MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

This change incorporates Executive Order No. 12586, dated 3 March 1987, published at 52 Fed. Reg. 7103, which amends Executive Order No. 12473, dated 13 April 1984, as amended by Executive Order No. 12484, dated 13 July 1984, and Executive Order No. 12550, dated 19 February 1986. Significant amendments include significant revision of provisions concerning lack of mental responsibility, including implementation of Article 50a, UCMJ (R.C.M. 701(b)(2), 706(c), 916(k), 918(a), 920, 921(c), 924(b), 1107(b)(5), 1113(d)(1), and 1203(c)); implementation of amendments to Articles 2 and 3 concerning court-martial jurisdiction over reserve component personnel (R.C.M. 204, 707 and 1003(c) and Paragraph 5, Part V); implementation of an amendment to Article 25(c) concerning oral requests for enlisted court-martial members (R.C.M. 503(a)(2) and 903(b) and (c)); implementation of an amendment to Article 60, UCMJ (R.C.M. 1105(c) and 1106(f)(5)); authorization for clinical psychologists to sit as members of sanity boards (R.C.M. 706(c)(1)); modification of the rule concerning self-defense (R.C.M. 916(e)(1)); modification of the rules governing review under the provisions of Article 69(b), UCMJ (R.C.M. 1010(c) and 1201(b)(3)(A)); provision to allow evidence of refusal to submit to test of body substances to be used as substantive evidence (Mil. R. Evid. 304(h)(4)); redefinition of the term "military property" under Article 108, UCMJ (paragraph 32c(1), Part IV); and amendment of the maximum permissible punishments for larceny of military property (paragraph 46, Part IV).

Copies of Executive Order No. 12586 were transmitted to the Congress of the United States in accordance with Section 836 of title 10 of the United States Code on 7 May 1987. *See* 133 Cong. Rec. H-3495 (daily ed. May 12, 1987) (EC-1384); *id.* S-6478 (daily ed. May 14, 1987) (EC-1224).

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 12586
v and vii	v through vi.1
xvii and xviii	xvii through xvii.1
xxi and xxii	xxi and xxii
xxvii and xxviii	xxvii and xxviii
II-9 through II-15	II-9 through II-16.1
II-17 and II-18	II-17 through II-18.1
II-21 and II-22	II-21 through II-22.1
II-29 through II-32	II-29 through II-32
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II-67 and II-68	II-67 through II-68.1
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II-113 and II-114	II-113 through II-114.1
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A22-45 through A22-46	A22-45 through A22-46.1
Index 35 through 38	Index 35 through 39
Index 61 and Index 62	Index 61 through 63

3. File this change sheet and Executive Order No. 12586 in front of this publication for reference purposes.

DISTRIBUTION:

Army

Active Army, ARNG, USAR: To be distributed in accordance with DA Form 12–4, requirements for Manual for Courts-Martial.

Navy: MANCTSM110

Air Force: F

Marine Corps: MARCORPS CODE: FD

Coast Guard: SDL–111

★ EXECUTIVE ORDER 12586

AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution of the United States and by Chapter 47 of title 10 of the United States Code (Uniform Code of Military Justice), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order Nos. 12484 and 12550, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. R.C.M. 201(e) is amended as follows:

★ ★ ★ ★ ★ ★ ★

b. Chapter II is amended by inserting the following new Rule following R.C.M. 203:

★ ★ ★ ★ ★ ★ ★

c. R.C.M. 503(a)(2) is amended by

★ ★ ★ ★ ★ ★ ★

d. R.C.M. 701(b)(2) is amended by

★ ★ ★ ★ ★ ★ ★

e. R.C.M. 706(c)(1) is amended to read as follows:

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f. R.C.M. 706(c)(2) is amended as follows:

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g. R.C.M. 707 is amended—

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h. R.C.M. 903 is amended—

★ ★ ★ ★ ★ ★ ★

i. R.C.M. 916 is amended as follows:

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j. R.C.M. 918(a) is amended—

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k. R.C.M. 920(e)(5)(D) is amended by

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l. R.C.M. 921(c) is amended—

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m. R.C.M. 924(b) is amended by

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n. R.C.M. 1001(b)(2) is amended by

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o. R.C.M. 1003(c) is amended—

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p. R.C.M. 1010(c) is amended to read as follows:

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q. R.C.M. 1105(c) is amended by—

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r. R.C.M. 1106(f)(5) is amended by

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s. R.C.M. 1107(b)(5) is amended to read as follows:

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t. R.C.M. 1109 is amended—

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u. R.C.M. 1112 is amended—

★ ★ ★ ★ ★ ★ ★

v. R.C.M. 1113(d)(1) is amended to read as follows:

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w. R.C.M. 1114 is amended as follows:

★ ★ ★ ★ ★ ★ ★

x. R.C.M. 1201(b)(3)(A) is amended by

★ ★ ★ ★ ★ ★ ★

y. R.C.M. 1203(c) is amended by

★ ★ ★ ★ ★ ★ ★

z. R.C.M. 1305(b)(2) is amended by

★ ★ ★ ★ ★ ★ ★

Section 2. Part III of the Manual for Courts-Martial, United States, 1984, is amended as follows:

a. Mil. R. Evid. 304(h) is amended by

★ ★ ★ ★ ★ ★ ★

b. Mil. R. Evid 613(a) is amended by

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c. Mil. R. Evid. 902(1) is amended by

★ ★ ★ ★ ★ ★ ★

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

a. Paragraph 4 is amended

★ ★ ★ ★ ★ ★ ★

b. Paragraph 10 is amended

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c. Paragraph 32 is amended—

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d. Paragraph 35 is amended—

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e. Paragraph 42 is amended

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f. Paragraph 46 is amended

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g. Paragraph 89 is amended

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Section 4. Part V of the Manual for Courts-Martial, United States, 1984, is amended in paragraph 5 by—

Section 5. These amendments shall take effect on 12 March 1987, subject to the following:

a. The addition of Rule for Courts-Martial 204, the amendments made to Rules for Courts-Martial 707 and 1003(c), and the amendments made to paragraph 5 of Part V, shall apply to any offense committed on or after 12 March 1987.

b. The amendments made to Rules for Courts-Martial 701(b), 706(c)(2), 916(b), 916(k), 918(a), 920(e), 921(c), and 924(b) shall apply to any offense committed on or after November 14, 1986, the date of enactment of the National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661.

c. The amendments made to Rules for Courts-Martial 503 and 903 shall apply only in cases in which arraignment has been completed on or after 12 March 1987.

d. The amendments made to Rules for Courts-Martial 1105 and 1106 shall apply only in cases in which the sentence is adjudged on or after 12 March 1987.

e. Except as provided in section 5.b, nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to 12 March 1987, which was not punishable when done or omitted.

f. The maximum punishment for an offense committed prior to 12 March 1987 shall not exceed the applicable maximum in effect at the time of the commission of such offense.

g. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to 12 March 1987, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

Section 6. The Secretary of Defense, on behalf of the President, shall transmit a copy of this Order to the Congress of the United States in accord with Section 836 of title 10 of the United States Code.

Ronald Reagan

THE WHITE HOUSE
March 3, 1987

Contents

PART I. PREAMBLE

PART II. RULES FOR COURTS-MARTIAL

Chapter I. General Provisions

Chapter II. Jurisdiction

*This revision supersedes the 1969 edition.

Chapter X. Sentencing

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

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

★(e) *Reciprocal jurisdiction.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

(f) *Types of courts-martial.*

(1) *General courts-martial.*

(A) *Cases under the code.*

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

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

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

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

(*b*) The case has been referred as noncapital.

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

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

(*a*) The law of war; or

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

Discussion

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

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

Discussion

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

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

(2) *Special courts-martial.*

(A) *In general.* Except as otherwise expressly provided, special courts-martial may try any

person subject to the code for any noncapital offense made punishable by the code and, as provided in this rule, for capital offenses.

(B) *Punishments.*

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

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

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

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

Discussion

See R.C.M. 503 concerning detailing the military judge and counsel.

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

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

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

(C) *Capital offenses*

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

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

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

Discussion

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

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

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

or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

Discussion

See Articles 104 and 106 for some instances of concurrent jurisdiction.

Rule 202. Persons subject to the jurisdiction of courts-martial

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

Discussion

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

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

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

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

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

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

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

> Notwithstanding any other provision of law, a person serving with an armed force who—
>
> (1) submitted voluntary to military authority:
>
> (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority [that is, not insane, intoxicated, or under the age of 17];
>
> (3) received military pay or allowances; and
>
> (4) performed military duties;
>
> is subject to [the code] until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

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

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

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

★(iii) *Call to active duty.* A member of a reserve component may be called or ordered to active duty for a variety of reasons, including training, service in time of war or national emergency, discipline,

or as a result of failure to participate satisfactorily in unit activities.

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

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

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

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

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

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

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

(*1*) The offense is one for which a court-martial may adjudge confinement for 5 or more years;

(*2*) The person cannot be tried in the courts of the United States or of a State, Territory, or the District of Columbia; and

(*3*) The person is, at the time of the court-martial, subject to the code, by reentry into the armed forces or otherwise. *See* Article 3(a).

(*b*) A person who was subject to the code at the time the offense was committed is subject to trial by court-martial despite a later discharge if—

(*1*) The discharge was issued before the end of the accused's term of enlistment for the purpose of reenlisting;

(*2*) The person remains, at the time of the court-martial, subject to the code; and

(*3*) The reenlistment occurred after 26 July 1982.

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

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

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

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

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

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

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

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

(c) *Attachment of jurisdiction over the person.*

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

Discussion

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

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

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

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

Rule 203. Jurisdiction over the offense

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

Discussion

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

(b) *Pleading and proof.* The prosecution should plead the facts establishing jurisdiction (*see* R.C.M. 307(c)(3) Discussion (F)). If the issue is raised, the prosecution must prove the disputed facts necessary to establish jurisdiction over the offense. *See* R.C.M. 907(b)(1)(A). Jurisdiction must exist over each offense. The fact that some offenses with which the accused is charged are service-connected does not necessarily establish jurisdiction over others, even if they are of a similar or related nature. However, where related on-base and off-base offenses are involved, there is a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay. The existence of this interest helps provide a basis for finding service-connection for the off-base offenses.

(c) *Determining service-connection.*

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

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

12. The offenses being among those traditionally prosecuted in civilian courts.

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

(1) the essential and obvious interest of the military in the security of persons and of property on the military enclave; (2) the responsibility of the military commander for maintenance of order in the command and the commander's authority to maintain that order; (3) the impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon the morale, discipline, reputation and integrity of the base itself, upon its personnel, and upon the military operations and the military mission; (4) Article I, section 8, clause 14 of the Constitution of the United States, vesting in Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a servicemember-offender and turn that person over to the civil authorities; (5) the distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community; (6) the presence of factors such as geographical and military relationships which have important significance in favor of service-connection; (7) historically, a crime against the person of one associated with the post was subject even to the General Article; (8) the misreading and undue restriction of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law; (9) the inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a servicemember's duty and off-duty activities and hours on the post. In addition, the effect of the offense on the reputation and morale of the Armed Service is an appropriate consideration in determining service-connection.

The test is not simply a numerical tally of the presence or absence of these or other factors. Instead, the factors identify circumstances which may tend to weigh for or against service-connection, depending on the facts of each case. Thus, certain factors will tend to weigh more heavily than others in given situations. This balancing test has been described by the Supreme Court:

> [The] issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts.

Schlesinger v. Councilman, 420 U.S. 738, 760 (1975).

(2) *Military offenses.* Military offenses, such as unauthorized absence, disrespect offenses, and disobedience of superiors, are always service-connected.

(3) *Offenses on a military installation.* Virtually all offenses which occur on a military base, post, or other installation are service-connected. Similarly, offenses aboard a military vessel or aircraft are service-connected. If an essential part of the offense occurs on a military installation, service-connection exists even though the remainder of the offense took place off base. However, on-base preparation to commit an offense or introduction onto a military installation of the fruits or instruments of a crime completed off base may not necessarily be sufficient to prove service-connection over an off-base offense. An offense which directly threatens the security of an installation may be service-connected even though it occurs off base. When an offense is committed near a military installation, the proximity may support a finding of service-connection, as when it injures relationships between the military and civilian communities and makes it more difficult for servicemembers to receive local support.

(4) *Drug offenses.* Almost every involvement of service personnel with the commerce in drugs, including use, possession, and distribution, is service-connected, regardless of location. However, examples of situations in which drug involvement by a servicemember which after *Relford* analysis might not be service-connected include use of marijuana by a servicemember on a lengthy leave away from the military, or off-base distribution by a servicemember of a small amount of illegal drugs to a civilian for personal use.

(5) *Offenses involving military status and the flouting of military authority.* The fact that the victim of an offense is a servicemember or that the accused used a military identification card may establish service-connection, especially in conjunction with other facts in a case. If the accused's status, either as a servicemember generally, or as the occupant of a specific position, is of central importance to the criminal activity, as where it is crucial in enabling the accused to commit the crime, service-connection will normally exist. The fact that the accused is an officer or military policeman or was in uniform when the offense was committed does not necessarily establish service-connection, although such circumstances may tend to support a finding of service-connection in conjunction with other facts.

(6) During a declared war, or a period of hostilities as a result of which Congress is unable to meet, virtually all offenses would be service-connected.

(d) *Exceptions to the service-connection requirement.*

(1) *The overseas exception.* Offenses which are committed outside the territorial limits of the United States and its possessions, and which are not subject to trial in the civilian courts of the United States, need not be service-connected to be tried by court-martial. This exception depends on the location of the commission of the offense, not on the location of the trial. Note that the overseas exception does not apply to all offenses committed abroad, for some criminal statutes of the United States apply to its citizens abroad. The offense must be service-connected in this case because the offense may also be tried in a civilian court of the United States. The fact that the offense occurred overseas may be a factor tending to establish service connection, however, even if potentially subject to trial in Federal civlian court.

(2) *The petty offenses exception.* Petty offenses may be tried by court-martial whether or not they are service-connected. An offense is petty if the maximum confinement which may be adjudged is 6 months or less and no punitive discharge is authorized.

★Rule 204. Jurisdiction over certain reserve component personnel

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

Discussion

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

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

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

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

Discussion

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

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

Discussion

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

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

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

Discussion

A member of a regular or reserve component remains subject to court-martial jurisdiction after leaving active duty for offenses committed prior to such termination of active duty if the member retains military

status in a reserve component without having been discharged from all obligations of military service.

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

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

Rule 301. Report of offense

(a) *Who may report.* Any person may report an offense subject to trial by court-martial.

(b) *To whom reports conveyed for disposition.* Ordinarily, any military authority who receives a report of an offense shall forward as soon as practicable the report and any accompanying information to the immediate commander of the suspect. Competent authority superior to that commander may direct otherwise.

Discussion

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

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

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

Rule 302. Apprehension

(a) *Definition and scope.*

(1) *Definition.* Apprehension is the taking of a person into custody.

Discussion

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

An apprehension is different from detention of a person for investigative purposes, although each involves the exercise of government control over the freedom of movement of a person. An apprehension must be based on probable cause, and the custody initiated in an apprehension may continue until proper authority is notified and acts under R.C.M. 304 or 305. An investigative detention may be made on less than probable cause (*see* Mil. R. Evid. 314(f)), and normally involves a relatively short period of custody. Furthermore, an extensive search of the person is not authorized incident to an investigative detention, as it is with an apprehension. *See* Mil. R. Evid. 314(f) and (g). This rule does not affect any seizure of the person less severe than apprehension.

Evidence obtained as the result of an apprehension which is in violation of this rule may be challenged under Mil. R. Evid. 311(c)(1). Evidence obtained as the result of an unlawful civilian arrest may be challenged under Mil. R. Evid. 311(c)(1), (2).

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(2) *Scope.* This rule applies only to apprehensions made by persons authorized to do so under subsection (b) of this rule with respect to offenses subject to trial by court-martial. Nothing in this rule limits the authority of federal law enforcement officials to apprehend persons, whether or not subject to trial by court-martial, to the extent permitted by applicable enabling statutes and other law.

Discussion

R.C.M. 302 does not affect the authority of any official to detain, arrest, or apprehend persons not subject to trial under the code. The rule does not apply to actions taken by any person in a private capacity.

Several federal agencies have broad powers to apprehend persons for violations of federal laws, including the Uniform Code of Military Justice. For example, agents of the Federal Bureau of Investigation, United States Marshals, and agents of the Secret Service may apprehend persons for any offenses committed in their presence and for felonies. 18 U.S.C. §§ 3052, 3053, 3056. Other agencies having apprehension powers include the General Services Administration, 40 U.S.C. § 318

and the Veterans Administration, 38 U.S.C. § 218. The extent to which such agencies become involved in the apprehension of persons subject to trial by courts-martial may depend on the statutory authority of the agency and the agency's formal or informal relationships with the Department of Defense.

(b) *Who may apprehend.* The following officials may apprehend any person subject to trial by court-martial:

(1) *Military law enforcement officials.* Security police, military police, master at arms personnel, members of the shore patrol, and persons designated by proper authorities to perform military criminal investigative, guard, or police duties, whether subject to the code or not, when, in each of the foregoing instances, the official making the apprehension is in the execution of law enforcement duties;

Discussion

Whenever enlisted persons, including police and guards, and civilian police and guards apprehend any commissioned or warrant officer, such persons should make an immediate report to the commissioned officer to whom the apprehending person is responsible.

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

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

Discussion

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

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

Discussion

The code specifically provides that any civil officer, whether of a State, Territory, district, or of the United States may apprehend any deserter. However, this authority does not permit state and local law enforcement officers to apprehend persons for other violations of the code. *See* Article 8.

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

Discussion

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

(d) *How an apprehension may be made.*

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

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

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

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

Discussion

See also R.C.M. 306.

Rule 305. Pretrial confinement

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

Discussion

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

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

Discussion

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

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

Discussion

"No provost marshal, commander of a guard, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner." Article 11(a).

(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

(c) *How to allege offenses.*

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

Discussion

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

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

Discussion

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

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

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

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

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

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

Discussion

How to draft specifications.

(A) *Sample specifications.* Before drafting a specification, the drafter should read the pertinent provisions of Part IV, where the elements of proof of various offenses and forms for specifications appear.

(B) *Numbering specifications.* If there is only one specification under a charge it is not numbered. When there is more than one specification under any charge, the specifications are numbered in Arabic numerals. The term "additional" is not used in connection with the specifications under an additional charge.

(C) *Name and description of the accused.*

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

★(ii) *Military association.* The specification should state the accused's rank or grade. If the

rank or grade of the accused has change since the date of an alleged offense, and the chnge is pertinent to the offense charged, the accused should be identified by the present rank or grade followed by rank or grade on the date of the alleged offense. For example: In that Seaman _____, then Seaman Apprentice _____, etc.

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

★(iv) *Basis of personal jurisdiction.*

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

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

(D) *Date and time of offense*

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

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

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

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

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

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

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

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

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

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

(G) *Description of offense.*

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

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

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

(iv) *Dupliciousness.* One specification should not allege more than one offense, either conjunctively (the accused "lost and destroyed") or alternatively (the accused "lost or destroyed"). However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively. *See* R.C.M. 906(b)(5).

(H) *Other considerations in drafting specifications.*

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

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

(iii) *Property.* In describing property generic terms should be used, such as "a watch" or "a knife," and descriptive details such as make, model, color, and serial number should ordinarily be omitted. In

some instances, however, details may be essential to the offense, so they must be alleged. For example: the length of a knife blade may be important when alleging a violation of general regulation prohibiting carrying a knife with a blade that exceeds a certain length.

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

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

(vi) *Orders.*

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

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

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

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

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

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

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

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

"In that Roe did, in conjunction with Doe, ..."

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

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

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

Discussion

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

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

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

Discussion

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

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

See R.C.M. 603 concerning amending specifications.

See R.C.M. 906(b)(5) and (6) concerning motions to amend specifications and bills of particulars.

(d) *Harmless error in citation.* Error in or omission of the designation of the article of the code or other statute, law of war, or regulation violated shall not be ground for dismissal of a charge or reversal of a conviction if the error or omission did not prejudicially mislead the accused.

Rule 308. Notification to accused of charges

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

Discussion

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

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

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

Rule 503. Detailing members, military judge, and counsel

(a) *Members.*

(1) *In general.* The convening authority shall detail qualified persons as members for courts-martial.

Discussion

The following persons are subject to challenge under R.C.M. 912(f) and should not be detailed as members: any person who is, in the same case, an accuser, witness, investigating officer, or counsel for any party; any person who, in the case of a new trial, other trial, or rehearing, was a member of any court-martial which previously heard the case; any person who is junior to the accused, unless this is unavoidable; an enlisted member from the same unit as the accused; any person who is in arrest or confinement.

★(2) *Enlisted members.* An enlisted accused may, before assembly, request orally on the record or in writing that enlisted persons serve as members of the general or special court-martial to which that accused's case has been or will be referred. If such a request is made, an enlisted accused may not be tried by a court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total number of members unless eligible enlisted members cannot be obtained because of physical conditions or military exigencies. If the appropriate number of enlisted members cannot be obtained, the court-martial may be assembled, and the trial may proceed without them, but the convening authority shall make a detailed written explanation why enlisted members could not be obtained which must be appended to the record of trial.

Discussion

When such a request is made, the convening authority should:

(1) Detail an appropriate number of enlisted members to the court-martial and, if appropriate, relieve an appropriate number of commissioned or warrant officers previously detailed;

(2) Withdraw the charges from the court-martial to which they were originally referred and refer them to a court-martial which includes the proper proportion of enlisted members; or

(3) Advise the court-martial before which the charges are then pending to proceed in the absence of enlisted members if eligible enlisted members cannot be detailed because of physical conditions or military exigencies.

See also R.C.M. 1103(b)(2)(D)(iii).

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(3) *Members from another command or armed force.* A convening authority may detail as members of general and special courts-martial persons under that convening authority's command or made available by their commander, even if those persons are members of an armed force different from that of the convening authority or accused.

Discussion

Concurrence of the proper commander may be oral and need not be shown by the record of trial.

Members should ordinarily be of the same armed force as the accused. When a court-martial composed of members of different armed forces is selected, at least a majority of the members should be of the same armed force as the accused unless exigent circumstances make it impractical to do so without manifest injury to the service.

(b) *Military judge.*

(1) *By whom detailed.* The military judge shall be detailed, in accordance with regulations of the Secretary concerned, by a person assigned as a military judge and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The authority to detail military judges may be delegated to persons assigned as military judges. If authority to detail military judges has been delegated to a military judge, that military judge may detail himself or herself as military judge for a court-martial.

(2) *Record of detail.* The order detailing a military judge shall be reduced to writing and included

in the record of trial or announced orally on the record at the court-martial. The writing or announcement shall indicate by whom the military judge was detailed. The Secretary concerned may require that the order be reduced to writing.

(3) *Military judge from a different armed force.* A military judge from one armed force may be detailed to a court-martial convened in a different armed force when permitted by the Judge Advocate General of the armed force of which the military judge is a member. The Judge Advocate General may delegate authority to make military judges available for this purpose.

(c) *Counsel.*

(1) *By whom detailed.* Trial and defense counsel, assistant trial and defense counsel, and associate defense counsel shall be detailed in accordance with regulations of the Secretary concerned. If authority to detail counsel has been delegated to a person, that person may detail himself or herself as counsel for a court-martial.

(2) *Record of detail.* The order detailing a counsel shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement shall indicate by whom the counsel was detailed. The Secretary concerned may require that the order be reduced to writing.

(3) *Counsel from a different armed force.* A person from one armed force may be detailed to serve as counsel in a court-martial in a different armed force when permitted by the Judge Advocate General of the armed force of which the counsel is a member. The Judge Advocate General may delegate authority to make persons available for this purpose.

Rule 504. Convening courts-martial

(a) *In general.* A court-martial is created by a convening order of the convening authority.

(b) *Who may convene courts-martial.*

(1) *General courts-martial.* Unless otherwise limited by superior competent authority, general courts-martial may be convened by persons occupying positions designated in Article 22(a) and by any commander designated by the Secretary concerned or empowered by the President.

Discussion

The authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions. The rules by which command devolves are found in regulations of the Secretary concerned.

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(2) *Special courts-martial.* Unless otherwise limited by superior competent authority, special courts-martial may be convened by persons occupying positions designated in Article 23(a) and by commanders designated by the Secretary concerned.

Discussion

See the discussion of subsection (b)(1) of this rule. Persons authorized to convene general courts-martial may also convene special courts-martial.

(A) *Definition.* For purposes of Articles 23 and 24, a command or unit is "separate or detached" when isolated or removed from the immediate disciplinary control of a superior in such manner as to make its commander the person held by superior commanders primarily responsible for discipline. "Separate or detached" is used in a disciplinary sense and not necessarily in a tactical or physical sense.

Discussion

The power of a commander of a separate or detached unit to convene courts-martial, like that of any other commander, may be limited by superior competent authority.

CHAPTER VII. PRETRIAL MATTERS

Rule 701. Discovery

(a) *Disclosure by the trial counsel.* Except as otherwise provided in subsections (f) and (g)(2) of this rule, the trial counsel shall provide the following information or matters to the defense—

(1) *Papers accompanying charges; convening orders; statements.* As soon as practicable after service of charges under R.C.M. 602, the trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:

(A) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;

(B) The convening order and any amending orders; and

(C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

(2) *Documents, tangible objects, reports.* After service of charges, upon request of the defense, the Government shall permit the defense to inspect:

(A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and

(B) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known, or by the exercise of due diligence may become known, to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

Discussion

For specific rules concerning certain mental examinations of the accused *see* R.C.M. 706 and Mil. R. Evid. 302

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(3) *Witnesses.* Before the beginning of trial on the merits the trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:

(A) In the prosecution case-in-chief; and

(B) To rebut a defense of alibi or lack of mental responsibility, when trial counsel has received timely notice under subsection (b)(1) or (2) of this rule.

Discussion

Such notice should be in writing except when impracticable.

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(4) *Prior convictions of accused offered on the merits.* Before arraignment the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to inspect such records when they are in the trial counsel's possession.

(5) *Information to be offered at sentencing.* Upon request of the defense the trial counsel shall:

(A) Permit the defense to inspect such written material as will be presented by the prosecution at the presentencing proceedings; and

(B) Notify the defense of the names and addresses of the witnesses the trial counsel intends to call at the presentencing proceedings under R.C.M. 1001(b).

(6) *Evidence favorable to the defense.* The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged; or

(C) Reduce the punishment.

Discussion

In addition to the matters required to be disclosed under subsection (a) of this rule, the Government is required to notify the defense of or provide to the defense certain information under other rules. Mil. R. Evid. 506 covers the disclosure of unclassified information which is under the control of the Government. Mil. R. Evid. 505 covers disclosure of classified information.

Other R.C.M. and Mil. R. Evid. concern disclosure of other specific matters. *See* R.C.M. 308 (identification of accuser), 405 (report of Article 32 investigation), 706(c)(3)(B) (mental examination of accused), 914 (production of certain statements), and 1004(b)(1) (aggravating circumstances in capital cases); Mil. R. Evid. 301(c)(2) (notice of immunity or leniency to witnesses), 302 (mental examination of accused), 304(d)(1) (statements by accused), 311(d)(1) (evidence seized from accused), 321(c)(1) (evidence based on lineups), 507 (identity of informants), 612 (memoranda used to refresh recollection), and 613(a) (prior inconsistent statements).

Requirements for notice of intent to use certain evidence are found in: Mil. R. Evid. 201A(b) (judicial notice of foreign law), 301(c)(2) (immunized witnesses), 304(d)(2) (notice of intent to use undisclosed confessions), 304(f) (testimony of accused for limited purpose on confession), 311(d)(2)(B) (notice of intent to use undisclosed evidence seized), 311(f) (testimony of accused for limited purpose on seizures), 321(c)(2)(B) (notice of intent to use undisclosed line-up evidence), 321(e) (testimony of accused for limited purpose on line-ups), 412(c)(1) and (2) (intent of defense to use evidence of sexual misconduct by a victim); 505(h) (intent to disclose classified information), 506(h) (intent to disclose privilage government information), and 609(b) (intent to impeach with conviction over 10 years old).

(b) *Disclosure by the defense.* Except as otherwise provided in subsections (f) and (g)(2) of this rule, the defense shall provide the following information to the trial counsel—

(1) *Notice of alibi.* The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer a defense of alibi. Such notice by the defense shall disclose the specific place or places at which the defense claims the accused to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the accused intends to rely to establish such alibi.

Discussion

If the defense needs more detail as to the time, date, or place of the offense to comply with this rule, it should request a bill of particulars. *See* R.C.M. 906(b)(6).

★(2) *Mental responsibility.* If the defense intends to rely upon the defense of lack of mental responsibility, or to introduce expert testimony relating to the defense of lack of mental responsibility, the defense shall, before the beginning of trial on the merits, notify the trial counsel of such intention.

Discussion

See R.C.M. 916(k) concerning the defense of lack of mental responsibility. *See* R.C.M. 706 concerning inquiries into the mental responsibility of the accused. *See* Mil. R. Evid. 302 concerning statements by the accused during such inquiries.

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(3) *Documents and tangible objects.* If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall

Discussion

See also R.C.M. 910(f) (plea agreement inquiry).

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused

(a) *Initial action.* If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

Discussion

See R.C.M. 909 concerning the capacity of the accused to stand trial and R.C.M. 916(k) concerning mental responsibility of the accused.

(b) *Ordering an inquiry.*

(1) *Before referral.* Before referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the convening authority before whom the charges are pending for disposition.

(2) *After referral.* After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge. The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the court-martial (including any Article 39(a) session) when the military judge is not reasonably available. The military judge may order a mental examination of the accused regardless of any earlier determination by the convening authority.

(c) *Inquiry.*

★(1) *By whom conducted.* When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall report as to the mental capacity or mental responsibility or both of the accused.

(2) *Matters in inquiry.* When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions:

★(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

(B) What is the clinical psychiatric diagnosis?

★(C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

(D) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense?

Other appropriate questions may also be included.

(3) *Directions to board.* In addition to the requirements specified in subsection (c)(2) of this rule, the order to the board shall specify:

(A) That upon completion of the board's investigation, a statement consisting only of the board's ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused's commanding officer, the investigating officer, if any, appointed pursuant to Article 32 and to all counsel in the case, the convening authority, and, after referral, to the military judge;

(B) That the full report of the board may be released by the board or other medical personnel only to other medical personnel for medical purposes, unless otherwise authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report shall be furnished to the defense and, upon request, to the commanding officer of the accused; and

(C) That neither the contents of the full report nor any matter considered by the board during its investigation shall be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge.

Discussion

Based on the report, further action in the case may be suspended, the charges may be dismissed by the convening authority, administrative action may be taken to discharge the accused from the service or, subject to Mil. R. Evid. 302, the charges may be tried by court-martial.

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(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); or

★(3) Entry on active duty under R.C.M. 204.

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 period of delay, not exceeding 60 days, occasioned in processing and implementing a request pursuant to R.C.M. 204 to order a member of a reserve component to active duty for disciplinary action.

Discussion

★The excludible period begins running on the day that the request for activation of the reservist is forwarded from the officer initially requesting activation for ultimate delivery to the regular component general

court-martial convening authority or the Secretary concerned. For any period of 60 days or less, the excludible period ends on the day that the accused properly reports for active duty.

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(9) 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.

(1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

(2) Where the military judge has acted as counsel, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.

(3) Where the military judge has been or will be a witness in the same case, is the accuser, has forwarded charges in the case with a personal recommendation as to disposition, or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.

(4) Where the military judge is not eligible to act because the military judge is not qualified under R.C.M. 502(c) or not detailed under R.C.M. 503(b).

(5) Where the military judge, the military judge's spouse, or a person within the third degree of relationshp to either of them or a spouse of such person:

(A) Is a party to the proceeding;

(B) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding; or

(C) Is to the military judge's knowledge likely to be a material witness in the proceeding.

Discussion

A military judge should inform himself or herself about his or her financial interests, and make a reasonable effort to inform himself or herself about the financial interests of his or her spouse and minor children living in his or her household.

(c) *Definitions.* For the purposes of this rule the following words or phrases shall have the meaning indicated—

(1) "Proceeding" includes pretrial, trial, post-trial, appellate review, or other stages of litigation.

(2) The "degree of relationshp" is calculated according to the civil law system.

Discussion

Relatives within the third degree of relationship are children, grandchildren, great grandchildren, parents, grandparents, great grandparents, brothers, sisters, uncles, aunts, nephews, and nieces.

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(3) "Military judge" does not include the president of a special court-martial without a military judge.

(d) *Procedure.*

(1) The military judge shall, upon motion of any party or sua sponte, decide whether the military judge is disqualified.

Discussion

There is no peremptory challenge against a military judge. A military judge should carefully consider whether any of the grounds for disqualification in this rule exist in each case. The military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily.

Possible grounds for disqualification should be raised at the earliest reasonable opportunity. They may be raised at any time, and an earlier adverse ruling does not bar later consideration of the same issue, as, for example, when additional evidence is discovered.

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(2) Each party shall be permitted to question the military judge and to present evidence regarding

a possible ground for disqualification before the military judge decides the matter.

(3) Except as provided under subsection (e) of this rule, if the military judge rules that the military judge is disqualified, the military judge shall recuse himself or herself.

(e) *Waiver.* No military judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b) of this rule. Where the ground for disqualification arises only under subsection (a) of this rule, waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Rule 903. Accused's elections on composition of court-martial

(a) *Time of elections.*

(1) *Requests for enlisted members.* Before the end of the initial Article 39(a) session or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable, whether an enlisted accused elects to be tried by a court-martial including enlisted members. The military judge may, as a matter of discretion, permit the accused to defer requesting enlisted members until any time before assembly, which time may be determined by the military judge.

(2) *Request for trial by military judge alone.* Before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable, whether in a noncapital case, the accused requests trial by the military judge alone. The accused may defer requesting trial by military judge alone until any time before assembly.

Discussion

Only an enlisted accused may request that enlisted members be detailed to a court-martial. Trial by military judge alone is not permitted in capital cases (*see* R.C.M. 201(f)(1)(C)) or in special courts-martial in which no military judge has been detailed.

(b) *Form of election.*

★(1) *Request for enlisted members.* A request for the membership of the court-martial to include enlisted persons shall be in writing and signed by the accused or shall be made orally on the record.

(2) *Request for trial by military judge alone.* A request for trial by military judge alone shall be in writing and signed by the accused or shall be made orally on the record.

(c) *Action on election.*

★(1) *Request for enlisted members.* Upon notice of a timely request for enlisted members by an enlisted accused, the convening authority shall detail enlisted members to the court-martial in accordance with R.C.M. 503 or prepare a detailed written statement explaining why physical conditions or military exigencies prevented this. The trial of the general issue shall not proceed until this is done.

(2) *Request for military judge alone.* Upon receipt of a timely request for trial by military judge alone the military judge shall:

(A) Ascertain whether the accused has consulted with defense counsel and has been informed of the identity of the military judge and of the right to trial by members; and

Discussion

Ordinarily the military judge should inquire personally of the accused to ensure that the accused's waiver of the right to trial by members is knowing and understanding. Failure to do so is not error, however, where such knowledge and understanding otherwise appear on the record.

DD Form 1722 (Request for Trial Before Military Judge Alone (Art. 16, UCMJ)) should normally be used for the purpose of requesting trial by military judge alone under this rule, if a written request is used.

(B) Approve or disapprove the request, in the military judge's discretion.

Discussion

A timely request for trial by military judge alone should be granted unless there is substantial reason why, in the interest of justice, the military judge should not sit as factfinder. The military judge may hear arguments from counsel before acting on the request. The basis for denial of a request must be made a matter of record.

★(3) *Other.* In the absence of a request for enlisted members or a request for trial by military judge alone, trial shall be by a court-martial composed of officers.

Discussion

Ordinarily if no request for enlisted members or trial by military judge alone is submitted, the military judge should inquire whether such a request will be made (*see* subsection (a)(1) of this rule) unless these elections are not available to the accused.

(d) *Right to withdraw request.*

(1) *Enlisted members.* A request for enlisted members may be withdrawn by the accused as a matter of right any time before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly.

(2) *Military judge.* A request for trial by military judge alone may be withdrawn by the accused as a matter of right any time before it is approved, or even after approval, if there is a change of the military judge.

Discussion

Withdrawal of a request for enlisted members or trial by military judge alone should be shown in the record.

(e) *Untimely requests.* Failure to request, or failure to withdraw a request for enlisted members or trial by military judge alone in a timely manner shall waive the right to submit or to withdraw such a request. However, the military judge may until the beginning of the introduction of evidence on the merits, as a matter of discretion, approve an untimely request or withdrawal of a request.

Discussion

In exercising discretion whether to approve an untimely request or withdrawl 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).

(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 five years. *See* Article 43(b). This period may be tolled (Article 43(c) and (d)), extended (Article 43(e) and (g)), or suspended (Article 43(f)) under certain circumstances. The prosecution bears the burden of proving that the statute of limitations has been tolled, extended, or suspended if it appears that it has run.

Some offenses are continuing offenses and any period of the offense occurring within the statute of limitations is not barred. Absence without leave, desertion, and fraudulent enlistment are not continuing offenses and are committed, respectively, on the day the person goes absent, deserts, or first receives pay or allowances under the enlistment.

When computing the statute of limitations, periods in which the accused was fleeing from justice or periods when the accused was absent without leave or in desertion are excluded. The military judge must determine by a preponderance, as an interlocutory matter, whether the accused was absent without authority or fleeing from justice. It would not be necessary that the accused be charged with the absence offense. In cases where the accused is charged with both an absence offense and a non-absence offense, but is found not guilty of the absence offense, the military judge would reconsider, by a preponderance, his or her prior determination whether that period of time is excludable.

If sworn charges have been received by an officer exercising summary court-martial jurisdiction over the command within the period of the statute, minor amendments (*see* R.C.M. 603(a)) may be made in the specification after the statute of limitations has run. However, if new charges are drafted or a major amendment made (*see* R.C.M. 603(d)) after the statute of limitations has run, prosecution is barred. Article 43(g) allows the government time to reinstate charges dismissed as defective or insufficient for any cause. The government would have up to six months to reinstate the charges if the original period of limitations has expired or will expire within six months of the dismissal.

In some cases, the issue whether the statute of limitations has run will depend on the findings on the general issue of guilt. For example, where the date of an offense is in dispute, a finding by the court-martial that the offense occurred at an earlier time may affect a determination as to the running of the statute of limitations.

When the statute of limitations has run as to a lesser included offense, but not as to the charged offense, see R.C.M. 920(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 proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense of the case.

Discussion

If the accused is not found to possess sufficient mental capacity to stand trial, the proceedings should be suspended. Depending on the nature and potential duration of the accused's incapacity, the case may be continued or charges withdrawn or dismissed. When appropriate, administrative action may be taken to discharge the accused from the service on grounds of mental disability. Additional mental examinations may be directed at any stage of the proceedings as circumstances may require.

Rule 910. Pleas

(a) *Alternatives.*

(1) *In general.* An accused may plead 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).

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(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

(3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a Federal grand jury.

Rule 915. Mistrial

(a) *In general.* The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. A mistrial may be declared as to some or all charges, and as to the entire proceedings or as to only the proceedings after findings.

Discussion

The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons. As examples, a mistrial may be appropriate when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members or when members engage in prejudicial misconduct. Also a mistrial is appropriate when the proceedings must be terminated because of a legal defect, such as a jurisdictional defect, which can be cured; for example, when the referral is jurisdictionally defective. *See also* R.C.M. 905(g) concerning the effect of rulings in one proceeding on later proceedings.

(b) *Procedure.* On motion for a mistrial or when it otherwise appears that grounds for a mistrial may exist, the military judge shall inquire into the views of the parties on the matter and then decide the matter as an interlocutory question.

Discussion

Except in a special court-martial without a military judge, the hearing on a mistrial should be conducted out of the presence of the members.

(c) *Effect of declaration of mistrial.*

(1) *Withdrawal of charges.* A declaration of a mistrial shall have the effect of withdrawing the affected charges and specifications from the court-martial.

Discussion

Upon declaration of a mistrial, the affected charges are returned to the convening authority who may refer them anew or otherwise dispose of them. *See* R.C.M. 401-407.

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(2) *Further proceedings.* A declaration of a mistrial shall not prevent trial by another court-martial on the affected charges and specifications except when the mistrial was declared after jeopardy attached and before findings, and the declaration was:

(A) An abuse of discretion and without the consent of the defense; or

(B) The direct result of intentional prosecutorial misconduct designed to necessitate a mistrial.

Rule 916. Defenses

(a) *In general.* As used in this rule, "defenses" includes any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly or partially, criminal responsibility for those acts.

Discussion

Special defenses are also called "affirmative defenses."

"Alibi" and "good character" are not special defenses, as they operate to deny that the accused

committed one or more of the acts constituting the offense. As to evidence of the accused's good character, *see* Mil. R. Evid. 404(a)(1). *See* R.C.M. 701(b)(1) concerning notice of alibi.

★(b) *Burden of proof.* Except for the defense of lack of mental responsiblity, once a defense under this rule is placed in issue by some evidence, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist. The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

Discussion

A defense may be raised by evidence presented by the defense, the prosecution, or the court-martial. For example, in a prosecution for assault, testimony by prosecution witnesses that the victim brandished a weapon toward the accused may raise a defense of self-defense. *See* subsection (e) below.

More than one defense may be raised as to a particular offense. The defenses need not necessarily be consistent.

See R.C.M. 920(e)(3) concerning instructions on defenses.

(c) *Justification.* A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.

Discussion

The duty may be imposed by statute, regulation, or order. For example, the use of force by a law enforcement officer when reasonably necessary in the proper execution of a lawful apprehension is justified because the duty to apprehend is imposed by lawful authority. Also, killing an enemy combatant in battle is justified.

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

Discussion

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

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

(e) *Self-defense.*

★(1) *Homicide or assault cases involving deadly force.* It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused:

(A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and

(B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm.

Discussion

★The words "involving deadly force" describe the factual circumstances of the case, not specific assault offenses. If the accused is charged with simple assault, battery or any form of aggravated assault, or if simple assault, battery or any form of aggravated assault is in issue as a lesser included offense, the accused may rely on this subsection if the test specified in subsections (A) and (B) is satisfied.

The test for the first element of self-defense is objective. Thus, the accused's apprehension of death or

grievous bodily harm must have been one which a reasonable, prudent person would have held under the circumstances. Because this test is objective, such matters as intoxication or emotional instability of the accused are irrelevant. On the other hand, such matters as the relative height, weight, and general build of the accused and the alleged victim, and the possibility of safe retreat are ordinarily among the circumstances which should be considered in determining the reasonableness of the apprehension of death or grievous bodily harm.

The test for the second element is entirely subjective. The accused is not objectively limited to the use of reasonable force. Accordingly, such matters as the accused's emotional control, education, and intelligence are relevant in determining the accused's actual belief as to the force necessary to repel the attack.

See also Mil. R. Evid. 404(a)(2) as to evidence concerning the character of the victim.

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(2) *Certain aggravated assault cases.* It is a defense to assault with a dangerous weapon or means likely to produce death or grievous bodily harm that the accused:

Discussion

Examples of ignorance or mistake which need only exist in fact include: ignorance of the fact that the person assaulted was an officer; belief that property allegedly stolen belonged to the accused; belief that a controlled substance was really sugar.

Examples of ignorance or mistake which must be reasonable as well as actual include: belief that the accused charged with unauthorized absence had permission to go; belief that the accused had a medical "profile" excusing shaving as otherwise required by regulation. Some offenses require special standards of conduct (*see*, for example, paragraph 68, Part IV, Dishonorable failure to maintain sufficient funds); the element of reasonableness must be applied in accordance with the standards imposed by such offenses.

Examples of offenses in which the accused's intent or knowledge is immaterial include: carnal knowledge (accused's knowledge of age of victim immaterial); improper use of countersign (mistake as to authority of person to whom disclosed not a defense). Such ignorance or mistake may be relevant in extenuation and mitigation, however.

See subsection (*l*)(1) of this rule concerning ignorance or mistake of law.

★(k) *Lack of mental responsibility.*

(1) *Lack of mental responsibility.* It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

Discussion

See R.C.M. 706 concerning sanity inquiries. *See also* R.C.M. 909 concerning the capacity of the accused to stand trial.

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(2) *Partial mental responsibility.* A mental condition not amounting to a lack of mental responsibility under subsection (k)(1) of this rule is not a defense, nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense.

(3) *Procedure.*

(A) *Presumption.* The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until the accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense.

Discussion

The accused is presumed to be mentally responsible, and this presumption continues throughout the proceedings unless the finder of fact determines that the accused has proven lack of mental responsibility by clear and convincing evidence. *See* subsection (b) of this rule.

(B) *Inquiry.* If a question is raised concerning the mental responsibility of the accused, the military judge shall rule finally whether to direct an inquiry under R.C.M. 706. In a special court-martial without a military judge, the president shall rule finally except to the extent that the question is one of fact, in which case the president rules subject to objection by any member.

Discussion

See R.C.M. 801(e)(3) for the procedures for voting on rulings of the president of a special court-martial without a military judge.

If an inquiry is directed, priority should be given to it.

(C) *Determination.* The issue of mental responsibility shall not be considered as an interlocutory question.

(1) *Not defenses generally.*

(1) *Ignorance or mistake of law.* Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense.

Discussion

For example, ignorance that it is a crime to possess marijuana is not a defense to wrongful possession of marijuana.

Ignorance or mistake of law may be a defense in some limited circumstances. If the accused, because of a mistake as to a separate nonpenal law, lacks the criminal intent or state of mind necessary to establish guilt, this may be a defense. For example, if the accused, under mistaken belief that the accused is entitled to take an item under property law, takes an item, this mistake of law (as to the accused's legal right) would, if genuine, be a defense to larceny. On the other hand, if the accused disobeyed an order, under the actual but mistaken belief that the order was unlawful, this would not be a defense because the accused's mistake was as to the order itself, and not as to a separate nonpenal law. Also, mistake of law may be a defense when the mistake results from reliance on the decision or pronouncement of an authorized public official or agency. For example, if an accused, acting on the advice of an official responsible for administering benefits that the accused is entitled to those benefits, applies for and receives those benefits, the accused may have a defense even though the accused was not legally eligible for the benefits. On the other hand, reliance on the advice of counsel that a certain course of conduct is legal is not, of itself, a defense.

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(2) *Voluntary intoxication.* Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

Discussion

Voluntary intoxication may reduce premeditated murder to unpremeditated murder, but it will not reduce murder to manslaughter or any other lesser offense. *See* paragraph 43c(2)(c), Part IV.

Although voluntary intoxication is not a defense, evidence of voluntary intoxication may be admitted in extenuation.

Rule 917. Motion for a finding of not guilty

(a) *In general.* The military judge, on motion by the accused or sua sponte, shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offense affected. If a motion for a finding of not guilty at the close of the prosecution's case is denied, the defense may offer evidence on that offense without having reserved the right to do so.

(b) *Form of motion.* The motion shall specifically indicate wherein the evidence is insufficient.

(c) *Procedure.* Before ruling on a motion for a finding of not guilty, whether made by counsel or sua sponte, the military judge shall give each party an opportunity to be heard on the matter.

Discussion

The military judge ordinarily should permit the trial counsel to reopen the case as to the insufficiency specified in the motion.

See R.C.M. 801(e)(2) and (3) for additional procedures to be followed in a special court-martial without a military judge.

(d) *Standard.* A motion for a finding of not guilty shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.

(e) *Motion as to greater offense.* A motion for a finding of not guilty may be granted as to part of a specification and, if appropriate, the corresponding charge, as long as a lesser offense charged is

alleged in the portion of the specification as to which the motion is not granted. In such cases, the military judge shall announce that a finding of not guilty has been granted as to specified language in the specification and, if appropriate, corresponding charge. In cases before members, the military judge shall instruct the members accordingly, so that any findings later announced will not be inconsistent with the granting of the motion.

(f) *Effect of ruling.* A ruling granting a motion for a finding of not guilty is final when announced and may not be reconsidered. Such a ruling is a finding of not guilty of the affected specification, or affected portion thereof, and, when appropriate, of the corresponding charge. A ruling denying a motion for a finding of not guilty may be reconsidered at any time before findings on the general issue of guilt are announced.

(g) *Effect of denial on review.* If all the evidence admitted before findings, regardless by whom offered, is sufficient to sustain findings of guilty, the findings need not be set aside upon review solely because the motion for finding of not guilty should have been granted upon the state of the evidence when it was made.

Rule 918. Findings

(a) *General findings.* The general findings of a court-martial state whether the accused is guilty of each offense charged. If two or more accused are tried together, separate findings as to each shall be made.

★(1) *As to a specification.* General findings as to a specification may be: guilty; guilty with exceptions, with or without substitutions, not guilty of the exceptions but guilty of any substitutions; not guilty only by reason of lack of mental responsibility; or not guilty. Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.

Discussion

Exceptions and substitutions. One or more words or figures may be excepted from a specification and, when necessary, others substituted, if the remaining language of the specification, with or without substitutions, states an offense by the accused which is punishable by court-martial. Changing the date or place of the offense may, but does not necessarily, change the nature or identity of an offense.

If A and B are joint accused and A is convicted but B is acquitted of the offense charged, A should be found guilty by excepting the name of B from the specification as well as any other words indicating the offense was a joint one.

Lesser included offenses. If the evidence fails to prove the offense charged but does prove an offense necessarily included in the offense charged, the factfinder may by exceptions and substitutions find the accused not guilty of the offense charged but guilty of a lesser offense, which is included in the offense charged. Ordinarily an attempt is a lesser included offense even if the evidence establishes that the offense charged was consummated. *See* Part IV concerning lesser included offenses.

Offenses arising from the same act or transaction. The accused may be found guilty of two or more offenses arising from the same act or transaction, whether or not the offenses are separately punishable. *But see* R.C.M. 906(b)(12); 907(b)(3)(B); 1003(c)(1)(C).

★(2) *As to a charge.* General findings as to a charge may be: guilty; not guilty, but guilty of a violation of Article _____; not guilty only by reason of lack of mental responsibility; or not guilty.

