Rule. However, it would be at least logical to argue that a record not made in substantial conformity with an implementing directive is not sufficiently reliable to be admissible. *See, e.g.*, Rule 403. Certainly, military case law predating the Military Rules may resolve this matter to the extent to which it is not based purely on now obsolete Manual provisions. As the modifications to subdivision (8) dealing with specific records retains the present Manual langauge, it is particularly likely that present case law will survive in this area.

Rule 803(8)(C) makes admissible, but only 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." This provision will make factual findings made, for example, by an Article 32 Investigating Officer or by a Court of Inquiry admissible on behalf of an accused. Because the provision applies only to "factual findings," great care must be taken to distinguish such factual determinations from opinions, recommendations, and incidental inferences.

(9) *Records of vital statistics.* Rule 803(9) is taken verbatim from the Federal Rule and had no express equivalent in the 1969 Manual.

(10) *Absence of public record or entry.* Rule 803(10) is taken verbatim from the Federal Rules and is similar to 1969 Manual ¶ 143*a*(2)(g).

(11–13) *Records of religious organizations: Marriage, baptismal, and similar certificates: Family records.* Rule 802(11)–(13) are all taken verbatim from the Federal Rule and had no express equivalents in the 1969 Manual.

(14–16) *Records of documents affecting an interest in property: Statements in documents affecting an interest in property; Statements in ancient documents.* Rules 803(14)–(16) are taken verbatim from the Federal Rule and had no express equivalent in the 1969 Manual. Although intended primarily for civil cases, they all have potential importance to courts-martial.

(17) *Market reports, commercial publications.* Rule 803(17) is taken generally from the Federal Rule. Government price lists have been added because of the degree of reliance placed upon them in military life. Although included within the general Rule, the Committee believed it inappropriate and impracticable not to clarify the matter by specific reference. The Rule is similar in scope and effect to the 1969 Manual ¶ 144*f* except that it lacks the Manual's specific reference to an absence of entries. The effect, if any, of the difference is unclear.

(18) *Learned treaties.* Rule 803(18) is taken from the Federal Rule without change. Unlike ¶ 138*e* of the 1969 Manual, which allowed use of such statements only for impeachment, this Rule allows substantive use on the merits of statements within treaties if relied upon in direct testimony or called to the expert's attention on cross-examination. Such statement 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 Rule 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 ¶ 138*f* 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 size". 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 primarily 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 on the point 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 Aricle 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 here 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 exceptions; 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 ¶ ¶ 145*a* and 145*b* 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 or 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 ¶ 145*b* 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 ¶ 804(b)(1)[(04)](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. *Hutson 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 ¶ 142*a*, 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 ¶ 142*a* 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; utters 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, e.g.*, 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 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, e.g., Bruton v. United States*, 391 U.S. 123, 128, n. 3 (1968); *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.

Section IX. Authentication and Identification

Rule 901. Requirement of authentication or identification

(a) *General provision.* Rule 901(a) is taken verbatim from the Federal Rule, and is similar to ¶ 143*b* of the 1969 Manual, which stated in pertinent part that: "A writing may be authenticated by any competent proof that it is genuine—is in fact what it purports or is claimed to be." Unlike the 1969 Manual provision, however, Rule 901(a) is not limited to writings and consequently is broader in scope. The Role supports the requirement for logical relevance. *See* Rule 401.

There is substantial question as to the proper interpretation of the Federal Rule equivalent of rule 901(a). The Rule requires only "evidence sufficient to support a finding that the matter in question is what its proponent claims." It is possible that this phrasing supersedes any formulaic approach to authentication and that rigid rules such as those that have been devised to authenticate taped recordings, for example, are no longer valid. On the other hand, it appears fully appropriate for a trial judge to require such evidence as is needed "to support a finding that the matter in question is what its proponent claims," which evidence may echo in some cases the common law formulations. There appears to be no reason to believe that the Rule will change the present law as it affects chains of custody for real evidence—especially if fungible. Present case law would appear to be consistent with the new Rule because the chain of custody requirement has not been applied in a rigid fashion. A chain of custody will still be required when it is necessary to show that the evidence is what it is claimed to be and, when appropriate, that its condition is unchanged. Rule 901(a) may make authentication somewhat easier, but is unlikely to make a substantial change in most areas of military practice.