Discussion

Where there are two or more specifications under one charge, conviction of any of those specifications requires a finding of guilty of the corresponding charge. Under such circumstances any findings of not guilty as to the other specifications do not affect that charge. If the accused is found guilty of one specification and of a lesser included offense prohibited by a different Article as to another specification under the same charge, the findings as to the corresponding charge should be: Of the Charge as to specification 1: Guilty; as to specification 2; not guilty, but guilty of a violation of Article___

An attempt should be found as a violation of Article 80 unless the attempt is punishable under Articles 85, 94, 100, 104, or 128, in which case it should be found as a violation of that Article.

A court-martial may not find an offense as a violation of an article under which it was not charged solely for the purpose of increasing the authorized punishment or for the purpose of adjudging less than the prescribed mandatory punishment.

(b) *Special findings.* In a trial by court-martial composed of military judge alone, the military judge shall make special findings upon request by any party. Special findings may be requested only as to matters of fact reasonably in issue as to an offense and need be made only as to offenses of which the accused was found guilty. Special findings may be requested at any time before general findings are announced. Only one set of special findings may be requested by a party in a case. If the request is for findings on specific matters, the military judge may require that the request be written. Special findings may be entered orally on the record at the court-martial or in writing during or after the court-martial, but in any event shall be made before authentication and included in the record of trial.

Discussion

Special findings ordinarily include findings as to the elements of the offenses of which the accused has been found guilty, and any affirmative defense relating thereto.

See also R.C.M. 905(d); Mil. R. Evid. 304(d)(4); 311(d)(4); 321(f) concerning other findings to be made by the military judge.

Members may not make special findings.

(c) *Basis of findings.* Findings may be based on direct or circumstantial evidence. Only matters properly before the court-martial on the merits of the case may be considered. A finding of guilty of any offense may be reached only when the factfinder is satisfied that guilt has been proved beyond a reasonable doubt.

Discussion

Direct evidence is evidence which tends directly to prove or disprove a fact in issue (for example, an element of the offense charged). Circumstantial evidence is evidence which tends directly to prove not a fact in issue but some other fact or circumstance from which, either alone or together with other facts or circumstances, one may reasonably infer the existence or nonexistence of a fact in issue. There is no general rule for determining or comparing the weight to be given to direct or circumstantial evidence.

A reasonable doubt is a doubt based on reason and common sense. A reasonable doubt is not mere conjecture; it is an honest, conscientious doubt suggested by the evidence, or lack of it, in the case. An absolute or mathematical certainty is not required. The rule as to reasonable doubt extends to every element of the offense. It is not necessary that each particular fact advanced by the prosecution which is not an element be proved beyond a reasonable doubt.

The factfinder should consider the inherent probability or improbability of the evidence, using common sense and knowledge of human nature, and should weigh the credibility of witnesses. A factfinder may properly believe one witness and disbelieve others whose testimony conflicts with that of the one. A factfinder may believe part of the testimony of a witness and disbelieve other parts.

Findings of guilty may not be based solely on the testimony of a witness other than the accused which is self-contradictory, unless the contradiction is adequately explained by the witness. Even if apparently credible and corroborated, the testimony of an accomplice should be considered with great caution.

Rule 919. Argument by counsel on findings

(a) *In general.* After the closing of evidence, trial counsel shall be permitted to open the argument. The defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebuttal.

(b) *Contents.* Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case.

Discussion

The military judge may exercise reasonable control over argument. *See* R.C.M. 801(a)(3).

Argument may include comment about the testimony, conduct, motives, interests, and biases of witnesses to the extent supported by the evidence. Counsel should not express a personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt or innocence of the accused, nor should counsel make arguments calculated to inflame passions or prejudices. In argument counsel may treat the testimony of witnesses as conclusively establishing the facts related by the witnesses. Counsel may not cite legal authorities or the facts of other cases when arguing to members on findings.

Trial counsel may not comment on the accused's exercise of the right against self-incrimination or the

right to counsel. *See* Mil. R. Evid. 512. Trial counsel may not argue that the prosecution's evidence is unrebutted if the only rebuttal could come from the accused. When the accused is on trial for several offenses and testifies only as to some of the offenses, trial counsel may not comment on the accused's failure to testify as to the others. When the accused testifies on the merits regarding an offense charged, trial counsel may comment on the accused's failure in that testimony to deny or explain specific incriminating facts that the evidence for the prosecution tends to establish regarding that offense.

Trial counsel may not comment on the failure of the defense to call witnesses or of the accused to testify at the Article 32 investigation or upon the probable effect of the court-martial's findings on relations between the military and civilian communities.

The rebuttal argument of trial counsel is generally limited to matters argued by the defense. If trial counsel is permitted to introduce new matter in closing argument, the defense should be allowed to reply in rebuttal. However, this will not preclude trial counsel from presenting a final argument.

(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 not reasonable doubt; and

★(D) The burden of proof to establish the guilt of the accused is upon the Government. [When the issue of lack of mental responsibility is raised, add:] However, the burden of proving the defense of lack of mental responsibility by clear and convincing evidence is upon the accused.

(6) Directions on the procedures under R.C.M. 921 for deliberations and voting; and

(7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, sua sponte, should be given.

Discussion

A matter is "in issue" when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose. An instruction on a lesser included offense is proper when an element from the charged offense which distinguishes that offense from the lesser offense is in dispute.

See R.C.M. 918(c) and discussion as to reasonable doubt and other matters relating to the basis for findings which may be the subject of an instruction.

Other matters which may be the subject of instruction in appropriate cases 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 of what respect the instructions given were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 921. Deliberations and voting on findings

(a) *In general.* After the military judge instructs the members on findings, the members shall deliberate and vote in a closed session. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner in an attempt to control the independence of members in the exercise of their judgment.

(b) *Deliberations.* Deliberations properly include full and free discussion of the merits of the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request.

(c) *Voting.*

(1) *Secret ballot.* Voting on the findings for each charge and specification shall be by secret written ballot. All members present shall vote.

(2) *Numbers of votes required to convict.*

(A) *Death penalty mandatory.* A finding of guilty of an offense for which the death penalty is mandatory results only if all members present vote for a finding of guilty.

Discussion

Article 106 is the only offense under the code for which the death penalty is mandatory.

(B) *Other offenses.* As to any offense for which the death penalty is not mandatory, a finding of guilty results only if at least two-thirds of the members present vote for a finding of guilty.

Discussion

In computing the number of votes required to convict, any fraction of a vote is rounded up to the next whole number. For example, if there are five members, the concurrence of at least four would be required to convict. The military judge should instruct the members on the specific number of votes required to convict.

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(3) *Acquittal.* If fewer than two-thirds of the members present vote for a finding of guilty—or, when the death penalty is mandatory, if fewer than all the members present vote for a finding of guilty—a finding of not guilty has resulted as to the charge or specification on which the vote was taken.

★(4) *Not guilty only by reason of lack of mental responsibility.* When the defense of lack of mental responsibility is in issue under R.C.M. 916(k)(1), the members shall first vote on whether the prosecution has proven the elements of the offense beyond a reasonable doubt. If at least two-thirds of the members present (all members for offenses where the death penalty is mandatory) vote for a

finding of guilty, then the members shall vote on whether the accused has proven lack of mental responsibility. If a majority of the members present concur that the accused has proven lack of mental responsibility by clear and convincing evidence, a finding of not guilty only by reason of lack of mental responsibility results. If the vote on lack of mental responsibility does not result in a finding of not guilty only by reason of lack of mental responsibility, then the defense of lack of mental responsibility has been rejected and the finding of guilty stands.

Discussion

If lack of mental responsibility is in issue with regard to more than one specification, the members should determine the issue of lack of mental responsibility on each specification separately.

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(5) *Included offenses.* Members shall not vote on a lesser included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of an offense charged has been reached the members shall vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members shall continue the vote on each included offense on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each such offense.

(6) *Procedure for voting.*

(A) *Order.* Each specification shall be voted on separately before the corresponding charge. The order of voting on several specifications under a charge or on several charges shall be determined by the president unless a majority of the members object.

(B) *Counting votes.* The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

Discussion

Once findings have been reached, they may be reconsidered only in accordance with R.C.M. 924.

(d) *Action after findings are reached.* After the members have reached findings on each charge and specification before them, the court-martial shall be opened and the president shall inform the military judge that findings have been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the findings and may assist the members in putting the findings in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the findings.

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 upon R.C.M. 910(g).

(d) *Erroneous announcement.* If an error was made in the announcement of the findings of the court-martial, the error may be corrected by a new announcement in accordance with this rule. The erorr must be discovered and the new announcement made before the final adjournment of the court-martial in the case.

Discussion

See R.C.M. 1102 concerning the action to be taken if the error in the announcement is discovered after final adjournment.

(e) *Polling prohibited.* Except as provided in Mil. R. Evid. 606, members may not be questioned about their deliberations and voting.

Rule 923. Impeachment of findings

Findings which are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Discussion

Deliberations of the members ordinarily are not subject to disclosure. *See* Mil. R. Evid. 606. Unsound reasoning by a member, misconception of the evidence, or misapplication of the law is not a proper basis for challenging the findings. However, when a showing of a ground for impeaching the verdict has been made, members may be questioned about such a ground. The military judge determines, as an interlocutory matter, whether such an inquiry will be conducted and whether a finding has been impeached.

Rule 924. Reconsideration of findings

(a) *Time for reconsideration.* Members may reconsider any finding reached by them before such finding is announced in open session. Members may reconsider any finding of guilty reached by them at any time before announcement of the sentence.

★(b) *Procedure.* Any member may propose that a finding be reconsidered. If such a proposal is made in a timely manner the question whether to reconsider shall be determined in closed session by secret written ballot. Any finding of not guilty shall be reconsidered if a majority vote for reconsideration. Any finding of guilty shall be reconsidered if more than one-third of the members vote for reconsideration. When the death penalty is mandatory, a request by any member for reconsideration of a guilty finding requires reconsideration. Any finding of not guilty only by reason

of lack of mental responsibility shall be reconsidered on the issue of the finding of guilty of the elements if more than one-third of the members vote for reconsideration, and on the issue of mental responsibility if a majority vote for reconsideration. If a vote to reconsider a finding succeeds, the procedures in R.C.M. 921 shall apply.

Discussion

After the initial secret ballot vote on a finding in closed session, no other vote may be taken on that finding unless a vote to reconsider succeeds.

(c) *Military judge sitting alone.* In trial by military judge alone, the military judge may reconsider any finding of guilty at any time before announcement of sentence.

CHAPTER X. SENTENCING

Rule 1001. Presentencing procedure

(a) *In general.*

(1) *Procedure.* After findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matter shall ordinarily be presented in the following sequence—

(A) Presentation by trial counsel of:

(i) service data relating to the accused taken from the charge sheet;

(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;

(iii) evidence of prior convictions, military or civilian;

(iv) evidence of aggravation; and

(v) evidence of rehabilitative potential.

(B) Presentation by the defense of evidence in extenuation or mitigation or both.

(C) Rebuttal.

(D) Argument by the trial counsel on sentence.

(E) Argument by the defense counsel on sentence.

(F) Rebuttal arguments in the discretion of the miltary judge.

(2) *Adjudging sentence.* A sentence shall be adjudged in all cases without unreasonable delay.

(3) *Advice and inquiry.* The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

(b) *Matter to be presented by the prosecution.*

(1) *Service data from the charge sheet.* Trial counsel shall inform the court-martial of the data on the charge sheet relating to the pay and service of the accused and the duration and nature of any pretrial restraint. In the discretion of the military judge, this may be done by reading the material from the charge sheet or by giving the court-martial a written statement of such matter. If the defense objects to the data as being materially inaccurate or incomplete, or containing specified objectionable matter, the military judge shall determine the issue. Objections not asserted are waived.

(2) *Personal data and character of prior service of the accused.* Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15.

★"Personnel records of the accused" includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.

(3) *Evidence of prior convictions of the accused.*

(A) *In general.* The trial counsel may introduce evidence of military or civilian convictions of the accused. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

Discussion

A vacation of a suspended sentence (*see* R.C.M. 1109) is not a conviction and is not admissible as such, but may be admissible under subsection (b)(2) of this rule as reflective of the character of the prior service of the accused.

(B) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible except that a conviction by summary court-martial or special court-martial without a military judge may not be used for purposes of this rule until review has been completed pursuant to Article 64 or Article 66, if applicable. Evidence of the pendency of an appeal is admissible.

(C) *Method of proof.* Previous convictions may be proved by any evidence admissible under the Military Rules of Evidence.

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).

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(4) *Evidence in aggravation.* The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

Discussion

Evidence in aggravation may include evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.

See also R.C.M. 1004 concerning aggravating circumstances in capital cases.

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(5) *Evidence of rehabilitative potential.* The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence, in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instances of conduct.

(c) *Matter to be presented by the defense.*

(1) *In general.* The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.

(A) *Matter in extenuation.* Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

(B) *Matter in mitigation.* Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

(2) *Statement by the accused.*

(A) *In general.* The accused may testify, make an unsworn statement, or both in extenuation, in mitigation or to rebut matters presented by the prosecution, or for all three purposes whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. This subsection does not permit the filing of an affidavit of the accused.

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.

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(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 adjuge 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.

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(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 reserve status in certain circumstances.

(A) *Restriction on liberty.* A member of a reserve component whose order to active duty is approved pursuant to Article 2(d)(5) may be required to serve any adjudged restriction on liberty during that period of active duty. Other members of a reserve component ordered to active duty pursuant to Article 2(d)(1) or tried by summary court-martial while on inactive duty training may not—

(i) be sentenced to confinement; or

(ii) be required to serve a court-martial punishment consisting of any other restriction on liberty except during subsequent periods of inactive-duty training or active duty.

(B) *Forfeiture.* A sentence to forfeiture of pay of a member not retained on active duty after completion of disciplinary proceedings may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

Discussion

For application of this subsection, *see* R.C.M. 204. At the conclusion of nonjudicial punishment proceedings or final adjournment of the court-martial, the reserve component member who was ordered to active duty for the purpose of conducting disciplinary proceedings should be released from active duty within one working day unless the order to active duty was approved by the Secretary concerned and confinement or other restriction on liberty was adjudged. Unserved punishments may be carried over to subsequent periods of inactive-duty training or active duty.

(4) *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 juisdictional 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

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 adjudged 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 neither reviewed by a Court of Military Review nor reviewed by the Judge Advocate General under R.C.M. 1201(b)(1); and

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

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 and special courts-martial.* After a general or special court-martial, the accused may submit matters under this rule within the later of 10 days after a copy of the authenticated record of trial or, if applicable, the recommendation of the staff judge advocate or legal officer is served on the accused. If the accused shows that additional time is required for the accused to submit such matters, the convening authority may, for good cause, extend the 10-day period for not more than 20 additional days.

(2) *Summary courts-martial.* After a summary court-martial, the accused may submit matters under this rule within 7 days after the sentence is announced. If the accused shows that additional time is required for the accused to submit such comments, the convening authority may, for good cause, extend the period in which comments may be submitted for up to 20 additional days.

(3) *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.

(4) *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 this rule, appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority.

(e) *No findings of guilty.* If the proceedings resulted in an acquittal of all charges and specifications or if, after the trial began, the proceedings were terminated without findings and no further action is contemplated, a recommendation under this rule is not required.

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

(1) *Service of recommendation on defense counsel.* Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused.

Discussion

The method of service and the form of the proof of service are not prescribed and may be by any appropriate means. *See* R.C.M. 1103(b)(3)(G).

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(2) *Counsel for the accused.* The accused may, at trial or in writing to the staff judge advocate or legal officer before the recommendation has been served under this rule, designate which counsel (detailed, individual military, or civilian) will be served with the recommendation. In the absence of such designation, the staff judge advocate or legal officer shall cause the recommendation to be served in the following order of precedence, as applicable, on: (1) civilian counsel; (2) individual military counsel; or (3) detailed defense counsel. If the accused has not retained civilian counsel and the detailed defense counsel and individual military counsel, if any, have been relieved or are not reasonably available to represent the accused, substitute military counsel to represent the accused shall be detailed by an appropriate authority. Substitute counsel shall enter into an attorney-client relationship with the accused before examining the recommendation and preparing any response.

Discussion

When the accused is represented by more than one counsel, the military judge should inquire of the accused and counsel before the end of the court-martial as to who will act for the accused under this rule.

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(3) *Record of trial.* The staff judge advocate or legal officer shall, upon request of counsel for the accused served with the recommendation, provide that counsel with a copy of the record of trial for use while preparing the response to the recommendation.

(4) *Response.* Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter.

Discussion

See also R.C.M. 1105.

★(5) *Time period.* Counsel for the accused shall be given 10 days from service of the record of trial under R.C.M. 1104(b) or receipt of the recommendation, whichever is later, in which to submit comments on the recommendation. The convening authority may, for good cause, extend the period in which comments may be submitted for up to 20 additional days.

(6) *Waiver.* Failure of counsel for the accused to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error.

Discussion

The accused is not required to raise objections to the trial proceedings in order to preserve them for later review.

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(7) *New matter in addendum to recommendation.* The staff judge advocate or legal officer may supplement the recommendation after counsel for the accused has been served with the recommendation and given an opportunity to comment. When new matter is introduced after counsel for the accused has examined the recommendation, however, counsel for the accused must be served with the new matter and given a further opportunity to comment.

Discussion

"New matter" includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. "New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation.

Rule 1107. Action by convening authority

(a) *Who may take action.* The convening authority shall take action on the sentence and, in the discretion of the convening authority, the findings, unless it is impracticable. If it is impracticable for the convening authority to act, the convening authority shall, in accordance with such regulations as the Secretary concerned may prescribe, forward the case to an officer exercising general court-martial jurisdiction who may take action under this rule.

Discussion

The convening authority may not delegate the function of taking action on the findings or sentence. The convening authority who convened the court-martial may take action on the case regardless whether the accused is a member of or present in the convening authority's command.

It would be impracticable for the convening authority to take initial action when, for example, a command has been decommissioned or inactivated before the convening authority's action; when a command has been alerted for immediate overseas movement; or when the convening authority is disqualified because the convening authority has other than an official interest in the case or because a member of the court-martial which tried the accused later became the convening authority.

If the convening authority forwards the case to an officer exercising general court-martial jurisdiction for initial review and action, the record should include a statement of the reasons why the convening authority did not act.

(b) *General considerations.*

(1) *Discretion of convening authority.* The action to be taken on the findings and sentence is within the sole discretion of the convening authority. Determining what action to take on the findings and sentence of a court-martial is a matter of command prerogative. The convening authority is not required to review the case for legal errors or factual sufficiency.

Discussion

The action is taken in the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons. If errors are noticed by the convening authority, the convening authority may take corrective action under this rule.

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(2) *When action may be taken.* The convening authority may take action only after the applicable time periods under R.C.M. 1105(c) have expired or the accused has waived the right to present matters under R.C.M. 1105(d), whichever is earlier, subject to regulations of the Secretary concerned.

(3) *Matters considered.*

(A) *Required matters.* Before taking action, the convening authority shall consider:

(i) The result of trial;

Discussion

See R.C.M. 1101(a).

(ii) The recommendation of the staff judge advocate or legal officer under R.C.M. 1106, if applicable; and

(iii) Any matters submitted by the accused under R.C.M. 1105 or, if applicable, R.C.M. 1106(f).

(B) *Additional matters.* Before taking action the convening authority may consider:

(i) The record of trial;

(ii) The personnel records of the accused; and

(iii) Such other matters as the convening authority deems appropriate. However, if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut.

(4) *When proceedings resulted in finding of not guilty or there was a ruling amounting to a finding of not guilty.* The convening authority shall not take any action approving or disapproving a finding of not guilty or a ruling amounting to a finding of not guilty.

★(5) *Action when accused lacks mental capacity.* The convening authority may not approve a sentence while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the convening authority may direct an examination of the accused in accordance with R.C.M. 706 before deciding whether the accused lacks mental capacity, but the examination may be limited to determining the accused's present capacity to understand and cooperate in the post-trial proceedings. The convening authority may approve the sentence unless it is established, by a preponderance of the evidence—including matters outside the record of trial—that the accused does not have the requisite mental capacity. Nothing in this subsection shall prohibit the convening authority from disapproving the findings of guilty and sentence.

(c) *Action on findings.* Action on the findings is not required. However, the convening authority may, in the convening authority's sole discretion:

(1) Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification; or

(2) Set aside any finding of guilty and—

(A) Dismiss the specification and, if appropriate, the charge, or

(B) Direct a rehearing in accordance with subsection (e) of this rule.

Discussion

The convening authority may for any reason or no reason disapprove a finding of guilty or approve a finding of guilty only of a lesser offense. However, *see* subsection (e) of this rule if a rehearing is ordered. The convening authority is not required to review the findings for legal or factual sufficiency and is not required to explain a decision to order or not to order a rehearing, except as provided in subsection (e) of this rule. The power to order a rehearing, or to take other corrective action on the findings, is designed solely to provide an expeditious means to correct errors that are identified in the course of exercising discretion under the rule.

(d) *Action on the sentence.*

(1) *In general.* The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. The convening or higher authority may not increase the punishment imposed by a court-martial. The approval or disapproval shall be explicitly stated.

Discussion

A sentence adjudged by a court-martial may be approved if it was within the jurisdiction of the court-martial to adjudge (*see* R.C.M. 201(f)) and did not exceed the maximum limits prescribed in Part IV and Chapter X of this Part for the offense(s) of which the accused legally has been found guilty.

When mitigating forfeitures, the duration and amounts of forfeiture may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeitures exceeds the jurisdiction of the court-martial. When mitigating confinement on bread and water or diminished rations, confinement, or hard labor without confinement, the convening authority should use the equivalencies at R.C.M. 1003(b)(6), (7), and (9), as appropriate. One form of punishment may be changed to a less severe punishment of a different nature, as long as the changed punishment is one which the court-martial could have adjudged. For example, a bad-conduct discharge adjudged by a special court-martial could be changed to confinement for 6 months (but not vice versa). A pretrial agreement may also affect what punishments may be changed by the convening authority.

See also R.C.M. 810(d) concerning sentence limitations upon a rehearing or new or other trial.

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(2) *Determining what sentence should be approved.* The convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused. When the court-martial has adjudged a mandatory punishment, the convening authority may nevertheless approve a lesser sentence.

Discussion

In determining what sentence should be approved the convening authority should consider all relevant factors including the possibility of rehabilitation, the deterrent effect of the sentence, and all matters relating to clemency, such as pretrial confinement. *See also* R.C.M. 1001 through 1004.

When an accused is not serving confinement, the accused should not be deprived of more than two-thirds pay for any month as a result of one or more sentences by court-martial and other stoppages or involuntary deductions, unless requested by the accused.

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(3) *Limitations on sentence based on record of trial.* If the record of trial does not meet the requirements of R.C.M. 1103(b)(2)(B) or (c)(1), the convening authority may not approve a sentence in excess of that which may be adjudged by a special court-martial, or one which includes a bad-conduct discharge.

Discussion

See also R.C.M. 1103(f).

(e) *Ordering rehearing or other trial.*

(1) *Rehearing.*

(A) *In general.* Subject to subsections (e)(1)(B) through (e)(1)(E) of this rule, the convening authority may in the convening authority's discretion order a rehearing. A rehearing may be ordered as to some or all offenses of which findings of guilty were entered and the sentence, or as to sentence only.

Discussion

A rehearing may be appropriate when an error substantially affecting the findings or sentence is noticed by the convening authority. The severity of the findings or the sentence of the original court-martial may not be

increased at a rehearing unless the sentence prescribed for the offense is mandatory. *See* R.C.M. 810(d). If the accused is placed under restraint pending a rehearing, *see* R.C.M. 304; 305.

(B) *When the convening authority may order a rehearing.* The convening authority may order a rehearing:

(i) When taking action on the court-martial under this rule;

(ii) In cases subject to review by the Court of Military Review, before the case is forwarded under R.C.M. 1111(a)(1) or (b)(1), but only as to any sentence which was approved or findings of guilty which were not disapproved in any earlier action. In such a case, a supplemental action disapproving the sentence and some or all of the findings, as appropriate, shall be taken; or

(iii) When authorized to do so by superior competent authority. If the convening authority finds a rehearing as to any offenses impracticable, the convening authority may dismiss those specifications and, when appropriate, charges.

Discussion

If a superior authority has approved some findings of guilty and has authorized a rehearing as to other offenses and the sentence, the convening authority may, unless otherwise directed, reassess the sentence based on the approved findings of guilty and dismiss the remaining charges.

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(1) *In general.* A probationer under a suspended sentence to confinement may be confined pending action under subsection (d)(2) of this rule in accordance with the procedures in subsection (c) of this rule.

(2) *Who may order confinement.* Any person who may order confinement under R.C.M. 304(b) may order confinement of a probationer under a suspended sentence to confinement.

★(3) *Basis for confinement.* A probationer under a suspended sentence to confinement may be ordered into confinement upon probable cause to believe the probationer violated any conditions of the suspension.

Discussion

A determination that confinement is necessary to ensure the presence of the probationer or to prevent further misconduct is not required.

If the violation of the conditions also constitutes an offense under the code for which trial by court-martial is considered, an appropriate form of pretrial restraint may be imposed as an alternative to confinement under this rule. *See* R.C.M. 304 and 305.

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(4) *Review of confinement.* Unless proceedings under subsection (d)(1) or (e) of this rule are completed within 7 days of imposition of confinement of the probationer (not including any delays requested by probationer), a preliminary hearing shall be conducted by a neutral and detached officer appointed in accordance with regulations of the Secretary concerned.

★(A) *Rights of accused.* Before the preliminary hearing, the accused shall be notified in writing of:

(i) The time, place, and purpose of the hearing, including the alleged violation(s) of the conditions of suspension;

(ii) The right to be present at the hearing;

(iii) The right to be represented at the hearing by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose; and

(iv) The opportunity to be heard, to present witnesses who are reasonably available and other evidence, and the right to confront and cross-examine adverse witnesses unless the hearing officer determines that this would subject these witnesses to risk or harm. For purposes of this subsection, a witness is not reasonably available if the witness requires reimbursement by the United States for cost incurred in appearing, cannot appear without unduly delaying the proceedings, or, if a military witness, cannot be excused from other important duties.

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

(C) *Decision.* The hearing officer shall determine whether there is probable cause to believe that the probationer violated the conditions of the probationer's suspension. If the hearing officer determines that probable cause is lacking, the hearing officer shall, in writing, order the probationer released from confinement. If the hearing officer determines that there is probable cause to believe that the probationer violated the conditions of suspension, the hearing officer shall set forth in a written memorandum the decision, the reasons for the decision, and the information relied on. The hearing officer shall forward the original memorandum or release order to the probationer's commander and forward a copy to the probationer and the officer in charge of the confinement facility.

★(d) *Vacation of suspended general court-martial sentence or of a suspended special court-martial sentence including a bad-conduct discharge.*

(1) *Action by officer having special court-martial jurisdiction over probationer.*

(A) *In general.* Before vacation of the suspension of any general court-martial sentence, or of a special court-martial sentence which, as approved, includes a bad-conduct discharge, the

officer having special court-martial jurisdiction over the probationer shall personally hold a hearing on the alleged violation of the conditions of suspension. If there is no officer having special court-martial jurisdiction over the accused, who is subordinate to the officer having general court-martial jurisdiction over the accused, the officer exercising general court-martial jurisdiction over the accused shall personally hold the hearing under subsection (d)(1) of this rule. In such cases, subsection (d)(1)(D) of this rule shall not apply.

(B) *Notice to probationer.* Before the hearing the authority conducting the hearing shall cause the probationer to be notified in writing of:

(i) The time, place, and purpose of the hearing;

(ii) The right to be present at the hearing;

(iii) The alleged violation(s) of the conditions of suspension and the evidence expected to be relied on;

(iv) The right to be represented at the hearing by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose; and

(v) The opportunity to be heard, to present witnesses and other evidence, and the right to confront and cross-examine adverse witnesses unless the hearing officer determines that there is good cause for not allowing confrontation and cross-examination.

Discussion

The notice should be provided sufficiently in advance of the hearing to permit adequate preparation.

(C) *Hearing.* The procedure for the vacation hearing shall follow that prescribed in R.C.M. 405(g), (h)(1), and (i).

(D) *Record; recommendation.* The officer who conducts the vacation proceeding shall make a summarized record of the proceeding and forward the record and that officer's written recommendation concerning vacation to the officer exercising general court-martial jurisdiction over the probationer.

(E) *Release from confinement.* If the special court-martial convening authority finds there is not probable cause to believe that the probationer violated the conditions of the suspension, the special court-martial convening authority shall order the release of the probationer from any confinement ordered under subsection (c) of this rule. The special court-martial convening authority shall, in any event, forward the record and recommendation under subsection (d)(1)(D) of this rule.

Discussion

See Appendix 18 for a sample of a Report of Proceedings to Vacate Suspension of a General Court-Martial Sentence or of a Special Court-Martial Sentence Including a Bad-Conduct Discharge under Article 72, UCMJ, and R.C.M. 1109 (DD Form 455).

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(2) *Action by officer exercising general court-martial jurisdiction over probationer.*

(A) *In general.* The officer exercising general court-martial jurisdiction over the probationer shall, based upon the record produced by and the recommendation of the officer exercising special court-martial jurisdiction over the probationer, decide whether the probationer violated a condition of suspension, and, if so, whether to vacate the suspended sentence. If the officer exercising general court-martial jurisdiction decides to vacate, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating.

(B) *Execution.* Any unexecuted part of a suspended sentence ordered vacated under this rule shall, subject to R.C.M. 1113(c), be ordered executed.

(e) *Vacation of a suspended special court-martial sentence not including a bad-conduct discharge or of a suspended summary court-martial sentence.*

(1) *In general.* Before vacation of the suspension of a special court-martial sentence not including a bad-conduct discharge or of a summary court-martial sentence, the officer having authority to convene for the command in which the probationer is serving or assigned the same kind of court-martial which imposed the sentence shall cause a hearing to be held on the alleged violation(s) of the conditions of suspension.

(2) *Notice to probationer.* The person conducting the hearing shall notify the probationer before the hearing of the rights specified in subsections (d)(1)(B)(i), (ii), (iii), and (v) of this rule. The authority conducting the hearing shall also notify the probationer that the probationer has the right to civilian counsel provided by the probationer or, upon request, counsel detailed for that purpose, if the probationer was entitled to such counsel under R.C.M. 506(a) at the court-martial which imposed the sentence.

(3) *Hearing.* The procedure for the vacation hearing shall follow that prescribed in R.C.M. 405(g), (h)(1), and (i).

★(4) *Record; recommendation.* If the hearing is not held by the commander with authority to vacate the suspension, the person who conducts the vacation proceeding shall make a summarized record of the proceeding and forward the record and that officer's written recommendation concerning vacation to the commander with authority to vacate the suspension.

★(5) *Decision.* If the appropriate authority decides that the probationer violated a condition of suspension, and to vacate, that person shall prepare a record of the hearing and a written statement indicating the decision, the reasons for the decision, and the evidence relied on.

Rule 1110. Waiver or withdrawal of appellate review

(a) *In general.* After any general court-martial, except one in which the approved sentence includes death, and after any special court-martial in which the approved sentence includes a bad-conduct discharge, the accused may waive or withdraw appellate review.

Discussion

Appellate review is not available for special courts-martial in which a bad-conduct discharge was not adjudged or approved or for summary courts-martial. Cases not subject to appellate review, or in which appellate review is waived or withdrawn, are reviewed by a judge advocate under R.C.M. 1112. Such cases may also be submitted to the Judge Advocate General for review. *See* R.C.M. 1201(b)(3). Appellate review is mandatory when the approved sentence includes death.

(b) *Right to counsel.*

(1) *In general.* The accused shall have the right to consult with counsel qualified under R.C.M. 502(d)(1) before submitting a waiver or withdrawal of appellate review.

(2) *Waiver.*

(A) *Counsel who represented the accused at the court-martial.* The accused shall have the right to consult with any civilian, individual military, or detailed counsel who represented the accused at the court-martial concerning whether to waive appellate review unless such counsel has been excused under R.C.M. 505(d)(2)(B).

(B) *Associate counsel.* If counsel who represented the accused at the court-martial has not been excused but is not immediately available to consult with the accused, because of physical separation or other reasons, associate defense counsel shall be detailed to the accused upon request by the accused. Such counsel shall communicate with counsel who represented the accused at the court-martial, and shall advise the accused concerning whether to waive appellate review.

(C) *Substitute counsel.* If counsel who represented the accused at the court-martial has been excused under R.C.M. 505(d)(2)(B), substitute defense counsel shall be detailed to advise the accused concerning waiver of appellate rights.

(3) *Withdrawal.*

(A) *Appellate defense counsel.* If the accused is represented by appellate defense counsel, the accused shall have the right to consult with such counsel concerning whether to withdraw the appeal.

(B) *Associate defense counsel.* If the accused is represented by appellate defense counsel, and such counsel is not immediately available to consult with the accused, because of physical separation or other reasons, associate defense counsel shall be detailed to the accused, upon request by the accused. Such counsel shall communicate with appellate defense counsel and shall advise the accused whether to withdraw the appeal.

(C) *No counsel.* If appellate defense counsel has not been assigned to the accused, defense counsel shall be detailed for the accused. Such counsel shall advise the accused concerning whether to withdraw the appeal. If practicable, counsel who represented the accused at the court-martial shall be detailed.

(4) *Civilian counsel.* Whether or not the accused was represented by civilian counsel at the court-martial, the accused may consult with civilian counsel, at no expense to the United States, concerning whether to waive or withdraw appellate review.

(5) *Record of trial.* Any defense counsel with whom the accused consults under this rule shall be given reasonable opportunity to examine the record of trial.

Discussion

Ordinarily counsel may use the accused's copy of the record. If this is not possible, as when the accused and counsel are physically separated, another copy should be made available to counsel.

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(6) *Consult.* The right to consult with counsel, as used in this rule, does not require communication in the presence of one another.

(c) *Compulsion, coercion, inducement prohibited.* No person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate reivew.

(d) *Form of waiver or withdrawal.* A waiver or withdrawal of appellate review shall:

(1) Be written;

(2) State that the accused and defense counsel have discussed the accused's right to appellate review and the effect of waiver or withdrawal of appellate review and that the accused understands these matters;

(3) State that the waiver or withdrawal is submitted voluntarily; and

(4) Be signed by the accused and by defense counsel.

Discussion

See Appendix 19 (DD Form 2330) or Appendix 20 (DD Form 2331) for samples of forms.

(e) *To whom submitted.*

(1) *Waiver.* A waiver of appellate review shall be filed with the convening authority. The waiver shall be attached to the record of trial.

(2) *Withdrawal.* A withdrawal of appellate review may be filed with the authority exercising general court-martial jurisdiction over the accused, who shall promptly forward it to the Judge

Advocate General, or directly with the Judge Advocate General.

(f) *Time limit.*

(1) *Waiver.* The accused may file a waiver of appellate review only within 10 days after the accused or defense counsel is served with a copy of the action under R.C.M. 1107(h). Upon written application of the accused, the convening authority may extend this period for good cause, for not more than 30 days.

(2) *Withdrawal.* The accused may file withdrawal from appellate review at any time before such review is completed.

(g) *Effect of waiver or withdrawal; substantial compliance required.*

(1) *In general.* A waiver or withdrawal of appellate review under this rule shall bar review by the Judge Advocate General under R.C.M. 1201(b)(1) and by the Court of Military Review. Once submitted, a waiver or withdrawal in compliance with this rule may not be revoked.

(2) *Waiver.* If the accused files a timely waiver of appellate review in accordance with this rule, the record shall be forwarded for review by a judge advocate under R.C.M. 1112.

(3) *Withdrawal.* Action on a withdrawal of appellate review shall be carried out in accordance with procedures established by the Judge Advocate General, or if the case is pending before a Court of Military Review, in accordance with the rules of such court. If the appeal is withdrawn, the Judge Advocate General shall forward the record to an appropriate authority for compliance with R.C.M. 1112.

(4) *Substantial compliance required.* A purported waiver or withdrawal of an appeal which does not substantially comply with this rule shall have no effect.

Rule 1111. Disposition of the record of trial after action

(a) *General courts-martial.*

(1) *Cases forwarded to the Judge Advocate General.* A record of trial by general court-martial and the convening authority's action shall be sent directly to the Judge Advocate General concerned if the approved sentence includes death or if the accused has not waived review under R.C.M. 110. Unless otherwise prescribed by regulations of the Secretary concerned, 10 copies of the order promulgating the result of trial as to each accused shall be forwarded with the original record of trial. Two additional copies of the record of trial shall accompany the original record if the approved sentence includes death or if it includes dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more and the accused has not waived appellate review.

(2) *Cases forwarded to a judge advocate.* A record of trial by general court-martial and the convening authority's action shall be sent directly to a judge advocate for review under R.C.M. 1112 if the sentence does not include death and if the accused has waived appellate review under R.C.M. 1110. Unless otherwise prescribed by the Secretary concerned, 4 copies of the order promulgating the result of trial shall be forwarded with the original record of trial.

(b) *Special courts-martial.*

(1) *Cases including an approved bad-conduct discharge.* If the approved sentence of a special court-martial includes a bad-conduct discharge, the record shall be disposed of as provided in subsection (a) of this rule for records of trial by general court-martial.

(2) *Other cases.* The record of trial by a special court-martial in which the approved sentence does not include a bad-conduct discharge shall be forwarded directly to a judge advocate for review under R.C.M. 1112. Four copies of the order promulgating the result of trial shall be forwarded with the record of trial, unless otherwise prescribed by regulations of the Secretary concerned.

(c) *Summary courts-martial.* The convening authority shall dispose of a record of trial by summary court-martial as provided by R.C.M. 1306.

Discussion

See DD Form 494 (Court-Martial Data Sheet).

Rule 1112. Review by a judge advocate

(a) *In general.* Except as provided in subsection (b) of this rule, under regulations of the Secretary concerned, a judge advocate shall review:

(1) Each general court-martial in which the accused has waived or withdrawn appellate review under R.C.M. 1110.

(2) Each special court-martial in which the accused has waived or withdrawn appellate review under R.C.M. 1110 or in which the approved sentence does not include a bad-conduct discharge; and

(3) Each summary court-martial.

(b) *Exception.* If the accused was not found guilty of any offense or if the convening authority disapproved all findings of guilty, no review under this rule is required.

(c) *Disqualification.* No person may review a case under this rule if that person has acted in the same case as an accuser, investigating officer, member of the court-martial, military judge, or counsel, or has otherwise acted on behalf of the prosecution or defense.

(d) *Form and content of review.* The judge advocate's review shall be in writing and shall contain the following:

(1) Conclusions as to whether—

(A) The court-martial had jurisdiction over the accused and each offense as to which there is a finding of guilty which has not been disapproved;

(B) Each specification as to which there is a finding of guilty which has not been disapproved stated an offense; and

(C) The sentence was legal;

(2) A response to each allegation of error made in writing by the accused. Such allegations may be filed under R.C.M. 1105, 1106(f), or directly with the judge advocate who reviews the case; and

(3) If the case is sent for action to the officer exercising general court-martial jurisdiction under subsection (e) of this rule, a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

★Copies of the judge advocate's review under this rule shall be attached to the original and all copies of the record of trial. A copy of the review shall be forwarded to the accused.

(e) *Forwarding to officer exercising general court-martial jurisdiction.* In cases reviewed under subsection (a) of this rule, the record of trial shall be sent for action to the officer exercising general court-martial convening authority over the accused at the time the court-martial was held (or to that officer's successor) when:

(1) The judge advocate who reviewed the case recommends corrective action;

(2) The sentence approved by the convening authority includes dismissal, a dishonorable or bad-conduct discharge, or confinement for more than 6 months; or

(3) Such action is otherwise required by regulations of the Secretary concerned.

(f) *Action by officer exercising general court-martial jurisdiction*

(1) *Action.* The officer exercising general court-martial jurisdiction who receives a record under subsection (e) of this rule may—

(A) Disapprove or approve the findings or sentence in whole or in part;

(B) Remit, commute, or suspend the sentence in whole or in part;

(C) Except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

(D) Dismiss the charges.

Discussion

See R.C.M. 1113 concerning when the officer exercising general court-martial jurisdiction may order parts of the sentence executed. *See* R.C.M. 1114 concerning orders promulgating the action of the officer exercising general court-martial jurisdiction. *See also* Appendix 16 (Forms for actions) and Appendix 17 (Forms for court-martial orders).

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(2) *Rehearing.* If the officer exercising general court-martial jurisdiction orders a rehearing, but the convening authority finds a rehearing impracticable, the convening authority shall dismiss the charges.

(3) *Notification.* After the officer exercising general court-martial jurisdiction has taken action, the accused shall be notified of that action and the accused shall be provided with a copy of the judge advocate's review.

(g) *Forwarding following review under this rule.*

(1) *Records forwarded to the Judge Advocate General.* If the judge advocate who reviews the case under this rule states that corrective action is required as a matter of law, and the officer exercising general court-martial jurisdiction does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and the action thereon shall be forwarded to the Judge Advocate General concerned for review under R.C.M. 1201(b)(2).

(2) *Sentence including dismissal.* If the approved sentence includes dismissal, the record shall be forwarded to the Secretary concerned.

Discussion

A dismissal may not be ordered executed until approved by the Secretary or the Secretary's designee. *See* R.C.M. 1206.

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(3) *Other records.* Records reviewed under this rule which are not forwarded under subsection (g)(1) of this rule shall be disposed of as prescribed by the Secretary concerned.

Discussion

A dismissal may not be ordered executed until approved by the Secretary or the Secretary's designee under R.C.M. 1206.

Rule 1113. Execution of sentences

(a) *In general.* No sentence of a court-martial may be executed unless it has been approved by the convening authority.

Discussion

An order executing the sentence directs that the sentence be carried out. Except as provided in subsection (d)(2) and (3) of this rule, no part of a sentence may be carried out until it is ordered executed.

(b) *Punishments which the convening authority may order executed in the initial action.* Except as provided in subsection (c) of this rule, the convening authority may order all or part of the sentence of a court-martial executed when the convening authority takes initial action under R.C.M. 1107.

(c) *Punishments which the convening authority may not order executed in the initial action.*

(1) *Dishonorable or a bad-conduct discharge.* Except as may otherwise be prescribed by the Secretary concerned, a dishonorable or a bad-conduct discharge may be ordered executed only by:

(A) The officer who reviews the case under R.C.M. 1112(f), as part of the action approving the sentence, except when that action must be forwarded under R.C.M. 1112(g)(1); or

(B) The officer then exercising general court-martial jurisdiction over the accused.

A dishonorable or a bad-conduct discharge may be ordered executed only after a final judgment within the meaning of R.C.M. 1209 has been rendered in the case. If more than 6 months have elapsed since approval of the sentence by the convening authority, before a dishonorable or a bad-conduct discharge may be executed, the officer exercising general court-martial jurisdiction over the accused shall consider the advice of that officer's staff judge advocate as to whether retention of the servicemember would be in the best interest of the service. Such advice shall include: the findings and sentence as finally approved; whether the servicemember has been on active duty since the court-martial, and if so, the nature and character of that duty; and a recommendation whether the discharge should be executed.

(2) *Dismissal of a commissioned officer, cadet, or midshipman.* Dismissal of a commissioned officer, cadet, or midshipman may be approved and ordered executed only by the Secretary concerned or such Under Secretary or Assistant Secretary as the Secretary concerned may designate.

Discussion

See R.C.M. 1206(a) concerning approval by the Secretary

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(3) *Sentences extending to death.* A punishment of death may be ordered executed only by the President.

Discussion

See R.C.M. 1207 concerning approval by the President.

(d) *Other considerations concerning the execution of certain sentences.*

★(1) *Death.*

(A) *Manner carried out.* A sentence to death which has been finally ordered executed shall be carried out in the manner prescribed by the Secretary concerned.

(B) *Action when accused lacks mental capacity.* An accused lacking the mental capacity to understand the punishment to be suffered or the reason for imposition of the death sentence may not be put to death during any period when such incapacity exists. The accused is presumed to have such mental capacity. If a substantial question is raised as to whether the accused lacks capacity, the convening authority then exercising general court-martial jurisdiction over the accused shall order a hearing on the question. A military judge, counsel for the government, and counsel for the accused shall be detailed. The convening authority shall direct an examination of the accused in accordance with R.C.M. 706, but the examination may be limited to determining whether the accused understands the punishment to be suffered and the reason therefore. The military judge shall consider all evidence presented, including evidence provided by the accused. The accused has the burden of proving such lack of capacity by a preponderance of the evidence. The military judge shall make findings of fact, which will then be forwarded to the convening authority ordering the hearing. If the accused is found to lack capacity, the convening authority shall stay the execution until the accused regains appropriate capacity.

Discussion

A verbatim transcript of the hearing should accompany the findings of fact.

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(2) *Confinement.*

(A) *Effective date of confinement.* Any period of confinement included in the sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but the following shall be excluded in computing the service of the term of confinement:

(i) Periods during which the sentence to confinement is suspended or deferred;

(ii) Periods during which the accused is in custody of civilian authorities under Article 14 from the time of the delivery to the return to military custody, if the accused was convicted in the civilian court;

(iii) Periods during which the accused has escaped or is absent without authority, or is absent under a parole which proper authority has later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon the prisoner's petition for a writ of habeas corpus under a court order which is later reversed; and

(iv) Periods during which another sentence by court-martial to confinement is being served. When a prisoner serving a court-martial sentence to confinement is later convicted by a court-martial of another offense and sentenced to confinement, the later sentence interrupts the running of the earlier sentence. Any unremitted remaining portion of the earlier sentence will be served after the later sentence is fully executed.

(B) *Nature of the confinement.* The omission of "hard labor" from any sentence of a court-martial which has adjudged confinement shall not prohibit the authority who orders the sentence executed from requiring hard labor as part of the punishment.

(C) *Place of confinement.* The authority who orders a sentence to confinement into execution shall designate the place of confinement under regulations prescribed by the Secretary concerned, unless otherwise prescribed by the Secretary concerned. Under such regulations as the Secretary concerned may prescribe, a sentence to confinement adjudged by a court-martial or other military tribunal, regardless whether the sentence includes a punitive discharge or dismissal and regardless whether the punitive discharge or dismissal has been executed, may be ordered to be served in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated. When the service of a sentence to confinement has been deferred and the deferment is later rescinded, the convening authority shall designate the place of confinement in the initial action on the sentence or in the order rescinding the deferment. No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces. The Secretary concerned may prescribe regulations governing the place and conditions of confinement.

Discussion

See R.C.M. 1101(c) concerning deferment of a sentence to confinement.

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(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. The subsequent action and the supplementary order may be the same document if signed personally by the appropriate convening or higher authority.

(A) *When the President or the Secretary concerned has taken final action.* General court-martial orders publishing the final result in cases in which the President or the Secretary concerned has taken final action shall be promulgated as prescribed by regulations of the Secretary concerned.

(B) *Other cases.* In cases other than those in subsection (b)(2)(A) of this rule, the final action may be promulgated by an appropriate convening authority.

★(c) *Contents.*

(1) *In general.* The order promulgating the intial action shall set forth: the type of court-martial and the command by which it was convened; the charges and specifications, or a summary thereof, on which the accused was arraigned; the accused's pleas; the findings or other disposition of each charge and specification; the sentence, if any; and the action of the convening authority, or a summary thereof. Supplementary orders shall recite, verbatim, the action or order of the appropriate authority, or a summary thereof.

(2) *Dates.* The date of a promulgating order shall be the date of the action of the convening authority being promulgated, if any. An order promulgating an acquittal, a finding of not guilty only

by reason of lack of mental responsibility, or a court-martial terminated before findings shall bear the date of its publication. A promulgating order shall state the date the sentence was adjudged, the date on which the acquittal or finding of not guilty only by reason of lack of mental responsibility was announced, or the date on which the proceedings were otherwise terminated.

Discussion

See Appendix 17 for sample forms for promulgating orders.

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(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 XII. APPEALS AND REVIEW

Rule 1201. Action by the Judge Advocate General

(a) *Cases required to be referred to a Court of Military Review.* The Judge Advocate General shall refer to a Court of Military Review the record in each trial by court-martial:

(1) In which the sentence, as approved, extends to death; or

(2) In which—

(A) The sentence, as approved, extends to dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for 1 year or longer; and

(B) The accused has not waived or withdrawn appellate review.

Discussion

See R.C.M. 1110 concerning waiver or withdrawal of appellate review.

See also subsection (b)(1) of this rule concerning cases reviewed by the Judge Advocate General which may be referred to a Court of Military Review.

See R.C.M. 1203 concerning review by the Court of Military Review and the powers and responsibilities of the Judge Advocate General after such review. *See* R.C.M. 1202 concerning appellate counsel.

(b) *Cases reviewed by the Judge Advocate General.*

(1) *Mandatory examination of certain general courts-martial.* Except when the accused has waived the right to appellate review or withdrawn such review, the record of trial by a general court-martial in which there has been a finding of guilty and a sentence, the appellate review of which is not provided for in subsection (a) of this rule, shall be examined in the office of the Judge Advocate General. If any part of the findings or sentence is found 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 in accordance with R.C.M. 1203. If the case is forwarded to a Court of Military Review, the accused shall be informed and shall have the rights under R.C.M. 1202(b)(2).

Discussion

When a case is forwarded to a Court of Military Review under this subsection, it is not subject to further review by the Court of Military Appeals, except when forwarded by the Judge Advocate General under R.C.M. 1203(c)(1).

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(2) *Mandatory review of cases forwarded under R.C.M. 1112(g)(1).* The Judge Advocate General shall review each case forwarded under R.C.M. 1112(g)(1). On such review, the Judge Advocate General may vacate or modify, in whole or part, the findings or sentence, or both, of a court-martial on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(3) *Review by the Judge Advocate General after final review.*

★(A) *In general.* Notwithstanding R.C.M. 1209, the Judge Advocate General may, sua sponte or upon application of the accused or a person with authority to act for the accused, vacate or modify, in whole or in part, the findings, sentence, or both of a court-martial which has been finally reviewed, but has not been reviewed either by a Court of Military Review or by the Judge Advocate General under subsection (b)(1) of this rule, on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

Discussion

See R.C.M. 1210 concerning petition for new trial. Review of a case by a Judge Advocate General under this subsection is not part of appellate review within the meaning of Article 76 or R.C.M. 1209.

(B) *Procedure.* Each Judge Advocate General shall provide procedures for considering all cases properly submitted under subsection (b)(3) of this rule and may prescribe the manner by which an application for relief under subsection (b)(3) of this rule may be made and, if submitted by a person other than the accused, may require that the applicant show authority to act on behalf of the accused.

Discussion

See R.C.M. 1114 concerning orders promulgating action under this rule.

(C) *Time limits on applications.* Any application for review by the Judge Advocate General under Article 69 must be made on or before the last day of the two year period beginning on the date the sentence is approved by the convening authority, unless the accused establishes good cause for failure to file within that time.

(4) *Rehearing.* If the Judge Advocate General sets aside the findings or sentence, the Judge Advocate General may, except when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If the Judge Advocate General sets aside the findings and sentence and does not order a rehearing, the Judge Advocate General shall order that the charges be dismissed. If the Judge Advocate General orders a rehearing but the convening authority finds a rehearing impractical, the convening authority shall dismiss the charges.

(c) *Remission and suspension.* The Judge Advocate General may, when so authorized by the Secretary concerned under Article 74, at any time remit or suspend the unexecuted part of any sentence, other than a sentence approved by the President.

Rule 1202. Appellate counsel

(a) *In general.* The Judge Advocate General concerned shall detail one or more commissioned officers as appellate Government counsel and one or more commissioned officers as appellate defense counsel who are qualified under Article 27(b)(1).

(b) *Duties.*

(1) *Appellate Government counsel.* Appellate Government counsel shall represent the United States before the Court of Military Review or the United States Court of Military Appeals when directed to do so by the Judge Advocate General concerned. Appellate Government counsel may represent the United States before the United States Supreme Court when requested to do so by the Attorney General.

(2) *Appellate defense counsel.* Appellate defense counsel shall represent the accused before the Court of Military Review, the Court of Military Appeals, or the Supreme Court when the accused is a party in the case before such court and:

(A) The accused requests to be represented by appellate defense counsel;

(B) The United States is represented by counsel; or

(C) The Judge Advocate General has sent the case to the United States Court of Military Appeals.

Appellate defense counsel is authorized to communicate directly with the accused. The accused is a party in the case when named as a party in pleadings before the court or, even if not so named, when the military judge is named as respondent in a petition by the Government for extraordinary relief from a ruling in favor of the accused at trial.

Discussion

For a discussion of the duties of the trial defense counsel concerning post-trial and appellate matters, *see* R.C.M. 502(d)(6) Discussion (E). Appellate defense counsel may communicate with trial defense counsel concerning the case. *See also* Mil. R. Evid. 502 (privileges).

If all or part of the findings and sentence are affirmed by the Court of Military Review, appellate defense counsel should advise the accused whether the accused should petition for further review in the United States Court of Military Appeals and concerning which issues should be raised.

The accused may be represented by civilian counsel before the Court of Military Review, the Court of Military Appeals, and the Supreme Court. Such counsel will not be provided at the expense of the United States. Civilian counsel may represent the accused before these courts in addition to or instead of military counsel.

If, after any decision of the Court of Military Appeals, the accused may apply for a writ of certiorari (*see* R.C.M. 1205), appellate defense counsel should advise the accused whether to apply for review by the Supreme Court and which issues might be raised. If authorized to do so by the accused, appellate defense counsel may prepare and file a petition for a writ of certiorari on behalf of the accused.

The accused has no right to select appellate defense counsel. Under some circumstances, however, the accused may be entitled to request that the detailed appellate defense counsel be replaced by another appellate defense counsel.

See also R.C.M. 1204(b)(1) concerning detailing counsel with respect to the right to petition the Court of Military Appeals for review.

Rule 1203. Review by a Court of Military Review

(a) *In general.* Each Judge Advocate General shall establish a Court of Military Review composed of appellate military judges.

Discussion

See Article 66 concerning the composition of the Courts of Military Review, the qualifications of appellate military judges, the grounds for their ineligibility, and restrictions upon the official relationship of the members of the court to other members. Uniform rules of court for the Courts of Military Review are prescribed by the Judge Advocates General.

(b) *Cases reviewed by a Court of Military Review.* A Court of Military Review shall review cases referred to it by the Judge Advocate General under R.C.M. 1201(a) or (b)(1).

Discussion

See R.C.M. 1110 concerning withdrawal of a case pending before a Court of Military Review.

See R.C.M. 908 concerning procedures for interlocutory appeals by the Government.

In cases referred to it under R.C.M. 1201, a Court of Military Review may act only with respect to the findings and sentence as approved by proper authority. It may affirm only such findings of guilty or such part of a finding of guilty as includes an included offense, as it finds correct in law and fact and determines on the basis of the entire record should be approved. A Court of Military Review has generally the same powers as the convening authority to modify a sentence (*see* R.C.M. 1107), but it may not suspend all or part of a sentence. However, it may reduce the period of a suspension prescribed by a convening authority. It may not defer service of a sentence to confinement. (*See* R.C.M. 1101(c)). It may, however, review a decision by a convening authority concerning deferral, to determine whether that decision was an abuse of the convening authority's discretion.

In considering the record of a case referred to it under R.C.M. 1201, a Court of Military Review may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the court-martial saw and heard the evidence. A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused. Article 59(a).

If a Court of Military Review sets aside any findings of guilty or the sentence, it may, except as to findings set aside for lack of sufficient evidence in the record to support the findings, order an appropriate type of rehearing or reassess the sentence as appropriate. *See* R.C.M. 810 concerning rehearings. If the Court of Military Review sets aside all the findings and the sentence and does not order a rehearing, it must order the charges dismissed. *See* Articles 59(a) and 66.

A Court of Military Review may on petition for extraordinary relief issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law. Any party may petition a Court of Military Review for extraordinary relief.

(c) *Action on cases reviewed by a Court of Military Review.*

(1) *Forwarding by the Judge Advocate General to the Court of Military Appeals.* The Judge Advocate General may forward the decision of the Court of Military Review to the Court of Military Appeals for review with respect to any matter of law. In such a case, the Judge Advocate General shall cause a copy of the decision of the Court of Military Review and the order forwarding the case to be served on the accused and on appellate defense counsel.

(2) *Action when sentence is set aside.* In a case reviewed by it under this rule in which the Court of Military Review has set aside the sentence and which is not forwarded to the Court of Military Appeals under subsection (c)(1) of this rule, the Judge Advocate General shall instruct an appropriate convening authority to take action in accordance with the decision of the Court of Military Review. If the Court of Military Review has ordererd a rehearing, the record shall be sent to an appropriate convening authority. If that convening authority finds a rehearing impracticable that convening authority may dismiss the charges.

Discussion

If charges are dismissed, *see* R.C.M. 1208 concerning restoration of rights, privileges, and property.*See* R.C.M. 1114 concerning promulgating orders.

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(3) *Action when sentence is affirmed in whole or part.*

(A) *Sentence requiring approval by the President.* If the Court of Military Review affirms any sentence which includes death, the Judge Advocate General shall transmit the record of trial and the decision of the Court of Military Review directly to the Court of Military Appeals when any period for reconsideration provided by the rules of the Courts of Military Review has expired.

(B) *Other cases.* If the Court of Military Review affirms any sentence other than one which includes death, the Judge Advocate General shall cause a copy of the decision of the Court of Military Review to be served on the accused in accordance with subsection (d) of this rule.

(4) *Remission or suspension.* If the Judge Advocate General believes that a sentence as affirmed by the Court of Military Review, other than one which includes death, should be remitted or suspended in whole or part, the Judge Advocate General may, before taking action under subsections (c)(1) or (3) of this rule, transmit the record of trial and the decision of the Court of Military Review to the Secretary concerned with a recommendation for action under Article 74 or may take such action as may be authorized by the Secretary concerned under Article 74(a).

Discussion

See R.C.M. 1201(c); 1206.

★(5) *Action when accused lacks mental capacity.* An appellate authority may not affirm the proceedings while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to conduct or cooperate intelligently in the appellate proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the appellate authority may direct that the record be forwarded to an appropriate authority for an examination of the accused in accordance with R.C.M. 706, but the examination may be limited to determining the accused's present capacity to understand and cooperate in the appellate proceedings. The order of the appellate authority will instruct the appropriate authority as to permissible actions that may be taken to dispose of the matter. If the record is thereafter returned to the appellate authority, the appellate authority may affirm part or all of the findings or sentence unless it is established, by a preponderance of the evidence—including matters outside the record of trial—that the accused does not have the requisite mental capacity. If the accused does not have the

requisite mental capacity, the appellate authority shall stay the proceedings until the accused regains appropriate capacity, or take other appropriate action. Nothing in this subsection shall prohibit the appellate authority from making a determination in favor of the accused which will result in the setting aside of a conviction.

(d) *Notification to accused.*

(1) *Notification of decision.* The accused shall be notified of the decision of the Court of Military Review in accordance with regulations of the Secretary concerned.

Discussion

The accused may be notified personally, or a copy of the decision may be sent, after service on appellate counsel of record, if any, by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the accused's official service record.

If the Judge Advocate General has forwarded the case to the Court of Military Appeals, the accused should be so notified. *See* subsection (c)(1) of this rule.

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(2) *Notification of right to petition the Court of Military Appeals for review.* If the accused has the right to petition the Court of Military Appeals for review, the accused shall be provided with a copy of the decision of the Court of Military Review bearing an endorsement notifying the accused of this right. The endorsement shall inform the accused that such a petition:

(A) May be filed only within 60 days from the time the accused was in fact notified of the decision of

(v) *Changed pleas.* The accused may change any plea at any time before findings are announced. The accused may change pleas from guilty to not guilty after findings are announced only for good cause.

(E) *Presentation of evidence.*

(i) The Military Rules of Evidence (Part III) apply to summary courts-martial.

(ii) The summary court-martial shall arrange for the attendance of necessary witnesses for the prosecution and defense, including those requested by the accused.

Discussion

See R.C.M. 703. Ordinarily witnesses should be excluded from the courtroom until called to testify. *See* Mil. R. Evid. 615.

(iii) Witnesses for the prosecution shall be called first and examined under oath. The accused shall be permitted to cross-examine these witnesses. The summary court-martial shall aid the accused in cross-examination if such assistance is requested or appears necessary in the interests of justice. The witnesses for the accused shall then be called and similarly examined under oath.

(iv) The summary court-martial shall obtain evidence which tends to disprove the accused's guilt or establishes extenuating circumstances.

Discussion

See R.C.M. 703 and 1001.

(F) *Findings and sentence.*

(i) The summary court-martial shall apply the principles in R.C.M. 918 in determining the findings. The summary court-martial shall announce the findings to the accused in open session.

(ii) The summary court-martial shall follow the procedures in R.C.M. 1001 and apply the principles in the remainder of Chapter X in determining a sentence. The summary court-martial shall announce the sentence to the accused in open session.

(iii) If the sentence includes confinement, the summary court-martial shall advise the accused of the right to apply to the convening authority for deferment of the service of the confinement.

(iv) If the accused is found guilty, the summary court-martial shall advise the accused of the rights under R.C.M. 1306(a) and (d) after the sentence is announced.

(v) The summary court-martial shall, as soon as practicable, inform the convening authority of the findings, sentence, recommendations, if any, for suspension of the sentence, and any deferment request.

(vi) If the sentence includes confinement, the summary court-martial shall cause the delivery of the accused to the accused's commanding officer or the commanding officer's designee.

Discussion

If the accused's immediate commanding officer is not the convening authority, the summary court-martial should ensure that the immediate commanding officer is informed of the findings, sentence, and any recommendations pertaining thereto. *See* R.C.M. 1101 concerning post-trial confinement.

Rule 1305. Record of trial

(a) *In general.* The record of trial of a summary court-martial shall be prepared as prescribed in subsection (b) of this rule. The convening or higher authority may prescribe additional requirements for the record of trial.

Discussion

See Appendix 15 for a sample of a Record of Trial by Summary Court-Martial (DD Form 2329).

Any petition submitted under R.C.M. 1306(a) should be appended to the record of trial.

(b) *Contents.* The summary court-martial shall prepare an original and at least two copies of the record of trial, which shall include:

(1) The pleas, findings, and sentence, and if the accused was represented by counsel at the summary court-martial, a notation to that effect;

★(2) The fact that the accused was advised of the matters set forth in R.C.M. 1304(b)(1);

(3) If the summary court-martial is the convening authority, a notation to that effect.

(c) *Authentication.* The summary court-martial shall authenticate the record by signing each copy.

Discussion

"Authentication" means attesting that the record accurately reports the proceedings. *See* R.C.M. 1104(a).

(d) *Medical certificate.* If the sentence ordered executed includes confinement on bread and water or diminished rations, the convening authority shall cause the medical certificate required by R.C.M. 1113(d)(5) to be attached to the original copy of the record of trial.

(e) *Forwarding copies of the record.*

(1) Accused's copy.

(A) *Service.* The summary court-martial shall cause a copy of the record of trial to be served on the accused as soon as it is authenticated.

(B) *Receipt.* The summary court-martial shall cause the accused's receipt for the copy of the record of trial to be obtained and attached to the original record of trial or shall attach to the original record of trial a certificate that the accused was served a copy of the record. If the record of trial was not served on the accused personally, the summary court-martial shall attach a statement explaining how and when such service was accomplished. If the accused was represented by counsel, such counsel may be served with the record of trial.

(C) *Classified information.* If classified information is included in the record of trial of a summary court-martial, R.C.M. 1104(b)(1)(D) shall apply.

(2) *Forwarding to the convening authority.* The original and one copy of the record of trial shall be forwarded to the convening authority after compliance with subsection (e)(1) of this rule.

(3) *Further disposition.* After compliance with R.C.M. 1306(b) and (c), the record of trial shall be disposed of under regulations prescribed by the Secretary concerned.

Rule 1306. Post-trial procedure

(a) *Matters submitted by the accused.* After a sentence is adjudged, the accused may submit written matters to the convening authority in accordance with R.C.M. 1105.

(b) *Convening authority's action.*

(1) *Who shall act.* Except as provided herein, the convening authority shall take action in accordance with R.C.M. 1107. The convening authority shall not take action before the period prescribed in R.C.M. 1105(c)(3) has expired, unless the right to submit matters has been waived under R.C.M. 1105(d).

(2) *Action.* The action of the convening authority shall be shown on all copies of the record of trial except that provided the accused if the accused has retained that copy. An order promulgating

the result of a trial by summary court-martial need not be issued. A copy of the action shall be forwarded to the accused.

(3) *Signature.* The action on the original record of trial shall be signed by the convening authority. The

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 that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the evidence would have been obtained even if the statement had not been made.

(f) *Defense evidence.* The defense may present evidence relevant to the admissibility of evidence as to which there has been an objection or motion to suppress under this rule. An accused may testify for the limited purpose of denying that the accused made the statement or that the statement was made voluntarily. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(g) *Corroboration.* An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(1) *Quantum of evidence needed.* The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

(2) *Procedure.* The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

(h) *Miscellaneous.*

(1) *Oral statements.* A voluntary oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing is not accounted for.

(2) *Completeness.* If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement.

(3) *Certain admissions by silence.* A person's failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation.

★(4) *Refusal to obey order to submit body substance.* If an accused refuses a lawful order to submit for chemical analysis a sample of his or her blood, breath, urine or other body substance, evidence of such refusal may be admitted into evidence on:

(A) A charge of violating an order to submit such a sample; or

(B) Any other charge on which the results of the chemical analysis would have been admissible.

Rule 305. Warnings about rights

(a) *General rule.* A statement obtained in violation of this rule is involuntary and shall be treated under Mil. R. Evid. 304.

(b) *Definitions.* As used in this rule:

(1) *Person subject to the code.* A "person subject to the code" includes a person acting as a knowing agent of a military unit or of a person subject to the code.

(2) *Interrogation.* "Interrogation" includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.

(c) *Warnings concerning the accusation, right to remain silent, and use of statements.* A person subject to the code who is required to give warnings under Article 31 may not interrogate or request any statement from an accused or a person suspected of an offense without first:

(1) informing the accused or suspect of the nature of the accusation;

(2) advising the accused or suspect that the accused or suspect has the right to remain silent; and

(3) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

(d) *Counsel rights and warnings.*

(1) *General rule.* When evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment to the Constitution of the United States either is sought or is a reasonable consequence of an interrogation, an accused or a person suspected of an offense is entitled to consult with counsel as provided by paragraph (2) of this subdivision, to have such counsel present at the interrogation, and to be warned of these rights prior to the interrogation if—

(A) The interrogation is conducted by a person subject to the code who is required to give warnings under Article 31 and the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way; or

(B) The interrogation is conducted by a person subject to the code acting in a law enforcement capacity, or an agent of such a person, the interrogation is conducted subsequent to preferral of charges or the imposition of pretrial restraint under R.C.M. 304, and the interrogation concerns the offenses or matters that were the subject of the preferral of charges or were the cause of the imposition of pretrial restraint.

(2) *Counsel.* When a person entitled to counsel under this rule requests counsel, a judge advocate or an individual certified in accordance with Article 27(b) shall be provided by the United States at no expense to the person and without regard to the person's indigency or lack thereof before the interrogation may proceed. In addition to counsel supplied by the United States, the person may retain civilian counsel at no expense to the United States. Unless otherwise provided by regulations of the Secretary concerned, an accused or suspect does not have a right under this rule to have military counsel of his or her own selection.

(e) *Notice to Counsel.* When a person subject to the code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.

(f) *Exercise of rights.* If a person chooses to exercise the privilege against self-incrimination or the right to counsel under this rule, questioning must cease immediately.

(g) *Waiver.*

(1) *General rule.* After receiving applicable warnings under this rule, a person may waive the rights described therein and in Mil. R. Evid. 301 and make a statement. The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused or suspect must acknowledge affirmatively that he or she understands the rights involved, affirmatively decline the right to counsel and affirmatively consent to making a statement.

(2) *Counsel.* If the right to counsel in subdivision (d) is applicable and the accused or suspect does not decline affirmatively the right to counsel, the prosecution must demonstrate by a preponderance of the evidence that the individual waived the right to counsel. In addition, if the notice to counsel in subdivision (e) is applicable, a waiver of the right to counsel is not effective unless the prosecution demonstrates by a preponderance of the evidence that reasonable efforts to notify the counsel were unavailing or that the counsel did not attend an interrogation scheduled within a reasonable period of time after the required notice was given.

(h) *Nonmilitary interrogations.*

(1) *General rule.* When a person subject to the code is interrogated by an official or agent of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States, or any political subdivision of such a State, Commonwealth, or possession, and such official or agent is not required to give 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

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 sumnmary court-martial or special court-martial without a military judge may not be used for purposes of impeachment until review has been completed pursuant to Article 64 or Article 66 if applicable. Evidence of the pendency of an appeal is admissible.

(f) *Definition.* For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

Rule 610. Religious beliefs or opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the credibility of the witness is impaired or enhanced.

Rule 611. Mode and order of interrogation and presentation

(a) *Control by the military judge.* The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) *Leading questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 612. Writing used to refresh memory

If a witness uses a writing to refresh his or her memory for the purpose of testifying, either

(1) while testifying, or

(2) before testifying, if the military judge determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing in camera, excise any privileged information or portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be attached to the record of trial as an appellate exhibit. If a writing is not produced or delivered pursuant to order under this rule, the military judge shall make any order justice requires, except that when the prosecution elects not to comply, the order shall be one striking the testimony or, if in discretion of the military judge it is determined that the interests of justice so required, declaring a mistrial. This rule does not preclude disclosure of information required to be disclosed under other provisions of these rules or this Manual.

Rule 613. Prior statements of witnesses

★(a) *Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Mil. R. Evid. 801(d)(2).

Rule 614. Calling and interrogation of witnesses by the court-martial

(a) *Calling by the court-martial.* The military judge may, sua sponte, or at the request of the members or the suggestion of a party, call witnesses, and all parties are entitled to cross-examine

witnesses thus called. When the members wish to call or recall a witness, the military judge shall determine whether it is appropriate to do so under these rules or this Manual.

(b) *Interrogation by the court-martial.* The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibililty 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 a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic public documents not under seal.* A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents.* A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position

PART IV
PUNITIVE ARTICLES

Introductory Discussion

Paragraphs 1 and 2 discuss the two articles of the code that are located in the punitive article subchapter of the code, but which are not punitive as such: Article 77, principals; and Article 79, lesser included offenses.

R.C.M. 307 prescribes rules for preferral of charges. The discussion under that rule explains how to allege violations under the code using the format of charge and specification.

Beginning with paragraph 3, the punitive articles of the code are discussed using the folowing sequence:

a. Text of the article

b. Elements of the offense or offenses

c. Explanation

d. Lesser included offenses

e. Maximum punishment

f. Sample specifications

★The term "elements," as used in Part IV, includes both the statutory elements of the offense and any aggravating factors listed under the President's authority which increases the maximum permissible punishment when specified aggravating factors are pleaded and proven.

The prescriptions of maximum punishments in subparagraph e of each paragraph of this part must be read in conjunction with R.C.M. 1003, which prescribes additional punishments that may be available and additional limitations on punishments. The sample specifications provided in subparagraph f of each paragraph in this part are guides. The specifications may be varied in form and content as necessary. *See* R.C.M. 307 for additional guidance.

1. Article 77—Principals

a. *Text.*

"Any person punishable under this chapter who—

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

(2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal."

b. *Explanation.*

(1) *Purpose.* Article 77 does not define an offense. Its purpose is to make clear that a person need not personally perform the acts necessary to constitute an offense to be guilty of it. A person who aids, abets, counsels, commands, or procures the commission of an offense, or who causes an act to be done which, if done by that person directly, would be an offense is equally guilty of the offense as one who commits it directly, and may be punished to the same extent.

Article 77 eliminates the common law distinctions between principal in the first degree ("perpetrator"); principal in the second degree (one who aids, counsels, commands, or encourages the commission of an offense and who is present at the scene of the crime—commonly known as an "aider and abettor"); and accessory before the fact (one who aids, counsels, commands, or encourages the commission of an offense and who is not present at the scene of the crime). All of these are now "principals."

(2) *Who may be liable for an offense.*

(a) *Perpetrator.* A perpetrator is one who actually commits the offense, either by the perpetrator's own hand, or by causing an offense to be committed by knowingly or intentionally inducing or setting in motion acts by an animate or inanimate agency or instrumentality which result in the commission of an offense. For example, a person who knowingly conceals contraband drugs in an automobile, and then induces another person, who is unaware and has no reason to know of the presence of drugs, to drive the automobile onto a military installation, is, although not present in the automobile, guilty of wrongful introduction of drugs onto a military installation. (On these facts, the driver would be guilty of no crime.) Similarly, if, upon orders of a superior, a soldier shot a person

who appeared to the soldier to be an enemy, but was known to the superior as a friend, the superior would be guilty of murder (but the soldier would be guilty of no offense).

(b) *Other Parties.* If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must:

(i) Assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and

(ii) Share in the criminal purpose of design.

One who, without knowledge of the criminal venture or plan, unwittingly encourages or renders assistance to another in the commission of an offense is not guilty of a crime. *See* the parentheticals in the examples in paragraph 1b(2)(a) above. In some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person (for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime *if* such a noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(3) *Presence.*

(a) *Not necessary.* Presence at the scene of the crime is not necessary to make one a party to the crime and liable as a principal. For example, one who, knowing that person intends to shoot another person and intending that such an assault be carried out, provides the person with a pistol, is guilty of assault when the offense is committed, even though not present at the scene.

(b) *Not sufficient.* Mere presence at the scene of a crime does not make one a principal unless the requirements of paragraph 1b(2)(a) or (b) have been met.

(4) *Parties whose intent differs from the perpetrator's.* When an offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must prove that the accused had that intent or state of mind, whether the accused is charged as a perpetrator or an "other party" to crime. It is possible for a party to have a state of mind more or less culpable than the perpetrator of the offense. In such a case, the party may be guilty of a more or less serious offense than that committed by the perpetrator. For example, when a homicide is committed, the perpetrator may act in the heat of sudden passion caused by adequate provocation and be guilty of manslaughter, while the party who, without such passion, hands the perpetrator a weapon and encourages the perpetrator to kill the victim, would be guilty of murder. On the other hand, if a party assists a perpetrator in an assault on a person who, known only to the perpetrator, is an officer, the party would be guilty only of assault, while the perpetrator would be guilty of assault on an officer.

(5) *Responsibility for other crimes.* A principal may be convicted of crimes committed by another principal if such crimes are likely to result as a natural and probable consequence of the criminal venture or design. For example, the accused who is a party to a burglary is guilty as a principal not only of the offense of burglary, but also, if the perpetrator kills an occupant in the course of the burglary, of murder. (*See also* paragraph 5 concerning liability for offenses committed by co-conspirators.)

(6) *Principals independently liable.* One may be a principal, even if the perpetrator is not identified or prosecuted, or is acquitted.

(7) *Withdrawal.* A person may withdraw from a common venture or design and avoid liability for any offenses committed after the withdrawal. To be effective, the withdrawal must meet the following requirements:

(a) It must occur before the offense is committed;

(b) The assistance, encouragement, advice, instigation, counsel, command, or procurement given by the person must be effectively countermanded or negated; and

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

b. *Elements.*

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

c. *Explanation.*

(1) *In general.* To constitute an attempt there must be a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose.

(2) *More than preparation.* Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson to applying a burning match to a haystack, even if no fire results. The overt act need not be the last act essential to the consummation of the offense. For example, an accused could commit an overt act, and then voluntarily decide not to go through with the intended offense. An attempt would nevertheless have been committed, for the combination of a specific intent to commit an offense, plus the commission of an overt act directly tending to accomplish it, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(3) *Factual impossibility.* A person who purposely engages in conduct which would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt. For example, if A, without justification or excuse and with intent to kill B, points a gun at B and pulls the trigger, A is guilty of attempt to murder, even though, unknown to A, the gun is defective and will not fire. Similarly, a person who reaches into the pocket of another with the intent to steal that person's billfold is guilty of an attempt to commit larceny, even though the pocket is empty.

(4) *Solicitation.* Soliciting another to commit an offense does not constitute an attempt. *See* paragraph 6 for a discussion of Article 82, solicitation.

(5) *Attempts not under Article 80.* While most attempts should be charged under Article 80, the following attempts are specifically addressed by some other article, and should be charged accordingly:

(a) Article 85—desertion

(b) Article 94—mutiny or sedition

(c) Article 100—subordinate compelling

(d) Article 104—aiding the enemy

★(e) Article 106a—espionage

(f) Article 128—assault

(6) *Regulations.* An attempt to commit conduct which would violate a lawful general order or regulation under Article 92 (*see* paragraph 16) should be charged under Article 80. It is not necessary in such cases to prove that the accused intended to violate the order or regulation, but it must be proved that the accused intended to commit the prohibited conduct.

d. *Lesser included offenses.* If the accused is charged with an attempt under Article 80, and the offense attempted has a lesser included offense, then the offense of attempting to commit the lesser

included offense would ordinarily be a lesser included offense to the charge of attempt. For example, if an accused was charged with attempted larceny, the offense of attempted wrongful appropriation would be a lesser included offense, although it, like the attempted larceny, would be a violation of Article 80.

e. *Maximum punishment.* Any person subject to the code who is found guilty of an attempt under Article 80 to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty or confinement exceeding 20 years be adjudged.

f. *Sample specification.*

In that _____ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 19 ____, attempt to (describe offense with sufficient detail to include expressly or by necessary implication every element).

5. Article 81—Conspiracy

a. *Text.*

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

b. *Elements.*

(1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

c. *Explanation.*

(1) *Co-conspirators.* Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the criminal purpose need not be established. The accused must be subject to the code, but the other co-conspirators need not be. A person may be guilty of conspiracy although incapable of committing the intended offense. For example, a bedridden conspirator may knowingly furnish the car to be used in a robbery. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. However, the conspirator who joined an existing conspiracy can be convicted of this offense only if, at or after the time of joining the conspiracy, an overt act in furtherance of the object of the agreement is committed.

(2) *Agreement.* The agreement in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play.

(3) *Object of the agreement.* The object of the agreement must, at least in part, involve the commission of one or more offenses under the code. An agreement to commit several offenses is ordinarily but a single conspiracy. Some offenses require two or more culpable actors acting in concert. There can be no conspiracy where the agreement exists only between the persons necessary to commit such an offense. Examples include dueling, bigamy, incest, adultery, and bribery.

(4) *Overt act.*

(a) The overt act must be independent of the agreement to commit the offense; must take place at the time of or after the agreement; must be done by one or more of the conspirators, but not necessarily the accused; and must be done to effectuate the object of the agreement.

(b) The overt act need not be in itself criminal, but it must be a manifestation that the agreement is being executed. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. Any overt act is enough, no matter how preliminary or preparatory in nature, as long as it is a manifestation that the agreement is being executed.

(c) An overt act by one conspirator becomes the act of all without any new agreement specifically directed to that act and each conspirator is equally guilty even though each does not participate in, or have knowledge of, all of the details of the execution of the conspiracy.

(a) That the accused absented himself or herself from his or her unit, organization, or place of duty at which he or she was required to be;

(b) That the absence of the accused was without authority;

(c) That the absence was for a certain period of time;

(d) That the accused knew that the absence would occur during a part of a period of maneuvers or field exercises; and

(e) That the accused intended to avoid all or part of a period of maneuvers or field exercises.

c. *Explanation.*

(1) *In general.* This article is designed to cover every case not elsewhere provided for in which any member of the armed forces is through the member's own fault not at the place where the member is required to be at a prescribed time. It is not necessary that the person be absent entirely from military jurisdiction and control. The first part of this article—relating to the appointed place of duty—applies whether the place is appointed as a rendezvous for several or for one only.

(2) *Actual knowledge.* The offenses of failure to go to and going from appointed place of duty require proof that the accused actually knew of the appointed time and place of duty. The offense of absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises requires proof that the accused actually knew that the absence would occur during a part of a period of maneuvers or field exercises. Actual knowledge may be proved by circumstantial evidence.

(3) *Intent.* Specific intent is not an element of unauthorized absence. Specific intent is an element for certain aggravated unauthorized absences.

(4) *Aggravated forms of unauthorized absence.* There are variations of unauthorized absence under Article 86(3) which are more serious because of aggravating circumstances such as duration of the absence, a special type of duty from which the accused absents himself or herself, and a particular specific intent which accompanies the absence. These circumstances are not essential elements of a violation of Article 86. They simply constitute special matters in aggravation. The following are aggravated unauthorized absences:

(a) Unauthorized absence for more than 3 days (duration).

(b) Unauthorized absence for more than 30 days (duration).

(c) Unauthorized absence from a guard, watch, or duty (special type of duty).

(d) Unauthorized absence from guard, watch, or duty section with the intent to abandon it (special type of duty and specific intent).

(e) Unauthorized absence with the intent to avoid maneuvers or field exercises (special type of duty and specific intent).

(5) *Control by civilian authorities.* A member of the armed forces turned over to the civilian authorities upon request under Article 14 (*see* R.C.M. 106) is not absent without leave while held by them under that delivery. When a member of the armed forces, being absent with leave, or absent without leave, is held, tried, and acquitted by civilian authorities, the member's status as absent with leave, or absent without leave, is not thereby changed, regardless how long held. The fact that a member of the armed forces is convicted by the civilian authorities, or adjudicated to be a juvenile offender, or the case is "diverted" out of the regular criminal process for a probationary period does not excuse any unauthorized absence, because the member's inability to return was the result of willful misconduct. If a member is released by the civilian authorities without trial, and was on authorized leave at the time of arrest or detention, the member may be found guilty of unauthorized absence only if it is proved that the member actually committed the offense for which detained, thus establishing that the absence was the result of the member's own misconduct.

(6) *Inability to return.* The status of absence without leave is not changed by an inability to return through sickness, lack of transportation facilities, or other disabilities. But the fact that all or

part of a period of unauthorized absence was in a sense enforced or involuntary is a factor in extenuation and should be given due weight when considering the initial disposition of the offense. When, however, a person or authorized leave, without fault, is unable to return at the expiration thereof, that person has not committed the offense of absence without leave.

(7) *Determining the unit or organization of an accused.* A person undergoing transfer between activities is ordinarily considered to be attached to the activity to which ordered to report. A person on temporary additional duty continues as a member of the regularly assigned unit and if the person is absent from the temporary duty assignment, the person becomes absent without leave from both units, and may be charged with being absent without leave from either unit.

(8) *Duration.* Unauthorized absence under Article 86(3) is an instantaneous offense. It is complete at the instant an accused absents himself or herself without authority. Duration of the absence is a matter in aggravation for the purpose of increasing the maximum punishment authorized for the offense. Even if the duration of the absence is not over 3 days, it is ordinarily alleged in an Article 86(3) specification. If the duration is not alleged or if alleged but not proved, an accused can be convicted of and punished for only 1 day of unauthorized absence.

★(9) *Computation of duration.* In computing the duration of an unauthorized absence, any one continuous period of absence found that totals not more than 24 hours is counted as 1 day; any such period that totals more than 24 hours and not more than 48 hours is counted as 2 days, and so on. The hours of departure and return on different dates are assumed to be the same if not alleged and proved. For example, if an accused is found guilty of unauthorized absence from 0600 hours, 4 April, to 1000 hours, 7 April of the same year (76 hours), the maximum punishment would be based on an absence of 4 days. However, if the accused is found guilty simply of unauthorized absence from 4 April to 7 April, the maximum punishment would be based on an absence of 3 days.

(10) *Termination—methods of return to military control.*

(a) *Surrender to military authority.* A surrender occurs when a person presents himself or herself to any military authority, whether or not a member of the same armed force, notifies that authority of his or her unauthorized absence status, and submits or demonstrates a willingness to submit to military control. Such a surrender terminates the unauthorized absence.

(b) *Apprehension by military authority.* Apprehension by military authority of a known absentee terminates an unauthorized absence.

(c) *Delivery to military authority.* Delivery of a known absentee by anyone to military authority terminates the unauthorized absence.

(d) *Apprehension by civilian authorities at the request of the military.* When an absentee is taken into custody by civilian authorities at the request of military authorities, the absence is terminated.

(e) *Apprehension by civilian authorities without prior military request.* When an absentee is in the hands of civilian authorities for other reasons and these authorities make the absentee available for return to military control, the absence is terminated when the military authorities are informed of the absentee's availability.

(11) *Findings of more than one absence under one specification.* An accused may properly be found guilty of two or more separate unauthorized absences under one specification, provided that each absence is included within the period alleged in the specification and provided that the accused was not misled. If an accused is found guilty of two or more unauthorized absences under a single specification, the maximum authorized punishment shall not exceed that authorized if the accused had been found guilty as charged in the specification.

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

e. *Maximum punishment.*

(1) *Failing to go to, or going from, the appointed place of duty.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(2) *Absence from unit, organization, or other place of duty.*

(a) For not more than 3 days. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(c) That the property was military property of the United States; and

(d) That the property was of a certain value.

(2) *Damaging, destroying, or losing military property.*

(a) That the accused, without proper authority, damaged or destroyed certain property in a certain way, or lost certain property;

(b) That the property was military property of the United States;

(c) That the damage, destruction, or loss was willfully caused by the accused or was the result of neglect by the accused; and

(d) That the property was of a certain value or the damage was of a certain amount.

(3) *Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.*

(a) That certain property (which was a firearm or explosive) was lost, damaged, destroyed, sold, or wrongfully disposed of;

(b) That the property was military property of the United States;

(c) That the loss, damage, destruction, sale, or wrongful dispostion was suffered by the accused, without proper authority, through a certain omission of duty by the accused;

(d) That the omission was willful or negligent; and

(e) That the property was of a certain value or the damage was of a certain amount.

c. *Explanation.*

★(1) *Military property.* Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States. It is immaterial whether the property sold, disposed, destroyed, lost, or damaged had been issued to the accused, to someone else, or even issued at all. If it is proved by either direct or circumstantial evidence that items of individual issue were issued to the acccused, it may be inferred, depending on all the evidence, that the damage, destruction, or loss proved was due to the neglect of the accused. Retail merchandise of service exchange stores is not military property under this article.

(2) *Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.* "To suffer" means to allow or permit. The willful or negligent sufferance specified by this article includes: deliberate violation or intentional disregard of some specific law, regulation, or order; reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; or loaning it to a person, known to be irresponsible, by whom it is damaged.

(3) *Value and damage.* In the case of loss, destruction, sale, or wrongful disposition, the value of the property controls the maximum punishment which may be adjudged. In the case of damage, the amount of damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by the government agency normally employed in such work, or the cost of replacement, as shown by government price lists or otherwise, whichever is less.

★d. *Lesser included offenses.*

(1) *Sale or disposition of military property.*

(a) Article 80—attempts

(b) Article 134—sale or disposition of non-military government property

(2) *Willfully damaging military property.*

(a) Article 108—damaging military property through neglect

(b) Article 109—willfully damaging non-military property

(c) Article 80—attempts

(3) *Willfully suffering military property to be damaged.*

(a) Article 108—through neglect suffering military property to be damaged

(b) Article 80—attempts

(4) *Willfully destroying military property.*

(a) Article 108—through neglect destroying military property

(b) Article 109—willfully destroying non-military property

(c) Article 108—willfully damaging military property

(d) Article 109—willfully damaging non-military property

(e) Article 108—through neglect damaging military property

(f) Article 80—attempts

(5) *Willfully suffering military property to be destroyed.*

(a) Article 108—through neglect suffering military property to be destroyed

(b) Article 108—willfully suffering military property to be damaged

(c) Article 108—through neglect suffering military property to be damaged

(d) Article 80—attempts

(6) *Willfully losing military property.*

(a) Article 108—through neglect, losing military property

(b) Article 80—attempts

(7) *Willfully suffering military property to be lost.*

(a) Article 108—through neglect, suffering military property to be lost

(b) Article 80—attempts

(8) Willfully suffering military property to be sold.

(a) Article 108—through neglect, suffering military property to be sold

(b) Article 80—attempts

(9) Willfully suffering military property to be wrongfully disposed of.

(a) Article 108—through neglect, suffering military property to be wrongfully disposed of in the manner alleged

(b) Article 80—attempts

e. *Maximum punishment.*

(1) *Selling or otherise disposing of military property.*

(a) *Of a value of $100.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowance, and confinement for 1 year.

(b) *Of a value of more than $100.00 or any firearm or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Through neglect damaging, destroying, or losing, or through neglect suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property.*

(a) *Of a value or damage of $100.00 or less.* Confinement for 6 months, and forfeiture of two-thirds pay per month for 6 months.

(b) *Of a value or damage of more than $100.00.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(3) *Willfully damaging, destroying, or losing, or willfully suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property.*

(a) *Of a value or damage of $100.00 or less.* Bad-conduct discharge, foreiture of all pay and allowances, and confinement for 1 year.

(2) *Willfully and wrongfully.* As used in this article, "willfully" means intentionally and "wrongfully" means contrary to law, regulation, lawful order, or custom.

(3) *Negligence.* "Negligence" as used in this article means the failure to exercise the care, prudence, or attention to duties, which the interests of the government require a prudent and reasonable person to exercise under the circumstances. This negligence may consist of the omission to do something the prudent and reasonable person would have done, or the doing of something which such a person would not have done under the circumstances. No person is relieved of culpability who fails to perform such duties as are imposed by the general responsibilities of that person's grade or rank, or by the customs of the service for the safety and protection of vessels of the armed forces, simply because these duties are not specifically enumerated in a regulation or order. However, a mere error in judgment that a reasonably able person might have committed under the same circumnstances does not constitute an offense under this article.

(4) *Suffer.* "To suffer" means to allow or permit. A ship is willfully suffered to be hazarded by one who, although not in direct control of the vessel, knows a danger to be imminent but takes no steps to prevent it, as by a plotting officer of a ship under way who fails to report to the officer of the deck a radar target which is observed to be on a collision course with, and dangerously close to, the ship. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a foreseeable danger.

d. *Lesser included offenses.*

(1) *Willfully and wrongfully hazarding a vessel.*

(a) Article 110—negligently hazarding a vessel

(b) Article 80—attempts

(2) *Willfully and wrongfully suffering a vessel to be hazarded.*

(a) Article 110—negligently suffering a vessel to be hazarded

(b) Article 80—attempts

e. *Maximum punishment.* Hazarding or suffering to be hazarded any vessel of the armed forces:

(1) *Willfully and wrongfully.* Death or such other punishment as a court-martial may direct.

(2) *Negligently.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. *Sample specifications.*

(1) *Hazarding or suffering to be hazarded any vessel, willfully and wrongfully.*

In that _____ (personal jurisdiction data), did, on _____ 19____, while serving as _____ aboard the _____ in the vicinity of _____, willfully and wrongfully (hazard the said vessel) (suffer the said vessel to be hazarded) by (causing the said vessel to collide with _____) (allowing the said vessel to run aground) (_____).

(2) *Hazarding of vessel, negligently.*

(a) *Example 1.*

In that _____ (personal jurisdiction data), on _____ 19____, while serving in command of the _____, making entrance to (Boston Harbor), did negligently hazard the said vessel by failing and neglecting to maintain or cause to be maintained an accurate running plot of the true position of said vessel while making said approach, as a result of which neglect the said _____, at or about _____, hours on the day aforesaid, became stranded in the vicinity of (Channel Buoy Number Three).

(b) *Example 2.*

In that _____ (personal jurisdiction data), on _____ 19 ____, while serving as navigator of the _____, cruising on special service in the _____ ocean off the coast of _____, notwithstanding the fact that at about midnight, _____ 19 ____, the northeast point of _____ Island bore abeam and was about six miles distant, the said ship being then under way and making a speed of about ten knots, and well knowing the position of the said ship at the time stated, and that the charts of the locality were unreliable and the currents thereabouts uncertain, did then and there negligently hazard the said vessel by failing and neglecting to exercise proper care and attention in navigating said ship while approaching _____ Island, in that he/she neglected and failed to lay a course that would carry said ship clear of the last aforesaid island, and to change the course in due time to avoid disaster; and the said ship, as a result of said negligence on the part of said _____, ran upon a rock off the southwest coast of _____ Island, at about _____ hours, _____, 19____, in consequence of which the said _____ was lost.

(c) *Example 3.*

In that _____ (personal jurisdiction data), on _____ 19 ____, while serving as navigator of the _____ and well knowing that at about sunset of said day the said ship had nearly run her estimated distance from the _____ position, obtained and plotted by him/her, to the position of _____, and well knowing the difficulty of sighting _____, from a safe distance after sunset, did then and there negligently hazard the said vessel by failing and neglecting to advise his/her commanding officer to lay a safe course for said ship to the northward before continuing on a westerly course, as it was the duty of said _____ to do; in consequence of which the said ship was, at about _____ hours on the day above mentioned, run upon _____ bank in the _____ sea, about latitude _____ degrees, _____ minutes, north, and longitude _____degrees, _____ minutes west, and seriously injured.

(3) *Suffering a vessel to be hazarded, negligently.*

In that _____ (personal jurisdiction data), while serving as combat intelligence center officer on board the _____, making passage from Boston to Philadelphia, and having, between _____ and _____ hours on _____, 19 ____, been duly informed of decreasing radar ranges and constant radar bearing indicating that the said _____ was upon a collison course approaching a radar target, did then and there negligently suffer the said vessel to be hazarded by failing and neglecting to report said collision course with said radar target to the officer of the deck, as it was his/her duty to do, and he/she, the said _____, through negligence, did cause the said _____ to collide with the _____ at or about _____ hours on said date, with resultant damage to both vessels.

35. Article 111—Drunken or reckless driving

a. *Text*

★"Any person subject to this chapter who operates any vehicle while drunk, or in a reckless or wanton manner, or while impaired by a substance described in section 912a(b) of this title (article 112a(b)), shall be punished as a court-martial may direct."

b. *Elements.*

(1) That the accused was operating a vehicle; and

★That the accused was drunk while operating the vehicle, that the accused operated the vehicle in a reckless or wanton manner, or that the accused was impaired by a substance described in article 112a(b) while operating the vehicle.

[Note: If injury resulted add the following element]

(3) That the accused thereby caused the vehicle to injure a person.

c. *Explanation.*

(1) *Vehicle. See* 1 U.S.C. § 4. Drunken or reckless operation of water and air transportation may be alleged under other articles of the code, as appropriate.

(2) *Operating.* Operating a vehicle includes not only driving or guiding it while in motion, either in person or through the agency of another, but also the setting of its motive power in action or the manipulation of its controls so as to cause the particular vehicle to move.

★(3) *Drunk or impaired.* "Drunk" and "impaired" mean any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties. Whether the drunkenness or impairment was caused by liquor or drugs is immaterial.

(4) *Reckless.*The operation of a vehicle is "reckless" when it exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, but all these factors may be admissible and relevant as bearing upon the ultimate question: whether, under all the circumstances, the accused's manner of operation of the vehicle was of that heedless nature which made it actually or imminently dangerous to the occupants, or to the rights or safety of others. It is driving with such a high degree of negligence that if death were caused, the accused would have committed involuntary manslaughter, at least. The condition of the surface on which the vehicle is operated, the time of day or night, the traffic, and the condition of the vehicle are often matters of importance in the proof of an offense charged under this article, and, where they are of importance, may properly be alleged.

(5) *Wanton.* "Wanton" includes "reckless," but in describing the operation of a vehicle, it may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(6) *Separate offenses.* While the same course of conduct may constitute both drunken and reckless driving, this article proscribes these as separate offenses, and both offenses may be charged. However, as recklessness is a relative matter, evidence of all the surrounding circumstances which made the operation dangerous, whether alleged or not, may be admissible. Thus, on a charge of reckless driving, evidence of drunkenness might be admissible as establishing one aspect of the recklessness, and evidence that the vehicle exceeded a safe speed, at a relevant prior point and time, might be admissible as corroborating other evidence of the specific recklessness charged. Similarly, on a charge of drunken driving, relevant evidence of recklessness might have probative value as corroborating other proof of drunkenness.

d. *Lesser included offenses.* Drunken driving.

(1) Article 112—drunk on duty

(2) Article 134—drunk on station

e. *Maximum punishment.*

(1) *Resulting in personal injury.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(2) *No personal injury involved.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

★f. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/onboard—location) (subject-matter jurisdiction data, if required), on or about _____ 19 ____ , (in the motor pool area) (near the Officer's Club) (on _____ Street between _____ and _____ Avenues) (_____) operate a vehicle, to wit: (a truck) (a passenger car) (_____), [while drunk] [while impaired by _____] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (driving at a speed in excess of 50 miles per hour on the sidewalk and wrong side of said street) (_____)] (and did thereby cause said vehicle to (strike and) injure _____).

36. Article 112—Drunk on duty

a. *Text.*

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

b. *Elements.*

(1) That the accused was on a certain duty; and

(2) That the accused was found drunk while on this duty.

c. *Explanation.*

(1) *Drunk. See* paragraph 35c(3).

(2) *Duty.* "Duty" as used in this article means military duty. Every duty which an officer or enlisted person may legally be required by superior authority to execute is necessarily a military duty. Within the meaning of this article, when in the actual exercise of command, the commander of a post, or of a command, or of a detachment in the field is constantly on duty, as is the commanding officer on board a ship. In the case of other officers or enlisted persons, "on duty" relates to duties of routine or detail, in garrison, at a station, or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and enlisted persons occupy the status of leisure known as "off duty" or "on liberty." In a region of active hostilities, the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article. So also, an officer of the day and members of the guard, or of the watch, are on duty during their entire tour within the meaning of this article.

(3) *Nature of offense.* It is necessary that the accused be found drunk while actually on the duty alleged, and the fact the accused became drunk before going on duty, although material in extenuation, does not affect the question of guilt. If, however, the accused does not undertake the responsibility or enter upon the duty at all, the accused's conduct does not fall within the terms of this article, nor does that of a person who absents himself or herself from duty and is found drunk while so absent. Included within the article is drunkenness while on duty of an anticipatory nature such as that of an aircraft crew ordered to stand by for flight duty, or of an enlisted person ordered to stand by for guard duty.

(4) *Defenses.* If the accused is known by superior authorities to be drunk at the time a duty is assigned, and the accused is thereafter allowed to assume that duty anyway, or if the drunkenness resulted from an accidental overdosage administered for medicinal purposes, the accused will have a defense to this offense. *But see* paragraph 76 (incapacitation for duty).

d. *Lesser included offense.* Article 134—drunk on station

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months.

f. *Sample specification.*

In that _____ (personal jurisdiction data), was, (at/on board—location), on or about _____ 19 ____ , found drunk while on duty as _____ .

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

a. *Text.*

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

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

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

(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.

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

b. *Elements.*

(1) *Wrongful possession of controlled substance.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 19 ____ , (cause) (participate in) a riot by unlawfully assembling with _____ (and _____) (and) (others to the number of about _____ whose names are unknown) for the purpose of (resisting the police of _____) (assaulting passers-by) (____), and in furtherance of said purpose did (fight with said police) (assault certain persons, to wit: _____) (_____), to the terror and disturbance of _____ .

(2) *Breach of the peace.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 19 ____ , (cause) (participate in) a breach of the peace by [wrongfully engaging in a fist fight in the dayroom with _____] [using the following provoking language (toward _____), to wit: " _____ ," or words to that effect] [wrongfully shouting and singing in a public place, to wit: _____] [ ].

42. Article 117—Provoking speeches or gestures

a. *Text.*

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

b. *Elements.*

(1) That the accused wrongfully used words or gestures toward a certain person;

(2) That the words or gestures used were provoking or reproachful; and

(3) That the person toward whom the words or gestures were used was a person subject to the code.

c. *Explanation.*

(1) *In general.* As used in this article, "provoking" and "reproachful" describe those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances. These words and gestures do not include reprimands, censures, reproofs and the like which may properly be administered in the interests of training, efficiency, or discipline in the armed forces.

(2) *Knowledge.* It is not necessary that the accused have knowledge that the person toward whom the words or gestures are directed is a person subject to the code.