As is generally the case, failure to object to evidence on the grounds of lack of authentication will waive the objection. *See* Rule 103(a).

(b) *Illustration.* Rule 901(b) is taken verbatim from the Federal Rule with the exception of a modification to Rule 901(b)(10). Rule 901(b)(10) has been modified by the addition of "or by applicable regulations prescribed pursuant to statutory authority." The new language was added because it was viewed as impracticable in military practice to require statutory or Supreme Court action to add authentication methods. The world wide disposition of the armed forces with their frequent redeployments may require rapid adjustments in authentication procedures to preclude substantial interference with personnel practices needed to ensure operational efficiency. The new language does not require new statutory authority. Rather, the present authority that exists for the various Service and Departmental Secretaries to issue those regulations necessary for the day to day operations of their departments is sufficient.

Rule 901(b) is a non-exhaustive list of illustrative examples of authentication techniques. None of the examples are inconsistent with prior military law and many are found within the 1969 Manual, *see, e.g.*, ¶ 143*b*. Self-authentication is governed by Rule 902.

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 prescribes 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 ¶¶ 143*b*(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 ¶¶ 143*b*(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 ¶¶ 143*b*(2)(e) and (f) 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 ¶ 143*b*(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 personnel 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* ¶ 143*a*(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 Rule 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 ¶ 143*d* 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 ¶ 143*a*(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 ¶ 143*a*(1) of the 1969 Manual defined as "duplicate originals." In view of Rule 1003's rule of admissibility for "duplicates," 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 ¶ 143*a*(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 1005–1007 *with* ¶ 143*a*(2) (f) of the 1969 Manual. For example, ¶¶ 143*a*(2) (e) and 144*c* 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 ¶ 144*a* 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," ¶ 143*a*(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 ¶ 143*a*(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 ¶ 143*a*(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 ¶ 143*a*(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 ¶ 143*a*(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 ¶ 143*a*(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).

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 Rule has been reversed extensively to adapt it 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 the Federal Rules of Evidence 1101(d) is inapplicable to military law due to the vastly different jurisdiction involved.

(a) *Rules applicable.* Rule 1101(a) specifies that the Military Rules are applicable to all courts-martial including summary courts-martial, to Article 39(a) proceedings, limited factfinding proceedings ordered on review, revision proceedings and contempt proceedings. This limited application is a direct result of the limited jurisdiction available to courts-martial.

(b) *Rules of privilege.* Rule 1101(b) is taken from subdivision (c) of the Federal Rule and is similar to prior military law. Unlike the Federal Rules, the Military Rules contain detailed privileges rather than a general reference to common law. *Compare* Federal Rule of Evidence 501 *with* Military Rule of Evidence 501−512.

(c) *Rules relaxed.* Rule 1101(c) conforms the rules or evidence to military sentencing procedures as set forth in the 1969 Manual ¶ 75*c*. Courts-martial are bifurcated proceedings with sentencing being an adversarial proceeding. Partial application of the rules of evidence is thus appropriate. The Rule also recognizes the possibility that other Manual provisions may now or later affect the application of the rules of evidence.

(d) *Rules inapplicable.* Rule 1101(d) is taken in concept from subdivision (d) of the Federal Rule. As the content of the Federal Rule is, however, generally inapplicable to military law, the equivalents of the Article III proceedings listed in Federal Rule have been listed here. They included Article 32 investigative hearings, the partial analog to grand jury proceedings, proceedings for search authorizations, and proceedings for pretrial release.

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 Rules of Evidence will be automatically applicable on the 180th day after its effective date. The President may, however, affirmatively direct that any such amendment 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.

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