★d. *Lesser included offenses.* Article 80—attempts

e. *Maximum punishment.* Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

f. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jursidiction data, if required), on or about _____ 19 ____ , wrongfully use (provoking) (reproachful) (words, to wit; " _____ :" or words to that effect) (and) (gestures, to wit: _____) towards (Sergeant _____ , U.S. Air Force) (_____).

43. Article 118—Murder

a. *Text.*

"Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-marital may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-marital may direct."

b. *Elements.*

(1) *Premeditated murder*

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had a premeditated design to kill.

(2) *Intent to kill or inflict great bodily harm.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person.

(3) *Act inherently dangerous to others.*

(a) That a cetain named or described person is dead;

(b) That the death resulted from the intentional act of the accused;

(c) That this act was inherently dangerous to others and showed a wanton disregard for human life;

(d) That the accused knew that death or great bodily harm was a probable consequence of the act; and

(e) That the killing was unlawful.

(4) *During certain offenses.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused was engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson.

c. *Explanation.*

(1) *In general.* Killing a human being is unlawful when done without justification or excuse. *See* R.C.M. 916. Whether an unlawful killing constitutes murder or a lesser offense depends upon the circumstances. The offense is committed at the place of the act or omission although the victim may have died elsewhere. Whether death occurs at the time of the accused's act or omission, or at some time thereafter, it must have followed from an injury received by the victim which resulted from the act or omission.

(2) *Premeditated murder.*

reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the female is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considerd in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the woman is of unsound mind or unconscious to an extent rendering her incapable of giving consent, the act is rape. Likewise, the acquiescence of a child of such tender years that she is incapable of understanding the nature of the act is not consent.

(c) *Character of victim. See* Mil. R. Evid. 412 concerning rules of evidence relating to an alleged rape victim's character.

(2) *Carnal knowledge.* "Carnal knowledge" is sexual intercourse under circumstances not amounting to rape, with a female who is not the accused's wife and who has not attained the age of 16 years. Any penetration, however slight, is sufficient to complete the offense. It is no defense that the accused is ignorant or misinformed as to the true age of the female, or that she was of prior unchaste character; it is the fact of the girl's age and not his knowledge or belief which fixes his criminal responsibility. Evidence of these matters should, however, be considered in determining an appropriate sentence.

d. *Lesser included offenses.*

(1) *Rape.*

(a) Article 128—assault; assault consummated by a battery

(b) Article 134—assault with intent to commit rape

(c) Article 134—indecent assault

(d) Article 80—attempts

(2) *Carnal knowledge.*

(a) Article 134—indecent acts or liberties with a person under 16

(b) Article 80—attempts

e. *Maximum punishment.*

(1) *Rape.* Death or such other punishment as a court-martial may direct.

(2) *Carnal knowledge.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

f. *Sample specifications.*

(1) *Rape.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 19 ____ , rape _____ .

(2) *Carnal knowledge.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 19 ____ , commit the offense of carnal knowledge with _____ .

46. Article 121—Larceny and wrongful appropriation

a. *Text*

"(a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty or wrongful appropriation.

(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct."

b. *Elements.*

(1) *Larceny.*

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.

★[Note: If the property is alleged to be military property, as defined in paragraph 32c(1), add the following element]

(e) That the property was military property.

(2) *Wrongful appropriation.*

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent temporarily to deprive or defraud another person of the use and benefit of the property or temporarily to appropriate the property for the use of the accused or for any person other than the owner.

c. *Explanation.*

(1) *Larceny.*

(a) *In general.* A wrongful taking with intent permanently to deprive includes the common law offense of larceny; a wrongful obtaining with intent permanently to defraud includes the offense formerly known as obtaining by false pretense; and a wrongful withholding with intent permanently to appropriate includes the offense formerly known as embezzlement. Any of the various types of larceny under Article 121 may be charged and proved under a specification alleging that the accused "did steal" the property in question.

(b) *Taking, obtaining, or withholding.* There must be a taking, obtaining, or withholding of the property by the thief. For instance, there is no taking if the property is connected to a building by a chain and the property has not been disconnected from the building; property is not "obtained" by merely acquiring title thereto without exercising some possessory control over it. As a general rule, however, any movement of the property or any exercise of dominion over it is sufficient if accompanied by the requisite intent. Thus, if an accused enticed another's horse into the accused's stable without touching the animal, or procured a railroad company to deliver another's trunk by changing the check on it, or obtained the delivery of another's goods to a person or place

designated by the accused, or had the funds of another transferred to the accused's bank account, the accused is guilty of larceny if the other elements of the offense have been proved. A person may "obtain" the property of another by acquiring possession without title, and one who already has possession of the property of another may "obtain" it by later acquiring title to it. A "withholding" may arise as a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property, or it may arise as a result of devoting property to a

owner of the property may testify as to its market value if familiar with its quality and condition. The fact that the owner is not an expert on the market value of the property goes only to the weight to be given that testimony, and not to its admissibility. *See* Mil. R. Evid. 701. When the character of the property clearly appears in evidence—for instance, when it is exhibited to the court-martial—the court-martial, from its own experience, may infer that it has some value. If as a matter of common knowledge the property is obviously of a value substantially in excess of $100.00, the court-martial may find a value of more than $100.00. Writings representing value may be considered to have the value—even though contingent—which they represented at the time of the theft.

(iv) *Limited interest in property.* If an owner of property or someone acting in the owner's behalf steals it from a person who has a superior, but limited, interest in the property, such as a lien, the value for punishment purposes shall be that of the limited interest.

(h) *Miscellaneous considerations.*

(i) *Lost property.* A taking or withholding of lost property by the finder is larceny if accompanied by an intent to steal and if a clue to the identity of the general or special owner, or through which such identity may be traced, is furnished by the character, location, or marketing of the property, or by other circumstances.

(ii) *Multiple article larceny.* When a larceny of several articles is committed at substantially the same time and place, it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several persons or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification.

(iii) *Special kinds of property which may also be the subject of larceny.* Included in property which may be the subject of larceny is property which is taken, obtained, or withheld by severing it from real estate and writings which represent value such as commercial paper.

(iv) *Services.* Theft of services may not be charged under this paragraph, *but see* paragraph 78.

(iv) *Mail.* As to larceny of mail, *see also* paragraph 93.

(2) *Wrongful appropriation.*

(a) *In general.* Wrongful appropriation requires an intent to temporarily—as opposed to permanently—deprive the owner of the use and benefit of, or appropriate to the use of another, the property wrongfully taken, withheld, or obtained. In all other respects wrongful appropriation and larceny are identical.

(b) *Examples.* Wrongful appropriation includes: taking another's automobile without permission or lawful authority with intent to drive it a short distance and then return it or cause it to be returned to the owner; obtaining a service weapon by falsely pretending to be about to go on guard duty with intent to use it on a hunting trip and later return it; and while driving a government vehicle on a mission to deliver supplies, withholding the vehicle from government service by deviating from the assigned route without authority, to visit a friend in a nearby town and later restore the vehicle to its lawful use. An inadvertent exercise of control over the property of another will not result in wrongful appropriation. For example, a person who fails to return a borrowed boat at the time agreed upon because the boat inadvertently went aground is not guilty of this offense.

★d. *Lesser included offenses.*

(1) *Larceny.*

(a) Article 121—wrongful appropriation

(b) Article 80—attempts

(2) *Larceny of military property.*

(a) Article 121—wrongful appropriation

(b) Article 121—larceny of property other than military property

(c) Article 80—attempts

(3) *Wrongful appropriation.* Article 80—attempts

★e. *Maximum punishment.*

(1) *Larceny.*

(a) *Military property of a value of $100 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) ***Property other than military property of a value of $100 or less.*** **Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.**

(c) ***Military property of a value of more than $100 or of any military motor vehicle, aircraft, vessel, firearm, or explosive.*** **Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.**

(d) *Property other than military property of a value of more than $100 or any motor vehicle, aircraft, vessel, firearm, or explosive not included in subparagraph e(1)(c).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

(2) *Wrongful appropriation.*

(a) *Of a value of $100.00 or less.* Confinement for 3 months, and forfeiture of two-thirds pay per month for 3 months.

(b) *Of a value of more than $100.00.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(c) *Of any motor vehicle, aircraft, vessel, firearm, or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. *Sample specifications.*

(1) *Larceny.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 19____, steal _____, (military property), of a value of (about) $ _____, the property of _____.

(2) *Wrongful appropriation.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 19____, wrongfully appropriate _____, of a value of (about) $ _____, the property of _____.

47. Article 122—Robbery

a. *Text.*

"Any person subject to this chapter who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct."

b. *Elements.*

(1) That the accused wrongfully took certain property from the person or from the possession and in the presence of a person named or described;

(2) That the taking was against the will of that person;

(3) That the taking was by means of force, violence, or force and violence, or putting the person in fear of immediate or future injury to that person, a relative, a member of the person's family, anyone accompanying the person at the time of the robbery, the person's property, or the

property of a relative, family member, or anyone accompanying the person at the time of the robbery;

(4) That the property belonged to a person named or described;

(5) That the property was of a certain or of some value; and

(6) That the taking of the property by the accused was with the intent permanently to deprive the person robbed of the use and benefit of the property.

[Note: If the robbery was committed with a firearm, add the following element]

(7) That the means of force or violence or of putting the person in fear was a firearm.

c. *Explanation.*

89. Article 134 (Indecent language)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) That the accused orally or in writing communicated to another person certain language;

(2) That such language was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[Note: In appropriate cases add the following element after element (1): That the person to whom the language was communicated was a child under the age of 16;].

c. *Explanation.* "Indecent" language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. The language must violate community standards. *See* paragraph 87 if the communication was made in the physical presence of a child.

★d. *Lesser included offenses*

(1) Article 117—provoking speeches

(2) Article 80—attempts

e. *Maximum punishment.* Indecent or insulting language.

(1) *Communicated to any child under the age of 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Other cases.* Bad-conduct discharge; forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 19 ____, (orally) (in writing) communicate to _____, (a child under the age of 16 years), certain indecent language, to wit: _____.

90. Article 134 (Indecent acts with another)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) That the accused committed a certain wrongful act with a certain person;

(2) That the act was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* "Indecent" signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.

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

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinment for 5 years.

f. *Sample specification*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 19 ____, wrongfully commit an indecent act with _____ by _____.

91. Article 134 (Jumping from vessel into the water)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) That the accused jumped from a vessel in use by the armed forces into the water;

(2) That such act by the accused was wrongful and intentional; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* "In use by" means any vessel operated by or under the control of the armed forces. This offense may be committed at sea, at anchor, or in port.

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

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification*

In that _____ (personal jurisdiction data), did, on board _____, at (location), on or about _____ 19 ____, wrongfully and intentionally jump from _____, a vessel in use by the armed forces, into the (sea) (lake) (river).

92. Article 134 (Kidnapping)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) That the accused seized, confined, inveigled, decoyed, or carried away a certain person;

(2) That the accused then held such person against that person's will;

(3) That the accused did so willfully and wrongfully; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *Inveigle, decoy.* "Inveigle" means to lure, lead astray, or entice by false representations or other deceitful means. For example, a person who entices another to ride in a car with a false promise to take the person to a certain destination has inveigled the passenger into the car. "Decoy" means to entice or lure by means of some fraud, trick, or temptation. For example, one who lures a child into a trap with candy has decoyed the child.

(2) *Held.* "Held" means detained. The holding must be more than a momentary or incidental detention. For example, a robber who holds the victim at gunpoint while the victim hands over a wallet, or a rapist who throws his victim to the ground, does not, by such acts, commit kidnapping. On the other hand, if, before or after such robbery or rape, the victim is involuntarily transported some substantial distance, as from a housing area to a remote area of the base or post, this may be kidnapping, in addition to robbery or rape.

(3) *Against the will.* "Against that person's will" means that the victim was held involuntarily. The involuntary nature of the detention may result from force, mental or physical coercion, or from other means, including false representations. If the victim is incapable of having a recognizable will, as in the case of a very young child or a mentally incompetent person, the holding must be against the will of the victim's parents or legal guardian. Evidence of the availability or nonavailability to the victim of means of exit or escape is relevant to the voluntariness of the detention, as is evidence of threats or force, or lack thereof, by the accused to detain the victim.

(4) *Willfully.* The accused must have specifically intended to hold the victim against the victim's will

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. *Punishments imposed on reserve component personnel while on inactive-duty training.* When a punishment under Article 15 amounting to a deprivation of liberty (for example, restriction, correctional custody, extra duties, or arrest in quarters) is imposed on a member of a reserve component during a period of inactive-duty training, the punishment may be served during one or both of the following:

(1) a normal period of inactive-duty training; or

(2) a subsequent period of active duty (not including a period of active duty under Article 2(d)(1), unless such active duty was approved by the Secretary concerned).

Unserved punishments may be carried over to subsequent periods of inactive-duty training or active duty. A sentence to forfeiture of pay may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

★f. *Punishments imposed on reserve component personnel when ordered to active duty for disciplinary purposes.* When a punishment under Article 15 is imposed on a member of a reserve component during a period of active duty to which the reservist was ordered pursuant to R.C.M. 204 and which constitutes a deprivation of liberty (for example, restriction, correctional custody, extra duties, or arrest in quarters), the punishment may be served during any or all of the following:

(1) that period of active duty to which the reservist was ordered pursuant to Article 2(d), but only where the order to active duty was approved by the Secretary concerned;

(2) a subsequent normal period of inactive-duty training; or

(3) a subsequent period of active duty (not including a period of active duty pursuant to R.C.M. 204 which was not approved by the Secretary concerned).

Unserved punishments may be carried over to subsequent periods of inactive-duty training or active duty. A sentence to forfeiture of pay may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

g. *Effective date and execution of punishments.* Reduction and forfeiture of pay, if unsuspended, take effect on the date the commander imposes the punishments. Other punishments, if unsuspended, will take effect and be carried into execution as prescribed by the Secretary concerned.

6. Suspension, mitigation, remission, and setting aside

a. *Suspension.* The nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment, or a successor in command over the person punished, may, at any time, suspend any part or amount of the unexecuted punishment imposed and may suspend a reduction in grade or a forfeiture, whether or not executed, subject to the following rules:

(1) An executed punishment of reduction or forfeiture of pay may be suspended only within a period of 4 months after the date of execution.

(2) Suspension of a punishment may not be for a period longer than 6 months from the date of the suspension, and the expiration of the current enlistment or term of service of the

servicemember involved automatically terminates the period of suspension.

(3) Unless the suspension is sooner vacated, suspended portions of the punishment are remitted, without further action, upon the termination of the period of suspension.

(4) 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 restriciton, 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,

APPENDIX 2

UNIFORM CODE OF MILITARY JUSTICE

Chapter 47. UNIFORM CODE OF MILITARY JUSTICE

Subchapter 1. GENERAL PROVISIONS

§ 801. Art. 1. Definitions

In this chapter.

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

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

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

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

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

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

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

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

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

(10) "Military judge" means an official of a general or special court-martial detailed in accordance with section 826 of this title (article 26).

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

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

(13) "Judge Advocate" means—

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

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

(C) an officer of the Coast Guard who is designated as a law specialist.

(14) "Record", when used in connection with the proceedings of a court-martial, means—

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

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

§ 802. Art. 2. Persons subject to this chapter

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

★(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virigin Islands.

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

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

(1) submitted voluntarily to military authority;

(2) met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

★(d) (1) A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 815 (article 15) or section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of—

(A) investigation under section 832 of this title (article 32);

(B) trial by court-martial; or

(C) nonjudicial punishment under section 815 of this title (article 15).

(2) A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was

(A) on active duty; or

(B) on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(3) Authority to order a member to active duty under paragraph (1) shall be exercised under regulations prescribed by the President.

(4) A member may be ordered to active duty under paragraph (1) only by a person empowered to convene general courts-martial in a regular component of the armed forces.

(5) A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not—

(A) be sentenced to confinement; or

(B) be required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive-duty training or active duty (other than active duty ordered under paragraph (1)).

§ 803. Art. 3. Jurisdiction to try certain personnel

(a) Subject to section 843 of this title (article 43), no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.

(b) Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to section 843 of this title (article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

(c) No person who has deserted from the armed forces may be relieved from amenability to the jurisdiction of this chapter by virtue of a separation from any later period of service.

★(d) A member of a reserve component who is subject to this chapter is not, by virtue of the termination of a period of active duty or inactive-duty training, relieved from amenability to the jurisdiction of this chapter for an offense against this chapter committed during such period of active duty or inactive-duty training.

§ 804. Art. 4. Dismissed officer's right to trial by court-martial

(a) If any commissioned officer, dismissed by order of the President, makes a written application for trial by court-martial setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try that officer on the charges on which he was dismissed. A court-martial so convened has jurisdiction to try the dismissed officer on those charges, and he shall be considered to have waived the right to plead any statute of limitations applicable to any offense with which he is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal, but if the court-martial acquits the accused or if the sentence adjudged, as finally approved or affirmed, does not include dismissal or death, the Secretary concerned shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issue.

(b) If the President fails to convene a general court-martial within six months from the preparation of an application for trial under this article, the Secretary concerned shall substitute for the dismissal order by the President a form of discharge authorized for administrative issue.

(c) If a discharge is substituted for a dismissal under this article, the President alone may reappoint the officer to such commissioned grade and with such rank as, in the opinion of the President, that former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to the existence of a vacancy and shall effect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and the reappointment shall be considered as actual service for all purposes, including the right to pay and allowances.

(d) If an officer is discharged from any armed force by administrative action or is dropped from the rolls by order of the President, he has no right to trial under this article.

§ 805. Art. 5. Territorial applicability of this chapter

This chapter applies in all places.

§ 806. Art. 6. Judge Advocates and legal officers

(a) The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspection in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is

entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General.

(c) No person has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing authority upon the same case.

★(d) (1) A judge advocate who is assigned or detailed to perform the functions of a civil office in the Government of the United States under section 973(b)(2)(B) of this title may perform such duties as may be requested by the agency concerned, including representation of the United States in civil and criminal cases.

(2) The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations providing that reimbursement may be a condition of assistance by judge advocates assigned or detailed under section 973(b)(2)(B) of this title.

Subchapter II. APPREHENSION AND RESTRAINT

§ 807. Art. 7. Apprehension

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

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

(c) Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays and disorders among persons subject to this chapter and to apprehend persons subject to this chapter who take part therein.

§ 808. Art. 8. Apprehension of deserters

Any civil officer having authority to apprehend offenders under the laws of the United States or of a State, Territory, Commonwealth, or possession, or the District of Columbia may summarily apprehend a deserter from the armed forces and deliver him into the custody of those forces.

§ 809. Art. 9. Imposition of restraint

(a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

(b) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement.

(c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

(d) No person may be oredered into arrest or confinement except for probable cause.

(e) Nothing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

§ 810. Art. 10. Restraint of persons charged with offenses

Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

§ 811. Art. 11. Reports and receiving of prisoners

(a) No provost marshal, commander or a guard, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after that commitment or as soon as he is relieved from guard, report to the commanding officer the name of the prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

§ 812. Art. 12. Confinement with enemy prisoners prohibited

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

§ 813. Art. 13. Punishment prohibited before trial

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

§ 814. Art. 14. Delivery of offenders to civil authorities

(a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

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

Subchapter III. NON-JUDICIAL PUNISHMENT

§ 815. Art. 15. Commanding Officer's non-judicial punishment

(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under

§ 817. Art. 17. Jurisdiction of courts-marital in general

(a) Each armed force has court-martial jurisdiction over all persons subject to this chapter. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.

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

§ 818. Art. 18. Jurisdiction of general courts-martial

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-marital of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

§ 819. Art. 19. Jurisdiction of special courts-martial

Subject to section 817 of this title (article 17), special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) was detailed to represent the accused, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed.

§ 820. Art. 20. Jurisdiction of summary courts-martial

Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

§ 821. Art. 21. Jurisdiction of courts-martial not exclusive

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

Subchapter V. COMPOSITION OF COURTS-MARTIAL

§ 822. Art. 22. Who may convene general courts-martial

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

(1) the President of the United States;

★(2) the Secretary of Defense;

★(3) the commanding officer of a unified or specified combatant command;

(4) the Secretary concerned;

(5) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;

(6) the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States;

(7) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps;

(8) any other commanding officer designated by the Secretary concerned; or

(9) any other commanding officer in any of the armed forces when empowered by the President.

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

§ 823. Art. 23. Who may convene special courts-martial

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

(1) any person who may convene a general court-martial;

(2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary air field, or other place where members of the Army or the Air Force are on duty;

(3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;

(4) the commanding officer of a wing, group, or separate squadron of the Air Force;

(5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; the commanding officer of any Marine brigade, regiment, detached battalion, or corresponding unit; the commanding officer of any Marine barracks, wing, group, separate squadron, station, base, auxiliary air field, or other place where members of the Marine Corps are on duty;

(6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or

(7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

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

§ 824. Art. 24. Who may convene summary courts-martial

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

(1) any person who may convene a general or special court-martial;

(2) the commanding officer of a detached company or other detachment of the Army;

(3) the commanding officer of a detached squadron or other detachment of the Air Force; or

(4) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

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

§ 825. Art. 25. Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

★(c) (1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-marital the membership of which does not include enlisted members in a number comprising at least one-third of the total

membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or miltiary exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(2) In this article, "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(7) The Secretary concerned shall, by regulation, define "reasonably available" for the purpose of paragraph (3)(B) and establish procedures for determining whether the military counsel selected by an accused under that paragraph is reasonably available. Such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member. To the maximum extent practicable, such regulations shall establish uniform policies among the armed forces while recognizing the differences in the circumstances and needs of the various armed forces. The Secretary concerned shall submit copies of regulations prescribed under this paragraph to the Committees on Armed Services of the Senate and House of Representatives.

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

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

(2) may assist the accused in the submission of any matter under section 860 of this title (article 60); and

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

(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

§ 839. Art. 39. Sessions

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record.

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

§ 840. Art. 40. Continuances

The military judge or a court-martial without a military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

§ 841. Art. 41. Challenges

(a) The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge, or, if none, the court, shall determine the relevance and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(b) Each accused and the trial counsel is entitled to one peremptory challenge, but the military judge may not be challenged except for cause.

§ 842. Art. 42. Oaths

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

(b) Each witness before a court-martial shall be examined on oath.

★§ 843. Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation.

(b) (1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(2) A person charged with an offense is not liable to be punished under section 815 of this title (article 15) if the offense was committed more than two years before the imposition of punishment.

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

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

(e) For an offense the trial of which in time of war is certified to the President by the Secretary concerned to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article is extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

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

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

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

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

is suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

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

(A) has expired; or

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

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

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

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

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

§ 844. Art. 44. Former jeopardy

(a) No person may, without his consent, be tried a second time for the same offense.

(b) No proceeding in which an accused has been found guilty by court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.

(c) A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article.

§ 845. Art. 45. Pleas of the accused

(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

§ 846. Art. 46. Opportunity to obtain witnesses and other evidence

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

§ 847. Art. 47. Refusal to appear or testify

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

(1) has been duly subpoenaed to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a depositon to be read in evidence before such a court, commission, or board;

(2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States; and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce;

is guilty of an offense against the United States.

(b) Any person who commits an offense named in subsection (a) shall be tried on information in a United States district court or in a court of original criminal jurisdiction in any of the Territories, Commonwealths, or possessions of the United States, and jurisdiction is conferred upon those courts for that purpose. Upon conviction, such a person shall be punished by a fine of not more than $500, or imprisonment for not more than six months, or both.

(c) The United States attorney or the officer prosecuting for the United States in any such court of original criminal jurisdiction shall, upon the certification of the facts to him by the military court, commission, court of inquiry, or board, file an information against and prosecute any person violating this article.

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

§ 848. Art. 48. Contempts

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

§ 849. Art. 49. Depositions

(a) At any time after charges have been signed as provided in section 830 of this title (article 30), any party may take oral or written depositons unless the mlitary judge or court-martial without a military judge hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate commissioned officers to represent the prosecution and the defense and may authorize those officers to take the deposition of any witness.

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

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

(d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears—

(1) that the witness resides or is beyond the State, Territory, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing;

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

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

(e) Subject to subsection (d), testimony by deposition may be presented by the defense in capital cases.

(f) Subject to subsection (d), a deposition may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence in any case in which the death penalty is authorized but is not mandatory, whenever the convening authority directs that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial.

§ 850. Art. 50. Admissibility of records of courts of inquiry

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

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

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

★§ 850a. Art. 50a. Defense of lack of mental responsibility

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

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

(c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge, or the president of a court-martial without a military judge, shall instruct the members of the court as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—

(1) guilty;

(2) not guilty; or

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

(d) Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall find the accused—

(1) guilty;

(2) not guilty; or

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

(e) Notwithstanding the provisions of section 852 of this title (article 52), the accused shall be found not guilty only by reason of lack of mental responsibility if—

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

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

§ 851. Art. 51. Voting and rulings

(a) Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(b) The military judge and, except for questions of challenge, the president of a court-martial without a military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused, or by the president of a court-martial without a military judge upon any question of law other than a motion for a finding of not guilty, is final and constitutes the ruling of the court. However, the military judge or the president of a court-martial without a military judge may change his ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title (article 52), beginning with the junior in rank.

(c) Before a vote is taken on the findings, the military judge or the president of a court-martial without a military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them—

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

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

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

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

(d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

§ 852. Art. 52. Number of votes required

(a) (1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.

(2) No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

(b) (1) No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this chapter expressly made punishable by death.

(2) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty or to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member challenged. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

§ 853. Art. 53. Court to announce action

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

§ 854. Art. 54. Record of trial

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

(b) Each special and summary court-martial shall keep a separate record of the proceedings in each case, and the record shall be authenticated in the manner required by such regulations as the President may prescribe.

(c) (1) A complete record of the proceedings and testimony shall be prepared—

(A) in each general court-martial case in which the sentence adjudged includes death, a dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court-martial; and

(B) in each special court-martial case in which the sentence adjudged includes a bad-conduct discharge.

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

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

Subchapter VIII. SENTENCES

§ 855. Art. 55. Cruel and unusual punishments prohibited

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

§ 856. Art. 56. Maximum limits

The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

§ 857. Art. 57. Effective date of sentences

(a) No forfeiture may extend to any pay or allowances accrued before the date on which the sentence is approved by the person acting under section 860(c) of this title (article 60(c)).

(b) Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement.

(c) All other sentences of courts-martial are effective on the date ordered executed.

(d) On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.

§ 858. Art. 58. Execution of confinement

(a) Under such instructions as the Secretary concerned may prescribe, a sentence of confinement adjudged by a court-martial or other military tribunal, whether or not the sentence includes discharge or dismissal, and whether or not the discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated.

(b) The omission of the words "hard labor" from any sentence of a court-martial adjudging confinement does not deprive the authority executing that sentence of the power to require hard labor as a part of the punishment.

§ 858a. Art. 58a. Sentences: reduction in enlisted grade upon approval

(a) Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, that includes—

(1) a dishonorable or bad-conduct discharge;

(2) confinement; or

(3) hard labor without confinement;

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

(b) If the sentence of a member who is reduced in pay grade under subsection (a) is set aside or disapproved, or, as finally approved, does not include any punishment named in subsection (a)(1), (2), or (3), the rights and privileges of which he was deprived because of that reduction shall be restored to him and he is entitled to the pay and allowances to which he would have been entitled for the period the reduction was in effect, had he not been so reduced.

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

§ 859. Art. 59. Error of law; lesser included offense

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

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

★§ 860. Art. 60. Action by the convening authority

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

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

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

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

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

(c) (1) The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority. Under regulations of the Secretary concerned, a commissioned officer comanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place fo the convening authority.

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

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

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

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

(d) Before acting under this section on any general court-martial case or any special court-martial case that includes a bad-conduct discharge, the convening authority or other person taking action under this section shall obtain and consider the written recommendation of his staff judge advocate or legal officer. The convening authority or other person taking action under this section shall refer the record of trial to his staff judge advocate or legal officer, and the staff judge advocate or legal officer shall use such record in the preparation of his recommendation. The recommendation of the staff judge advocate or legal officer shall include such matters as the President may prescribe by regulation and shall be served on the accused, who may submit any matter in response under subsection (b). Failure to object in the response to the recommendation or to any matter attached to the recommendation waives the right to object thereto.

(e) (1) The convening authority or other person taking action under this section, in his sole discretion, may order a proceeding in revision or a rehearing.

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

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

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

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

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

§ 861. Art. 61. Waiver or withdrawal of appeal

(a) In each case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)), except a case in which the sentence as approved under section 860(c) of this title (article 60(c)) includes death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review. Such a waiver shall be signed by both the accused and by defense counsel and must be filed within 10 days after the action under section 860(c) of this title (article 60(c)) is served on the accused or on defense counsel. The convening authority or other person taking such action, for good cause, may extend the period for such filing by not more than 30 days.

(b) Except in a case in which the sentence as approved under section 860(c) of this title (article 60(c)) includes death, the accused may withdraw an appeal at any time.

(c) A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 866 or 869(a) of this title (article 66 or 69(a)).

§ 862. Art. 62. Appeal by the United States

(a) (1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceeding. However, the United States may not appeal an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification.

(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence exluded is substantial proof of a fact material in the proceeding.

(3) An appeal under this section shall be diligently prosecuted by appellate Government counsel.

(b) An appeal under this section shall be forwarded by a means prescribed under regulations of the President directly to the Court of Military Review and shall, whenever practicable, have priority over all other proceedings before that court. In ruling on an appeal under this section, the Court of Military Review may act only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c)).

(c) Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.

§ 863. Art. 63. Rehearings

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

§ 864. Art. 64. Review by a judge advocate

(a) Each case in which there has been a finding of guilty that is not reviewed under section 866 or 869(a) of this title (article 66 or 69(a)) shall be reviewed by a judge advocate under regulations of the Secretary concerned. A judge advocate may not review a case under this subsection if he has acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosectuion or defense. The judge advocate's review shall be in writing and shall contain the following:

(1) Conclusions as to whether—

(A) the court had jurisdiction over the accused and the offense;

(B) the charge and specification stated an offense; and

(C) the sentence was within the limits prescribed as a matter of law.

(2) A response to each allegation of error made in writing by the accused.

(3) If the case is sent for action under subsection (b), a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

(b) The record of trial and related documents in each case reviewed under subsection (a) shall be sent for action to the person exercising general court-martial jurisdiction over the accused at the time the court was convened (or to that person's successor in command) if—

(1) the judge advocate who reviewed the case recommends corrective action;

(2) the sentence approved under section 860(c) of this title (article 60(c)) extends to dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six months; or

(3) such action is otherwise required by regulations of the Secretary concerned.

(c) (1) The person to whom the record of trial and related documents are sent under subsection (b) may—

(A) disapprove or approve the findings or sentence, in whole or in part;

(B) remit, commute, or suspend the sentence in whole or in part;

(C) except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

(D) dismiss the charges.

(2) If a rehearing is ordered but the convening authority finds a rehearing impracticable, he shall dismiss the charges.

(3) If the opinion of the judge advocate in the judge advocate's review under subsection (a) is that corrective action is required as a matter of law and if the person required to take action under subsection (b) does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and action thereon shall be sent to Judge Advocate General for review under section 869(b) of this title (article 69(b)).

§ 865. Art. 65. Disposition of records

(a) In a case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)) in which the right to such review is not waived, or an appeal is not withdrawn, under section 861 of this title (article 61), the record of trial and action thereon shall be transmitted to the Judge Advocate General for appropriate action.

(b) Except as otherwise required by this chapter, all other records of trial and related documents shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.

§ 866. Art. 66. Review by Court of Military Review

(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State. The Judge Advocate General shall designate as

§ 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 form 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 prisioners; 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-marital 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-marital 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, or while impaired by a substance described in section 912a(b) of this title (article 112a(b)), shall be punished as a court-martial may direct.

§ 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.

§ 932. Art. 132. Frauds against the United States

Any person subject to this chapter—

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

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

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

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

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

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

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

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

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

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

§ 933. Art. 133. Conduct unbecoming an officer and a gentleman

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

§ 934. Art. 134. General article

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Subchapter XI. MISCELLANEOUS PROVISIONS

§ 935. Art. 135. Courts of inquiry

(a) Courts of inquiry to investigate any matter may be convened by any person authorized to convene a general court-martial or by any other person designated by the Secretary concerned for that purpose, whether or not the persons involved have requested such an inquiry.

(b) A court of inquiry consists of three or more commissioned officers. For each court of inquiry the convening authority shall also appoint counsel for the court.

(c) Any person subject to this chapter whose conduct is subject to inquiry shall be designated as a party. Any person subject to this chapter or employed by the Department of Defense who has a direct interest in the subject of inquiry has the right to be designated as a party upon request to the court. Any person designated as a party shall be given due notice and has the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence.

(d) Members of a court of inquiry may be challenged by a party, but only for cause stated to the court.

(e) The members, counsel, the reporter, and interpreters of courts of inquiry shall take an oath to faithfully perform their duties.

(f) Witnesses may be summoned to appear and testify and be examined before courts of inquiry, as provided for courts-martial.

(g) Courts of inquiry shall make findings of fact but may not express opinions or make recommendations unless required to do so by the convening authority.

(h) Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. If the record cannot be authenticated by the president, it shall be signed by a member in lieu of the president. If the record cannot be authenticated by the counsel for the court, it shall be signed by a member in lieu of the counsel.

★§ 936. Art. 136. Authority to administer oaths and to act as notary

(a) The following persons on active duty or performing inactive-duty training may administer oaths for the purposes of military administration, including military justice, and have the general powers of a notary public and of a consul of the United States, in the performance of all notarial acts to be executed by members of any of the armed forces, wherever they may be, by persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, Puerto Rico, Guam, and the Virgin Islands, and by other persons subject to this chapter outside of the United States:

(1) All judge advocates.

(2) All summary courts-martial.

(3) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants.

(4) All commanding officers of the Navy, Marine Corps, and Coast Guard.

(5) All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers.

(6) All other persons designated by regulations of the armed forces or by statute.

(b) The following persons on active duty or performing inactive-duty training may administer oaths necessary in the performance of their duties:

(1) The president, military judge, trial counsel, and assistant trial counsel for all general and special courts-martial.

(2) The president and the counsel for the court of any court of inquiry.

(3) All officers designated to take a deposition.

(4) All persons detailed to conduct an investigation.

(5) All recruiting officers.

(6) All other persons designated by regulations of the armed forces or by statute.

(c) No fee may be paid to or received by any person for the performance of any notarial act herein authorized.

(d) The signature without seal of any such person acting as notary, together with the title of his office, is prima facie evidence of his authority.

★§ 937. Art. 137. Articles to be explained

(a) (1) The sections of this title (articles of the Uniform Code of Military Justice) specified in paragraph (3) shall be carefully explained to each enlisted member at the time of (or within six days after)—

(A) the member's initial entrance on active duty; or

(B) the member's initial entrance into a duty status with a reserve component.

(2) Such sections (articles) shall be explained again—

(A) after the member has completed six months of active duty or, in the case of a member of a reserve component, after the member has completed basic or recruit training; and

(B) at the time when the member reenlists.

(3) This subsection applies with respect to sections 802, 803, 807-815, 825, 827, 831, 837, 838, 855, 877-934, and 937-939 of this title (articles 2, 3, 7-15, 25, 27, 31, 38, 55, 77-134, and 137-139).

(b) The text of the Uniform Code of Military Justice and of the regulations prescribed by the President under such Code shall be made available to a member on active duty or to a member of a reserve component, upon request by the member, for the member's personal examination.

§ 938. Art. 138. Complaints of wrongs

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall

forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

§ 939. Art. 139. Redress of injuries to property

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

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

§ 940. Art. 140. Delegation by the President

The President may delegate any authority vested in him under this chapter, and provide for the subdelegation of any such authority.

APPENDIX 6

FORMS FOR ORDERS CONVENING COURTS-MARTIAL

a. General and special court-martial convening orders

(1) *Convening orders.*

[Note 1. *See* R.C.M. 504(d)]

(Date) _____

(Designation of command of officer convening court-martial)

★[Pursuant to (para. _____ General Order No. _____ , Department of the _____ , 19 ____) (SECNAV ltr ser _____ of _____) a] (A) (general) (special) court-martial is convened with the following members (and shall meet at _____ , unless otherwise directed):

(Captain) (Colonel) _____
(Commander) (Lieutenant Colonel) _____
(Lieutenant Commander) (Major) _____
(Lieutenant) (Captain) _____
(Lieutenant, j.g.) (First Lieutenant) _____

[Note 2. The name, rank, and position of the convening authority should be shown. The order may be authenticated by the signature of the convening authority or a person acting under the direction of the convening authority.]

[Note 3. The language in brackets or parentheses in the foregoing samples should be used when appropriate. The Secretary concerned may prescribe additional requirements for convening orders. *See* R.C.M. 504(d)(3). Service regulations should be consulted when preparing convening orders.]

[Note 4. When a new court-martial is convened to replace one in existence, the following should be added below the names of the personnel of the court-martial and before the authentication line:]

All cases referred to the (general) (special) court-martial convened by order no. _____ this (headquarters) (ship) (_____), dated _____ 19 ____ , in which the proceedings have not begun, will be brought to trial before the court-martial hereby convened.

(2) *Order amending convening orders.*

[Note 5. The same heading and authentication used on convening order should be used on amending orders.]

[Note 6. A succession of amending orders may result in error. Care should be used in amending convening orders.]

(*a*) *Adding members.*

[Note 7. Members may be added in specific cases or for all cases.]

The following members are detailed to the (general) (special) court-martial convened by order no. _____ , this (headquarters) (ship) (_____), dated ____ 19 ____ (for the trial of _____ only).

(*b*) *Replacing members.*

[Note 8. Members may be replaced in specific cases or for all cases.]

(Captain) (Colonel) _____ , is detailed as a member of the (general) (special) court-martial convened by order no. _____ , this (headquarters) (ship) (_____), dated _____ 19____ , vice (Captain) (Colonel) _____ , relieved (for the case of _____ only).

b. Summary court-martial convening orders

(Date)

(Designation of command of officer convening court-martial)

★[Pursuant to (para. _____, General Order No. _____, Department of the _____, 19____,) (SECNV 1tr ser _____ of _____ 19____,)] (Lieutenant Commander) (Major) _____ is detailed a summary court-martial (and shall sit at _____, unless otherwise directed).

[Note 9. The name, rank, and position of the convening authority should be shown. The order may be authenticated by the signature of the convening authority or a person acting under the direction of the convening authority.]

[Note 10. The summary court-martial convening order may be a separate page or a notation on the charge sheet. *See* R.C.M. 504(d)(2) and 1302(c).]

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 10 days after you or your counsel receive a copy of the record of trial and the recommendation of the (staff judge advocate) (legal officer).

If the convening authority approves the discharge or confinement at hard labor for a year or more, your case will be reviewed by a Court of Military Review.

After the Court of Military Review completes its review, you may request that your case be reviewed by the Court of Military Appeals; if your case is reviewed by that Court, you may request review by the United States Supreme Court.

You also have the right to give up review by the Court of Military Review, or to withdraw your case from appellate review at any time before such review is completed.

If you give up your right to review by the Court of Military Review or later withdraw your case from appellate review.

(a) That decision is final and you cannot change your mind later.

(b) Your case will be reviewed by a military lawyer for legal error. It will also be sent to the (general court-martial*) convening authority for final action.

(*Use only for special court-martial.)

(c) Within 2 years after final action is taken on your case, you may request the Judge Advocate General to take corrective action.

Do you have any questions?

ACC: _____ .

MJ: The court-martial is adjourned.

GCM subject to review under Article 69

[Note 101. In general courts-martial subject to review under Article 69, the following advice should be given. In other cases, proceed to Note 102.]

MJ: _____, I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights you have the right to the advice and assistance of military counsel provided free of charge or civilian counsel provided at your own expense.

★You have the right to submit any matters you wish the convening authority to consider in deciding whether to approve all, part, or any of the findings and sentence in your case. Such matters must be submitted within 10 days after you or your counsel receive a copy of the record of trial and the recommendation of the (staff judge advocate) (legal officer). If the convening authority approves any part of your sentence, your case will be examined in the Office of the Judge Advocate General for any legal errors and to determine whether your sentence is fair. The Judge Advocate General may take corrective action, if appropriate. You also have the right to give up examination by the Judge Advocate General or to withdraw your case from such examination at any time before such examination is completed. If you give up your right to examination by the Judge Advocate General or later withdraw your case from such examination:

(a) That decision is final and you cannot change your mind later.

(b) Your case will be reviewed by a military lawyer for legal error. It will also be sent to the convening authority for final action.

(c) Within 2 years after action is taken on your case, you may request the Judge Advocate General to take corrective action.

Do you have any questions?

ACC: _____ .

MJ: The court-martial is adjourned.

★SPCM not involving a BCD

[Note 102. In special courts-martial not involving BCD, the following advice should be given.]

MJ: _____ , I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights, you have the right to the advice and assistance of military counsel provided free of charge or civilian counsel provided at your own expense. You have the right to submit any matters you wish the convening authority to consider in deciding

whether to approve all, part, or any of the findings and sentence in your case. Such matters must be submitted within 10 days after you or your counsel receive a copy of the record of trial. If the convening authority approves any part of the findings or sentence, your case will be reviewed by a military lawyer for legal error. It may be sent to the general court-martial convening authority for final action on any recommendation by the lawyer for corrective action. Within 2 years after final action is taken on your case, you may request the Judge Advocate General to take corrective action.

Do you have any questions?

Presentence procedure

SCM: I will now receive information in order to decide on an appropriate sentence. Look at the information concerning you on the front page of the charge sheet. Is it correct?

[Note 30. If the accused alleges that any of the information is incorrect, the summary court-martial must determine whether it is correct and correct the charge sheet, if necessary.]

[Note 31. Evidence from the accused's personnel records, including evidence favorable to the accused, should now be received in accordance with R.C.M. 1001(b)(2). These records should be shown to the accused.]

SCM: Do you know any reason why I should not consider these?

ACC: _____ .

[Note 32. The summary court-martial shall resolve objections under R.C.M. 1002(b)(2) and the Military Rules of Evidence and then proceed as follows. *See also* R.C.M. 1001(b)(3), (4), and (5) concerning other evidence which may be introduced.]

Extenuation and mitigation

SCM: In addition to the information already admitted which is favorable to you, and which I will consider, you may call witnesses who are reasonably available, you may present evidence, and you may make a statement. This information may be to explain the circumstances of the offense(s), including any reasons for committing the offense(s), and to lessen the punishment for the offense(s) regardless of the circumstances. You may show particular acts of good conduct or bravery, and evidence of your reputation in the service for efficiency, fidelity, obedience, temperance, courage, or any other trait desirable in a good servicemember. You may call available witnesses or you may use letters, affidavits, certificates of military and civil officers, or other similar writings. If you introduce such matters, I may receive written evidence for the purpose of contradicting the matters you presented. If you want me to get some military records that you would otherwise be unable to obtain, give me a list of these documents. If you intend to introduce letters, affidavits, or other documents, but you do not have them, tell me so that I can help you get them. Do you understand that?

ACC: _____ .

Rights of accused to testify, remain silent, and make an unsworn statement

SCM: I informed you earlier of your right to testify under oath, to remain silent, and to make an unsworn statement about these matters.

SCM: Do you understand these rights?

ACC: _____ .

SCM: Do you wish to call witnesses or introduce anything in writing?

ACC: _____ .

[Note 33. If the accused wants the summary court-martial to obtain evidence, arrange to have the evidence produced as soon as practicable.]

[Note 34. The summary court-martial should now receive evidence favorable to the accused. If the accused does not produce evidence, the summary court-martial may do so if there are matters favorable to the accused which should be presented.]

SCM: Do you wish to testify or make an unsworn statement?

ACC: _____ .

Questions concerning pleas of guilty

[Note 35. If as a result of matters received on sentencing, including the accused's testimony or an unsworn statement, any matter is disclosed which is inconsistent with the pleas of guilty, the summary court-martial must immediately inform the accused and resolve the matter. *See* Note 16.]

Argument on sentence

SCM: You may make an argument on an appropriate sentence.

ACC: _____ .

Deliberations prior to announcing sentence

[Note 36. After receiving all matters relevant to sentencing, the summary court-martial should normally close for deliberations. If the summary court-martial decides to close, proceed as follows.]

Closing the court-martial

SCM: This court-martial is closed for determination of the sentence. Wait outside the courtroom until I recall you.

[Note 37. *See* Appendix 11 concerning proper form of sentence. Once the summary court-martial has determined the sentence, it should reconvene the court-martial and announce the sentence as follows.]

Announcement of sentence

SCM: Please rise. I sentence you to _____ .

[Note 38. If the sentence includes confinement, advise the accused as follows.]

SCM: You have the right to request in writing that [name of convening authority] defer your sentence to confinement. Deferment is not a form of clemency and is not the same as suspension of a sentence. It merely postpones the running of a sentence to confinement.

[Note 39. Whether or not the sentence includes confinement, advise the accused as follows.]

★SCM: You have the right to submit in writing a petition or statement to the convening authority. This statement may include any matters you feel the convening authority should consider, a request for clemency, or both. This statement must be submitted within 7 days, unless you request and convening authority approves an extension of up to 20 days. After the convening authority takes action, your case will be reviewed by a judge advocate for legal error. You may suggest, in writing, legal errors for the judge advocate to consider. If, after final action has been taken in your case, you believe that there has been a legal error, you may request review of your case by the Judge Advocate General of _____ . Do you understand these rights?

ACC: _____ .

Adjourning the court-martial

SCM: This court-martial is adjourned.

Entry on charge sheet

[Note 40. Record the sentence in the record of trial, inform the convening authority of the findings, recommendations for suspension, if any, and any deferment request. If the sentence includes confinement, arrange for the delivery of the accused to the accused's commander, or someone designated by the commander, for appropriate action. Ensure that the commander is informed of the sentence. Complete the record of trial and forward to the convening authority.]

APPENDIX 10

FORMS OF FINDINGS

a. Announcement of findings

See R.C.M. 922.

In announcing the findings the president or, in cases tried by military judge alone, the military judge should announce:

"(Name of accused), this court-martial finds you _____ ."

The findings should now be announced following one of the forms in *b* below, or any necessary modification or combination thereof.

b. Forms

[Note: The following may, in combination with the format for announcing the findings in *a* above, be used as a format for a findings worksheet, appropriately tailored for the specific case.]

Forms of Findings

I. Acquittal of all Charges

Of all Specifications and Charges: Not Guilty

★II. Finding of Not Guilty only by Reason of Lack of Mental Responsibility

Of (the) Specification (____) of (the) Charge (____) and of (the) Charge (____): Not Guilty only by Reason of Lack of Mental Responsibility

III. Conviction of all Charges

Of all Specifications and Charges: Guilty

IV. Conviction of all Specifications of some Charges

Of all Specification(s) of Charge I: Guilty

Of Charge I: Guilty

Of all Specification(s) of Charge II: Not Guilty

Of Charge II: Not Guilty

V. Conviction of some Specifications of a Charge

Of Specification(s) _____of Charge I: Guilty

Of Specification(s) _____of Charge I: Not Guilty

Of Charge I: Guilty

VI. Conviction by exceptions

Of (the) Specification (_____) of Charge I: Guilty except the words "_____";

Of the excepted words: Not Guilty

Of Charge I: (Guilty) (Not Guilty, but Guilty of a violation of Article _____)

VII: Conviction by exceptions and substitutions

Of (the) Specification (_____) of Charge I: Guilty except the words "_____," substituting therefor the words " _____ ";

Of the excepted words: Not Guilty
Of the substituted words: Guilty

Of Charge I: (Guilty) (Not Guilty, but Guilty of a violation of Article _____)

VIII. Conviction under one Charge of offenses under different Articles

Of Specification 1 of (the) Charge (_____): Guilty, of Specification 2 of (the) Charge (_____): Guilty, except the words " _____ ."

Of (the) Charge (_____), as to Specification 1: Guilty, as to Specification 2: Not Guilty, but Guilty of a violation of Article _____ .

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 military property of a value of $100.00 or less	BCD	1 yr.	Total
	Of property other than military property of a value of $100.00 or less	BCD	6 mos.	Total
	Of military property of a value of more than $100.00 or of any military motor vehicle, aircraft, vessel, firearm, or explosive	DD, BDC	10 yrs.	Total
	Of property other than military property of a value of more than $100.00 or any motor vehicle, aircraft, vessel, firearm, or explosive	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 of:			
	$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

Article	*Offenses*	*Discharge*	*Confinement*	*Forfeitures*
127	Extortion	DD, BCD	3 yrs.	Total
128	Assaults			
	Simple assault	None	3 mos.	2/3 3 mos.
	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 partrol, master at arms, or civil law enforcement	DD, BCD	3 yrs.	Total
	Assault consummated by battery upon child under age of 16 years	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	Perjury	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. 59e)	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.

Article	*Offenses*	*Discharge*	*Confinement*	*Forfeitures*
	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.

GUIDE FOR PREPARATION OF RECORD OF TRIAL

PERSONS PRESENT
PERSONS ABSENT

Accounting for personnel

Note. List military judge, if any, and all members of the court-martial, prosecution, and defense as present or absent, as announced by the trial counsel. The record of an Article 39(a) session or trial by the military judge alone need only reflect that the members are absent and need not list the absent members by name. Only rank or grade and name should be shown unless service number is necessary to distinguish between two persons.

Presence of accused

The following named accused (was) (were) present: _____.

Swearing reporter

The detailed reporter, _____, (was sworn) (had previously been sworn).

Note. The remainder of the record of trial follows the actual proceedings in court-martial. The reporter records all the proceedings verbatim.

Time of session

Note. The reporter should note the time and date of the beginning and ending of each session of the court, including the opening and closing of the court-martial during trial. For example:

The (court-martial) (session) was called to order at _____ hours, _____ 19____ .

The (court-martial) (session was) (adjourned) (recessed) at hours, _____ 19____ .

The court-martial (closed) (opened) at _____ hours, _____ 19____ .

Administration of oaths

Note. It is not necessary to record verbatim the oath actually used, whether it be administered to a witness, the military judge, counsel, or the members. Regardless of the form of oath, affirmation, or ceremony by which the conscience of the witness is bound, R.C.M. 807, only the fact that a witness took an oath or affirmation is to be recorded. However, if preliminary qualifying questions are asked a witness prior to the administration of an oath, the questions and answers should be recorded verbatim. These preliminary questions and answers do not eliminate the requirement that an oath be administered. The following are examples of the recording of the administration of various oaths:

The detailed interpreter, _____ , (was sworn) (had previously been sworn).

The military judge and the personnel of the prosecution and defense (were sworn) (had previously been sworn).

The members were sworn.

Accounting for personnel during trial

Note. After the reporter is sworn, the reporter will record verbatim the statements of the trial counsel with respect to the presence of personnel of the court-martial, counsel, and the accused. The reporter should note whether, when a witness is excused, the witness withdraws from the courtroom or, in the case of the accused, whether the accused resumes a seat at counsel table. Similarly, if the military judge excuses a member as a result of challenge and the member withdraws, the reporter should note this fact in the record. In a special court-martial without a military judge, if a challenged member withdraws from the court-martial while it votes on a challenge, and then is excused as a result of challenge or resumes a seat after the court-martial has voted on a challenge, the reporter should note this fact in the record. Examples of the manner in which such facts should be recorded are as follows:

The (witness withdrew from the courtroom) (accused resumed his/her seat at the counsel table).

_____ , the challenged member, withdrew from the courtroom.

_____, resumed his/her seat as a member of the court-martial.

★Arraignment

Note. The original charge sheet or a duplicate should be inserted here. If the charges are read, the charges should also be transcribed as read. *See* R.C.M. 1103(b)(2)(D)(i).

Recording testimony

Note. The testimony of a witness will be recorded verbatim in a form similar to that set forth below for a prosecution witness:

_____ was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. State your full name, (etc.) _____.
A. _____.
Q. _____?
A. _____.

CROSS-EXAMINATION

Questions by the defense:

Q. _____?
A. _____.

REDIRECT EXAMINATION

Questions by the prosecution:

Q. _____?
A. _____.

RECROSS- EXAMINATION

Questions by the defense:

Q. _____?
A. _____.

EXAMINATION BY THE COURT-MARTIAL

Questions by (military judge) (member's name):

Q. _____?
A. _____.

REDIRECT EXAMINATION

Questions by the prosecution:

Q. _____?
A. _____.

APPENDIX 17

FORMS FOR COURT-MARTIAL ORDERS

★a. *Forms for initial promulgating orders*

[Note. The following is a form applicable in promulgating the results of trial and the action of the convening authority in all general and special court-martial cases. Omit the marginal side notes in drafting orders. *See* R.C.M. 1114(c).]

Heading

(General (Special) (Headquarters) (USS)
Court-Martial Order No. _____ _____ 19 _____

[Note. The date must be the same as the date of the convening authority's action, if any.]

(Grade) (Name) (Service No.) (Armed Force)

(Unit)

Arraignment

was arraigned (at/on board _____) on the following offenses at a court-martial convened by (this command) (Commander, _____).

Offenses

CHARGE I. ARTICLE 86. Plea: G. Finding: G.

Specification 1: Unauthorized absence from unit from 1 April 1984 to 31 May 1984. Plea: G. Finding: G.

[Note. Specifications may be reproduced verbatim or may be summarized. Specific factors, such as value, amount, and other circumstances which affect the maximum punishment should be indicated in a summarized specification. Other significant matters contained in the specification may be included. If the specification is copied verbatim, include any amendment made during trial. Similarly, information included in a summarized specification should reflect any amendment to that information made during the trial.]

Specification 2: Failure to repair on 18 March 1984. Plea: None entered. Finding: Dismissed on motion of defense for failure to state an offense.

[Note. If a finding is not entered to a specification because, for example, a motion to dismiss was granted, this should be noted where the finding would otherwise appear.]

CHARGE II. ARTICLE 91. Plea: NG. Finding: NG, but G of a violation of ARTICLE 92.

Specification: Disobedience of superior noncommissioned officer on 30 March 1984 by refusing to inspect sentinels on perimeter of bivouac site. Plea: NG. Finding: G, except for disobedience of superior noncommissioned officer, substituting failure to obey a lawful order to inspect sentinels on perimeter of bivouac site.

CHARGE III. ARTICLE 112a. Plea: G Finding: G.

Specification 1: Wrongful possession of 150 grams of marijuana on 24 March 1984. Plea: G. Finding: G.

Specification 2: Wrongful use of marijuana while on duty as a sentinel on 24 March 1984. Plea: G. Finding G.

Specification 3: Wrongful possession of heroin with intent to distribute on 24 March 1984. Plea: NG. Finding: G.

CHARGE IV. ARTICLE 121. Plea: NG. Finding: G.

Specification: Larceny of property of a value of $150.00 on 27 March 1984. Plea: NG. Finding: G, except the word "steal," substituting "wrongfully appropriate."

Acquittal

If the accused was acquitted of all charges and specifications, the date of the acquittal should be shown: "The findings were announced on 19 ."

SENTENCE

Sentence adjudged on _____ 19 ____ : Dishonorable discharge, forfeiture of all pay and allowances, confinement for 2 years, and reduction to the lowest enlisted grade.

Action of convening authority

ACTION

[Note. Summarize or enter verbatim the action of the convening authority. Whether or not the action is recited verbatim, the heading, date, and signature block of the convening authority need not be copied from the action if the same heading and date appear at the top of this order and if the name and rank of the convening authority are shown in the authentication.]

Authentication

[Note. *See* R.C.M. 1114(e) concerning authentication of the order.]

Joint or common trial

[Note. In case of a joint or common trial, separate orders should be issued for each accused. The description of the offenses on which each accused was arraigned may, but need not, indicate that there was a coaccused.]

b. Forms for supplementary orders promulgating results of affirming action

[Note. Court-martial orders publishing the final results of cases in which the President or the Secretary concerned has taken final action are promulgated by departmental orders. In other cases the final action may be promulgated by an appropriate convening authority, or by an officer exercising general court-martial jurisdiction over the accused at the time of final action, or by the Secretary concerned. The following sample forms may be used where such a promulgating order is published in the field. These forms are guides. Extreme care should be exercised in using them. If a sentence as ordered into execution or suspended by the convening authority is affirmed without modifications and there has been no modification of the findings, no supplementary promulgating order is required.]

Heading
*See above.

Sentence
-Affirmed

In the (general) (special) court-martial case of (*name, grade or rank, branch of service, and service number of accused,*) the sentence to bad-conduct discharge, forfeiture of _____ _____ , and confinement for _____ , as promulgated in (General) (Special) Court-Martial Order No. _____ , (Headquarters) (Commandant, _____ Naval District) _____ , dated _____ 19 ____ , has been finally affirmed. Article 71(c) having been complied with, the bad-conduct discharge will be executed.

or

-Affirmed in part

In the (general) (special) court-martial case of (*name, grade or rank, branch of service, and service number of accused,*) only so much of the sentence promulgated in (General) (Special) Court-Martial Order No. _____ , (Headquarters) (Commandant, _____ Naval District) _____ , dated _____ 19 ____ , as provides for _____ , has been finally affirmed. Article 71(c) having been complied with, the bad-conduct discharge will be executed.

or

In the (general) (special) court-martial case of (*name, grade or rank, branch of service, and service number of accused,*) the findings of guilty of Charge II and its

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

This rule is based on Article 4 and paragraph 111 of MCM, 1969 (Rev.). *See also* H. R. Rep. No. 491, 81st Cong., 1st Sess. 12 (1949); W. Winthrop, *Military Law and Precedents* 64 (2d ed. 1920 reprint). The text of 10 U.S.C. § 1161(a) is as follows:

(a) No commissioned officer may be dismissed from any armed force except—

(1) by sentence of a general court-martial;

(2) in commutation of a sentence of a general court-martial; or

(3) in time of war, by order of the President.

Rule 108. Rules of court

This rule is new and is based on Fed. R. Crim. P. 57(a) and Article 140. *Cf.* Article 66(f). *See also United States v. Kelson*, 3 M.J. 139 (C.M.A. 1977). Depending on the regulations, rules of court may be promulgated on a service-wide, judicial circuit, or trial judge level, or a combination thereof. The rule recognizes that differences in organization and operations of services and regional and local conditions may necessitate variations in practices and procedures to supplement those prescribed by the code and this Manual.

The manner in which rules of court are disseminated is within the sole discretion of the Judge Advocate General concerned. Service-wide rules, for example, may be published in the same manner as regulations or specialized pamphlets or journals. Local rules may be published in the same manner as local regulations or other publications, for example. Parties to any court-martial are entitled to a copy, without cost, of any rules pertaining thereto. Members of the public may obtain copies under rules of the military department concerned. The penultimate sentence ensures that failure to publish in accordance with the rules of the Judge Advocate General (or a delegate) will not affect the validity of a rule if a person has actual and timely notice or if there is no prejudice within the meaning of Article 59. *Cf.* 5 U.S.C. § 552(a)(1).

Rule 109. Professional supervision of military judges and counsel

This rule is based on paragraph 43 of MCM, 1969 (Rev.). *See also* Articles 1(13), 6(a), 26, and 27. The previous rule was limited to conduct of counsel in courts-martial. This rule also applies to military trial and appellate judges and to all judge advocates and other lawyers who practice in military justice, including the administration of nonjudicial punishment and pretrial and posttrial matters relating to courts-martial. The rule also applies to civilian lawyers so engaged, as did its predecessor. The rule does not apply to lay persons. Nothing in this rule is intended to prevent a military judge from excluding, in a particular case, a counsel from representing a party before the court-martial over which the military judge is presiding, on grounds of lack of qualifications under R.C.M. 502(d), or to otherwise exercise control over counsel in accordance with these rules. *See, e.g.*, R.C.M. 801.

CHAPTER II. JURISDICTION

Rule 201. Jurisdiction in general

Introduction. The primary source of court- martial jurisdiction is Art. I, sec. 8, cl. 14 of the Constitution, which empowers Congress to make rules for the government and regulation of the armed forces of the United States. Courts-martial are recognized in the provisions of the fifth amendment expressly exempting "cases arising in the land or naval forces" from the requirement of presentment and indictment by grand jury. *See also* Part I, Preamble, for a fuller discussion of the nature of courts-martial and the sources of their jurisdiction.

(a) *Nature of court-martial jurisdiction.* Subsection (1) reiterates the first sentence of the second paragraph of paragraph 8 of MCM, 1969 (Rev.). The discussion is based on paragraph 8 of MCM, 1969 (Rev.). *Cf.* Fed R. Crim. P.7(c)(2); 18 U.S.C. §§ 3611–20. Courts-martial generally have the power to resolve issues which arise in connection with litigating criminal liability and punishment for offenses, to the extent that such resolution is necessary to a disposition of the issue of criminal liability or punishment.

Subsection (2) restates the worldwide extent of court-martial jurisdiction. Article 5. *See Autry v. Hyde*, 19 U.S.C.M.A. 433, 42 C.M.R. 35 (1970). The discussion points out that, despite the worldwide applicability of the code, geographical considerations may affect court-martial jurisdiction. *See* R.C.M. 202 and 203.

Subsection (3) restates the third paragraph of paragraph 8 of MCM, 1969 (Rev.). *See also Chenoweth v. Van Arsdall*, 22 U.S.C.M.A. 183, 46 C.M.R. 183 (1973), which held that Art. III, sec. 2, cl. 3 of the Constitution (requiring crimes to be tried in the state in which committed) does not apply to courts-martial. The second sentence is based on Article 18. *See also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

(b) *Requisites of court-martial jurisdiction.* This rule is derived from the fourth paragraph of paragraph 8 of MCM, 1969 (Rev.). The first sentence in the rule is new. *See Rosado v. Wyman*, 397 U.S. 397, 404 n.3 (1970); *Wickham v. Hall*, 12 M.J. 145, 152 n.8 (C.M.A. 1981). *Cf. Ex parte Poresky*, 290 U.S. 30 (1933). The rule expands the list of requisites for court-martial jurisdiction to conform more accurately to practice and case law. Requisite (3) has been added to reflect the distinction, long

recognized in military justice, between creating a court-martial by convening it, and extending to a court-martial the power to resolve certain issues by referring charges to it. Thus, a court-martial has power to dispose only of those offenses which a convening authority has referred to it. Not all defects in a referral are jurisdictional. *See United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983). Requisite (5) is listed separately for the first time. This requisite makes clear that courts-martial have the power to hear only those cases which they are authorized by the code to try (i.e., offenses made punishable by the code, and, in the case of general courts-martial, certain offenses under the law of war). Second, it recognizes the important effect of *O'Callahan v. Parker*, 395 U.S. 258 (1969), on courts-martial. Although nothing in this rule or R.C.M. 203 is intended to codify the service-connection requirement of *O'Callahan* or later decisions, the requirement cannot be ignored in the Manual for Courts-Martial.

Requisites (1) and (2) restate two requisites in paragraph 8 of MCM, 1969 (Rev.). *See generally United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978); *United States v. Newcomb*, 5 M.J. 4 (C.M.A. 1978). Contrary to the holdings in *Ryan* and *Newcomb*, "errors in the assignment or excusal of counsel, members, or a military judge that do not affect the required composition of a court-martial will be tested solely for prejudice under Article 59." S. Rep. No. 53, 98th Cong., 1st Sess. 12 (1983). The second sentence of subsection (2) makes this clear, and also emphasizes that counsel are not a jurisdictional component of a court-martial. *See Wright v. United States*, 2 M.J. 9 (C.M.A. 1976). Requisite (4) is somewhat broader than the statement in MCM, 1969 (Rev.), since jurisdiction over the person has been affected by judicial decisions. *See e.g., McElroy v. United States ex. rel. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970). Thus it is misleading to refer solely to the code as determining whether jurisdiction over the person exists. The discussion restates the basic principle that the judgment of a court-martial without jurisdiction is void.

(c) *Contempt.* This subsection restates Article 48, except for the deletion of military commissions and provost courts. These tribunals are also governed by Article 48, but need not be mentioned in rules pertaining to courts- martial.

(d) *Exclusive and nonexclusive jurisdiction.* Subsection (d) is based on paragraph 12 of MCM, 1969 (Rev.). Military offenses are those, such as unauthorized absence, disrespect, and disobedience, which have no analog in civilian criminal law. The second paragraph of paragraph 12 is omitted here, as the subject now appears at R.C.M. 106. Concurrent jurisdiction of courts-martial and domestic tribunals was formerly discussed separately from concurrent jurisdiction of courts-martial and foreign tribunals. The present rule treats both at once since, for purposes of the rule, each situation is treated the same. The differing considerations and legal implications in the domestic and foreign situations are treated in the discussion. *See* R.C.M. 907(b)(2)(c) for a discussion of the former jeopardy aspects of exercise of jurisdiction by more than one agency or tribunal. With respect to the exercise of jurisdiction by the United States or a foreign government. *Wilson v. Girard*, 354 U.S. 524 (1957), establishes that the determination of which nation will exercise jurisdiction is not a right of the accused.

The first paragraph in the discussion reaffirms the policy found in DOD Directive 5525.1, Jan. 22, 1966 (superceded by DOD Directive 5525.1, Aug. 7, 1979), which is implemented by a triservice regulation, AR 27-50/SECNAVINST 5820.4E/AFR 110-12, Dec. 1, 1978, that the United States seek to maximize jurisdiction over its personnel.

The second paragraph in the discussion restates the third paragraph in paragraph 12 of MCM, 1969 (Rev.), which was based on *The Schooner Exchange v. McFaddon and Others*, 11 U.S. (7 Cranch) 116 (1812). *See also Wilson v. Girard, supra.*

(e) *Reciprocal jurisdiction.* This subsection is based on Article 17 and paragraph 13 of MCM, 1969 (Rev.). It continues the express presidential authorization for the exercise of reciprocal jurisdiction and the delegation of authority (Article 140) to the Secretary of Defense to empower commanders of joint commands or task forces to exercise such power. *See United States v. Hooper*, 5 U.S.C.M.A. 391, 18 C.M.R. 15 (1955). It also continues the guidance in MCM, 1969 (Rev.) concerning the exercise of reciprocal jurisdiction by commanders other than those empowered under R.C.M. 201(e)(2). The language is modified to clarify that manifest injury is not limited to a specific armed force. The subsection adds a clarification at the end of subsection (3) that a court-martial convened by a commander of a service different from the accused's is not jurisdictionally defective nor is the service of which the convening authority is a member an issue in which the accused has a recognized interest. The rule and its guidance effectuate the congressional intent that reciprocal jurisdiction ordinarily not be exercised outside of joint commands or task forces (*Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 612-615; 957-958 (1949)) and is designed to protect the integrity of intraservice lines of authority. *See United States v. Hooper, supra* (Brosman, J. and Latimer, J., concurring in the result).

_____ *1986 Amendment*: Subsections (e)(2) and (e)(3) were revised to implement the Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99- 433, tit. II, § 211(b), _____ Stat. _____ . Because commanders of unified and specified commands (the combatant commands) derive court-martial convening authority from Article 22(a)(3), as added by this legislation, they need not be established as convening authorities in the Manual.

Paragraph (2)(A), which sets forth the authority of the combatant commanders to convene courts-martial over members of any of the armed forces, is an exercise of the President's authority under Article 17(a). In paragraph (2)(B), the first clause is a delegation from the President to the Secretary of Defense of the President's authority to designate general court-martial convening authorities. This provision, which reflects the current Manual, may be used by the Secretary of Defense to grant general court-martial convening authority to commanders of joint commands or joint task forces who are not commanders of a unified or specified command. The second clause of paragraph 2(b) is an exercise of the President's authority under article 17(a).

Nothing in this provision affects the authority of the President or Secretary of Defense, as superior authorities, to withhold court-martial convening authority from the combatant commanders in whole or in part.

Subsection (4) has been added to avoid possible questions concerning detailing military judges from different services.

Subsection (5) restates Article 17(b).

_____ *1986 Amendment*: Subsection (6) was inserted in the context of the Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, tit. II, _____ Stat. _____ , to specify the process for resolving disagreements when two organizations, at the highest levels of each, assert competing claims for jurisdiction over an individual case or class of cases. Under this legislation, the commanders of unified and specified commands are authorized to convene courts-martial. At the same time, the military departments retain authority over all aspects of personnel administration, including administration of discipline, with respect to all persons assigned to joint duty or otherwise assigned to organizations within joint commands. In effect, the combatant commands and the military departments have concurrent jurisdiction over persons assigned to such commands. Under most circumstances, any issues as to jurisdiction will be resolved between the military department and the joint command. Paragraph (6) has been added to provide a means for resolving the matter when the Service Secretary and the commander of the joint organization cannot reach agreement. *See* H.R. Rep. No. 824, 99th Cong., 2d Sess. (1986), at 125. Paragraph (6) also requires use of the same procedure when there is a disagreement between two Service Secretaries as to the exercise of reciprocal jurisdiction.

Subsection (7) was added to ensure that the Secretaries of the military departments retain responsibility for the administration of discipline, including responsibility for all persons in their departments assigned to joint duty.

Paragraphs (6) and (7) apply only when the commander is acting solely in his joint capacity or when he is seeking to assert jurisdiction over a member of a different armed force. There are various provisions of the Manual addressing the duties or responsibilities of superior authorities, and it was considered more useful to establish who may act as a superior authority as a general proposition rather than to specify in great detail the relationship between joint commanders and Service Secretaries as to each such matter. Accordingly, when action is required to be taken by an authority superior to a combatant commander, the responsibility is given to the Secretary of the Military Department that includes the armed force of which the accused is a member. This includes responsibility for acting on matters such as a request for counsel of the accused's own selection. An exception is expressly set forth in paragraph (6), however, which specifically provides the procedure for resolving disagreements as to jurisdiction. The Service Secretary cannot withhold or limit the exercise of jurisdiction under R.C.M. 504(b) or under Part V (Nonjudicial Punishment Procedure) by a combatant commander over persons assigned to the joint command. Such action may be taken, however, by the Secretary of Defense, who may assign responsibility to the military department or the unified command for any case or class of cases as he deems appropriate.

The amendments to R.C.M. 201 are designed to govern organizational relationships between joint commands and military departments over a range of issues, and are not intended to confer rights on accused servicemembers. These provisions reflect the President's inherent authority as Commander-in-Chief to prescribe or modify the chain of command, his specific authority under Article 17 to regulate reciprocal jurisdiction and his authority (and that of the Secretary of Defense) under 10 U.S.C. §§ 161-65 (as added by the 1986 legislation) to prescribe or modify the chain of command.

To the extent that a commander of a joint organization is "dual-hatted" (i.e., simultaneously serving as commander of a joint organization and a separate organization within a military department), subsections (6) and (7) apply only to the actions taken in a joint capacity.

(f) *Types of courts-martial.* The source for subsection (1) is Article 18. This subsection is substantially the same as paragraph 14 of MCM, 1969 (Rev.), although it has been reorganized for clarity. Several statements in MCM, 1969 (Rev.) concerning punishments by general courts-martial have been placed in the discussion. As to the second sentence in subsection (1)(A)(i), *see also Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1983); *Wickham v. Hall*, 706 F. 2d 713 (5th Cir. 1983).

The source for subsection (2) is Article 19. Subsection (2) is based on paragraph 15 of MCM, 1969 (Rev.), although it has been reorganized for clarity. Note that under subsection (2)(C)(ii) a general court-martial convening authority may permit a subordinate convening authority to refer a capital offense to a special court-martial. This is a modification of paragraph 15*a*(1) of MCM, 1969 (Rev.) which said a general court- martial convening authority could "cause" a capital offense to be referred to a special court-martial without specifying whether the convening authority had to make the referral personally. Subsection (2)(C)(iii) permits the Secretary concerned to authorize special court-martial convening authorities to refer capital offense to special courts-martial without first getting authorization from a general court-martial convening authority. Several statements in MCM, 1969 (Rev.) have been placed in the discussion.

As to subsection (3) summary courts-martial are treated separately in R.C.M. 1301-1306.

(g) *Concurrent jurisdiction of other military tribunals.* This subsection is based on the last paragraph in paragraph 12 of MCM, 1969 (Rev.).

Rule 202. Persons subject to the jurisdiction of courts-martial

(a) *In general.* This subsection incorporates by reference the provisions of the code (see Articles 2, 3, 4, and 73) which provide jurisdiction over the person. *See also* Articles 83, 104, 106. The discussion under this subsection briefly describes some of the more important requirements for court-martial jurisdiction over persons. Standards governing active duty servicemembers (Article 2(a)(1)) are emphasized, although subsection (4) brings attention to limitations on jurisdiction over civilians established by judicial decisions.

Subsection (2)(A) of the discussion dealing with inception of jurisdiction over commissioned officers, cadets, midshipmen, warrant officers, and enlisted persons is divided into three parts. The first part, enlistment, summarizes the area of the law in the wake of the amendment of Article 2 in 1979. Act of November 9, 1979, Pub. L. No. 96-107, § 801(a), 93 Stat. 810-11. In essence, the amendment eliminated recruiter misconduct as a factor of legal significance in matters involving jurisdiction, and

reestablished and clarified the "constructive enlistment" doctrine. The statutory enlistment standards concerning capacity under 10 U.S.C. §§ 504 and 505 thus become critical, along with the issue of voluntariness. As to whether an enlistment is compelled or voluntary, *compare United States v. Catlow*, 23 U.S.C.M.A. 142, 48 C.M.R. 758 (1974) *with United States v. Wagner*, 5 M.J. 461 (C.M.A. 1978) *and United States v. Lightfoot*, 4 M.J. 262 (C.M.A. 1978). *See also United States v. McDonagh*, 14 M.J. 415 (C.M.A. 1983).

The second paragraph under (i) *Enlistment* is based on *United States v. Bean*, 13 U.S.C.M.A. 203, 32 C.M.R. 203 (1962); *United States v. Overton*, 9 U.S.C.M.A. 684, 26 C.M.R. 464 (1958); and 10 U.S.C. § 1170. The last sentence is based on Article 2(c) which provides that in case of constructive enlistment, jurisdiction continues until "terminated in accordance with law or regulations promulgated by the Secretary concerned."

The last paragraph restates Article 2(c). The last sentence of that paragraph takes account of the legislative history of Article 2(c). *See* S. Rep. No. 197, 96th Cong., 1st Sess. 122 (1979), which indicates that *United States v. King*, 11 U.S.C.M.A. 19, 28 C.M.R. 243 (1959) is overruled by the statute. This is also reflected in the first paragraph under (ii) *Induction.*

The first paragraph of (ii) *Induction* is (with the exception of the application of the constructive enlistment doctrine, *see* the immediately preceding paragraph) based on *United States v. Hall*, 17 C.M.A. 88, 37 C.M.R. 352 (1967); *United States v. Rodriguez*, 2 U.S.C.M.A. 101, 6 C.M.R. 101 (1952); *United States v. Ornelas*, 2 U.S.C.M.A. 96, C.M.R. 96 (1952). *See also Billings v. Truesdell*, 321 U.S. 542 (1944); *Mayborn v. Heflebower*, 145 F.2d 864 (5th Cir. 1944), *cert. denied*, 325 U.S. 854 (1945).

The second paragraph under (ii) *Induction* is based on *United States v. Scheunemann*, 14 U.S.C.M.A. 479, 34 C.M.R. 259 (1964). *See also United States v. Wilson*, 44 C.M.R. 891 (A.C.M.R. 1971). Although no military case has so held, *dicta* and *Scheunemann* supports the second sentence.

As to (iii) *Call to active duty, see* 10 U.S.C. §§ 672, 673, and 673a. *See also United States v. Peel*, 4 M.J. 28 (C.M.A. 1977). The second paragraph of this section reflects decisions in *United States v. Barraza*, 5 M.J. 230 (C.M.A. 1978); *United States v. Kilbreth*, 22 U.S.C.M.A. 390, 47 C.M.R. 327 (1973).

_____ *1986 Amendment*: Paragraph (2)(A)(iii) of the Discussion was amended and paragraph (5) was added to reflect amendments to Articles 2 and 3 of the UCMJ contained in the "Military Justice Amendments of 1986," tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____, _____ (1986), which, among other things, preserves the exercise of jurisdiction over reservists for offenses committee in a duty status, notwithstanding their release from duty status, if they have time remaining on their military obligation. The legislation also provides express statutory authority to order reservists, including members of the National Guard of the United States and the Air National Guard of the United States who commit offenses while serving on duty under Title 10 of the United States Code, to active duty for disciplinary action, including the service of any punishment imposed.

The first paragraph under (B) *Termination of jurisdiction over active duty personnel* restates the basic rule. *See United States v. Brown*, 12 U.S.C.M.A. 693, 31 C.M.R. 297 (1962); *United States v. Scott*, 11 U.S.C.M.A. 646, 29 C.M.R. 462 (1960). *See also United States v. Griffin*, 13 U.S.C.M.A. 213, 32 C.M.R. 213 (1962).

Subsection (B)(i) is based on *United States v. Wheeley*, 6 M.J. 220 (C.M.A. 1979); *United States v. Smith*, 4 M.J. 265 (C.M.A. 1978); *United States v. Hutchins, 4 M.J. 190 (C.M.A. 1978); United States v. Hout*, 19 U.S.C.M.A. 299, 41 C.M.R. 299 (1970). *See also Dickenson v. Davis*, 245 F.2d 317 (10th Cir. 1957).

Subsection (B)(ii) describes what jurisdiction remains under Article 3(a) in light of *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). *See also United States v. Clardy*, 13 M.J. 308 (C.M.A. 1982).

The exceptions in subsection (B)(iii) are restated in slightly different language for clarity from paragraph 11*b* of MCM, 1969 (Rev.). Exception (*b*) is based on *United States v. Clardy, supra. See also* 14 M.J. 123 (C.M.A. 1982). As to exception (c), jurisdiction over prisoners in the custody of the armed forces, *see Kahn v. Anderson*, 255 U.S. 1 (1921); *United States v. Nelson*, 14 U.S.C.M.A. 93, 33 C.M.R. 305 (1963). *See also Mosher v. Hunter*, 143 F.2d 745 (10th Cir. 1944), *cert. denied*, 323 U.S. 800 (1945). Although it has not been judicially interpreted, the sentence of paragraph 11*b* of MCM, 1969 (Rev.) has been included here. The principle it expressed has long been recognized. *See* the last sentence in paragraph 11*b* of MCM, 1951; the last sentence of the third paragraph of paragraph 10 of MCM (Army), 1949; and the last sentence of the fourth paragraph of paragraph 10 of MCM, 1928. As to jurisdiction under Article 3(b), *see Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981); *Wickham v. Hall*, 706 F.2d 713 (5th Cir. 1983).

Subsection (3) described the jurisdiction under Article 2(a)(8). *See also* 33 U.S.C. § 855; 42 U.S.C. § 217.

Subsection (4) of the discussion points out that jurisdiction over civilians has been restricted by judicial decisions. *See generally Reid v. Covert*, 354 U.S. 1 (1957); *Toth v. Quarles, supra.* The MCM 1969 (Rev.) referred to such limitations only in footnotes to Articles 2(a)(10) and (11) and 3(a). The discussion of R.C.M. 202 is a more appropriate place to bring attention to these matters. A brief reference in the discussion was considered sufficient, while the analysis provides primary sources of law in the area, should an issue arise on the subject.

The second sentence in the subsection (4) of discussion is based on *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert, supra.* It is not settled whether "peacetime" as used in these decisions means all times other than a period of declared war or whether "peacetime" ceases when armed forces are involved in undeclared wars or hostilities. There is some authority for the latter view. *See* W. Winthrop, *Military Law and Precedents* 101 (2d ed. 1920 reprint).

With respect to Article 2(a)(10), the Court of Military Appeals has held that "time of war" means a formally declared war (based on U.S. Const., art I, sec. 8, cl. 11). *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970). *But cf. Latney v. Ignatius*, 416 F.2d 821 (D.C. Cir. 1969) (assuming without deciding that Article 2(a)(10) could be invoked during period of undeclared war, no court-martial jurisdiction existed over civilian merchant seaman for murder in Vietnam because crime and accused were not sufficiently connected with the military). *See also* Analysis, R.C.M. 103(19).

The words "in the field" and "accompanying an armed force" have also been judicially construed. "In the field" implies military operations with a view to the enemy. 14 Ops. Atty Gen. 22 (1872). The question whether an armed force is "in the field" is not to be determined by the locality in which it is found, but rather by the activity in which it is engaged. *Hines v. Mikell*, 259 F.28, 34 (4th Cir. 1919). Thus, forces assembled in the United States for training preparatory for service in the actual theater of war were held to be "in the field." *Hines v. Mikell, supra.* A merchant ship and crew transporting troops and supplies to a battle zone constitute a military expedition "in the field." *In re Berue*, 54 F.Supp. 252 (S.D. Ohio 1944); *McCune v. Kilpatrick*, 53 F.Supp. 80 (E.D. Va. 1943). *See also Ex parte Gerlach*, 247 F.616 (S.D.N.Y. 1917); *United States v. Burney*, 6 U.S.C.M.A. 776, 21 C.M.R. 98 (1956); *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 872-3 (1949). *But see*, W. Winthrop, *supra* at 100-102; *Reid v. Covert, supra* at 34 n. 61.

One may be "accompanying an armed force" although not directly employed by it or the Government. For example, an employee of a contractor engaged on a military project or serving on a merchant ship carrying supplies or troops is "accompanying an armed force." *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945), *cert. dism.*, 328 U.S. 822 (1946); *In re DiBartolo*, 50 F.Supp. 929 (S.D.N.Y. 1943); *In re Berue, supra; McCune v. Kilpatrick, supra.* To be "accompanying an armed force" one's presence within a military installation must be more than merely incidental; it must be connected with or dependent upon the activities of the armed forces or its personnel. Although a person "accompanying an armed force" may be "serving with" it as well, the distinction is important because even though a civilian's contract with the Government ended before the commission of an offense, and hence the person is no longer "serving with" an armed force, jurisdiction may remain on the ground that the person is "accompanying an armed force" because of continued connection with the military. *Perlstein v. United States, supra; Grewe v. France*, 75 F.Supp. 433 (E.D. Wis. 1948).

McElroy v.Guagliardo, supra at 285-87, discusses possible methods for extending court-martial jurisdiction over civilians in some circumstances. To date these methods remain undeveloped. *See also* Everett and Hourcle, *Crime Without Punishment—Ex-servicemen, Civilian Employees and Dependents*, 13 A.F.JAG L. Rev. 184 (1971). Civilians may be tried by general court-martial under Article 18 and the law of war. *See* R.C.M. 201(f)(1)(B); 202(b). *See also* Article 21. This includes trial by court-martial in places where the United States in an occupying power. *See e.g., Madsen v. Kinsella*, 343 U.S. 341 (1952) [upholding jurisdiction of military commission to try a dependent spouse in occupied Germany in 1950. Although a state of war with Germany still technically existed (*see* Proclamation No. 2950, 3 C.F.R. (1948-53 Comp.) 135 (1951)) hostilities were declared terminated on 31 December 1946 (*see* Proclamation No. 2714, 3 C.F.R. (1948-53 Comp.) 99 (1947)) and the United States Supreme Court observed in dicta that military courts might have jurisdiction in occupied territory even in peacetime, 343 U.S. at 360)]. *See also Wilson v. Bohlender*, 361 U.S. 281, 283 n. 2 (1960); *Kinsella v. Singleton, supra* at 244.

(b) *Offenses under the law of war.* This subsection is based on Article 18. *See also* Article 21. The phrase "offense subject to trial by court-martial" or "offense triable by court-martial" is used in the R.C.M. in recognition of the fact that the Manual for Courts-Martial governs courts-martial for offenses under the law of war as well as under the code. *See e.g.*, R.C.M. 301(b); 302(c); 304(c); 305(d). In such contexts, the phrase does not include a requirement for a jurisdictional determination.

(c) *Attachment of jurisdiction over the person.* This subsection is based on paragraph 11*d* of MCM, 1969 (Rev.), and states the basic principle that once the jurisdiction of a court-martial attaches, it continues until the process of trial, appeal, and punishment is complete. *See generally United States v. Douse*, 12 M.J. 473 (C.M.A. 1982);*United States v. Sippel*, 4 U.S.C.M.A. 50, 15 C.M.R. 50(1954).

The discussion clarifies the distinction between the existence of personal jurisdiction and the attachment of jurisdiction. *Compare United States v. Douse, supra* at 479 (Everett, C.J., concurring in the result); *United States v. Wheeley*, 6 M.J. 220 (C.M.A. 1979); *United States v. Hutchins*, 4 M.J. 190 (C.M.A. 1978); and *United States v. Hout, supra* (opinion of Quinn, C.J.) *with United States v. Douse, supra* (opinion of Cook, J.); *United States v. Smith*, 4 M.J. 265 (C.M.A. 1978); *United States v. Hout, supra* at 302, 41 C.M.R. 299, 302 (1970) (Darden, J., concurring in the result); and *United States v. Rubenstein*, 7 U.S.C.M.A. 523, 22 C.M.R. 313 (1957). *See also* W. Winthrop, *supra* at 90-91.

Subsection (2) includes examples of means by which jurisdiction may attach. They are taken from paragraph 11*d* of MCM, 1969 (Rev.) although "filing of charges" has been clarified to mean preferral of charges. *See United States v. Hout, supra.* This list is not exhaustive. *See United States v. Self*, 13 M.J. 132 (C.M.A. 1982); *United States v. Douse, supra; United States v. Smith, supra. See also United States v. Fitzpatrick*, 14 M.J. 394 (C.M.A. 1983); *United States v. Handy*, 14 M.J. 202 (C.M.A. 1982); *United States v. Wheeley, supra; United States v. Rubenstein, supra; United States v. Mansbarger*, 20 C.M.R. 449 (A.B.R. 1955).

Rule 203. Jurisdiction over the offense

This rule is intended to provide for the maximum possible court-martial jurisdiction over offenses. Since the constitutional limits of subject-matter jurisdiction are matters of judicial interpretation, specific rules are of limited value and may unnecessarily restrict jurisdiction more than is constitutionally required. Specific standards derived from current case law are treated in the discussion.

The discussion begins with a brief description of the rule under *O'Callahan v. Parker*, 395 U.S. 258 (1969). It also describes the requirements established in *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977) to plead and prove jurisdiction. *See*

also R.C.M. 907(b)(1)(A). The last three sentences in subsection (b) of the discussion are based on *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983). The remainder of the discussion reflects the Working Group's analysis of the application of service-connection as currently construed in judicial decisions. It is not intended as endorsement or criticism of that construction.

Subsection (c) of the discussion lists the *Relford* factors, which are starting points in service-connection analysis, although the nine additional considerations in *Relford* are also significant. These factors are not exhaustive. *United States v. Lockwood, supra. See also United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980). *Relford* itself establishes the basis for (c)(2) and (c)(3) of the discussion. It has never been seriously contended that purely military offenses are not service-connected per se. *See Relford* factor number 12. Decisions uniformly have held that offenses committed on a military installation are service-connected. *See, e.g., United States v. Hedlund, supra; United States v. Daniels*, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970). *See Relford* factors 2, 3, 10, and 11. As to the third sentence in (c)(3), *see United States v. Seivers*, 8 M.J. 63 (C.M.A. 1979); *United States v. Escobar*, 7 M.J. 197 (C.M.A. 1979); *United States v. Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); *Harkcom v. Parker*, 439 F.2d 265 (3d Cir. 1971). With respect to the fourth sentence of (c)(3), *see United States v. Hedlund, supra; United States v. Riehle*, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969). *But cf. United States v. Lockwood, supra.* Although much of the reasoning in *United States v. McCarthy*, 2 M.J. 26 (C.M.A. 1976) has been repudiated by *United States v. Trottier, supra*, the holding of *McCarthy* still appears to support the penultimate sentence in (c)(3). *See also United States v. Lockwood, supra; United States v. Gladue*, 4 M.J. 1 (C.M.A. 1977). The last sentence is based on *United States v. Lockwood, supra.*

The discussion of drug offenses in (c)(4) is taken from *United States v. Trottier, supra.*

As to (c)(5), the first sentence is based on *United States v. Lockwood, supra.* Whether the military status of the victim or the accused's use of a military identification card can independently support service-connection is not established by the holding in *Lockwood.* The second sentence is based on *United States v. Whatley*, 5 M.J. 39 (C.M.A. 1978); *United states v. Moore*, 1 M.J. 448 (C.M.A. 1976). The last sentence is based on *United States v. Conn, supra; United States v. Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969) (officer status of accused does not establish service-connection under Article 134) (note: service-connection of Article 133 offenses has not been judicially determined); *United States v. Saulter*, 5 M.J. 281 (C.M.A. 1978); *United States v. Conn, supra* (fact that accused was military policeman did not establish service-connection); *United States v. Armes*, 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969) (wearing uniform during commission of offense does not establish service-connection).

Subsection (c)(6) of the discussion indicates that virtually all offenses by servicemembers in time of declared war are service-connected. There is little case authority on this point. The issue was apparently not addressed during the conflict in Vietnam; of course, the overseas exception provided jurisdiction over offenses committed in the theater of hostilities. The emphasis in *O'Callahan* on the fact that the offenses occurred in peacetime (*see Relford* factor number 5) strongly suggests a different balance in time of war. Furthermore, in *Warner v. Flemings*, a companion case decided with *Gosa v. Mayden*, 413 U.S. 665 (1973), Justices Douglas and Stewart concurred in the result in upholding Flemings' court-martial conviction for stealing an automobile while off post and absent without authority in 1944, on grounds that such an offense, during a congressionally declared war, is service-connected. The other Justices did not reach this question. Assigning *Relford* factor number 5 such extensive, indeed controlling, weight during time of declared war is appropriate in view of the need for broad and clear jurisdictional lines in such a period.

Subsection (d) of the discussion lists recognized exceptions to the service-connection requirement. The overseas exception was first recognized in *United States V. Weinstein*, 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969). *See also United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969). The overseas exception flows from *O'Callahan's* basic premise: that the service-connection requirement is necessary to protect the constitutional right of service members to indictment by grand jury and trial by jury. While this premise might not be evident from a reading of *O'Callahan* alone, the Supreme Court subsequently confirmed that this was the basis of the *O'Callahan* rule. *See Gosa v. Mayden, supra* at 677. Since normally no civilian court in which the accused would have those rights is available in the foreign setting, the service-connection limitation does not apply.

The situs of the offense, not the trial, determines whether the exception may apply. *United States v. Newvine*, 23 U.S.C.M.A. 208, 48 C.M.R. 960 (1974); *United States v. Bowers*, 47 C.M.R. 516 (A.C.M.R. 1973). The last sentence in the discussion of the overseas exception is based on *United States V. Black*, 1 M.J. 340 (C.M.A. 1976). *See also United States v. Gladue*, 4 M.J. 1 (C.M.A. 1977); *United States V. Lazzaro*, 2 M.J. 76 (C.M.A. 1976). Some federal courts have suggested that the existence of court-martial jurisdiction over an overseas offense does not depend solely on the fact that the offense is not cognizable in the United States civilian courts. *See Hemphill v. Moseley*, 443 F.2d 322 (10th Cir. 1971). *See also United States v. King*, 6 M.J. 553 (A.C.M.R. 1978), *pet. denied*, 6 M.J. 290 (1979).

Several Federal courts which have addressed this issue have also held that the foreign situs of a trial is sufficient to support court-martial jurisdiction, although the rationale for this result has not been uniform. *See, e.g., Williams v. Froehlke*, 490 F.2d 998 (2d Cir. 1974); *Wimberly v. Laird*, 472 F.2d 923 (7th Cir.), *cert. denied*, 413 U.S. 921 (1973); *Gallagher v. United States*, 423 F.2d 1371 (Ct. Cl.), *cert. denied*, 400 U.S. 849 (1970); *Bell v. Clark*, 308 F.Supp. 384 (E.D. Va. 1970), *aff'd*, 437 F.2d 200 (4th Cir. 1971). As several of these decisions recognize, the foreign situs of an offense is a factor weighing heavily in favor of service-connection even without an exception for overseas offenses. *See Relford* factors 4 and 8. The logistical difficulties, the disruptive effect on military activities, the delays in disposing of offenses, and the need for an armed force in a foreign country to control its own members all militate toward service-connection for offenses committed abroad. Another consideration, often cited by the courts, is the likelihood that if the service-connection rule were applied overseas as it is in the United States, the practical effect would be far more frequent exercise of jurisdiction by host nations, thus depriving the individual of constitutional protections the rule is designed to protect.

The petty offenses exception rests on a similar doctrinal foundation as the overseas exception. Because there is no constitutional right to indictment by grand jury or trial by jury for petty offenses (*see Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Duke v. United States*, 301 U.S. 492 (1937)), the service-connection requirement does not apply to them. *United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969). Under *Baldwin v. New York, supra*, a petty offense is one in which the maximum sentence is six months confinement or less. Any time a punitive discharge is included in the maximum punishment, the offense is not petty. *See United States v. Smith*, 9 M.J. 359, 360 n. 1 (C.M.A. 1980); *United States V. Brown*, 13 U.S.C.M.A. 333, 32 C.M.R. 333 (1962).

Sharkey relied on the maximum punishment under the table of maximum punishments in determining whether an offense is petty. It is the view of the Working Group that offenses tried by summary courts-martial and special courts-martial at which no punitive discharge may be adjudged are "petty offenses" for purposes of *O'Callahan* in view of the jurisdictional limitations of such courts. Whether the jurisdictional limits of a summary or such special court-martial makes an offense referred to such a court-martial petty has not been judicially determined.

Rule 204. Jurisdiction over certain reserve component personnel

_____ *1986 Amendment*: R.C.M. 204 and its Discussion were added to implement the amendments to Articles 2 and 3, UCMJ, contained in the "Military Justice Amendments of 1986," tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____, _____ (1986). Use of the term "member of a reserve component" in Article 3(d) means membership in the reserve component at the time disciplinary action is initiated. The limitation in subsection (b)(1) restricting general and special courts-martial to periods of active duty is based upon the practical problems associated with conducting a court-martial only during periods of scheduled inactive-duty training, and ensures that the exercise of court-martial jurisdiction is consistent with the policies set forth in Article 2(d). The last sentence of subsection (d) reflects legislative intent "not to disturb the jurisprudence of *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949)" (H.R. Rep. No. 718, 99th Cong., 2d Sess. at 227 (1986)).

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

Rule 301. Report of offense

The primary source of this rule is paragraphs 29*a* and 31 of MCM, 1969 (Rev.). Those provisions were adopted in substance except that subsection (b) provides that reports be conveyed to the "immediate commander" of suspects, meaning the "commander exercising immediate jurisdiction . . . under Article 15." The language was changed because the previous language was cumbersome and legalistic. There is no corresponding provision in the Federal Rules of Criminal Procedure. The most closely analogous provision of the Federal Rules of Criminal Procedure is Rule 3 (complaints). However, "[w]ith respect to the complaint, in general, it should be noted that its principle purpose is to serve as the basis for an arrest warrant." J. Moore, *Moore's Federal Practice, Rules Pamphlet* (part 3) 10 (1982). That purpose is not the same as the purpose of R.C.M. 301. R.C.M. 301 is simply to assure that ordinarily information relating to offenses is conveyed promptly to the suspect's immediate commander.

Rule 302. Apprehension

(a) *Definition and scope.* The definition of "apprehension" in subsection (1) is taken from Article 7(a), as was its predecessor, paragraph 18*a* ofMCM, 1969 (Rev.).

The peculiar military term "apprehension" is statutory (Article 7(a)) and cannot be abandoned in favor of the more conventional civilian term, "arrest." *See generally United States v. Kinane*, 1 M.J. 309 (C.M.A. 1976). *See also United States v. Cordero*, 11 M.J. 210, 217 n.1 (C.M.A. 1981) (Everett, C.J., concurring).

The discussion of "apprehension" is also consistent with paragraphs 18*a* and *b*(1) of MCM, 1969 (Rev.). The discussion draws a distinction between apprehensions and detentions. The distinction is based upon the duration of the status, the legal consequences of the impairment of liberty, and the circumstances under which the two forms are used. *Brown v. Texas*, 443 U.S. 47 (1979); *Dunaway v. New York*, 442 U.S. 200 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Schneider*, 14 M.J. 189 (C.M.A. 1982); *United States v. Texidor-Perez*, 7 M.J. 356 (C.M.A. 1979).

This rule conforms in intent with the substance of Fed. R. Crim. P. 3 through 5. However, the formal warrant application process and initial appearance requirement of those rules are impracticable, and, given the command control aspects of the military, unnecessary for military criminal practice. The purposes of Fed. R. Crim. P. 3 through 5 are achieved by later rules in this chapter.

Subsection (2) clarifies the scope of the rule. It does not affect apprehensions of persons not subject to trial by court-martial. Apprehension and detention of such persons by military law enforcement personnel is not part of the court-martial process; it is based on the commander's inherent authority to maintain law and order on the installation and on various state laws concerning citizen's arrests. *See United States v. Banks*, 539 F.2d 14 (9th Cir. 1976). The rule also does not affect the authority of persons not listed in subsection (b) to apprehend. The discussion gives some examples of such categories.

(b) *Who may apprehend.* This subsection restates the substance of Articles 7(b) and (c) and 8, and paragraphs 19*a* and 23 of MCM, 1969 (Rev.). Subsection (3), Federal civilian law enforcement officers, is the only new provision.

Subsection (1) is taken from paragraph 19*a* of MCM, 1969 (Rev.). The phrase "whether subject to the code or not" is added to the present rule to make clear that contract civilian guards and police and similar civilian law enforcement agents of the military have the power to apprehend persons subject to the code.

The discussion of subsection (1) reflects the elimination of the previous restrictive policy against apprehensions of commissioned and warrant officers by enlisted and civilian law enforcement personnel. This recognizes the authority of such personnel commensurate with their law enforcement duties. The rule does not foreclose Secretarial limitations on the discretion of such personnel.

_____ *1986 Amendment*: The Discussion was amended to clarify that special agents of the Defense Criminal Investigative Service have the authority to apprehend persons subject to trial by courts-martial.

Subsection (2) restates the previous exercise of delegated authority under Article 7(b) to designate persons authorized to apprehend which appeared in the first clause in the first sentence of paragraph 19*a* of MCM, 1969 (Rev.). The accompanying discussion is based on the second sentence of paragraph 19*a* of MCM, 1969 (Rev.).

Subsection (3) restates Article 8. This seemingly duplicative statement is required because the codal provision as to deserters extends the Federal arrest power to state and local law enforcement agents who do not have the kind of Federal arrest power possessed by their colleagues listed in subsection (3). The fact that a person who apprehended a deserter was not authorized to do so is not a ground for discharging the deserter from military custody. *See* paragraph 23 of MCM, 1969 (Rev.).

(c) *Grounds of apprehension.* This subsection concerns apprehension of persons subject to the code or to trial by court-martial. Note that such persons may be apprehended under this rule only for offenses subject to trial by court-martial. *See also* the analysis of subsection (a)(2) of this rule. The power to apprehend under this rule lasts as long as the person to be apprehended is subject to the code or to trial by court-martial. This provision has no explicit parallel in MCM, 1969 (Rev.) but is consistent with the limitation of the apprehension power in both the code and that Manual to persons subject to the code. The Federal Rules of Criminal Procedure have no similar provision either, because the arrest power of civilian law enforcement officials is not similarly limited by the status of the suspect.

The subsection states alternative circumstances which must exist to permit apprehension during this period. The first two sentences restate the probable cause requirement for apprehension of suspects, the main use of the apprehension power of which Article 7(b) and paragraph 19*a* of MCM, 1969 (Rev.) took note. They are consistent with Fed. R. Crim. P. 4(a). No change to the substance of those provisions has been made, but the discussion provides that probable cause may be based on "the reports of others" to make clear that hearsay may be relied upon as well as personal knowledge. This addition is consistent with Fed. R. Crim. P. 4(b). The wording has been changed to eliminate the legal term, "hearsay."

The last sentence of the subsection restates the codal authority of commissioned, warrant, petty, and noncommissioned officers to use the apprehension power to quell disorders, and is based on Article 7(c) and paragraph 19*b* of MCM, 1969 (Rev.), changed only as necessary to accommodate format. *Cf.* paragraph 19*a* of MCM, 1951, and of MCM, 1969 (Rev.) (authority of military law enforcement official to apprehend on probable cause). *See also* Article of War 68 (1920). *Compare* paragraph 20*b* (authority of military police) *with* paragraph 20*c* (quarrels and frays) of MCM (Army), 1949 and of MCM (AF), 1949. Article 7(b) expressly requires probable cause to believe an offense has been committed; Article 7(c) does not.

(d) *How an apprehension may be made.* In subsection (1) the general statement of procedure to make an apprehension is based on paragraph 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 exclusionary rule or supplying standing to an accused on behalf of a third party when the accused's right to privacy was not violated. *See Rakas v. Illinois*, 439 U.S. 128 (1978). Failure to secure authorization or warrant to enter a private dwelling not occupied by the person to be apprehended may violate the rights of residents of that private dwelling.

Rule 303. Investigation of charges

This rule is based on paragraph 32 of MCM, 1969 (Rev.). Much of the predecessor now appears in the accompanying discussion.

Rule 304. Pretrial restraint

(a) *Types of pretrial restraint.* Except for the "conditions on liberty" provision, which is new, this subsection is based on paragraphs 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 is 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 "delegation," it would be a rescission of the earlier withholding. The limits of subsection (3) would not apply.

(c) *When a person may be restrained.* This subsection is based on Articles 9(d) and 10. Although forms of restraint less severe than arrest are not addressed by these articles, it is appropriate to require probable cause and a need for restraint for all forms of pretrial restraint. An officer imposing restraint has considerable discretion in determining how much restraint is necessary (*cf.* 18 U.S.C. §§ 3146(a) and 3147), although a decision to confine is subject to thorough review under R.C.M. 305. The discussion borrows from the language of Article 13 to admonish that the restraint must serve only the limited purpose of this rule. *See* subsection (f). *See also United States v. Haynes*, 15 U.S.C.M.A. 122, 35 C.M.R. 94 (1964).

(d) *Procedures for ordering pretrial restraint.* This subsection is based on Article 9(b) and (c) and on paragraph 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 predjudice. *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.).

_____ *1986 Amendment*: The discussion was amended to clarify that pretrial restraint may be imposed not only when charges are to be reinstated but also when a convening authority intends to order a rehearing or an "other" trial. *See* R.C.M. 1107(e). Restraint imposed during any of these situations is considered "imposed before and during disposition of offenses." *See* R.C.M. 304(a).

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

Rule 305. Pretrial confinement

Introduction. This rule clarifies the 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); *Cortney 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.

been added based on the amendment of Article 27(a) and 42(a). *See* Military Justice Act of 1983, Pub. L. No. 98-209, § 3(c), (f), 97 Stat. 1393 (1983). As the discussion indicates, "associate counsel" ordinarily refers to detailed counsel when the accused has military or civilian counsel. *See* Article 38(b)(6). An associate defense counsel must be qualified to act as defense counsel. An assistant defense counsel need not be. One other substantive change from MCM, 1969 (Rev.). has been made. Detailed defense counsel in special courts-martial must be certified by the Judge Advocate General concerned although this is not required by Article 27(c). Article 27(c) permits representation of an accused by a counsel not qualified and certified under Article 27(b) if the accused does not request qualified counsel, having been given the opportunity to do so, or when such counsel cannot be obtained on account of physical conditions or military exigencies. In the latter event, no bad-conduct discharge may be adjudged. Article 19. Currently, certified counsel is routinely provided in all special courts-martial, so the modification of the rule will not change existing practice. Moreover, the enforcement of waiver provisions in these rules and the Military Rules of Evidence necessitate, both for fairness and the orderly administration of justice, that the accused be represented by qualified counsel. *See also United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977). Because of this rule, the rule of equivalency in Article 27(c) and (3) is not necessary.

Subsection (2) is based on the fifth sentence of the first paragraph of paragraph 6*c* and on paragraph 6*d* of MCM, 1969 (Rev.).

Subsection (3) is based on the first sentence of the second paragraph of paragraph 48*a* of MCM, 1969 (Rev.) and on *Soriano v. Hosken*, 9 M.J. 221 (C.M.A. 1980); *United States v. Kraskouskas*, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958). The discussion is taken from *Soriano v. Hosken, supra.*

Subsection (4) is based on Article 27(a) and on the fourth and fifth sentences of paragraph 6*a* of MCM, 1969 (Rev.). *See also United States v. Catt*, 1 M.J. 41 (C.M.A. 1975). The accuser has been added to the list of disqualifications. *See ABA Standards, The Prosecution Function*, §§ 3-1.1(c); 3-3.9(c)(1979).

Subsection (5) is based on paragraph 44*d* and 45*a* of MCM, 1969 (Rev.) and on Article 38(d). The forum based distinction as to the powers of an assistant trial counsel has been deleted. The trial counsel is responsible for the prosecution of the case. R.C.M. 805(c) requires the presence of a qualified trial counsel at general courts-martial. The discussion is based on paragraphs 44*e, f, g,* and *h* of MCM, 1969 (Rev.). Some of the specific duties are now covered in other rules, *e.g.*, R.C.M. 701; 812, 813; 914; 919. Some examples and explanation have been deleted as unnecessary.

The first sentence of subsection (6) is new. *Cf.* paragraphs 46*d* and 48*c* of MCM, 1969 (Rev.). The second sentence of subsection (6) is based on Article 38(e). The rule does not require that defense counsel in the court-martial represent the accused in administrative or civil actions arising out of the same offenses. The discussion is based on paragraphs 46*d*, 47, and 48*c, d, e, f, g, h, j* and *k* of MCM, 1969 (Rev.). The matters covered in paragraph 48*k*(2) and (3) of MCM, 1969 (Rev.) are modified in the discussion based on the amendment of Articles 38(c) and 61. *See* Military Justice Act of 1983, Pub. L. No. 98-209, §§ 3(e)(3), 5(b)(1), 97 Stat. 1393 (1983). *See* R.C.M. 1105; 1110. As to associate counsel, *see* the Analysis subsection (d)(1) of this rule. *See also United States v. Breese*, 11 M.J. 17, 22 n. 13 (C.M.A. 1981); *United States v. Rivas, supra; United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977); *United States v.Goode*, 1 M.J. 3 (C.M.A. 1975).

(e) *Interpreters, reporters, escorts, bailiffs, clerks, and guards.* This subsection is based on paragraphs 7, 49, 50, and 51 of MCM, 1969 (Rev.). The list of disqualifications, except for the accuser, is new and is intended to prevent circumstances which may detract from the integrity of the court-martial.

(f) *Action upon discovery of disqualification or lack of qualification.* This subsection is based on paragraphs 41*c*, 44*b*, 46*b* of MCM, 1969 (Rev.).

Rule 503. Detailing members, military judge, and counsel

(a) *Members.* Subsection (1) is based on Article 25. Because of the amendment of Articles 26 and 27 the convening authority is no longer required to personally detail the military judge and counsel. Military Justice Act of 1983, Pub. L. No. 98-209, § 3(c), 97 Stat. 1393 (1983). The last sentence of paragraph 4*b* of MCM, 1969 (Rev.) is deleted as unnecessary. The second paragraph in the discussion serves the same purpose as the third paragraph of paragraph 4*b* of MCM, 1969 (Rev.): to alert the convening authority to avoid appointing people subject to removal for cause. Unlike that paragraph, however, no suggestion is now made that the convening authority commits error by appointing such persons, since the disqualifications are waivable. *See* Analysis, R.C.M.912(f)(4).

Subsection (2) is based on Article 25(c) and the third paragraph of paragraph 4*c* of MCM, 1969 (Rev.). The discussion is based on paragraph 36*c*(2) of MCM, 1969 (Rev.).

_____ *1986 Amendment*: Subsection (2) was amended to reflect an amendment to Article 25(c)(1), UCMJ, in the "Military Justice Amendments of 1986," tit. VIII, § 803, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____ , _____ (1986) which authorizes enlisted accused to request orally on the record that at least one-third of the members of courts-martial be enlisted.

Subsection (3) is based on paragraphs 4*f* and *g* of MCM, 1969 (Rev.). Subsection (3) combines treatment of members from a different command and those from a different armed force. The power of a commander to detail members not under the convening authority's command is the same whether the members are in the same or a different armed force. Therefore each situation can be covered in one rule. The discussion repeats the preference for members, or at least a majority thereof, to be of the same service as the accused which was found in paragraph 4*g*(1) of MCM, 1969 (Rev.). Permission of the Judge Advocate

General to detail members of another armed force is no longer required in the Manual. Detailing a military judge from a different command or armed force is now covered in subsection (d).

(b) *Military Judge.* Subsections (1) and (2) are based on Article 26(a), as amended, Military Justice Act of 1983, Pub. L. No. 98-209, § 3(c)(1), 97 Stat. 1393 (1983). The convening authority is no longer required to detail personally the military judge. *Id.* Subsection (1) requires that responsibility for detailing military judges will be in judicial channels. *See Hearings on S.2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 2nd Sess. 52 (1982). More specific requirements will be provided in service regulations. Subsection (2) is intended to make detailing the military judge administratively efficient. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 3-5, 12 (1983), H.R. Rep. No. 549, 98th Cong., 1st Sess. 13-14 (1983). As long as qualified military judge presides over the court-martial, any irregularity in detailing a military judge is not jurisdictional and would result in reversal only if specific prejudice was shown. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 12 (1983).

Subsection (3) is based on Article 26. *See also* Article 6(a).

(c) *Counsel.* Subsections (1) and (2) are based on Article 27(a), as amended, Military Justice Act of 1983, Pub. L. No. 98-209, § 3(c)(2), 97 Stat. 1393 (1983). The convening authority is no longer required to detail personally the counsel. *Id.* Efficient allocation of authority for detailing counsel will depend on the organizational structure and operational requirements of each service. Therefore, specific requirements will be provided in service regulations. Subsection (2) is intended to make detailing counsel administratively efficient. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 3-5, 12 (1983); H. R. Rep. No. 549, 98th Cong., 1st Sess. 13-14(1983). Counsel are not a jurisdictional component of courts-martial. *Wright v. United States*, 2 M.J. 9 (C.M.A. 1976). Any irregularity in detailing counsel would result in reversal only if specific prejudice was shown. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 12 (1983).

Subsection (3) is based on Article 27. *See also* Article 6(a).

Rule 504. Convening courts-martial

(a) *In general.* This subsection substantially repeats the first sentence of paragraph 36*b* of MCM, 1969 (Rev.).

(b) *Who may convene courts-martial.* Subsection (1) is based on Article 22 and paragraph 5*a*(1) of MCM, 1969 (Rev.). The power of superiors to limit the authority of subordinate convening authorities is based on paragraph 5*b*(4) of MCM, 1969 (Rev.). Although that paragraph applied only to special and summary courts-martial, the same principle applies to general courts-martial. *See* Article 22(b). *See generally United States v. Hardy*, 4 M.J. 20 (C.M.A. 1977); *United States v. Hawthorne*, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956); *United States v. Rembert*, 47 C.M.R. 755 (A.C.M.R. 1973), *pet.denied*, 23 U.S.C.M.A. 598 (1974). The discussion is based on the second and third sentences of paragraph 5*a*(5) of MCM, 1969 (Rev.).

Subsection (2) is based on Article 23 and paragraphs 5*b*(1), (3), and (4) of MCM, 1969 (Rev.).

As to subsection (3), *see* Analysis, R.C.M. 1302(a).

Subsection (4) is based on the first sentence of paragraph 5*a*(5) of MCM, 1969 (Rev.). *See also United States v. Greenwalt*, 6 U.S.C.M.A. 569, 20 C.M.R. 285 (1955); *United States v. Bunting*, 4 U.S.C.M.A. 84, 15 C.M.R. 84 (1954).

(c) *Disqualification.* This subsection is based on Articles 22(b) and 23(b) and on paragraph 5*a*(3) of MCM, 1969 (Rev.). *See also* Article 1(5) and (9); *United States v. Haygood*, 12 U.S.C.M.A. 481, 31 C.M.R. 67 (1961); *United States v. LaGrange*, 1 U.S.C.M.A. 342, 3 C.M.R. 76 (1952); *United States v. Kostes*, 38 C.M.R. 512 (A.B.R. 1967).

(d) *Convening orders.* This subsection is based on paragraph 36*b* of MCM, 1969 (Rev.) with two substantive modifications. First, in conformity with the amendment of Articles 26(a) and 27(a), *see* Military Justice Act of 1983, Pub. L. No. 98-209, § 3(c), 97 Stat. 1393 (1983), the military judge and counsel are no longer included in the convening order. *See* R.C.M. 503(b) and (c) and Analysis. Second, several matters, such as the unit of any enlisted members, which were required by paragraph 36*b* are not included here. These may be required by service regulations. Summary courts-martial are treated separately from general and special courts-martial because of their different composition.

(e) *Place.* This subsection is new. It derives from the convening authority's power to fix the place of trial (*see also* R.C.M. 906(b)(11)) and from the convening authority's control of the resources for the trial. It does not change current practice.

Rule 505. Changes in members, military judge, and counsel

(a) *In general.* This subsection is based on the first sentence of paragraph 37*a* of MCM, 1969 (Rev.) except that it has been modified to conform to the amendment of Articles 26(a) and 27(a). *See* Military Justice Act of 1983, Pub. L. No. 98-209, § 3(c), 97 Stat. 1393 (1983). The discussion is based on the third and fourth sentences of paragraph 37*c* of MCM, 1969 (Rev.).

(b) *Procedure.* This subsection is based on the first two sentences of paragraph 37*c*(1) and on paragraph 37*c*(2) of MCM, 1969 (Rev.). *See also United States v. Ware*, 5 M.J. 24 (C.M.A. 1978). It has been modified to reflect that military judges and counsel no longer must be detailed by the convening authority. The second paragraph in the discussion is based on *United States v. Herrington*, 8 M.J. 194 (C.M.A. 1980). References in paragraph 37*b* to excusal as a result of challenges are deleted here as challenges are covered in R.C.M. 902 and 912.

(c) *Changes of members.* This subsection is based on Articles 25(e) and 29, and paragraphs 37*b* and *c*, and 39*e* of MCM, 1969 (Rev.). The limitation on the authority of the convening authority's delegate to excuse no more than one-third of the members is based on S. Rep. No. 53, 98th Cong., 1st Sess. 13 (1983).

(d) *Changes of detailed counsel.* Subsection (1) is based on that part of the second sentence of paragraph 37*a* of MCM, 1969 (Rev.) which covered trial counsel.

Subsection (2) is new and conforms to the amendment of Article 27(a) concerning who details counsel. Subsection (2)(A) is consistent with that part of the second sentence of paragraph 37*a* of MCM, 1969 (Rev.) which dealt with defense counsel. Subsection (2)(B) is based on Article 38(b)(5); *United States v. Catt*, 1 M.J. 41 (C.M.A. 1975); *United States v. Timberlake*, 22 U.S.C.M.A. 117, 46 C.M.R. 117 (1973); *United States v. Andrews*, 21 U.S.C.M.A. 165, 44 C.M.R. 219 (1972);*United States v. Massey*, 14 U.S.C.M.A. 486, 34 C.M.R. 266 (1964).

(e) *Change of military judge.* This subsection is based on Articles 26(a) and 29(d) and on paragraph 39*e* of MCM, 1969 (Rev.). *See also United States v. Smith*, 3 M.J. 490 (C.M.A. 1975).

(f) *Good cause.* This subsection is based on Article 29 and on *United States v. Greenwell*, 12 U.S.C.M.A. 560, 31 C.M.R. 146 (1961); *United States v. Boysen*, 11 U.S.C.M.A. 331, 29 C.M.R. 147 (1960); *United States v. Grow*, 3 U.S.C.M.A. 77, 11 C.M.R. 77 (1953). *See* S. Rep. No.

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 rules does not require a record in certain cases. Instead the discussion suggests that such a record is desirable if the later referral is more onerous to the accused. *See United States v. Blaylock, supra* at 192 n.1; *United States v.Hardy, supra.*

The 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 in 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.

_____ *1986 Amendment*: The phrase "a mental disease, defect, or other condition bearing upon the guilt of the accused" was deleted from this subsection, with other language substituted, in conjunction with the implementation of Article 50a, and the phrase "or partial mental responsibility" was deleted from the Discussion to conform to the amendment to R.C.M. 916(k)(2).

(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 Procedures 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).

(d) *Procedure.* This subsection is new. It is intended to protect the parties to a grant of immunity by reducing the possibility of misunderstanding or disagreement over its existence or terms. *Cf. Cooke v. Orser, supra.*

The first paragraph in the discussion is based on *United States v. Kirsch, supra.*

The second paragraph in the discussion is based on *United States v. Conway*, 20 U.S.C.MA 99, 42 C.M.R. 291 (1970); *United States v. Stoltz*, 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964). *See also United States v. Scoles*, 14 U.S.C.M.A. 14, 33 C.M.R. 226 (1963); Green I, *supra* at 20-23.

The last paragraph in the discussion is based on Mil. R. Evid. 301(c)(2) and *United States v. Webster*, 1 M.J. 216 (C.M.A. 1975).

(e) *Decision to grant immunity.* This subsection is based on *United States v. Villines, supra.* Although there was no majority opinion in that case, each judge recognized the problem of the need to immunize defense witnesses under some circumstances, and each suggested different possible solutions. The rule addresses these concerns and provides a mechanism to deal with them. Note that the military judge is not empowered to immunize a witness. If the military judge finds that a grant of immunity is essential to a fair trial, the military judge will abate the proceedings unless immunity is granted by an appropriate convening authority.

Rule 705. Pretrial agreements

Introduction. This rule is new. The code does not address pretrial agreements, and MCM, 1969 (Rev.) did not discuss them. Pretrial agreements have long existed and been sanctioned in courts-martial, however. *See United States v. Allen*, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957). *See generally Gray, Pretrial Agreements*, 37 Fed. Bar J. 49 (1978). The rule recognizes the utility of pretrial agreements. At the same time the rule, coupled with the requirement for judicial inquiry in R.C.M. 910, is intended to prevent informal agreements and protect the rights of the accused and the interests of the Government. *See also Santobello v. New York*, 404 U.S. 257 (1971); Fed. R. Crim. P. 11(e); *ABA Standards, Pleas of Guilty* (1979).

(a) *In general.* This subsection is based on *United States v. Allen, supra.* Only the convening authority may enter a pretrial agreement with an accused. *See United States v. Caruth*, 6 M.J. 184 (C.M.A. 1979); *United States v. Johnson*, 2 M.J. 541 (A.C.M.R. 1976); *United States v. Crawford*, 46 C.M.R. 1007 (A.C.M.R. 1972). *See also United States v. Troglin*, 21 U.S.C.M.A. 183, 44 C.M.R. 237 (1972). Pretrial agreements have long been subject to service regulations. *See, e.g.*, A.F.M. 111-1, para. 4-8 (May 13, 1980); JAGMAN section 0114 (June 11, 1982). Subsection (a) expressly continues such authority. The discussion is based on Department of Defense Directive 1355.1 (July 21, 1981).

(b) *Nature of agreement.* This subsection recognizes the matters contained in pretrial agreements. *See United States v. Cook*, 12 M.J. 448 (C.M.A. 1982); *United States v. Schaffer*, 12 M.J. 425 (C.M.A. 1982); *United States v. Brown*, 12 M.J. 420 (C.M.A. 1982); *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977); *United States v. Allen, supra.* As to prohibited and permitted terms and conditions, *see* subsection (c) of this rule. This discussion under subsection (2)(C) is based on *United States v. Cook, supra.*

(c) *Terms and conditions.* This subsection is intended to ensure that certain fundamental rights of the accused cannot be bargained away while permitting the accused substantial latitude to enter into terms or conditions as long as the accused does so freely and voluntarily. Subsection (1)(B) lists certain matters which cannot be bargained away. This is because to give up these matters would leave no substantial means to judicially ensure that the accused's plea was provident, that the accused entered the pretrial agreement voluntarily, and that the sentencing proceedings met acceptable standards. *See United States v. Mills*, 12 M.J. 1 (C.M.A. 1981); *United States v. Green*, 1 M.J. 453 (C.M.A. 1976); *United States v. Holland*, 1 M.J. 58 (C.M.A. 1975); *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969); *United States v. Cummings*, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968); *United States v. Allen, supra.* The discussion under subsection (2) is based on *United States v. Holland, supra.* The rule is not intended to codify *Holland* to the extent that *Holland* may prevent the accused from giving up the right to make any motions before trial. *Cf. United States v. Schaffer, supra.* Subsection (1)(A) provides that any term or condition, even if not otherwise prohibited, must be agreed to by the accused freely and voluntarily. *Cf. United States v. Green, supra; United States v. Care, supra.*

Subsection (2) makes clear that certain terms or conditions are not included in subsection (1)(B) and are permissible as long as they are freely and voluntarily agreed to by the accused. Since the accused may waive many matters other than jurisdiction, in some cases by failure to object or raise a matter (*see* R.C.M. 905(e); Mil. R. Evid. 103(a)), or by a plea of guilty (*see* R.C.M. 910(j) and Analysis), there is no reason why the accused should not be able to seek a more favorable agreement by agreeing to waive such matters as part of a pretrial agreement. Indeed, authorization for such terms or conditions, coupled with the requirement that they be included in the written agreement (*see* subsection (d)(3) of this rule) prevents *sub rosa* agreements concerning such matters and ensures that a careful judicial inquiry into, and record of, the accused's understanding of such matters will be made. The matters listed in subsection (2) have been judicially sanctioned. As to subsection (2)(A), *see United States v. Thomas*, 6 M.J. 573 (A.C.M.R. 1978). *Cf. United States v. Bertelson, supra.* Subsection (2)(B) is based on *United States v. Reynolds*, 2 M.J. 887 (A.C.M.R. 1976); *United States v. Tyson*, 2 M.J. 583 (N.C.M.R. 1976). *See also United States v. Chavez-Rey*, 1 M.J. 34 (C.M.A. 1975); *United States v. Stoltz*, 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964).

Subsection (2)(C) is based on *United States v. Callahan*, 8 M.J. 804 (N.C.M.R. 1980); *United States v. Brown*, 4 M.J. 654 (A.C.M.R. 1977). Enforcement of a restitution clause may raise problems if the accused, despite good faith efforts, is unable to comply. *See United States v. Brown, supra.*

Subsection (2)(D) is based on *United States v. Dawson*, 10 M.J. 142 (C.M.A. 1982). Although the post-trial misconduct provision in *Dawson* was rejected, a majority of the court was apparently willing to permit such provisions if adequate

protections against arbitrary revocation of the agreement are provided. However, *see United States v. Connell*, 13 M.J. 156 (C.M.A. 1982) in which a post-trial misconduct provision was held unenforceable without detailed analysis. Subsection (D) provides the same protections as revocation of a suspended sentence requires. *See* R.C.M. 1109 and Analysis. Given such protections, there is no reason why an accused who has bargained for sentence relief such as a suspended sentence should enjoy immunity from revocation of the agreement before action but not afterward. Other decisions have suggested the validity of post-trial misconduct provisions. *See United States v. Goode*, 1 M.J. 3 (C.M.A. 1975); *United States v. Thomas, supra; United States v. French*, 5 M.J. 655 (N.C.M.R. 1978). *Cf. United States v. Lallande*, 22 U.S.C.M.A. 170, 46 C.M.R. 170 (1973).

Subsection (2)(E) is based on *United States v. Schaffer, supra; United States v. Mills, supra; United States v. Schmeltz*, 1 M.J. 8 (C.M.A. 1975). Note that the list is not exhaustive. The right to enlisted members may be waived, for example.

(d) *Procedure.* This subsection ensures that an offer to plead guilty pursuant to a pretrial agreement originates with the accused, and that the accused freely and voluntarily enters a pretrial agreement. At the same time it recognizes that a pretrial agreement is the product of negotiation and discussion on both sides, each of which is free to refuse to enter an agreement and go to trial. Subsection (1) is based on *United States v. Schaffer, supra.* This subsection, together with the prohibition against terms not freely and voluntarily agreed to by the accused and the requirement in R.C.M. 910 for an inquiry into the agreement, should prevent prosecutorial pressure or improper inducements to the accused to plead guilty or to waive rights against the accused's wish or interest. *See United States v. Schaffer, supra* at 428-29.

Subsection (2) provides that once plea discussions are initiated by the defense the convening authority or a representative may negotiate with the defense. This recognizes that while the offer must originate with the defense, the specific provisions in an agreement may be the product of discussions with the Government. *Schaffer, Mills*, and *Schmeltz* suggest that each term must originate with the defense. R.C.M. 705 is consistent with this insofar as it requires that the offer to plead guilty originate with the accused (subsection (d)(1)), that the written proposal be prepared by the defense (subsection (d)(3)), and that the accused enter or agree to each term freely and voluntarily (subsection (c)(1)(A)). It is of no legal consequence whether the accused's counsel or someone else conceived the idea for a specific provision as long as the accused, after thorough consultation with qualified counsel, can freely choose whether to submit a proposed agreement and what it will contain. *See United States v. Munt*, 3 M.J. 1082 (A.C.M.R. 1977), *pet. denied*, 4 M.J. 198 (C.M.A. 1978).

Subsection (3) ensures that all understandings be included in the agreement. This is in the interest of both parties. *See United States v. Cooke*, 11 M.J. 257 (C.M.A. 1981); *United States v. Lanzer*, 3 M.J. 60 (C.M.A. 1977); *United States v. Cox*, 22 U.S.C.M.A. 69, 46 C.M.R. 69 (1972). The last sentence is based on *United States v. Green, supra.* Note that the rule does not require the convening authority to sign the agreement. Although the convening authority must personally approve the agreement, (*see* subsection (a)) and has sole discretion whether to do so under subsection (4), the convening authority need not personally sign the agreement. In some circumstances, it may not be practicable or even possible to physically present the written agreement to the convening authority for approval. The rule allows flexibility in this regard. The staff judge advocate, trial counsel, or other person authorized by the convening authority to sign may do so. Authority to sign may be granted orally. Subsection (3) is not intended to preclude oral modifications in the agreement from being made on the record at trial, with the consent of the parties.

Subsection (5) makes clear that neither party is bound by a pretrial agreement until performance begins. *See United States v. Kazena*, 11 M.J. 28 (C.M.A. 1981). In *Shepardson v. Roberts*, 14 M.J. 354 (C.M.A. 1983), the Court stated that the convening authority may be bound by a pretrial agreement before entry of a plea of guilty if the accused has detrimentally relied on the agreement. The Court indicated, however, that not all forms of reliance by the accused rise to the level of detrimental reliance as it used that term. Thus the Court held in *Shepardson* that exclusion of statements allegedly made by the accused as a result of the agreement (but not necessarily pursuant to it) was an adeqaute remedy, and enforcement of the agreement was not required when the convening authority withdrew from it before trial. Similarly, the Court opined that the fact that an accused made arrangements to secure employment or took similar actions in reliance on an agreement would not require enforcement of a pretrial agreement. Subsection (5) is consistent with this approach, but uses beginning of performance by the accused to provide a clearer point at which the right of the convening authority to withdraw terminates. Note that the beginning of performance is not limited to entry of a plea. It would also include testifying in a companion case, providing information to Government agents, or other actions pursuant to the terms of an agreement.

Note that the accused may withdraw from a pretrial agreement even after entering a guilty plea or a confessional stipulation, but, once the plea is accepted or the stipulation admitted, could not withdraw the plea or the stipulation except as provided under R.C.M. 910(h) or 811(d). The fact that the accused may withdraw at any time affords the accused an additional measure of protection against prosecutorial abuse. It also reflects the fact that the convening authority can retrieve any relief granted the accused. *See* Article 63; *United States v. Cook, supra.*

(e) *Nondisclosure of existence of agreement.* This subsection is based on *United States v. Green, supra; United States v. Wood*, 23 U.S.C.M.A. 57, 48 C.M.R. 528 (1974). *See also* R.C.M. 910(f); Mil. R. Evid. 410.

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused

This rule is taken from paragraph 121 of MCM, 1969 (Rev.). Minor changes were made in order to conform with the format and style of the Rules for Courts-Martial. *See also United States v. Cortes-Crespo*, 13 M.J. 420 (1982); *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977); Mil R. Evid. 302 and Analysis. The rule is generally consistent with 18 U.S.C. § 4244. The penultimate paragraph in paragraph 121 is deleted as an unnecessary statement.

1986 Amendment: Subsection (c)(1) was modified, in light of changes to federal law, to allow the use of available clinical psychologists. *See* 18 U.S.C. 4241, 4242, and 4247. Subsection (c)(2) was revised to implement Article 50a,

which was added to the UCMJ in the "Military Justice Amendments of 1986," tit. VIII, §802, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____ (1986). Article 50a adopted some provisions of the Insanity Defense Reform Act, ch. IV, Pub. L. No. 98-473, 98 Stat. 2057 (1984). *See also* Analysis of R.C.M. 916(k). The subsection dealing with the volitional prong of the American Law Institute's Model Penal Code test was deleted. Subsection (A) was amended by adding and defining the word "severe." *See* R.C.M. 916(k)(1); S. Rep. No. 225, 98th Cong., 1st Sess. 229 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 1, 231. Subsection (C) was amended to state the cognitive test as now set out in R.C.M. 916(k)(1).

Rule 707. Speedy trial

Introduction. This rule is based on *ABA Standards, Speedy Trial* (1978). It is generally similar to 18 U.S.C. § 3161 et seq. It differs from the latter in terms of specific requirements because of the different procedures in courts-martial and because of different conditions in the military.

The rule is intended to protect the speedy trial rights under the sixth amendment and Article 10 and to encourage protection of command and societal interests in prompt administration of justice. *See generally Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. Walls*, 9 M.J. 88 (C.M.A. 1980). The rule provides substantial guidance for assessing speedy trial claims while retaining reasonable flexibility to avoid rigid and arbitrary application. *Cf. United States v. Henderson*, 1 M.J. 421, 427 (C.M.A. 1976) (Fletcher, C.J., dissenting).

(a) *In general.* This subsection is based on *ABA Standards, supra* at §§ 12-2.1. 12-2.2, *Cf.* 18 U.S.C. § 3161. The ABA Standards set no time limit, but leave the matter open depending on local conditions. The basic period from arrest or summons to trial under 18 U.S.C. § 3161 is 100 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 of 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.

_____ *1986 Amendment*: Subsection (3) was added to implement the legislative intent underlying passage of the "Military Justice Amendments of 1986," tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____ (1986). Congress created substantial procedural protections for members of reserve components who are involuntarily ordered to active duty pursuant to Article 2(d) and R.C.M. 204. Consistent with that intent, the speedy trial time will begin to run when the member reports for active duty in cases where charges have not been preferred prior to such activation.

(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 (3). 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.*

_____ *1986 Amendment*: Subsection (c)(9) and its Discussion were added to implement the amendment to Article 2, UCMJ, contained in the "Military Justice Amendments of 1986," tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____ (1986), to exclude not more than 60 days delay during the processing of a request to activate a member of a reserve component for disciplinary action. Because such a request must be forwarded to a regular component general court-martial convening authority or to the Secretary concerned, delays not contemplated by the prior speedy trial rule are likely to arise.

(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 includes 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 Staes 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 remedy 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 delayed 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

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 for 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).

_____ *1986 Amendment*: Subsections (b)(1), (c)(1) and (c)(3) were amended to reflect an amendment to Article 25(c)(1), UCMJ, in the "Military Justice Amendments of 1986," tit. VIII, § 803, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____ , _____ (1986). *See* Analysis, R.C.M. 503.

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), *affd*, 417 F.2d 629 (5th Cir. 1969); *cert. denied*, 397 U.S. 962 (1970). The last sentence in Fed. R. Crim. P. 47, allowing a motion to be supported by affidavit, is not included here. *See* subsection (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 an Article 39(a) session (*see* R.C.M. 803) for the period after pleas are entered but before trial to hear motions.

(d) *Ruling on motions.* This subsection is based on Fed R. Crim. P. 12(e). It is consistent with the first sentence in paragraph 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 postrial 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. Fed. R. Crim. P. 12(g) is covered at R.C.M. 803 and 808. The matters in Fed. R. Crim. P. 12(h) would fall under the procedures in R.C.M. 304 and 305.

(k) *Production of statements on motion to suppress.* This subsection is based on Fed. R. Crim. P. 12(i).

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 or other officials to direct that action be taken notwithstanding the fact that such action might also be sought by the trial counsel by motion for appropriate relief before the military judge. Specific modifications of the powers of such officials are noted expressly in the rules or analysis.

(b) *Grounds for appropriate relief.* This subsection has the same general purpose as paragraph 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 proceedings and control the docket. *See generally United States v. Wolzok*, 1 M.J. 125 (C.M.A. 1975). To the extent that paragraph 58*a* extended to the military judge the power to direct postponement, it was duplicative of the power to grant a continuance and unnecessary.

Subsection (2) is based on paragraph 48*b*(4) of MCM, 1969 (Rev.). *See also United States v. Redding*, 11 M.J. 100 (C.M.A. 1981).

Subsection (3) is based on paragraph 69*c* of MCM, 1969 (Rev.). *See also* Articles 32(d) and 34; *United States v. Johnson*, 7 M.J. 396 (C.M.A. 1979); *United States v. Donaldson*, 23 U.S.C.M.A. 293, 49 C.M.R. 542 (1975); *United States v. Maness*, 23 U.S.C.M.A. 41, 48 C.M.R. 512 (1974).

Subsection (4) is based on paragraph 69*b* of MCM, 1969 (Rev.). *See also* Article 30(a); paragraphs 29*e* and 33*d* of MCM, 1969 (Rev.); Fed. R. Crim. P. 7(d). *See generally United States v. Arbic*, 16 U.S.C.M.A. 292, 36 C.M.R. 448 (1966); *United States v. Krutsinger*, 15 U.S.C.M.A. 235, 35 C.M.R. 207 (1965); *United States v. Johnson*, 12 U.S.C.M.A. 710, 31 C.M.R. 296 (1962).

Subsection (5) and its discussion are based on paragraph 28*b* of MCM, 1969 (Rev.); *United States v. Collins*, 16 U.S.C.M.A. 167, 36 C.M.R. 323 (1966); *United States v. Means*, 12 U.S.C.M.A. 290, 30 C.M.R. 290 (1961); *United States v. Parker*, 3 U.S.C.M.A. 541, 13 C.M.R. 97 (1953); *United States v. Voudren*, 33 C.M.R. 722 (A.B.R. 1963). *See also* paragraphs 158 and 200*a*(8) of MCM,1969 (Rev.). *But see United Staates v. Davis*, 16 U.S.C.M.A. 207, 36 C.M.R. 363 (1966) (thefts occurring at different places and times over four month period were separate).

Subsection (6) is based on Fed R. Crim. P. 7(f). Although not expressly provided for in the previous Manual, bills of particulars have been recognized in military practice. *See United States v. Alef*, 3 M.J. 414 (C.M.A. 1977); *United States v. Paulk*, 13 U.S.C.M.A. 456, 32 C.M.R. 456 (1963); *United States v. Calley*, 46 C.M.R. 1131, 1170 (A.C.M.R.), *aff'd*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973); James, *Pleadings and Practice under United States v. Alef*, 20 A.F.L. Rev. 22 (1978); Dunn, *Military Pleading*, 17 A.F.L. Rev. 17 (Fall, 1975). The discussion is based on *United States v. Mannino*, 480 F. Supp. 1182, 1185 (S.D.N.Y. 1979); *United States v. Deaton*, 448 F. Supp. 532 (N.D. Ohio, 1978); *see also United States v. Harbin*, 601 F.2d 773, 779 (5th Cir. 1979); *United States v. Giese*, 597 F. 2d 1170, 1180 (9th Cir. 1979); *United States v. Davis*, 582 F. 2d 947, 951 (5th Cir. 1978), *cert. denied*, 441 U.S. 962 (1979). Concerning the contents of a bill, *see United States v. Diecidue*, 603 F. 2d 535, 563 (5th Cir. 1979); *United States v. Murray*, 527 F. 2d 401, 411 (5th Cir. 1976); *United States v. Mannino, supra; United States v. Hubbard*, 474 F. Supp. 64, 80—81 (D.D.C. 1979).

Subsection (7) is based on paragraphs 75*e* and 115*a* of MCM, 1969 (Rev.). *See also* Fed. R. Crim. P. 12(b)(4); *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980); *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978).

Subsection (8) is new to the Manual although not to military practice. *See* Analysis, R.C.M. 305(j).

Subsection (9) is based on paragraph 69*d* of MCM, 1969 (Rev.) and Fed. R. Crim. P. 14 to the extent that the latter applies to severance of codefendants. Note that the Government may also accomplish a severance by proper withdrawal of charges against one or more codefendants and rereferrals of these charges to another court-martial. *See* R.C.M. 604. The discussion is based on paragraph 69*d* of MCM, 1969 (Rev.).

Subsection (10) is new. It roughly parallels Fed. R. Crim. P. 14, but is much narrower because of the general policy in the military favoring trial of all known charges at a single court-martial. *See* R.C.M. 601(e) and discussion; *United States v. Keith*, 1 U.S.C.M.A. 442, 4 C.M.R. 34 (1952). Motions to sever charges have, in effect, existed through the policy in paragraph 26c of MCM, 1969 (Rev.), against joining minor and major offenses. *See, e.g., United States v. Grant*, 26 C.M.R. 692 (A.B.R. 1958). Although that provision has been eliminated, severance of offenses may still be appropriate in unusual cases. *See generally United States v. Gettz*, 49 C.M.R. 79 (N.C.M.R. 1974).

Subsection (11) is based generally on paragraph 69*e* of MCM, 1969 (Rev.) and on Fed. R. Crim. P. 21. *See United States v. Nivens, supra; United States v. Gravitt*, 5 U.S.C.M.A. 249, 17 C.M.R. 249 (1954). The constitutional requirement that the trial of a crime occur in the district in which the crime was committed (U.S. Const. Art. III, sec. 2, cl. 3; amend VI) does not

apply in the military. *Chenoweth v. VanArsdall*, 22 U.S.C.M.A. 183, 46 C.M.R. 183 (1973). Therefore, Fed. R. Crim. P. 21(b) is inapplicable. In recognition of this, and of the fact that the convening authority has an interest, both financial and operational, in fixing the place of the trial, the rule allows the situs of the trial to be set and changed for the convenience of the Government, subject to judicial protection of the accused's rights as they may be affected by that situs. *See United States v. Nivens, supra.*

Subsection (12) is based on paragraph 76*a*(5) of MCM, 1969 (Rev.). *See also* Analysis, R.C.M. 907(b)(3)(B) and Analysis, R.C.M. 1003(c)(1)(C).

Subsection (13) is new to the Manual, although motions *in limine* have been recognized previously. *See* Mil. R. Evid. 104(c); *United States v. Cofield*, 11 M.J. 422 (C.M.A. 1981); Siano, *Motions in Limine*, The Army Lawyer, 17 (Jan. 1976).

Subsection (14) is based on paragraph 69*f* of MCM, 1969 (Rev.). *See* Analysis, R.C.M. 706, R.C.M. 909, and Analysis, R.C.M. 916(k).

Rule 907. Motions to dismiss

(a) *In general.* This subsection is based on paragraphs 68 and 214 of MCM, 1969 (Rev.).

Fed. R. Crim. P. 48(a) is inapposite because the trial counsel may not independently request dismissal of charges, and unnecessary because the convening authority already has authority to withdraw and to dismiss charges. *See* R.C.M. 306(c)(1); 401(c)(1); 604.The matters contained in Fed. R. Crim. P. 48(b) are addressed by R.C.M. 707 and 907(b)(2)(A).

(b) *Grounds for dismissal.* This subsection lists common grounds for motions to dismiss. It is not intended to be exclusive. It is divided into three subsections. These correspond to nonwaivable (subsection (1) and waivable (subsections (2) and (3)) motions to dismiss (*see* R.C.M. 905(e) and analysis), and to circumstances which require dismissal (subsections (1) and (2)) and those in which dismissal is only permissible (subsection (3)).

Subsection (1) is based on paragraph 68*b* of MCM, 1969 (Rev.). *See also* Fed. R. Crim. P. 12(b)(2) and 34.

Subsection (2)(A) is based on paragraph 68*i* of MCM, 1969 (Rev.). *See also* 18 U.S.C. § 3162(a)(2). The rules for speedy trial are covered in R.C.M. 707.

Subsection (2)(B) is based on the first two paragraphs in paragraph 68*c* of MCM, 1969 (Rev.); *United States v. Troxell*, 12 U.S.C.M.A. 6, 30 C.M.R. 6 (1960); *United States v. Rodgers*, 8 U.S.C.M.A. 226, 24 C.M.R. 36 (1957). The discussion is based on paragraphs 68*c* and 215*d* of MCM, 1969 (Rev.). *See also United States v. Arbic*, 16 U.S.C.M.A. 292, 36 C.M.R. 448 (1966); *United States v. Spann*, 10 U.S.C.M.A. 410, 27 C.M.R. 484 (1959); *United States v. Reeves*, 49 C.M.R. 841 (A.C.M.R. 1975).

_____ *1986 Amendment*: The Discussion under subsection (b)(2)(B) was revised to reflect several amendments to Article 43, UCMJ, contained in the "Military Justice Amendments of 1986," tit. VIII, § 805, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____ , _____ (1986). These amendments were derived, in part, from Chapter 213 of Title 18, United States Code.

Subsection (2)(C) is based on paragraph 215*b* of MCM, 1969 (Rev.) and Article 44. *See also* paragraph 56 of MCM, 1969 (Rev.). Concerning the applicability to courts-martial of the double jeopardy clause (U.S. Const. amend. V), *see Wade v. Hunter*, 336 U.S. 684 (1949); *United States v. Richardson*, 21 U.S.C.M.A. 54, 44 C.M.R. 108 (1971). *See also United States v. Francis*, 15 M.J. 424 (C.M.A. 1983).

Subsection (2)(C)(i) is based on Article 44(c). The applicability of *Crist v. Bretz*, 437 U.S. 28 (1978) was considered. *Crist* held that, in jury cases, jeopardy attaches when the jury is empanelled and sworn. For reasons stated below, the Working Group concluded that the beginning of the presentation of evidence on the merits, which is the constitutional standard for nonjury trials (*Crist v. Bretz, supra* at 37 n. 15; *Serfass v. United States*, 420 U.S. 377 (1975)) and is prescribed by Article 44(c), is the proper cutoff point.

There is no jury in courts-martial. *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Ex parte Quirin*, 317 U.S. 1 (1942); *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3, (1964). *See also United States v. McCarthy*, 2 M.J. 26, 29 n.3 (C.M.A. 1976). Members are an essential jurisdictional element of a court-martial. *United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978). Historically the members, as an entity, served as jury *and* judge, or, in other words, as the "court." W. Winthrop, *Military Law and Precedents* 54—55, 173 (2d ed., 1920 reprint). Assembling the court-martial has not been the last step before trial on the merits. *See* paragraph 61*j* and appendix 8*b* of MCM, 1969 (Rev.); paragraph 61*h* and *i* and appendix 8*a* of MCM, 1951; paragraph 61 of MCM, 1949 (Army); paragraph 61 of MCM, 1928; W. Winthrop, *supra* at 205—80. Congress clearly contemplated that the members may be sworn at an early point in the proceedings. *See* Article 42(a); H. Rep. No. 491, 81st Cong. 1st Sess. 22 (1949).

The role of members has become somewhat more analogous to that of a jury. *See, e.g.*, Article 39(a). Nevertheless, significant differences remain. When they are present, the members with the military judge, constitute the court-martial and participate in the exercise of contempt power. Article 48. *See* R.C.M. 809 and analysis. Moreover, members may sit as a special court-martial without a military judge, in which case they exercise all judicial functions. Articles 19; 26; 40; 41; 51; 52.

The holding in *Crist* would have adverse practical effect if applied in the military. In addition to being unworkable in special court-martial without a military judge, it would negate the utility of Article 29, which provides that the assembly of the court-martial does not wholly preclude later substitution of members. This provision recognizes that military exigencies or other

unusual circumstances may cause a member to be unavailable at any stage in the court-martial. It also recognizes that the special need of the military to dispose of offenses swiftly, without necessary diversion of personnel and other resources, may justify continuing the trial with substituted members, rather that requiring a mistrial. This provision is squarely at odds with civilian practice with respect to juries and, therefore, with the rationale in *Crist*.

Subsection (2)(C)(ii) is based on paragraph 56 of MCM, 1969 (Rev.). *See also Wade v. Hunter, supra; United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). "Manifest necessity" is the traditional justification for a mistrial. *Id. See United States v. Richardson, supra. Cf.* Article 44(c), which does not prohibit retrial of a proceeding terminated on motion of the accused. *See also* Analysis, R.C.M. 915.

Subsection (2)(C)(iii) is taken from Article 44(b). *See United States v. Richardson, supra. See also* Article 63. *But see* R.C.M. 810(d).

Subsection (2)(C)(iv) is new. It is axiomatic that jeopardy does not attach in a proceeding which lacks jurisdiction. *Ball v. United States*, 163 U.S. 662 (1973). Therefore, if proceedings are terminated before findings because the court-martial lacks jurisdiction, retrial is not barred if the jurisdictional defect is corrected. For example, if during the course of trial it is discovered that the charges were not referred to the court-martial by a person empowered to do so, those proceedings would be terminated. This would not bar later referral of those charges by a proper official to a court-martial. *Cf. Lee v. United States*, 432 U.S. 23 (1977); *Illinois v. Somerville*, 410 U.S. 458 (1973). *See also United States v. Newcomb*, 5 M.J. 4 (C.M.A. 1977); *United States v. Hardy*, 4 M.J. 20 (C.M.A. 1977) authorizing re-referral of charges were earlier proceedings lacked jurisdiction because of defects in referral and composition). Res judicata would bar retrial by a court-martial for a jurisdictional defect which is not "correctable." *See, e.g.*, R.C.M. 202 and 203. *See also* R.C.M. 905(g).

By its terms, the rule permits a retrial of a person acquitted by a court-martial which lacks jurisdiction. The Court of Military Appeals decision in *United States v. Culver*, 22 U.S.C.M.A. 141, 46 C.M.R. 141 (1973) does not preclude this, although that decision raises questions concerning this result. There was no majority opinion in *Culver*. Judge Quinn held that the defect (absence of a written judge alone request) was not jurisdictional. In the alternative, Judge Quinn construed paragraph 81*d* of MCM, 1969 (Rev.) and the automatic review structure in courts-martial as precluding retrial on an offense of which the accused had been acquitted. (Note that R.C.M. 810(d), using slightly different language, continues the same policy of limiting the maximum sentence for offenses tried at an "other trial" to that adjudged at the earlier defective trial.) Judge Duncan, concurring in the result in *Culver*, found that although the original trial was jurisdictionally defective, the defect was not so fundamental as to render the proceedings void. In Judge Duncan's view, the original court-martial had jurisdiction when it began, but "lost" it when the request for military judge alone was not reduced to writing. Therefore, the double jeopardy clause of the Fifth Amendment and Article 44 barred the second trial for an offense of which the accused had been acquitted at the first. Chief Judge Darden dissented. He held that because the earlier court-martial lacked jurisdiction, the proceedings were void and did not bar the second trial. Thus in *Culver*, two judges divided over whether the double jeopardy clause bars a second trial for an offense of which the accused was acquitted at a court-martial which lacked jurisdiction because of improper composition. The third judge held retrial was barred on nonconstitutional grounds.

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 dougle 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.*

_____ *1986 Amendment*: The requirement that the accused prove lack of mental responsibility was added to implement Article 50a, which was added to the UCMJ in the "Military Justice Amendments of 1986," tit. VIII, § 802, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____, _____ (1986). Article 50a(b) adopted the provisions of 18 U.S.C. 20(b), created by the Insanity Defense Reform Act, ch. IV, Pub. L. No. 98-473, 98 Stat. 2057 (1984). *See generally Jones v. United States*, 463 U.S. 354, 103 S.Ct. 3043, 3051 n.17 (1983); *Leland v. Oregon*, 343 U.S. 790, 799 (1952); S. Rep. No. 225, 98th Cong., 1st Sess. 224-25 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 1, 226-27.

(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-Vergas*, 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).

_____ *1986 Amendment*: The test for lack of mental responsibility in subsection (1) was changed to implement Article 50a, which was added to the UCMJ in the "Military Justice Amendments of 1986," tit. VIII, 802, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____ , _____ (1986). Article 50a is modeled on 18 U.S.C. 20. *See* Insanity Defense Reform Act, ch. IV, Pub. L. No. 98-473, 98 Stat. 2057 (1984). The new test deletes the volitional prong of the American Law Institute's Model Penal Code standard (*see United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984) (en banc), *cert. denied*, 105 S. Ct. 323 (1985)), which was applied to courts-martial in *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977). The new standard also changes the quantity of mental disability necessary to establish the defense from "lacks substantial capacity to appreciate" to being "unable to appreciate." The new test is very similar to the test in *M'Naghten's Case*, 10 Cl. & F. 200, 8 Eng. Rep. 718 (House of Lords 1843). *See also* Carroll, *Insanity Defense Reform*, 114 Mil. L. Rev. 183 (1986).

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).

_____ *1986 Amendment*: Subsection (2) was amended to eliminate the defense of partial mental responsibility in conformance with Article 50a, which was added to the UCMJ in the "Military Justice Amendments of 1986," tit. VIII, 802, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____ , _____ (1986). Article 50a(a) is adopted from 18 U.S.C. 20(a). Congress wrote the last sentence of 18 U.S.C. 20(a) (now also the last sentence of Article 50a(a)) "to insure that the insanity defense is not improperly resurrected in the guise of showing some other affirmative defense, such as that the defendant had a 'diminished responsibility' or some similarly asserted state of mind which would serve to excuse the offense and open the door, once again, to needlessly confusing psychiatric testimony." S. Rep. No. 225, 98th Cong., 1st Sess. 229 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 1, 231. *See Muench v. Israel, 715 F. 2d 1124 (7th Cir. 1983), cert. denied*, 104 S.Ct. 2682 (1984); *State v. Wilcox*, 436 N.E.2d 523 (Ohio 1982).

Because the language of section 20(a) and its legislative history have been contended to be somewhat ambiguous regarding "diminished capacity" or "diminished responsibility," this aspect of the legislation has been litigated in Article III courts. *United States v. Pohlot*, Crim. No. 85-00354-01 (E.D. Pa. March 31, 1986) held that section 20(a) eliminated the defense of diminished capacity. *See also United States v. White*, 766 F.2d 22, 24-25 (1st Cir. 1985); U.S. DEPARTMENT OF JUSTICE, HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 AND OTHER CRIMINAL STATUTES ENACTED BY THE 98TH CONGRESS 58, 60 (December, 1984). *Contra United States v. Frisbee*, 623 F. Supp. 1217 (N.D. Cal. 1985) (holding that Congress did not intend to eliminate the defense of diminished capacity). *See also* Carroll, *Insanity Defense Reform*, 114 Mil. L. Rev. 183, 196 (1986). The drafters concluded that Congress intended to eliminate this defense in section 20(a).

Subsection (3)(A) and the discussion are based on paragraph 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.

_____ *1986 Amendment*: Subsection (3)(A) was amended to conform to Article 50a(b) and R.C.M. 916(b).

Subsection (3)(B) and the discussion are based on paragraph 122*b*(2) of MCM, 1969 (Rev.). The procedures for an inquiry into the mental responsibility of the accused are covered in R.C.M. 706.

Subsection (3)(C) is new. Article 51(b) prohibits a military judge from ruling finally on the factual question of mental responsibility. It does not, however, require that the question be treated as an interlocutory one, and there is no apparent reason for doing so. The import of Article 51(b) is that the issue of mental responsibility may not be removed from the factfinder. Moreover, to permit mental responsibility to be treated separately from other issues relating to the general issue could work to the detriment of the accused. *Cf. United States v. Laws*, 11 M.J. 475 (C.M.A. 1981).

(l) *Not defenses generally.*

Subsection (1) is based on the first sentence of paragraph 216*j* of MCM, 1969 (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).

_____ *1986 Amendment*: The provisions allowing for findings of not guilty only by reason of lack of mental responsibility were added to subsections (a)(1) and (2) to implement Article 50a(c), which was added to the UCMJ in the "Military Justice Amendments of 1986," tit. VIII, 802, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____, _____ (1986). This finding is modeled after 18 U.S.C. 4242(b)(3), section 403 of the Insanity Defense Reform Act, ch. IV, Pub. L. No. 98-473, 98 Stat. 2057, 2059. The drafters intend that adoption of the finding of "not guilty only by reason of lack of mental responsibility" does not require conformance to the procedures that follow an insanity acquittal in Federal courts (*see* 18 U.S.C. 4243 *et. seq.*). The Services are free to use available medical and administrative procedures which address disposition of servicemembers having psychiatric illnesses. The drafters further intend that, for purposes of subsequent appellate and other legal reviews under this Manual, a finding of "not guilty only by reason of lack of mental responsibility" shall be treated as any other acquittal.

(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 accused 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*, 468 U.S. 447 (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).

_____ *1986 Amendment*: Subsection (e)(5)(D) was amended to conform to amendments to R.C.M. 916(b).

(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.).

_____ *1986 Amendment*: Subsections (4) and (5) were redesignated as subsections (5) and (6) and a new subsection (4) was inserted. New subsection (4) is based on Article 50a(e) and provides for bifurcated voting on the elements of the offense and on mental responsibility, and defines the procedures for arriving at a finding of not guilty only by reason of lack of mental responsibility. When the prosecution had the burden of proving mental responsibility beyond a reasonable doubt, the same as the burden regarding the elements of the offense, the members were unlikely to confuse the two general issues. Without any procedure for bifurcated voting under the 198 amendment, substantial confusion might result if the members were required to simultaneously vote on whether the defense has proven lack of mental responsibility by clear and convincing evidence, and whether the prosecution has proven the elements of the offense beyond a reasonable doubt. Each issue might result in a different number of votes. Bifurcated voting is also necessary to provide the finding of "not guilty only by reason of lack of mental responsibility" provided for in R.C.M. 918(a). *But see* Carroll, *Insanity Defense Reform*, 114 Mil. L. Rev. 183, 216 (1986).

Subsection (4) is new to the Manual but it conforms to practice generally followed in courts-martial. Paragraph 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 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 Practice 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*, 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).

_____ *1986 Amendment*: R.C.M. 924(b) was amended in conjunction with the adoption in R.C.M. 921(c)(4) of bifurcated voting on lack of mental responsibility. It is also necessary to bifurcate the vote on reconsideration to retain the relative burdens for reconsideration and to prevent prejudice to the accused.

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

_____ *1986 Amendment*: The words "all those records" were changed to "any records" to implement more clearly the drafters' original intent. According to the paragraph just above, the drafters "intended to avoid the result reached in *United States v. Morgan*," *supra*, by allowing the trial counsel to offer only such records as he or she desired to offer. In *Morgan*, the court held that, when the trial counsel offered adverse documents from the accused's service record, the "rule of completeness" under Mil. R. Evid. 106 required that he offer all documents from that record.

Subsection (3) deletes the exclusion of convictions more than 6 years old. No similar restriction applies to consideration of prior convictions at sentencing proceedings in Federal civilian courts. There is no reason to forbid their consideration by courts-martial, subject to Mil. R. Evid. 403.

Subsection (3) also eliminates the requirement that a conviction be final before it may be considered by the court-martial on sentencing. No similar restriction applies in Federal civilian courts. This subsection parallels Mil. R. Evid. 609. An exception is provided for summary courts-martial and special courts-martial without a military judge. *See* Analysis, Mil. R. Evid. 609. Whether the adjudication of guilt in a civilian forum is a conviction will depend on the law in that jurisdiction.

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 stipulation of fact permits nonproduction. *See United States v. Gonzalez*, 16 M.J. 58 (C.M.A. 1983).

(f) *Additional matters to be considered.* This subsection is based on the third and fourth sentences of paragraph 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 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 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.

_____ *1986 Amendment*: Subsection (c)(3) was redesignated as subsection (c)(4) and new subsection (c)(3) was added to reflect the legislative restrictions placed upon punishment of reserve component personnel in certain circumstances in the amendment to Article 2, UCMJ, contained in the "Military Justice Amendments of 1986," tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____, _____ (1986).

(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 filed*, 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*

(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 (l). 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 mililtary 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 if 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 ensures 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 serve 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).

_____ *1986 Amendment*: Subsection (c) was revised to reflect amendments to Article 60, UCMJ, in the "Military Justice Amendments of 1986," tit. VIII, § 806, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat._____ , _____ (1986). These amendments simplify post-trial submissions by setting a simple baseline for calculating the time for submissions.

(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.

(c) *When the convening authority does not have a staff judge advocate or legal officer or that person is disqualified.* Subsection (1) is based on the third paragraph of paragraph 85*a* of MCM, 1969 (Rev.). Legal officers have been included in its application based on Article 60(d). Subsection (2) is new. It recognizes the advantages of having the recommendation prepared by a staff judge advocate. This flexibility should also permit more prompt disposition in some cases as well.

(d) *Form and content of recommendation.* This subsection is based on Article 60(d) and on S. Rep. No. 53, 98th Cong., 1st Sess. 20 (1983). As to the subsection (1), *see also* Article 60(c). Subsections (3), (4), and (5) conform to the specific guidance in S. Rep. No. 53, *supra*. Subsection (6) is based on S. Rep. No. 53, 98th Cong., 1st Sess. 21 (1983). The recommendation should be a concise statement of required and other matters. Summarization of the evidence and review for legal error is not required. Therefore paragraph 85*b* of MCM, 1969 (Rev.) is deleted.

Paragraph 85*c* of MCM, 1969 (Rev.) is also deleted. That paragraph stated that the convening authority should explain any decision not to follow the staff judge advocate's recommendation. *See also United States v. Harris*, 10 M.J. 276 (C.M.A. 1981); *United States v. Dixson*, 9 M.J. 72 (C.M.A. 1980); *United States v. Keller*, 1 M.J. 159 (C.M.A. 1976). The convening authority is no longer required to examine the record for legal or factual sufficiency. The convening authority's action is solely a matter of command prerogative. Article 60(c). Therefore the convening authority is not obligated to explain a decision not to follow the recommendation of the staff judge advocate or legal officer.

(e) *No findings of guilty.* This subsection is based on Articles 60 and 63. When no findings of guilty are reached, no action by the convening authority is required. Consequently, no recommendation by the staff judge advocate or legal officer is necessary. The last paragraph of paragraph 85*b* of MCM, 1969 (Rev.), which was based on Article 61 (before it was amended), was similar.

(f) *Service of recommendation on defense counsel; defense response.* This subsection is based on Article 60(d). *See also United States v. Goode*, 1 M.J. 3 (C.M.A. 1975).

Subsection (1) is based on Article 60(d). *See also United States v. Hill*, 3 M.J. 295 (C.M.A. 1977); *United States v. Goode, supra.*

Subsection (2) makes clear who is to be served with the post-trial review. *See United States v. Robinson*, 11 M.J. 218, 223 n.2 (C.M.A. 1981). This issue has been a source of appellate litigation. *See e.g., United States v. Kincheloe*, 14 M.J. 40 (C.M.A. 1982); *United States v. Babcock*, 14 M.J. 34 (C.M.A. 1982); *United States v. Robinson, supra; United States v. Clark*, 11 M.J. 70 (C.M.A. 1981); *United States v. Elliot*, 11 M.J. 1 (C.M.A. 1981); *United States v. Marcoux*, 8 M.J. 155 (C.M.A. 1980); *United States v. Brown*, 5 M.J. (C.M.A. 1978); *United States v. Davis*, 5 M.J. 451 (C.M.A. 1978); *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978); *United States v. Annis*, 5 M.J. (C.M.A. 1978). The last sentence in this subsection is based on *United States v. Robinson, United States v. Brown*, and *United States v. Iverson*, all *supra*. The discussion is based on *United States v. Robinson, supra*.

Subsection (3) is based on *United States v. Babcock, supra; United States v. Cruz*, 5 M.J. 286 (C.M.A. 1978); *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976). Ordinarily the record will have been provided to the accused under R.C.M. 1104(b).

Subsections (4) and (5) are based on Article 60(d). *See also United States v. Goode, supra. See United States v. McAdoo*, 14 M.J. 60 (C.M.A. 1982).

_____ *1986 Amendment*: Subsection (5) was amended to reflect amendments to Article 60, UCMJ, in the "Military Justice Amendments of 1986," tit. VIII, § 806, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____, _____ (1986). *See* Analysis to R.C.M. 1105(c).

Subsection (6) is based on Article 60(d). *See also* S. Rep. No. 53, 98th Cong., 1st Sess. 21 (1983); *United States v. Morrison, supra; United States v. Barnes*, 3 M.J. 406 (C.M.A. 1982); *United States v. Goode, supra. But see United States v. Burroughs, supra; United States v. Moles*, 10 M.J. 154 (C.M.A. 1981) (defects not waived by failure to comment).

Subsection (7) is based on *United States v. Narine*, 14 M.J. 55 (C.M.A. 1982).

Rule 1107. Action by convening authority

(a) *Who may take action.* This subsection is based on Article 60(c). It is similar to the first sentence of paragraph 84*b* and the first sentence of paragraph 84*c* of MCM, 1969 (Rev.) except insofar as the amendment of Article 60 provides otherwise. *See* Military Justice Act of 1983, Pub. L. No. 98-209, § 5(a)(1), 97 Stat. 1393 (1983). The first paragraph in the discussion is based on the last two sentences of paragraph 84*a* of MCM, 1969 (Rev.). The second paragraph of the discussion is based on the second and third sentences of paragraph 84*c* of MCM, 1969 (Rev.); *United States v. Conn*, 6 M.J. 351 (C.M.A. 1979); *United States v. Reed*, 2 M.J. 64 (C.M.A. 1976); *United States v. Choice*, 23 U.S.C.M.A. 329, 49 C.M.R. 663 (1975). *See also United States v. James*, 12 M.J. 944 (N.M.C.M.R.), *pet. granted*, 14 M.J. 235 (1982). The reference in the third sentence of paragraph 84*c* of MCM, 1969 (Rev.) to disqualification of a convening authority because the convening authority granted immunity to a witness has been deleted. *See United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). Note that although *Newman* held that a convening authority is not automatically disqualified from taking action by reason of having granted immunity, the Court indicated that a convening authority may be disqualified by granting immunity under some circumstances.

(b) *General considerations.* Subsection (1) and the discussion is based on Article 60(c). *See also* S. Rep. No. 53, 98th Cong., 1st Sess. 19 (1983).

Subsection (2) is based on Article 60(b) and (c).

Subsection (3)(A)(i) is based on Article 60(a). Subsection (3)(A)(ii) is based on Article 60(d). Subsection (3)(A)(iii) is based on Article 60(b) and (d). Subsection (3)(B) is based on Article 60 and on S. Rep. No. 53, 98th Cong., 1st Sess. 19-20 (1983). The second sentence in subsection (3)(B)(iii) is also based on the last sentence of paragraph 85*b* of MCM, 1969 (Rev.). *See also United States v. Vara*, 8 U.S.C.M.A. 651, 25 C.M.R. 155 (1958); *United States v. Lanford*, 6 U.S.C.M.A. 371, 20 C.M.R. 87 (1955).

Subsection (4) is based on Article 60(c)(3). *See also* Article 60(e)(3). This subsection is consistent with paragraph 86*b*(2) of MCM, 1969 (Rev.) except that it does not refer to examining the record for jurisdictional error.

Subsection (5) is based on the second paragraph of paragraph 124 of MCM, 1969 (Rev.). *See also United States v. Korzeniewski*, 7 U.S.C.M.A. 314, 22 C.M.R. 104 (1956); *United States v. Washington*, 6 U.S.C.M.A. 114, 19 C.M.R. 240 (1955); *United States v. Phillips*, 13 M.J. 858 (N.M.C.M.R. 1982).

_____ *1986 Amendment*: The fourth sentence of subsection (b)(5) was amended to shift to the defense the burden of showing the accused's lack of mental capacity to cooperate in post-trial proceedings. This is consistent with amendments to R.C.M. 909(c)(2) and R.C.M. 916(k)(3)(A) which also shifted to the defense the burden of showing lack of mental capacity to stand trial and lack of mental responsibility. The second sentence was added to establish a presumption of capacity and the third sentence was amended to allow limitation of the scope of the sanity board's examination. The word "substantial" is used in the second and third sentences to indicate that considerably more credible evidence than merely an allegation of lack of capacity is required before further inquiry need by made. *Ford v. Wainwright*, 477 U.S. ____ , 106 S.Ct. 2595, 2610 (1986) (Powell, J., concurring).

(c) *Action on findings.* This subsection is based on Article 60(c)(2). Subsection (2)(B) is also based on Article 60(e)(1) and (3). The first sentence in the discussion is based on *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*; 81st Cong., 1st Sess. 1182-85 (1949). The second sentence in the discussion is based on Article 60(e)(3). The remainder of the discussion is based on S. Rep. No. 53, 98th Cong., 1st Sess. 21 (1983).

(d) *Action on the sentence.* Subsection (1) is based on Article 60(c) and is similar to the first paragraph of paragraph 88*a* of MCM, 1969 (Rev.). The first paragraph of the discussion is based on paragraph 88*a* of MCM, 1969 (Rev.). The second paragraph of the discussion is based on *Jones v. Ignatius*, 18 U.S.C.M.A. 7, 39 C.M.R. 7 (1968); *United States v. Brown*, 13 U.S.C.M.A. 333, 32 C.M.R. 333 (1962); *United States v. Prow*, 13 U.S.C.M.A. 63, 32 C.M.R. 63 (1962); *United States v. Johnson*, 12 U.S.C.M.A. 640, 31 C.M.R. 226 (1962); *United States v. Christenson*, 12 U.S.C.M.A. 393, 30 C.M.R. 393 (1961); *United States v. Williams*, 6 M.J. 803 (N.C.M.R.), *pet. dismissed*, 7 M.J. 68 (C.M.A. 1979); *United States v. Berg*, 34 C.M.R. 684 (N.B.R. 1963). *See also United States v. McKnight*, 20 C.M.R. 520 (N.B.R. 1955).

Subsection (2) is based on Article 60(c) and S. Rep. No. 53, 98th Cong., 1st Sess. 19 (1983). The second sentence is also based on *United States v. Russo*, 11 U.S.C.M.A. 352, 29 C.M.R. 168 (1960). The second paragraph of the discussion is based on the third paragraph of paragraph 88*b* of MCM, 1969 (Rev.).

Subsection (3) is based on Articles 19 and 54(c)(1) and on the third sentence of paragraph 82*b*(1) of MCM, 1969 (Rev.).

(e) *Ordering rehearing or other trial.* Subsection (1)(A) is based on Article 60(e), and on paragraph 92*a* of MCM, 1969 (Rev.). Note that the decision of the convening authority to order a rehearing is discretionary. The convening authority is not required to review the record for legal errors. Authority to order a rehearing is, therefore, "designed solely to provide an expeditious means to correct errors that are identified in the course of exercising discretion under Article 60(c)." S. Rep. No. 53, 98th Cong., 1st Sess. 21 (1983). Subsection (1)(B) is based on Article 60(e). As to subsection (1)(B)(ii), *see* S. Rep. No. 53, *supra* at 22. Subsection (1)(B)(ii) is based on the second sentence of the second paragraph of paragraph 92*a* of MCM, 1969 (Rev.). The discussion is based on the second sentence of the fourth paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Subsection (1)(C)(i) is based on Article 62(e)(3) and on the first sentence of the third paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Subsection (1)(C)(ii) and the discussion are based on Article 60(e)(3) and on the first paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Subsection (1)(C)(ii) is based on the first sentence of the tenth paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Subsection (1)(D) is based on the sixth paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Subsection (1)(E) is based on the eighth paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Subsection (1)(F) is based on the third sentence of the third paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Because of the modification of Article 71 (*see* R.C.M. 1113) and because the convening authority may direct a rehearing after action in some circumstances (*see* subsection (e)(1)(B)(ii) of this rule), the language is

modified. The remaining parts of paragraph 92*a*, concerning procedures for a rehearing, are now covered in R.C.M. 810.

Subsection (2) is based on paragraph 92*b* of MCM, 1969 (Rev.). *See also* paragraph 89*c*(1) of MCM, 1969 (Rev.). If the accused was acquitted of a specification which is later determined to have failed to state an offense, another trial for the same offense would be barred. *United States v. Ball*, 163 U.S. 662 (1896). It is unclear whether an acquittal by a jurisdictionally defective court-martial bars retrial. *See United States v. Culver*, 22 U.S.C.M.A. 141, 46 C.M.R. 141 (1973).

(f) *Contents of action and related matters.* Subsection (1) is based on paragraph 89*a* of MCM, 1969 (Rev.).

Subsection (2) is based on paragraph 89*b* of MCM, 1969 (Rev.). The second sentence is new. It is intended to simplify the procedure when a defect in the action is discovered in Article 65(c) review. There is no need for another authority to formally act in such cases if the convening authority can take corrective action. The accused cannot be harmed by such action. A convening authority may still be directed to take corrective action when necessary, under the third sentence. "Erroneous" means clerical error only. *See* subsection (g) of this rule. This new sentence is not intended to allow a convening authority to change a proper action because of a change of mind.

Subsection (3) is based on paragraph 89*c*(2) of MCM, 1969 (Rev.) The provision in paragraph 89*c*(2) of MCM, 1969 (Rev.) that disapproval of the sentence also constitutes disapproval of the findings unless otherwise stated is deleted. The convening authority must expressly indicate which findings, if any, are disapproved in any case. *See* Article 60(c)(3). The discussion is based on paragraph 89*c*(2) of MCM, 1969 (Rev.). Subsection (4)(A) is based on paragraph 89*c*(3) of MCM, 1969 (Rev.). The first sentence of paragraph 89*c*(2) is no longer accurate. Since no action on the findings is required, any disapproval of findings must be expressed. Subsection (4)(B) is taken from paragraph 89*c*(4) of MCM, 1969 (Rev.). Subsection (4)(C) is taken from paragraph 89*c*(5) of MCM, 1969 (Rev.). Subsection (4)(D) is based on paragraph 89*c*(6) of MCM, 1969 (Rev.). However, because that portion of the sentence which extends to confinement may now be ordered executed when the convening authority takes action (*see* Article 71(c)(2); R.C.M. 1113(b)), temporary custody is unnecessary in such cases. Therefore, this subsection applies only when death has been adjudged and approved. Subsection (4)(E) is taken from paragraph 89*c*(7) of MCM, 1969 (Rev.). Subsection (4)(F) is new. *See* Analysis, R.C.M. 305(k). *See also United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983). Subsection (4)(G) is taken from paragraph 89*c*(9) of MCM, 1969 (Rev.). Subsection (4)(H) is modified based on the amendment of Article 71 which permits a reprimand to be ordered executed from action, regardless of the other components of the sentence. Admonition has been deleted. *See* R.C.M. 1003(b)(1).

Subsection (5) is based on paragraph 89*c*(8) of MCM, 1969 (Rev.). *See also* R.C.M. 810(d) and Analysis. The provision in paragraph 89*c*(8) requiring that the accused be credited with time in confinement while awaiting a rehearing is deleted. Given the procedures for imposition and continuation of restraint while awaiting trial (*see* R.C.M. 304 and 305), there should not be a credit simply because the trial is a rehearing.

(g) *Incomplete, ambiguous, or erroneous action.* This subsection is based on paragraph 95 of MCM, 1969 (Rev.). *See generally United States v. Loft*, 10 M.J. 266 (C.M.A. 1981); *United States v. Lower*, 10 M.J. 263 (C.M.A. 1981).

(h) *Service on accused.* This subsection is based on Article 61(a), *as amended, see* Military Justice Act of 1983, Pub. L. No. 98-209, § 5(b)(1), 97 Stat. 1393 (1983).

Rule 1108. Suspension of execution of sentence

This rule is based on Articles 71(d) and 74, and paragraphs 88*e* and 97*a* of MCM, 1969 (Rev.). *See also* Fed. R. Crim. P. 32(e). The second paragraph of the discussion to subsection (b) is based on *United States v. Stonesifer*, 2 M.J. 212 (C.M.A. 1977); *United States v. Williams*, 2 M.J. 74 (C.M.A. 1976); *United States v. Occhi*, 2 M.J. 60 (C.M.A. 1976). Subsection (c) is new and based on Article 71; *United States v. Lallande*, 22 U.S.C.M.A. 170, 46 C.M.R. 170 (1973); *United States v. May*, 10 U.S.C.M.A. 258, 27 C.M.R. 432 (1959). Cf. 18 U.S.C. § 3651 ("upon such terms and conditions as the court deems best"). The notice provisions are designed to facilitate vacation when that becomes necessary. *See* the Analysis, R.C.M. 1109. The language limiting the period of suspension to the accused's current enlistment has been deleted. *See United States v. Thomas*, 45 C.M.R. 908 (N.C.M.R. 1972). *Cf. United States v. Clardy*, 13 M.J. 308 (C.M.A. 1982). *See also* subsection (e) of this rule.

Rule 1109. Vacation of suspension of sentence

(a) *In general.* This subsection is based on Article 72 and paragraph 97*b* of MCM, 1969 (Rev.).

(b) *Timeliness.* This subsection is based on the fourth paragraph of paragraph 97*b* of MCM, 1969 (Rev.); *United States v. Pells*, 5 M.J. 380 (C.M.A. 1978); *United States v. Rozycki*, 3 M.J. 127, 129 (C.M.A. 1977).

(c) *Confinement of probationer pending vacation proceedings.* This subsection is new and based on *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *United States v. Bingham*, 3 M.J. 119 (C.M.A. 1977). It is consistent with Fed. R. Crim. P. 32.1(a)(1). Note that if the actual hearing on vacation under subsection (d)(1) or (e)(3) and (4) is completed within the specified time period, a separate probable cause hearing need not be held.

(d) *Violation of suspended general court-martial sentence or of a suspended court-martial sentence including a bad-conduct discharge.* This subsection is based on Article 72(a) and (b); the first two paragraphs of paragraph 97*b* of MCM, 1969 (Rev.); *United States v. Bingham, supra; United States v. Rozycki, supra. See also* Fed. R. Crim. P. 32.1(a)(2).

(e) *Vacation of suspended special court-martial sentence not including a bad-conduct discharge or of a suspended summary court-martial sentence.* This subsection is based on Article 72(c); *United States v. Bingham, supra; United States v. Rozycki, supra.*

Fed. R. Crim. P. 32.1(b) is not adopted. That rule requires a hearing before conditions of probation may be modified. Modification is seldom used in the military. Because a probationer may be transferred or change duty assignments as a normal incident of military life, a commander should have the flexibility to make appropriate changes in conditions of probation without having to conduct a hearing. This is not intended to permit conditions of probation to be made substantially more severe without due process. At a minimum, the probationer must be notified of the changes.

_____ *1986 Amendment*: Several amendments were made to R.C.M. 1109 to specify that the notice to the probationer concerning the vacation proceedings must be in writing, and to specify that the recommendations concerning vacation of the suspension provided by the hearing officer must also be in writing. *Black v. Romano*, 471 U.S. _____, 105 S.Ct. 2254 (1985). Several references to "conditions of probation" were changed to "conditions of suspension" for consistency of terminology.

Rule 1110. Waiver or withdrawal of appellate review

Introduction. This rule is new and is based on Article 61, as amended, *see* Military Justice Act of 1983, Pub. L. No. 98-209, § 5(b)(1), 97 Stat. 1393 (1983). The rule provides procedures to ensure that a waiver or withdrawal of appellate review is a voluntary and informed choice. *See also* Appendices 19 and 20 for forms. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 22-23 (1983).

(a) *In general.* This subsection is based on Article 61. The discussion is also based on Articles 64 and 69(b).

(b) *Right to counsel.* This subsection is based on Article 61(a). Although Article 61(b) does not expressly require the signature of defense counsel as does Article 61(a), the same requirements should apply. Preferably counsel who represented the accused at trial will advise the accused concerning waiver, the appellate counsel (if one has been appointed) will do so concerning withdrawal. This subsection reflects this preference. It also recognizes, however, that this may not always be practicable; for example, the accused may be confined a substantial distance from counsel who represented the accused at trial when it is time to decide whether to waive or withdraw appeal. In such cases, associate counsel may be detailed upon request by the accused. *See* R.C.M. 502(d)(1) as to the qualification of defense counsel. Associate counsel is obligated to consult with at least one of the counsel who represented the accused at trial. In this way the accused can have the benefit of the opinion of the trial defense counsel even if the defense counsel is not immediately available. Subsection (2)(C) provides for the appointment of substitute counsel when, for the limited reasons in R.C.M. 505(d)(2)(B), the accused is no longer represented by any trial defense counsel. Subsection (3) contains similar provisions concerning withdrawal of an appeal. Note that if the case is reviewed by the Judge Advocate General, there would be no appellate counsel. In such cases, subsection (3)(C) would apply. Subsection (6) clarifies that here, as in other circumstances, a face-to-face meeting between the accused and counsel is not required. When necessary, such communication may be by telephone, radio, or similar means. *See also* Mil. R. Evid. 511(b). The rule, including the opportunity for appointment of associate counsel, is intended to permit face-to-face consultation with an attorney in all but the most unusual circumstances. Face-to-face consultation is strongly encouraged, especially if the accused wants to waive or withdraw appellate review.

(c) *Compulsion, coercion, inducement prohibited.* This subsection is intended to ensure that any waiver or withdrawal of appellate review is voluntary. *See* S. Rep. No. 53, *supra* at 22-23; *Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 1st Sess. 78, 128 (1982); *United States v. Mills*, 12 M.J. 1 (C.M.A. 1981). *See also* R.C.M. 705(c)(1)(B).

(d) *Form of waiver or withdrawal.* This subsection is based on Article 60(a) and on S. Rep. No. 53, *supra* at 23. Requiring not only the waiver but a statement, signed by the accused, that the accused has received essential advice concerning the waiver and that it is voluntary should protect the Government and the defense counsel against later attacks on the adequacy of counsel and the validity of the waiver or withdrawal.

(e) *To whom submitted.* Subsection (l) is based on Article 60(a). Article 60(b) does not establish where a withdrawal is filed. Subsection (2) establishes a procedure which should be easy for the accused to use and which ensures the withdrawal will be forwarded to the proper authority. A waiver or withdrawal of appeal is filed with the convening authority or authority exercising general court-martial jurisdiction for administrative convenience. *See* Hearings on S. 2521, *supra* at 31.

(f) *Time limit.* Subsection (1) is based on Article 60(a). Subsection (2) is based on Article 60(b). *See also* subsection (g)(3) and Analysis, below.

(g) *Effect of waiver of withdrawal, substantial compliance required.* Subsection (1) is based on Article 60(c). Subsections (2) and (3) are based on Article 64. Subsection (3) also recognizes that, once an appeal is filed (i.e., not waived in a timely manner) there may be a point at which it may not be withdrawn as of right. *Cf.* Sup. Ct. R. 53; Fed. R. App. P. 42; *Hammett v. Texas*, 448 U.S. 725 (1974); *Shellman v. U.S. Lines, Inc.*, 528 F. 2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976). Subsection (4) is intended to protect the integrity of the waiver or withdrawal procedure by ensuring compliance with this rule. The accused should be notified promptly if a purported waiver or withdrawal is defective.

Rule 1111. Disposition of the record of trial after action

This rule is based generally on paragraph 91 of MCM, 1969 (Rev.), but is modified to conform to the accused's right to waive or withdraw appellate review and to the elimination of supervisory review and of automatic review of cases affecting

general and flag officers. *See* Articles 61, 64, 65, 66(b). Some matters in paragraph 91 of MCM, 1969 (Rev.) are covered in other rules. *See* R.C.M. 1103(b)(3)(F); 1104(b)(1)(B).

Rule 1112. Review by a judge advocate

This rule is based on Articles 64 and 65(b), *as amended, see* Military Justice Act of 1983, Pub. L. No. 98-209, §§ 6(d)(1), (7)(a)(1), 97 Stat. 1393 (1983).

_____ *1986 Amendment*: The last paragraph of R.C.M. 1112(d) was added to clarify the requirement that a copy of the judge advocate's review be attached to the original and each copy of the record of trial. The last paragraph of R.C.M. 1112(e), which previously contained an equivalent but ambiguous requirement, was deleted.

Rule 1113. Execution of sentences

Introduction. Fed. R. Crim. P. 38 is inapplicable. The execution of sentences in the military is governed by the code. *See* Articles 57 and 71. *See also* Articles 60, 61, 64, 65, 66, and 69.

(a) *In general.* This subsection is based on Article 71(c)(2) and the first paragraph of paragraph 98 of MCM, 1969 (Rev.). *See also* Articles 60, 61, 64, 65, 66, and 67.

(b) *Punishments which the convening authority may order executed in the initial action.* This subsection is based on Article 71(d). *See also* the first paragraph of paragraph 88*d*(1) of MCM, 1969 (Rev.). Note that under the amendment of Article 71 (*see* Pub. L. No. 98-209, § 5(e), 97 Stat. 1393 (1983)), the convening authority may order parts of a sentence executed in the initial action, even if the sentence includes other parts (e.g., a punitive discharge) which cannot be ordered executed until the conviction is final.

(c) *Punishments which the convening authority may not order executed in the initial action.* This subsection is based on the sources noted below. The structure has been revised to provide clearer guidance as to who may order the various types of punishments executed. Applicable services regulations should be consulted, because the Secretary concerned may supplement this rule, and may under Article 74(a) designate certain officials who may remit unexecuted portions of sentences. *See also* R.C.M. 1206.

Subsection (1) is based on Article 71(c). *See also* Article 64(c)(3). The last two sentences of this subsection are based on S. Rep. No. 53, 98th Cong., 1st Sess. 25 (1983).

Subsection (2) is based on Article 71(b).

Subsection (3) is based on Articles 66(b), 67(b)(1), and 71(a).

(d) *Other considerations concerning execution of sentences.* Subsection (1) is based on the third paragraph of paragraph 126*a* of MCM, 1969 (Rev.). The second paragraph of paragraph 88*d*(1) of MCM, 1969 (Rev.) is deleted as unnecessary.

_____ *1986 Amendment*: Subsection (d)(1)(B) was added to incorporate the holding in *Ford v. Wainwright*, 477 U.S. _____, 106 S.Ct. 2595 (1986). The plurality in *Ford* held that the Constitution precludes executing a person who lacks the mental capacity to understand either that he will be executed or why he will be executed. *See also United States v. Washington*, 6 U.S.C.M.A. 114, 119, 19 C.M.R. 240, 245 (1955). The Court also criticized the procedures specified by Florida law used to determine whether a person lacks such capacity because the accused was provided no opportunity to submit matters on the issue of capacity, but the case is unclear as to what procedures would suffice.

Because of this ambiguity, the drafters elected to provide for a judicial hearing, with representation for the government and the accused. This is more than adequate to meet the due process requirements of *Ford v. Wainwright*.

The word "substantial" is used in the third sentence to indicate that considerably more credible evidence than merely an allegation of lack of capacity is required before further inquiry need be made. *Ford v. Wainwright*, 477 U.S. _____, 106 S.Ct. 2595, 2610 (1986) (Powell, J., concurring). The burden of showing the accused's lack of mental capacity is on the defense when the issue is before the court for adjudication. This is consistent with amendments to R.C.M. 909(c)(2) and R.C.M. 916(k)(3)(A) which shifted to the defense the burden of showing lack of mental capacity to stand trial and lack of mental responsibility. The rule also establishes a presumption of capacity and allows limits on the scope of the sanity board's examination.

Subsection (2)(A) is based on Articles 14 and 57(b) and paragraph 97*c* of MCM, 1969 (Rev.). *See also* paragraph 126*j* of MCM, 1969 (Rev.). Subsection (2)(B) is based on Article 58(b) and the third paragraph of paragraph 126*j* of MCM, 1969 (Rev.). Subsection (2)(C) is based on Article 58(a) and paragraph 93 of MCM, 1969 (Rev.). Note that if the Secretary concerned so prescribes, the convening authority need not designate the place of confinement. Because the plate of confinement is determined by regulations in some services, the convening authority's designation is a pro forma matter in such cases. The penultimate sentence in subsection (2)(C) is based on Article 12 and on paragraph 125 of MCM, 1969 (Rev.). The last sentence in subsection (2)(C) is based on 10 U.S.C. § 951. See the second paragraph of paragraph 18*b*(3) of MCM, 1969 (Rev.).

Subsection (3) is based on paragraph 126*h*(3) of MCM, 1969 (Rev.), but it is modified to avoid constitutional problems. *See Bearden v. Georgia*, 461 U.S. 660 (1983); *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970). *See also United States v. Slubowski*, 5 M.J. 882 (N.C.M.R. 1978), *aff'd*, 7 M.J. 461 (1979); *United States v. Vinyard*, 3 M.J. 551 (A.C.M.R.), *pet. denied*, 3 M.J. 207 (1977); *United States v. Donaldson*, 2 M.J. 605 (N.C.M.R. 1977), *aff'd*, 5 M.J. 212 (1978); *United States v. Martinez*, 2 M.J. 1123 (C.G. C.M.R. 1976); *United States v. Kehrli*, 44 C.M.R. 582 (A.F.C.M.R.

1971), *pet. denied*, 44 C.M.R. 940 (1972); *ABA Standards, Sentencing Alternatives and Procedures* § 18-2.7 (1979).

Subsection (4) is new. *See* Article 57(c).

Subsection (5) is based on the last paragraph of paragraph 125 of MCM, 1969 (Rev.).

Paragraph 88*d*(3) of MCM, 1969 (Rev.) is deleted based on the amendment of Articles 57(a) and 71(c)(2) which eliminated the necessity for application or deferment of forfeitures. Forfeitures always may be ordered executed in the initial action.

Rule 1114. Promulgating orders

(a) *In general.* Subsections (1) and (2) are based on the first paragraph of paragraph 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.

_____*1986 Amendment*: Subsection (b)(2) was amended to clarify that actions taken subsequent to the initial action may also comprise the supplementary order. Section (c) was amended to simplify and shorten court-martial orders. *See* revisions to Appendix 17.

CHAPTER XII. APPEALS AND REVIEW

Rule 1201. Action by the Judge Advocate General

(a) *Cases required to be referred to a Court of Military Review.* This subsection is based on Article 66(b).

(b) *Cases reviewed by the Judge Advocate General.* Subsection (1) is based on Article 69(a). Subsection (2) is based on Article 64(b)(3) and Article 69(b). Subsection (3) is based on Article 69(b). Subsection (4) is based on Article 69(c). Subsection (b) is similar to paragraph 103 and the first two paragraphs of paragraph 110A of MCM, 1969 (Rev.) except insofar as the amendments of Articles 61, 64, and 69 dictate otherwise. *See* Military Justice Act of 1983, Pub. L. No. 98-209, §§ 4(b), 7(a), (e), 97 Stat. 1393 (1983). The last paragraph of paragraph 110A of MCM, 1969 (Rev.) was deleted as unnecessary.

_____*1986 Amendment*: Subsection (b)(3)(A) was changed to conform to the language of Article 69(b), as enacted by the Military Justice Act of 1983, which precludes review of cases previously reviewed under Article 69(a).

(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*, 599 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 an 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*, 411 F.2d 622 (2d Cir. 1975), *cert. denied*, 422 U.S. 1042 (1976).

(c) *Action on cases reviewed by a Court of Military Review.* Subsection (1) is based on Article 67(b)(2). *See also* paragraph 100*b*(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.

1986 Amendment: Subsection (5) is based on the second paragraph of paragraph 124 of MCM, 1969 (Rev.). The fourth sentence is based, in part, on *United States v. Williams*, 18 M.J. 533 (A.F.C.M.R. 1984). *See also United States v. Korzeniewski*, 7 U.S.C.M.A. 314, 22 C.M.R. 104 (1956); *United States v. Bledsoe*, 16 M.J. 977 (A.F.C.M.R. 1983). The provision assigning the burden of proof is consistent with amendments to R.C.M. 909(c)(2) and R.C.M. 916(k)(3)(A) which shifted to the defense the burden of showing lack of mental capacity to stand trial and lack of mental responsibility.

(d) *Notification to accused.* This subsection is based on Article 67(c) (as amended, *see* Military Justice Amendments of 1981, Pub. L. 97-81, § 5, 95 Stat. 1088-89) and on the first paragraph of paragraph 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.

of MCM, 1969 (Rev.). The provision in paragraph 79*d*(2) which provided for hearing evidence on the offense(s) in a guilty plea case is omitted here because this procedure is covered in R.C.M. 1001(b)(4).

Subsection (2)(E)(i) is based on Mil. R. Evid. 101 and 1101. Subsections (2)(E)(ii) through (iv) are based on paragraph 79*d*(3) of MCM, 1969 (Rev.).

Subsections (2)(F)(i) through (iii) are based on paragraph 79*d*(4) of MCM, 1969 (Rev.). Note that the summary court-martial may consider otherwise admissible records from the accused's personnel file under R.C.M. 1001(b)(2). This was not permitted under MCM, 1969 (Rev.) before the amendment of paragraph 75 on 1 August 1981. *See* Exec. Order No. 12315 (July 29, 1981). Subsection (2)(F)(iv) is new and fulfills the summary court-martial's post-trial responsibility to protect the interests of the accused by informing the accused of post-trial rights.

Subsection (2)(F)(v) is new and designed to inform the convening authority of any suspension recommendation and deferment request before receipt of the record of trial. Subsection (2)(F)(vi) modifies paragraph 79*d*(4) of MCM, 1969 (Rev.). It recognizes the custodial responsibility of the summary court-martial over an accused sentenced to confinement until the accused is delivered to the commander or the commander's designee. It does not address the subsequent disposition of the accused, as this is a prerogative of the commander.

Rule 1305. Record of trial

(a) *In general.* This rule is based on paragraphs 79*e* and 91*c* of MCM, 1969 (Rev.) insofar as they prescribed that the record of trial of a summary court-martial will consist of a notation of key events at trial and insofar as they permitted the convening or higher authority to require additional matters in the record. Additional requirements may be established by the Secretary concerned, the convening authority, or other competent authority. The modification of the format of the charge sheet (*see* Appendix 4) eliminated it as the form for the record of trial of a summary court-martial. A separate format is now provided at Appendix 15.

(b) *Contents.* This subsection is based on paragraphs 79*e* and 91*c* of MCM, 1969 (Rev.).

_____ *1986 Amendment*: R.C.M. 1305(b)(2) was amended to delete the requirement that the record of trial in summary courts-martial reflect the number of previous convictions considered. The Committee concluded that this requirement had only slight utility and also noted that DD Form 2329, which serves as the record of trial in summary courts-martial, has no entry for this information. The Committee also noted that the Services each have requirements for retaining documents introduced at summary courts-martial with the record of trial.

(c) *Authentication.* This subsection is based on paragraph 79*e* of MCM, 1969 (Rev.).

(d) *Medical Certificate.* This subsection is based on paragraphs 91*c* and 125 of MCM, 1969 (Rev.).

(e) *Forwarding copies of the record.* Subsection (1) is based on Article 60(b)(2). Subsection (2) is based on the third paragraph of paragraph 91*c* of MCM, 1969 (Rev.). Subsection (3) is self-explanatory.

Rule 1306. Post-trial procedure

(a) *Accused's post-trial petition.* This subsection is based on Article 60(b). *Cf.* Article 38(c).

(b) *Convening authority's action.* Subsection (1) refers to the detailed provisions concerning the convening authority's initial review and action in R.C.M. 1107. The time period is based on Article 60(b)(1). Subsections (2) through (4) are based on paragraph 90*e* of the MCM, 1969 (Rev.). Subsection (2) is modified to reflect that the accused ordinarily will receive a copy of the record before action is taken. *See* Article 60(b)(2).

(c) *Review by a judge advocate.* This subsection is based on Article 64.

(d) *Review by the Judge Advocate General.* This subsection is based on Article 69 and refers to the detailed provisions governing such requests for review in R.C.M. 1201.

PART IV

PUNITIVE ARTICLES

Introduction. Unless otherwise indicated, the elements, maximum punishments and sample specifications in paragraphs 3 through 113 are based on paragraphs 157 through 213, paragraph 127c (Table of Maximum Punishments), and Appendix 6c of MCM, 1969 (Rev.).

_____ *1986 Amendment*: The next to last paragraph of the introduction to Part IV was added to define the term "elements," as used in Part IV. In MCM, 1969 (Rev.), the equivalent term used was "proof." Both "proof" and "elements" referred to the statutory elements of the offense and to any additional aggravating factors prescribed by the President under Article 56, UCMJ, to increase the maximum permissible punishment above that allowed for the basic offense. These additional factors are commonly referred to as "elements," and judicial construction has approved this usage, as long as these "elements"

are pled, proven, and instructed upon. *United States v. Flucas*, 23 U.S.C.M.A. 274, 49 C.M.R. 449 (1975); *United States v. Nickaboine*, 3 U.S.C.M.A. 152, 11 C.M.R. 152 (1953); *United States v. Bernard*, 10 C.M.R. 718 (AFBR 1953).

1. Article 77—Principals

b. *Explanation.* (1) *Purpose.* Article 77 is based on 18 U.S.C. § 2. *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 1240-1244 (1949). The first paragraph of subparagraph b(1) reflects the purpose of 18 U.S.C. § 2 (*see Standefer v. United States*, 447 U.S. 10 (1980)) and Article 77 (*see Hearings,supra* at 1240).

The common law definitions in the second paragrah of subparagraph b(1) are based on R. Perkins, *Criminal Law* 643-666 (2d ed. 1969); and 1 C. Torcia, *Wharton's Criminal Law and Procedure* §§ 29-38 (1978). Several common law terms such as "aider and abettor" are now used rather loosely and do not always retain their literal common law meanings, *See United States v. Burroughs*, 12 M.J. 380, 384 n.4. (C.M.A. 1982); *United States v. Molina,* 581 F.2d 56, 61 n.8 (2d Cir. 1978). To eliminate confusion, the explanation avoids the use of such terms where possible. *See United States v. Burroughs, supra* at 382 n.3.

(2) *Who may be liable for an offense.* Subparagraph (2)(a) is based on paragraph 156 of MCM, 1969 (Rev.). *See* 18 U.S.C.A. § 2 Historical and Revision Notes (West 1969). *See also United States v. Giles,* 300 U.S. 41 (1937); *Wharton's, supra* at §§ 30, 31, 35.

Subparagraph (2)(b) sets forth the basic formulation of the requirements for liability as a principal. An act (which may be passive, as discussed in this subparagraph) and intent are necessary to make one liable as a principal. *See United States v. Burroughs, supra; United States v. Jackson,* 6 U.S.C.M.A. 193, 19 C.M.R. 319 (1955); *United States v. Wooten,* 1 U.S.C.M.A. 358, 3 C.M.R. 92 (1952); *United States v. Jacobs,* 1 U.S.C.M.A. 209, 2 C.M.R. 115 (1952). *See also United States v. Walker,* 621 F.2d 163 (5th Cir. 1980), *cert. denied,* 450 U.S. 1000 (1981); *Morei v. United States,* 127 F.2d 827 (6th Cir. 1942); *United States v. Peoni,* 100 F.2d 401, 402 (2d Cir. 1938). The terms "assist" and "encourage, advise, and instigate" have been substituted for "aid" and "abet" respectivedly, since the latter terms are technical and may not be clear to the lay reader. *See Black's Law Dictionary* 5, 63 (5th ed., 1979). *See also Nye and Nissen v. United States,* 336 U.S. 613, 620 (1949); *Wharton's, supra* at 246-47.

The last two sentences in subparagraph (2)(b) are based on the third paragraph of paragraph 156 of MCM, 1969 (Rev.). *See United States v. Ford,* 12 U.S.C.M.A. 31, 30 C.M.R. 31 (1960); *United States v. McCarthy,* 11 U.S.C.M.A. 758, 29 C.M.R. 574 (1960); *United States v. Lyons,* 11 U.S.C.M.A. 68, 28 C.M.R. 292 (1959).

(3) *Presence.* This subparagraph clarifies, as paragraph 156 of MCM, 1969 (Rev.) did not, that presence at the scene is neither necessary nor sufficient to make one a principal. "Aid" and "abet" as used in 18 U.S.C. § 2, and in Article 77, are not used in the narrow common law sense of an "aider and abettor" who must be present at the scene to be guilty as such. *Unted States v. Burroughs, supra; United States v. Sampol.* 636 F.2d 621 (D.C. Cir. 1980); *United States v. Molina, supra; United States v. Carter,* 23 C.M.R. 872 (A.F.B.R. 1957). *Cf. Milanovich v. United States,* 365 U.S. 551 (1961). *See also Wharton's, supra* at 231. Subparagraph (b) continues the admonition, contained in the third paragraph of paragraph 156 of MCM, 1969 (Rev.), that presence at the scene of a crime is not sufficient to make one a principal. *See United States v. Waluski, 6* U.S.C.M.A. 724, 21 C.M.R. 46 (1956); *United States v. Johnson,* 6 U.S.C.M.A. 20, 19 C.M.R. 146 (1955); *United States v. Guest,* 3 U.S.C.M.A. 147, 11 C.M.R. 147 (1953).

(4) *Parties whose intent differs from the perpetrators.* This subparagraph is based on the first paragraph in pargraph 156 of MCM, 1969 (Rev.). *See United States v. Jackson,* 6 U.S.C.M.A. 193, 19 C.M.R. 319 (1955); *Wharton's, supra* at § 35.

(5) *Responsibility for other crimes.* This subparagraph is based on the first two paragraphs in paragraph 156 of MCM, 1969 (Rev.). *See United States v. Cowan,* 12 C.M.R. 374 (A.B.R. 1953); *United States v. Self,* 13 C.M.R. 227 (A.B.R. 1953).

(6) *Principals independently liable.* This subparagraph is new and is based on Federal decisions. *See Standefer v. United States, supra; United States v. Chenaur,* 552 F.2d 294 (9th Cir. 1977); *United States v. Frye,* 548 F.2d 765 (8th Cir. 1977).

(7) *Withdrawal.* This subparagraph is new and is based on *United States v. Williams,* 19 U.S.C.M.A. 334, 41 C.M.R. 334 (1970). *See also United States v. Miasel,* 8 U.S.C.M.A. 374, 378, 24 C.M.R. 184, 188 (1957); *United States v. Lowell,* 649 F. 2d 950 (3d Cir. 1981); *United States v. Killian,* 639 F. 2d 206 (5th Cir.), *cert. denied,* 451 U.S. 1021 (1981).

2. Article 79—Lesser included offenses

b. *Explanation.* (1) *In general.* This subparagraph and the three subparagraphs are based on paragraph 158 of MCM, 1969 (Rev.). *See also United States v. Thacker,* 16 U.S.C.M.A. 408, 37 C.M.R. 28 (1966).

(2) *Multiple lesser included offenses.* This subparagraph is based on paragraph 158 of MCM, 1969 (Rev.). *See also United States v. Calhoun,* 5 U.S.C.M.A. 428, 18 C.M.R. 52 (1955).

(3) *Findings of guilty to a lesser included offense.* This subparagraph is taken from paragraph 158 of MCM, 1969 (Rev.).

3. Article 78—Accessory after the fact

c. *Explanation.* (1) *In general.* This subparagraph is based on paragraph 157 of MCM, 1969 (Rev.). *See also United States v. Tamas,* 6 U.S.C.M.A. 502, 20 C.M.R. 218 (1955).

(2) *Failure to report offense.* This subparagraph is based on paragraph 157 of MCM, 1969 (Rev.); *United States v. Smith,* 5 M.J. 129 (C.M.A. 1978).

(3) *Offense punishable by the code.* This subparagraph is based on Article 78; *United States v. Michaels,* 3 M.J 846 (A.C.M.R. 1977); *United States v. Blevins,* 34 C.M.R. 967 (A.F.B.R. 1964).

(4) *Status of principal.* This subparagraph is based on Article 78 and *United States v. Michaels,* 3 M.J. 846 (A.C.M.R. 1977); *United States v. Blevins,* 34 C.M.R. 967 (A.F.B.R. 1964).

(5) *Conviction or acquittal of principal.* The subparagrah is based on paragraph 157 of MCM, 1969 (Rev.); *United States v. Marsh,* 13 U.S.C.M.A. 252, 32 C.M.R. 252 (1962); and *United States v. Humble,* 11 U.S.C.M.A. 38, 28 C.M.R. 262 (1959). *See also United States v. McConnico,* 7 M.J. 302 (C.M.A. 1979).

(6) *Accessory after the fact not a lesser included offense.* This subparagraph is based on *United States v. McFarland,* 8 U.S.C.M.A. 42, 23 C.M.R. 266 (1957).

(7) *Actual Knowledge.* This paragraph is based on *United States v. Marsh, supra. See United States v. Foushee,* 13 M.J. 833 (A.C.M.R. 1982).

4. Article 80—Attempts

c. *Explanation.* (1) *In general.* This subparagraph is based on paragraph 159 of MCM, 1969 (Rev.).

(2) *More than preparation.* This subparagraph is based on paragraph 159 of MCM, 1969 (Rev.); *United States v. Johnson,* 7 U.S.C.M.A. 488, 22 C.M.R. 278 (1957); *United States v. Choat,* 7 U.S.C.M.A. 187, 21 C.M.R. 313 (1956); *United States v. Goff,* 5 M.J. 817 (A.C.M.R. 1978); *United States v. Emerson,* 16 C.M.R. 690 (A.F.B.R. 1954).

(3) *Factual impossibility.* This subparagraph is based on paragraph 159 of MCM, 1969 (Rev.); *United States v. Thomas,* 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962). *See United States v. Quijada,* 588 F.2d 1253 (9th Cir. 1978).

(4) *Solicitation.* This subparagraph is based on paragraph 159 of MCM, 1969 (Rev.).

(5) *Attempts not under Article 80.* This subparagraph is based on paragraph 159 of MCM, 1969 (Rev.).

★_____ *1986 Amendment*: In 4c(5), subparagrah (e) was redesignated as subparagraph (f), and a new subparagraph (e) was added to reflect the offense of attempted espionage as established by the Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 534, 99 Stat. 583, 634-35 (1985) (art. 106a).

(6) *Regulations.* This subparagraph is new and is based on *United States v. Davis,* 16 M.J. 225 (C.M.A. 1983); *United States v. Foster,* 14 M.J. 246 (C.M.A. 1983)

5. Article 81—Conspiracy

c. *Explanation.* (1) *Co-conspirators.* This subparagraph is based on paragraph 160 of MCM, 1969 (Rev.); *United States v. Kinder,* 14 C.M.R. 742 (A.F.B.R. 1953). The portion of paragraph 160 which provided that acquittal of all alleged co-conspirators precludes conviction of the accused has been deleted. *See United States v. Garcia* 16 M.J. 52 (C.M.A. 1983). *See also United States v. Standefer,* 447 U.S. 10 (1980).

(2) *Agreement.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.).

(3) *Object of the agreement.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.); *United States v. Kidd,* 13 U.S.C.M.A. 184, 32 C.M.R. 184 (1962). The last three sentences reflect "Wharton's Rule," 4 C. Torcia, *Wharton's Criminal Law,* § 731 (1981). *See Iannelli v. United States,* 420 U.S. 770 (1975); *United States v. Yarborough,* 1 U.S.C.M.A. 678, 5 C.M.R. 106 (1952); *United States v. Osthoff,* 8 M.J. 629 (A.C.M.R. 1979); *United States v. McClelland,* 49 C.M.R. 557 (A.C.M.R. 1974).

(4) *Overt act.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.); *United States v. Rhodes,* 11 U.S.C.M.A. 735, 29 C.M.R. 551 (1960); *United States v Choat,* 7 U.S.C.M.A. 187, 21 C.M.R. 313 (1956); and *United States v. Graalum,* 19 C.M.R. 667 (A.B.R. 1955).

(5) *Liability for offenses.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.). *See Pinkerton v. United States, 328 U.S. 640 (1946); United States v. Salisbury,* 14 U.S.C.M.A. 171, 33 C.M.R. 383 (1963); *United States v. Woodley,* 13 M.J. 984 (A.C.M.R. 1982).

(6) *Withdrawal.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.); *United States v.Miasel,* 8 U.S.C.M.A. 374, 24 C.M.R. 184 (1957).

(7) *Factual impossibility.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.).

(8) *Conspiracy as a separate offense.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.). *See also United States v. Washington,* 1 M.J. 473 (C.M.A. 1976).

(9) *Special conspiracies under Article 134.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.); *United States v. Chapman,* 10 C.M.R. 306 (A.B.R. 1953).

6. Article 82—Solicitation

b. *Elements.* Solicitation under Article 82 has long been recognized as a specific intent offense. *See* paragraph 161 of MCM, 1969 (Rev.); paragraph 161 of MCM, 1951. *See generally United States v. Mitchell*, 15 M.J. 214 (C.M.A. 1983); *United States v. Benton,* 7 M.J. 606 (N.C.M.R. 1979). It has been added as an element for clarity.

c. *Explanation.* This paragraph is taken from paragraph 161 of MCM, 1969 (Rev.), *United States v. Wysong*, 9 U.S.C.M.A. 248, 26 C.M.R. 29 (1958); *United States v. Gentry*, 8 U.S.C.M.A. 14, 23 C.M.R. 238 (1957); *United States v. Benton,* 7 M.J. 606 (N.C.M.R. 1979).

7. Article 83—Fraudulent enlistment, appointment, or separation

c. *Explanation.* This paragraph is based on paragraph 162 of MCM, 1969 (Rev.); *United States v. Danley*, 21 U.S.C.M.A. 486, 45 C.M.R. 260 (1972). *See Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981).

e. *Maximum Punishment.* The reference to membership in, association with, or activities in connection with organizations, associations etc., found in the Table of Maximum Punishments, paragraph 127*c* of MCM, 1969 (Rev.), for Article 83, was deleted as unnecessary. The maximum punishment for all fraudulent enlistment or appointment cases was then standardized.

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

c. *Explanation.* This paragraph is taken from paragraph 163 of MCM, 1969 (Rev.). *See also United States v. Hightower,* 5 M.J. 717 (A.C.M.R. 1978).

e. *Maximum punishment.* The reference to membership in, association with, or activities in connection with organizations, associations, etc., found in the Table of Maximum Punishments, paragraph 127*c* of MCM, 1969 (Rev.), or Article 84, was deleted as unnecessary. The maximum punishment for all cases was then standardized.

9. Article 85—Desertion

c. *Explanation.* (1) Desertion with intent to remain away permanently.

(a) *In general.* This subparagraph is taken from paragraph 164*a* of MCM, 1969 (Rev.).

(b) *Absence without authority—inception, duration, termination. See* the Analysis, paragraph 10.

(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).

1986 Amendment: Subparagraph c(1) was amended to correct an ambiguity in the definition of military property. The previous language "military department" is specifically defined in 10 U.S.C. 101(7) as consisting of the Department of the Army, Navy and Air Force. Article 1(8), UCMJ, however, defines "military" when used in the Code as referring to all the armed forces. Use of the term "military department" inadvertently excluded property owned or used by the Coast Guard. The subparagraph has been changed to return to the state of the law prior to 1984, as including the property of all of the armed forces. *See United States v. Geisler*, 37 C.M.R. 530 (A.B.R. 1966); *United States v. Schelin*, 15 M.J. 218, 220 n.6 (C.M.A. 1983).

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

1986 Amendment: Subparagraph d(1) was amended to include a lesser included offense previously omitted. *See United States v. Rivers*, 3 C.M.R. 564 (A.F.B.R. 1952) and 18 U.S.C. 641. Subparagraphs d(2) and (4) were amended to include lesser included offenses recognizing that destruction and damage of property which is not proved to be military may be a violation of Article 109. *See United States v. Suthers*, 22 C.M.R. 787 (A.F.B.R. 1956).

e. *Maximum punishment.* The maximum punishments have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100) only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdictions. The punishments are based on 18 U.S.C. § 1361. The maximum punishment for selling or wrongfully disposing of a firearm or explosive and for willfully damaging, destroying, or losing such property or suffering it to be lost, damaged, destroyed, sold, or wrongfully disposed of includes 10 years confinement regardless of the value of the item. The harm to the military in such cases is not simply the intrinsic value of the item. Because of their nature, special accountability and protective measures are employed to protect firearms or explosives against loss, damage, destruction, sale, and wrongful disposition. Such property may be a target of theft or other offenses without regard to its value. Therefore, to protect the Government's special interest in such property, and the community against improper disposition, such property is treated the same as property of a higher value.

33. Article 109—Property other than military property of the United States—waste, spoilage, or destruction

c. *Explanation.* This paragraph is based on paragraph 188 of MCM, 1969 (Rev.). *See also United States v. Bernacki*, 13 U.S.C.M.A. 641, 33 C.M.R. 173 (1963).

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.

f. *Sample specification. See United States v. Collins*, 16 U.S.C.M.A. 167, 36 C.M.R. 323 (1966), concerning charging damage to different articles belonging to different owners, which occurred during a single transaction, as one offense.

34. Article 110—Improper hazarding of vessel

c. *Explanation.* This paragraph is based on paragraph 189 of MCM, 1969 (Rev.). *See also United States v. Adams*, 42 C.M.R. 911 (N.C.M.R. 1970), *pet. denied*, 20 U.S.C.M.A. 628 (1970); *United States v. MacLane*, 32 C.M.R. 732 (C.G.B.R. 1962); *United States v. Day*, 23 C.M.R. 651 (N.B.R. 1957).

35. Article 111—Drunken or reckless driving

b. *Elements.* The aggravating element of injury is listed as suggested by sample specification number 75 and the Table of Maximum Punishments at 25-13 and A6-13 of MCM, 1969 (Rev.). The wording leaves it possible to plead and prove that the *accused* was injured as a result of the accused's drunken driving and so make available the higher maximum punishment. This result recognizes the interest of society in the accused's resulting unavailability or impairment for duty and the costs of medical

treatment. Paragraph 190 [Proof, (c)] of MCM, 1969 (Rev.) used "victim," the ambiguity of which might have implied that injury to the accused would not aggravate the maximum punishment. *Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised Edition)* DA PAM 27-2, at 28-10, does not suggest that the drafters intended such a result.

c. *Explanation.* This paragraph is taken from paragraph 190 of MCM, 1969 (Rev.). *See also United States v. Bull*, 3 U.S.C.M.A. 635, 14 C.M.R. 53 (1954) (drunkenness); *United States v. Eagleson*, 3 U.S.C.M.A. 685, 14 C.M.R. 103 (1954) (reckless); *United States v. Grossman*, 2 U.S.C.M.A. 406, 9 C.M.R. 36 (1953) (separate offenses).

e. *Maximum Punishment.* The maximum authorized confinement for drunk driving resulting in injury was increased from 1 year to 18 months. This increase reflects the same concern for the seriousness of the misconduct as that which has, by current reports, motivated almost half the states to provide more stringent responses.

_____*1986 Amendment*: Subparagraphs b(2), c(3), and f were amended to implement the amendment to Article 111 contained in the Anti-Drug Abuse Act of 1986, tit. III, § 3055, Pub. L. No. 99-570, _____ Stat. _____, _____(1986), enacted 27 October 1986, proscribing driving while impaired by a substance described in Article 112a(b). This amendment codifies prior interpretation of the scope of Article 111, as previously implemented in paragraph 35c(3).

36. Article 112—Drunk on duty

c. *Explanation.* This paragraph is based on paragraph 191 of MCM, 1969 (Rev.). The discussion of defenses is based on *United States v. Gossett,* 14 U.S.C.M.A. 305, 34 C.M.R. 85 (1963); *United States v. Burroughs*, 37 C.M.R. 775 (C.G.B.R. 1966).

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

Introduction. This paragraph is based on Article 112a (*see* Military Justice Act of 1983, Pub. L. No. 98-209, § 8, 97 Stat. 1393 (1983)), and on paragraphs 127 and 213, and Appendix 6c of MCM, 1969 (Rev.), as amended by Exec. Order No. 12383 (Sep. 23, 1982). Paragraphs 127 and 213 and Appendix 6c of MCM, 1969 (Rev.) are consistent with Article 112a. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 29 (1983).

The only changes made by Article 112a in the former Manual paragraphs are: elimination of the third element under Article 134; substitution of barbituric acid for phenobarbital and secobarbital (these are still specifically listed in subparagraph c), and inclusion of importation and exportation of controlled substances. The definition of "customs territory of the United States" is based on 21 U.S.C. § 951(a)(2) and on general headnote 2 to the Tariff Schedules of the United States. *See* 21 U.S.C. § 1202. *See also* H.R. Rep. No. 91-1444, 91st Cong., 2d Sess. 74 (1970). The maximum punishments for importing or exporting a controlled substance are based generally on 21 U.S.C. § 960. *See also* 21 U.S.C. §§ 951-53.

The definition of "missile launch facility" has been added to clarify that the term includes not only the actual situs of the missile, but those places directly integral to the launch of the missile.

The following is an analysis of Exec. Order No. 12383 (Sep. 23, 1982):

Section 1 [now subparagraph e] amends paragraph 127*c*, Section A of the MCM, 1969 (Rev.). This amendment of the Table of Maximum Punishments provides a completely revised system of punishments for contraband drug offenses under Article 134. The punishments under 21 U.S.C. §§ 841 and 844 were used as a benchmark for punishments in this paragraph. Thus, the maximum penalty for distribution or possession with intent to distribute certain Schedule I substances under 21 U.S.C. § 841—15 years imprisonment—is the same as the highest maximum punishment under paragraph 127*c* (except when the escalator clause is triggered, *see* analysis of section 2 *infra*.)

Within the range under the 15 year maximum, the penalties under paragraph 127*c* are generally somewhat more severe than those under 21 U.S.C. §§ 841 and 844. This is because in the military *any* drug offense is serious because of high potential for adversely affecting readiness and mission performance. *See generally Schlesinger v. Councilman*, 420 U.S. 738, 760 n.34 (1975); *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980). The availability of contraband drugs, especially in some overseas locations, the ambivalence toward and even acceptance of drug usage in some segments of society, especially among young people, and the insidious nature of drug offenses all require that deterrence play a substantial part in the effort to prevent drug abuse by servicemembers.

The following sentence enhancement provisions in the United States Code were not adopted: (1) the recidivism provisions in 21 U.S.C. §§ 841(b), 844(a), and 845(b), which either double or triple the otherwise prescribed maximum penalty; and (2) the provision in 21 U.S.C. § 845(a) which doubles the maximum penalty for distribution of a controlled substance to a person under the age of 21. (The latter provision would probably apply to a high percentage of distribution offenses in the armed forces, given the high proportion of persons in this age group in the armed forces.) These special provisions were not adopted in favor of a simpler, more uniform punishment system. The overall result is an absence of the higher punishment extremes of the Federal system, while some of the offenses treated more leniently in the lower end of the scale in the Federal system are subject to potentially higher punishments in the military, for the reasons stated in the preceding paragraph. There are no mandatory minimum sentences for any drug offense. *See* Article 56.

The expungement procedure in 21 U.S.C. § 844(b) and (c) is unnecessary and inappropriate for military practice. Alternatives to prosecution for drug offenses already exist. *See, e.g.*, Article 15. The use of such alternatives is properly a command prerogative.

Section 2 [now the last paragraph of subparagraph e] amends paragraph 127*c* Section B by adding an escalator clause to

provide for certain special situations, unique to the military, in which drug involvement presents an even greater danger than normal. *See* 37 U.S.C. § 310 concerning hostile fire pay zones.

Section 3 [now subparagraphs b and c] amends paragraph 213, dealing with certain offenses under Article 134. Paragraph 213*g* replaces the discussion of offenses involving some contraband drugs which was found in the last paragraph of paragraph 213*b* of MCM, 1969 (Rev.). It was considered necessary to treat drug offenses more extensively in the Manual for Courts-Martial because of the significant incidence of drug offenses in the military and because of the serious effect such offenses have in the military environment. It was also necessary to provide a comprehensive treatment of drugs, with a complete set of maximum punishments, in order to eliminate the confusion, disruption, and disparate treatment of some drug offenses among the services in the wake of *United States v. Courtney*, 1 M.J. 438 (C.M.A. 1976); *United States v. Jackson*, 3 M.J. 101 (C.M.A. 1977); *United States v. Hoesing*, 5 M.J. 355 (C.M.A. 1978); *United States v. Guilbault*, 6 M.J. 20 (C.M.A. 1978); *United States v. Thurman*, 7 M.J. 26 (C.M.A. 1979). (1) *Controlled substance.* The list of drugs specifically punishable under Article 134 has been expanded to cover the substances which are, according to studies, most prevalent in the military community. *See, e.g.*, M. Burt, *et al. Highlights from the Worldwide Survey of Nonmedical Drug Use and Alcohol Use Among Military Personnel: 1980.* In addition, the controlled substances which are listed in Schedules I through V of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (codified at 21 U.S.C. § 801 *et seq.*) as amended are incorporated. The most commonly abused drugs are listed separately so that it will be unnecessary to refer to the controlled substances list, as modified by the Attorney General in the Code of Federal Regulations, in most cases. Most commanders and some legal offices do not have ready access to such authorities.

(2) *Possess.* The definition of possession is based upon *United States v. Aloyian*, 16 U.S.C.M.A. 333, 36 C.M.R. 489 (1966) and paragraph 4-144, *Military Judges' Benchbook*, DA PAM 27-9 (May 1982). *See also United States v. Wilson*, 7 M.J. 290 (C.M.A. 1979) and cases cited therein concerning the concept of constructive possession. With respect to the inferences described in this subparagraph and subparagraph (5) *Wrongfulness, see United States v. Alvarez*, 10 U.S.C.M.A. 24, 27 C.M.R. 98 (1958); *United States v. Nabors*, 10 U.S.C.M.A. 27, 27 C.M.R. 101 (1958). It is important to bear in mind the distinction between inferences and presumptions. *See United States v. Mahan*, 1 M.J. 303 (C.M.A. 1976). *See also United States v. Baylor*, 16 U.S.C.M.A. 502, 37 C.M.R. 122 (1967).

(3) *Distribute.* This subparagraph is based on 21 U.S.C. § 802(8) and (11). *See also* E. Devitt and C. Blackmar, 2 *Federal Jury Practice and Instructions*, § 58.03 (3d ed. 1977).

"Distribution" replaces "sale" and "transfer." This conforms with Federal practice, *see* 21 U.S.C. § 841(a), and will simplify military practice by reducing pleading, proof, and associated multiplicity problems in drug offenses. *See, e.g., United States v. Long*, 7 M.J. 342 (C.M.A. 1979); *United States v. Maginley*, 13 U.S.C.M.A. 445, 32 C.M.R. 445 (1963). Evidence of sale is not necessary to prove the offense of distributing a controlled substance. *See United States v. Snow*, 537 F.2d 1166 (4th Cir. 1976); *United States v. Johnson*, 481 F.2d 645 (5th Cir. 1973). Thus, the defense of "agency" *see United States v. Fruscella*, 21 U.S.C.M.A. 26, 44 C.M.R. 80 (1971), no longer applies in the military. *Cf. United States v. Snow, supra; United States v. Pruitt*, 487 F.2d 1241 (8th Cir. 1973); *United States v. Johnson, supra* ("procuring agent" defense abolished under 21 U.S.C. § 801 *et seq.*). Evidence of sale is admissible, of course, on the merits as "part and parcel" of the criminal transaction (*see United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982); *cf. United States v. Johnson, supra; see also* Mil. R. Evid. 404(b)), or in aggravation (*see* paragraph 75*b*(4) of MCM, 1969 (Rev.); *see also United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982)).

(4) *Manufacture.* This definition is taken from 21 U.S.C. § 802(14). The exception in 21 U.S.C. § 802(14) is covered in subparagraph (5).

(5) *Wrongfulness.* This subparagraph is based on the last paragraph of paragraph 213*b* of MCM, 1969 (Rev.). *Cf.* 21 U.S.C. § 822(c). *See also United States v. West*, 15 U.S.C.M.A. 3, 34 C.M.R. 449 (1964); paragraphs 4-144 and 145, Military Judges' Benchbook, DA PAM 27-9 (May 1982). It is not intended to perpetuate the holding in *United States v. Rowe*, 11 M.J. 11 (C.M.A. 1981).

(6) *Intent to distribute.* This subparagraph parallels Federal law which allows for increased punishment for drug offenses with an intent to distribute. 21 U.S.C. § 841(a)(1). The discussion of circumstances from which an inference of intent to distribute may be inferred is based on numerous Federal cases. *See, e.g., United States v. Grayson*, 625 F.2d 66 (5th Cir. 1980); *United States v. Hill*, 589 F.2d 1344 (8th Cir. 1979), *cert. denied*, 442 U.S. 919 (1979); *United States v. Ramirez-Rodriquez*, 552 F.2d 883 (9th Cir. 1977); *United States v. Blake*, 484 F.2d 50 (8th Cir. 1973); *cert. denied*, 417 U.S. 949 (1974). *Cf. United States v. Mather*, 465 F.2d 1035 (5th Cir. 1972), *cert. denined*, 409 U.S. 1085 (1972). Possession of a large amount of drugs may permit an inference but does not create a presumption of intent to distribute. *See Turner v. United States*, 396 U.S. 398 (1970); *United States v. Mahan*, 1 M.J. 303 (C.M.A. 1976).

(7) *Certain amount.* This subparagraph is based on *United States v. Alvarez*, 10 U.S.C.M.A. 24, 27 C.M.R. 98 (1958); *United States v. Brown*, 45 C.M.R. 416 (A.C.M.R. 1972); *United States v. Burns*, 37 C.M.R. 942 (A.F.B.R. 1967); *United States v. Owens*, 36 C.M.R. 909 (A.B.R. 1966).

Section 4 [now subparagraph f] amends Appendix 6c. The new sample specifications are based on sample specifications 144 through 146 found in appendix 6c of the MCM, 1969 (Rev.), as modified to reflect the new comprehensive drug offense provision.

Section 5 provides an effective date for the new amendments.

Section 6 requires the Secretary of Defense to transmit these amendments to Congress.

38. Article 113—Misbehavior of sentinel or lookout

c. *Explanation.* Subparagraphs (1), (2), and (3) are based on paragraph 192 of MCM, 1969 (Rev.). Subparagraph (4) is based on *United States v. Seeser*, 5 U.S.C.M.A. 472, 18 C.M.R. 96 (1955); paragraph 192 of MCM, 1969 (Rev.); paragraph 174 of MCM (Army), 1949; paragraph 174 of MCM (AF), 1949. Subparagraph (6) is based on *United States v. Williams*, 4 U.S.C.M.A. 69, 15 C.M.R. 69 (1954); *United States v. Cook*, 31 C.M.R. 550 (A.F.B.R. 1961). *See also United States v. Getman*, 2 M.J. 279 (A.F.C.M.R. 1976).

39. Article 114—Dueling

c. *Explanation.* This paragraph is based on paragraph 193 of MCM, 1969 (Rev.). The explanation of conniving at fighting a duel was modified to reflect the requirement for actual knowledge and to more correctly reflect the term connive.

f. *Sample specification.* The sample specification for conniving at fighting a duel was redrafted to more accurately reflect the nature of the offense.

40. Article 115—Malingering

c. *Explanation.* This paragraph is based on paragraph 194 of MCM, 1969 (Rev.). *See also United States v. Kisner*, 15 U.S.C.M.A. 153, 35 C.M.R. 125 (1964); *United States v. Mamaluy*, 10 U.S.C.M.A. 102, 27 C.M.R. 176 (1959); *United States v. Kersten*, 4 M.J. 657 (A.C.M.R. 1977).

d. *Lesser included offenses. See United States v. Taylor*, 17 U.S.C.M.A. 595, 38 C.M.R. 393 (1968).

e. *Maximum punishment.* The maximum punishments were changed to reflect the greater seriousness of malingering in war or other combat situations and to add a greater measure of deterrence in such cases.

41. Article 116—Riot or breach of peace

c. *Explanation.* This paragraph is based on paragraph 195 of MCM, 1969 (Rev.) and *United States v. Metcalf*, 16 U.S.C.M.A. 153, 36 C.M.R. 309 (1966). The reference to "use of vile or abusive words to another in a public place" contained in paragraph 195*b* of MCM, 1969 (Rev.) has been replaced by the language contained in the fourth sentence of subparagraph (2) since the former language was subject to an overly broad application. *See Gooding v. Wilson*, 405 U.S. 518 (1972).

f. *Sample specifications.* Riot—*see United States v. Randolf*, 49 C.M.R. 336 (N.C.M.R. 1974); *United States v. Brice*, 48 C.M.R. 368 (N.C.M.R. 1973).

42. Article 117—Provoking speeches or gestures

c. *Explanation.* Subparagraph (1) is based on paragraph 196 of MCM, 1969 (Rev.); *United States v. Thompson*, 22 U.S.C.M.A. 88, 46 C.M.R. 88 (1972). *See generally Gooding v. Wilson*, 405 U.S. 518 (1972); *United States v. Hughens*, 14 C.M.R. 509 (N.B.R. 1954). Subparagraph (2) is based on the language of Article 117 and *United States v. Bowden*, 24 C.M.R. 540 (A.F.B.R. 1957), *pet. denied*, 24 C.M.R. 311 (1957). *See also United States v. Lacy*, 10 U.S.C.M.A. 164, 27 C.M.R. 238 (1959).

_____ *1986 Amendment*: The listing of "Article 134—indecent language" as a lesser included offense of provoking speeches was deleted. *United States v. Linyear*, 3 M.J. 1027 (N.M.C.M.R. 1977), held that provoking speeches is actually a lesser included offense of indecent language. Also, indecent language carries a greater maximum punishment than provoking speeches, which would be unusual for a lesser offense.

e. *Maximum punishment.* The maximum punishment was increased from that set forth in paragraph 127*c* of MCM, 1969 (Rev.) to more accurately reflect the seriousness of the offense.

43. Article 118—Murder

b. *Elements.* Element (b) in (3), *Act inherently dangerous to others*, has been modified based on *United States v. Hartley*, 16 U.S.C.M.A. 249, 36 C.M.R. 405 (1966).

c. *Explanation.* This paragraph is based on paragraph 197 of MCM, 1969 (Rev.). Subparagraphs c(2)(b) is based on *United States v. Sechler*, 3 U.S.C.M.A. 363, 12 C.M.R. 119 (1953). As to subparagraph (c)(4)(A), *see United States v. Vandenack*, 15 M.J. 428 (C.M.A. 1983). Subparagraph c(4)(b) is based on *United States v. Stokes*, 6 U.S.C.M.A. 65, 19 C.M.R. 191 (1955).

d. *Lesser included offenses.* As to Article 118(3), *see United States v. Roa*, 12 M.J. 210 (C.M.A. 1982).

44. Article 119—Manslaughter

c. *Explanation.* This paragraph is based on paragraph 198 of MCM, 1969 (Rev.). *See also United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977); *United States v. Harrison*, 16 U.S.C.M.A. 484, 37 C.M.R. 104 (1967); *United States v. Redding*, 14 U.S.C.M.A. 242, 34 C.M.R. 22 (1963); *United States v. Fox*, 2 U.S.C.M.A. 465, 9 C.M.R. 95 (1953).

45. Article 120—Rape and carnal knowledge

c. *Explanation.* This paragraph is based on paragraph 199 of MCM, 1969 (Rev.). The third paragraph of paragraph 199(a) was deleted as unnecessary. The third paragraph of paragraph 199(b) was deleted based on the preemption doctrine. *See United States v. Wright*, 5 M.J. 106 (C.M.A. 1978); *United States v. Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953). *Cf. Williams v. United States*, 327 U.S. 711 (1946) (scope of preemption doctrine). The Military Rules of Evidence deleted the requirement for

corroboration of the victim's testimony in rape and similar cases under former paragraph 153*a* of MCM, 1969. *See* Analysis, Mil. R. Evid. 412.

d. *Lesser included offenses.* Carnal knowledge was deleted as a lesser included offense of rape in view of the separate elements in each offense. Both should be separately pleaded in a proper case. *See generally United States v. Smith*, 7 M.J. 842 (A.C.M.R. 1979).

46. Article 121—Larceny and wrongful appropriation

c. *Explanation.* This paragraph is based on paragraph 200 of MCM, 1969 (Rev.). The discussion in the fourth and fifth sentences of paragraph 200*a*(4) was deleted as ambiguous and overbroad. The penultimate sentence in subparagraph c(1)(d) adequately covers the point. C. Torcia, *2 Wharton's Criminal Law and Procedure* § 393 (1980); *Hall v. United States*, 277 Fed. 19 (8th Cir. 1921). As to subparagraph c(1)(c) *see also United States v. Leslie*, 13 M.J. 170 (C.M.A. 1982). As to subparagraph c(1)(d) *see also United States v. Smith*, 14 M.J. 68 (C.M.A. 1982); *United States v. Cunningham*, 14 M.J. 539 (A.C.M.R. 1981). As to subparagraph c(1)(f), *see also United States v. Kastner*, 17 M.J. 11 (C.M.A. 1983); *United States v. Eggleton*, 22 U.S.C.M.A. 504, 47 C.M.R. 920 (1973); *United States v. O'Hara*, 14 U.S.C.M.A. 167, 33 C.M.R. 379 (1963); *United States v. Hayes*, 8 U.S.C.M.A. 627, 25 C.M.R. 131 (1958). As to subparagraph c(1)(h)(i) *see also United States v. Malone*, 14 M.J. 563 (N.M.C.M.R. 1982).

e. *Maximum punishment.* The maximum punishments have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100) only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdictions. The maximum punishment for larceny or wrongful appropriation of a firearm or explosive includes 5 or 2 years' confinement respectively. This is because, regardless of the intrinsic value of such items, the threat to the community and disruption of military activities is substantial when such items are wrongfully taken. Special accountability and protective measures are taken with firearms and explosives, and they may be the target of theft regardless of value.

_____ *1986 Amendment*: The maximum punishments for larceny were revised as they relate to larceny of military property to make them consistent with the punishments under Article 108 and paragraph 32e, Part IV, MCM, 1984. Before this amendment, a person who stole military property faced less punishment than a person who willfully damaged, destroyed, or disposed of military property. The revised punishments are also consistent with 18 U.S.C. 641.

47. Article 122—Robbery

c. *Explanation.* This paragraph is based on paragraph 201 of MCM, 1969 (Rev.). *See also United States v. Chambers*, 12 M.J. 443 (C.M.A. 1982); *United States v. Washington*, 12 M.J. 1036 (A.C.M.R. 1982), *pet. denied*, 14 M.J. 170 (1982). Subparagraph (5) is based on *United States v. Parker*, 17 U.S.C.M.A. 545, 38 C.M.R. 343 (1968).

d. *Lesser included offenses. See United States v. Calhoun*, 5 U.S.C.M.A. 428, 18 C.M.R. 52 (1955).

e. *Maximum punishment.* The aggravating factor of use of a firearm in the commission of a robbery, and a higher maximum punishment in such cases, have been added because of the increased danger when robbery is committed with a firearm whether or not loaded or operable. *Cf.* 18 U.S.C. §§ 2113 and 2114; *United States v. Shelton*, 465 F.2d 361 (4th Cir. 1972); *United States v.Thomas*, 455 F.2d 320 (6th Cir. 1972); *Baker v. United States*, 412 F.2d 1069 (5th Cir. 1969). *See also* U.S. Dep't of Justice, *Attorney General's Task Force on Violent Crime, Final Report* 29-33 (Aug. 17, 1981). The 15-year maximum is the same as that for robbery under 18 U.S.C. § 2111.

48. Article 123—Forgery

c. *Explanation.* This paragraph is based on paragraph 202 of MCM, 1969 (Rev.).

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

c. *Explanation.* This paragraph is based on paragraph 202A of MCM, 1969 (Rev.). The language in paragraph 202A using an illegal transaction such as an illegal gambling game as an example of "for any other purpose" was eliminated in subparagraph (7), based on *United States v. Wallace*, 15 U.S.C.M.A. 650, 36 C.M.R. 148 (1966). The statutory inference found in Article 123a and explained in subparagraph (17) was not meant to preempt the usual methods of proof of knowledge and intent. *See* S. Rep. No. 659, 87th Cong. 1st Sess. 2 (1961). Subparagraph (18) is based on *United States v. Callaghan*, 14 U.S.C.M.A. 231, 34 C.M.R. 11 (1963). *See also United States v. Webb*, 46 C.M.R. 1083 (A.C.M.R. 1972). As to share drafts *see also United States v. Palmer*, 14 M.J. 731 (A.F.C.M.R. 1982); *United States v. Grubbs*, 13 M.J. 594 (A.F.C.M.R. 1982).

e. *Maximum punishment.* The maximum punishment for subsection (1) has 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 jurisdiction.

f. *Sample specification. See also United States v. Palmer* and *United States v. Grubbs*, both *supra* (pleading share drafts; pleading more than one check or draft).

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

c. *Explanation.* This paragraph is based on *United States v. Herndon*, 15 U.S.C.M.A. 510, 36 C.M.R. 8 (1965); *United States v. Abeyta*, 12 M.J. 507 (A.C.M.R. 1981); *United States v. Case*, 37 C.M.R. 606 (A.B.R. 1966).

e. *Maximum punishment.* The maximum punishments have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100) only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in similar offenses in civilian jurisdictions.

79. Article 134 (False swearing)

c. *Explanation.* This paragraph is based on paragraph 213*f*(4) of MCM, 1969 (Rev.). *See also United States v. Whitaker*, 13 U.S.C.M.A. 341, 32 C.M.R. 341 (1962); *United States v. McCarthy*, 11 U.S.C.M.A. 758, 29 C.M.R. 574 (1960).

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

c. *Explanation.* This paragraph is based on *United States v. Darisse,* 17 U.S.C.M.A. 29, 37 C.M.R. 293 (1967); *United States v. Barrientes,* 38 C.M.R. 612 (A.B.R. 1967). The term "carelessness" was changed to "negligence" because the latter is defined in paragraph 85c(2).

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

c. *Explanation.* This paragraph is based on *United States v. Potter*, 15 U.S.C.M.A. 271, 35 C.M.R. 243 (1965).

82. Article 134 (Fleeing scene of accident)

c. *Explanation.* (1) *Nature or offense.* This paragraph is based on *United States v. Seeger*, 2 M.J. 249 (A.F.C.M.R. 1976).

(2) *Knowledge.* This paragraph is based on *United States v. Eagleson*, 3 U.S.C.M.A. 685, 14 C.M.R. 103 (1954) (Latimer, J., concurring in the result). Actual knowledge is an essential element of the offense rather than an affirmative defense as is current practice. This is because actual knowledge that an accident has occurred is the point at which the driver's or passenger's responsibilities begin. *See United States v. Waluski*, 6 U.S.C.M.A. 724, 21 C.M.R. 46 (1956).

(3) *Passengers. See United States v. Waluski*, supra.

83. Article 134 (Fraternization)

Introduction. This paragraph is new to the Manual for Courts-Martial, although the offense of fraternization is based on longstanding custom of the services, as recognized in the sources below. Relationships between senior officers and junior officers and between noncommissioned or petty officers and their subordinates may, under some circumstances, be prejudicial to good order and discipline. This paragraph is not intended to preclude prosecution for such offenses.

c. *Explanation.* This paragraph is new and is based on *United States v. Pitasi*, 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971); *United States v. Free*, 14 C.M.R. 466 (N.B.R. 1953). *See also* W. Winthrop, *Military Law and Precedents* 41, 716 n.44 (2d ed. 1920 reprint); *Staton v. Froehlke*, 390 F. Supp. 503 (D.D.C. 1975); *United States v. Lovejoy,* 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970); *United States v. Rodriquez,* ACM 23545 (A.F.C.M.R. 1982); *United States v. Livingston,* 8 C.M.R. 206 (A.B.R. 1952). *See* Nelson, *Conduct Expected of an Officer and a Gentleman: Ambiguity*, 12 A.F. JAG. L.R. 124 (1970).

d. *Maximum punishment.* The maximum punishment for this offense is based on the maximum punishment for violation of general orders and regulations, since some forms of fraternization have also been punished under Article 92. As to dismissal, *see* Nelson, *supra* at 129-130.

f. *Sample specification. See United States v. Free, supra.*

84. Article 134 (Gambling with subordinate)

c. *Explanation.* This paragraph is new and is based on *United States v. Burgin,* 30 C.M.R. 525 (A.B.R. 1961).

d. *Maximum punishment.* The maximum punishment was increased from that provided in paragraph 127*c* of MCM, 1969 (Rev.) to expressly authorize confinement. *Cf.* the second paragraph of paragraph 127*c*(2) of MCM, 1969 (Rev.).

e. *Sample specification.* Sample specification 153 in Appendix 6c of MCM, 1969 (Rev.) was revised to more correctly reflect the elements of the offense.

85. Article 134 (Homicide, negligent)

c. *Explanation.* This paragraph is based on paragraph 213*f*(12) of MCM, (Rev.); *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979).

86. Article 134 (Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official)

b. *Elements.* The elements are based on *United States v. Yum*, 10 M.J. 1 (C.M.A. 1980).

c. *Explanation.* This paragraph is new and is based on *United States v. Demetris*, 9 U.S.C.M.A. 412, 26 C.M.R. 192 (1958); *United States v. Messenger*, 2 U.S.C.M.A. 21, 6 C.M.R. 21 (1952).

87. Article 134 (Indecent acts or liberties with a child)

c. *Explanation.* This paragraph is based on paragraph 213*f*(3) of MCM, 1969 (Rev.). *See also United States v. Knowles*, 15 U.S.C.M.A. 404, 35 C.M.R. 376 (1965); *United States v. Brown*, 3 U.S.C.M.A. 454, 13 C.M.R. 454, 13 C.M.R. 10 (1953); *United States v. Riffe*, 25 C.M.R. 650 (A.B.R. 1957), *pet denied*, 9 U.S.C.M.A. 813, 25 C.M.R. 486 (1958). "Lewd" and "lascivious" were deleted because they are synonymos with indecent. *See id. See also* paragraph 90c.

88. Article 134 (Indecent exposure)

c. *Explanation.* This paragraph is new and is based on *United States v. Manos,* 8 U.S.C.M.A. 734, 25 C.M.R. 238 (1958). *See also United States v. Caune*, 22 U.S.C.M.A. 200, 46 C.M.R. 200 (1973); *United States v. Conrad*, 15 U.S.C.M.A. 439, 35 C.M.R. 411 (1965).

e. *Maximum punishment.* The maximum punishment has been increased to include a bad-conduct discharge. Indecent exposure in some circumstances (e.g., in front of children, but without the intent to incite lust or gratify sexual desires necessary for indecent acts or liberties) is sufficiently serious to authorize a punitive discharge.

89. Article 134 (Indecent language)

Introduction. "Obscene" was removed from the title because it is synonymous with "indecent." *See* paragraph 90c and Analysis. "Insulting" was removed from the title based on *United States v. Prince*, 14 M.J. 654 (A.C.M.R. 1982); *United States v. Linyear*, 3 M.J. 1027 (N.C.M.R. 1977).

Gender-neutral language has been used in this paragraph, as well as throughout this Manual. This will eliminate any question about the intended scope of certain offenses, such as indecent language, which may have been raised by the use of the masculine pronoun in MCM, 1969 (Rev.). It is, however, consistent with the construction given to the former Manual. *See e.g., United States v. Respess*, 7 M.J. 566 (A.C.M.R. 1979). *See generally* 1 U.S.C. §§ ("unless the context indicates otherwise . . . words importing the masculine gender include the feminine as well . . . . ").

c. *Explanation.* This paragraph is new and is based on *United States v. Knowles*, 15 U.S.C.M.A. 404, 35 C.M.R. 376 (1965); *United States v. Wainwright,* 42 C.M.R. 997 (A.F.C.M.R. 1970). For a general discussion of this offense, *see United States v. Linyear supra.*

_____ *1986 Amendment*: "Provoking speeches and gestures" was added as a lesser included offense. *United States v. Linyear*, 3 M.J. 1027 (N.M.C.M.R. 1977).

e. *Maximum punishment.* The maximum punishment in cases other than communication to a child under the age of 16 has been reduced. It now parallels that for indecent exposure.

90. Article 134 (Indecent acts with another)

c. *Explanation.* This paragraph is new and is based on *United States v. Holland*, 12 U.S.C.M.A. 444, 31 C.M.R. 30 (1961); *United States v. Gaskin*, 12 U.S.C.M.A. 419, 31 C.M.R. 5 (1961); *United States v. Sanchez*, 11 U.S.C.M.A. 216, 29 C.M.R. 32 (1960); *United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978). "Lewd" and "lascivious" have been deleted as they are synonymous with "indecent." *See id.*

91. Article 134 (Jumping from vessel into the water)

Introduction. This offense is new to the Manual for Courts-Martial. It was added to the list of Article 134 offenses based on *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964).

92. Article 134 (Kidnapping)

Introduction. This offense is new to the Manual for Courts-Martial. It is based generally on 18 U.S.C. § 1201. *See also Military Judges' Benchbook*, DA PAM 27-9, paragraph 3-190 (May 1982).

Kidnapping has been recognized as an offense under Article 134 under several different theories. Appellate courts in the military have affirmed convictions for kidnapping in violation of State law, as applied through the third clause of Article 134 and 18 U.S.C. § 13 (*see* paragraph 60), *e.g., United States v. Picotte*, 12 U.S.C.M.A. 196, 30 C.M.R. 196 (1961); in violation of Federal law (18 U.S.C. § 1201) as applied through the third clause of Article 134, *e.g., United States v. Perkins*, 6 M.J. 602 (A.C.M.R. 1978); and in violation of the first two clauses of Article 134, *e.g., United States v. Jackson*, 17 U.S.C.M.A. 580, 38 C.M.R. 378 (1968). As a result, there has been some confusion concerning pleading and proving kidnaping in courts-martial. *See, e.g., United States v. Smith*, 8 M.J. 522 (A.C.M.R. 1979); *United States v. DiGiulio*, 7 M.J. 848 (A.C.M.R. 1979); *United States v. Perkins, supra.*

After *United States v. Picotte, supra,* was decided, 18 U.S.C. § 1201 was amended to include kidnapping within the special maritime and territorial jurisdiction of the United States. Pub. L. 92-539, § 201, 86 Stat. 1072 (1972). Consequently, reference to state law through 18 U.S.C. § 13 is no longer necessary (or authorized) in most cases. *See United States v. Perkins, supra.* Nevertheless, there remains some uncertainty concerning kidnapping as an offense in the armed forces, as noted above. This paragraph should eliminate such uncertainty, as well as any different treatment of kidnapping in different places.

b. *Elements.* The elements are based on 18 U.S.C. § 1201. The language in that statute "for ransom or reward or otherwise" has been deleted. This language has been construed to mean that no specific purpose is required for kidnapping. *United States v. Healy*, 376 U.S. 75 (1964); *Gooch v. United States* 297 U.S. 124 (1936); *Gawne v. United States*, 409 F.2d 1399 (9th Cir. 1969), *cert. denied* 397 U.S. 943 (1970). Instead it is required that the holding be against the will of the victim. *See Chatwin. United States*, 326 U.S. 455 (1946); 2 E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 43.09 (1977); *Military Judges' Benchbook, supra* at paragraph 3-190. *See also Amsler v. United States*, 381 F.2d 37 (9th Cir. 1967); *Davidson v. United States*, 312 F.2d 163 (8th Cir. 1963).

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 nonjudical 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.

_____ *1986 Amendment*: Subparagraph e was redesignated as subparagraph g and new subparagraphs e and f were added to implement the amendments to Articles 2 and 3, UCMJ, contained in the "Military Justice Amendments of 1986," tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____ , _____ (1986).

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.).

The corroboration rule requires only that evidence be admitted which would support an inference that the essential facts admitted in the statement are true. For example, presume that an accused charged with premeditated murder has voluntarily confessed that, intending to kill the alleged victim, she concealed herself so that she might surprise the victim at a certain place and that when the victim passed by, she plunged a knife in his back. At trial, the prosecution introduces independent evidence that the victim was found dead as a result of a knife wound in his back at the place where, according to the confession, the incident occurred. This fact would corroborate the confession because it would support an inference of the truth of the essential facts admitted in the confession.

(h) *Miscellaneous.*

(1) *Oral statements.* Rule 304(h)(1) is taken verbatim from 1969 Manual paragraph 140a(6). It recognizes that although an oral statement may be transcribed, the oral statement is separate and distinct from the transcription and that accordingly the oral statement may be received into evidence without violation of the best evidence rule unless the specific writing is in question, *see* Rule 1002. So long as the oral statement is complete, no specific rule would require the prosecution to offer the transcription. The defense could of course offer the writing when it would constitute impeachment.

(2) *Completeness.* Rule 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 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.

_____ *1986 Amendment*: Mil. R. Evid. 304(h)(4) was added to make clear that evidence of a refusal to obey a lawful order to submit to a chemical analysis of body substances is admissible evidence when relevant either to a violation of such order or an offense which the test results would have been offered to prove. The Supreme Court in *South Dakota v. Neville*, 459 U.S. 553 (1983) held that where the government may compel an individual to submit to a test of a body substance, evidence of a refusal to submit to the test is constitutionally admissible. Since the results of tests of body substances are non-testimonial, a servicemember has no Fifth Amendment or Article 31 right to refuse to submit to such a test. *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980); *Schmerber v. State of California*, 384 U.S. 757 (1966). A test of body substances in various circumstances, such as search incident to arrest, probable cause and exigent circumstances, and inspection or random testing programs, among others, is a reasonable search and seizure in the military. *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); Mil. R. Evid. 312; Mil. R. Evid. 313. Under the Uniform Code of Military Justice, a military order is a valid means to compel a servicemember to submit to a test of a body substance. *Murray v. Haldeman, supra.* Evidence of a refusal to obey such an order may be relevant as evidence of consciousness of guilt. *People v. Ellis*, 65 Cal. 2d 529, 421 P.2d 393 (1966). *See also State v. Anderson*, Or. App., 631 P.2d 822 (1981); *Newhouse v. Misterly*, 415 F.2d 514 (9th Cir. 1969), *cert. denied* 397 U.S. 966 (1970).

This Rule creates no right to refuse a lawful order. A servicemember may still be compelled to submit to the test. *See, e.g.*, Mil. R. Evid. 312. Any such refusal may be prosecuted separately for violation of an order.

Rule 305. Warnings About Rights

(a) *General Rule.* Rule 305(a) makes statements obtained in violation of rule 305, *e.g.*, statements obtained in violation of Article 31(b) and the right to counsel, involuntary within the meaning of rule 304. This approach eliminates any distinction between statements obtained in violation of the common law voluntariness doctrine (which is, in any event, included within Article 31(d) and those statements obtained in violation, for example, of *Miranda (Miranda v. Arizona*, 384 U.S. 435 (1966) warning requirements. This is consistent with the approach taken in the 1969 Manual, *e.g.*, ¶ 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 resonable 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 ¶ 140*c*(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. 211, 38 C.M.R. 9 (1967); *United States v. Greer*, 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953); and *United States v. Ruiz*, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974). Rule 305(d)(1) requires that an individual who is entitled to counsel under the Rule be advised of the nature of that right before an interrogation involving evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment (an interrogation as defined in Rule 305(d)(2) and modified in this case by Rule 305(d)(1)) may lawfully proceed. Although the Rule does not specifically require any particular wording or format for the right to counsel warning, reasonable specificity is required. At a minimum, the right to counsel warning must include the following substantive matter:

(1) That the accused or suspect has the right to be represented by a lawyer at the interrogation if he or she so desires;

(2) That the right to have counsel at the interrogation includes the right to consult with counsel and to have counsel at the interrogation;

(3) That if the accused or suspect so desires, he or she will have a military lawyer appointed to represent the accused or suspect at the interrogation at no expense to the individual, and the accused or suspect may obtain civilian counsel at no expense to the Government in addition to or instead of free military counsel.

It is important to note that those warnings are in addition to such other warnings and waiver questions as may be required by Rule 305.

Rule 305(d)(1)(A) follows the plurality of civilian jurisdiction by utilizing an objective test in defining "custodial" interrogation. *See also United States v. Temperley*, 22 U.S.C.M.A. 383, 47 C.M.R. 235(1978). Unfortunately, there is no national consensus as to the exact nature of the test that should be used. The language used in the Rule results from an analysis of *Miranda v. Arizona*, 384 U.S. 436 (1966) which leads to the conclusion that *Miranda* is predominately a voluntariness decision concerned with the effects of the psychological coercion inherent in official questioning. *See e.g.*, Lederer, *Miranda v. Arizona—The Law Today*, 78 Mil. L. Rev. 107, 130 (1977).

The variant chosen adopts an objective test that complies with *Miranda's* intent by using the viewpoint of the suspect. The objective nature of the test, however, makes it improbable that a suspect would be able to claim a custodial status not recognized by the interrogator. The test makes the actual belief of the suspect irrelevant because of the belief that it adds nothing in practice and would unnecessarily lengthen trial.

Rule 305(d)(1)(B) codifies the Supreme Court's decisions in *Brewer v. Williams*, 480 U.S. 387 (1977) and *Massiah v. United States*, 377 U.S. 201 (1964). As modified by *Brewer Massiah* requires that an accused or suspect be advised of his or her right

to counsel prior to interrogation, whether open or surreptitious, if that interrogation takes place after either arraignment or indictment. As the Armed Forces lack any equivalent to those civilian procedural points, the initiation of the formal military criminal process has been utilized as the functional equivalent. Accordingly, the right to counsel attaches if an individual is interrogated after 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 aware. In the absence of the expansion, present law places a premium on law enforcement ignorance and has the potential for encouraging perjury. The change rejects the view expressed in *United States v. Roy*, 4 M.J. 840 (A.C.M.R. 1978) which held that in the absence of bad faith a criminal investigator who interviewed the

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, 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 midbehavior 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. United 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 the test is normally a matter within the military judge's discretion.

Under Rule 103(a) any objection to an expert on the basis that the individual is not in fact adequately qualified under the Rule will be waived by a failure to so object.

¶ 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 possibile 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 admissibilty 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 intergral 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 these 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.

_____ *1986 Amendment:* While writing the Manual provisions to implement the enactment of Article 50a, UCMJ ("Military Justice Amendments of 1986," National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, _____ Stat. _____, (1986)), the drafters rejected adoption of Fed. R. Evid. 704(b). The statutory qualifications for military court members reduce the risk that military court members will be unduly influenced by the presentation of ultimate opinion testimony from psychiatric experts.

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-examintion 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

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