

Regulation for Trial by Military Commission

(2011 Edition)



Department of Defense

Regulation for Trial by Military Commission

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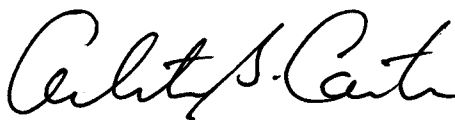
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FOREWORD

The reforms of the Military Commissions Act of 2009 are reflected in the 2010 Edition of the Manual for Military Commissions which provides the rules of evidence and procedures for trial by military commission. The 2011 Regulation for Trial by Military Commission provides guidance for practitioners in military commissions and implements the provisions of the Military Commissions Act of 2009 and the 2010 Edition of the Manual for Military Commissions. To the extent that the guidance here differs from that which applies in courts-martial, that difference is necessitated by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need, consistent with Military Commissions Act of 2009.

The 2011 Regulation for Trial by Military Commission applies to: the Office of the Secretary of Defense; the Military Departments; the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff; the Combatant Commands; the Office of the Inspector General of the Department of Defense (DoD); the Defense Agencies; the DoD Field Activities; all other organizational entities within the DoD (hereinafter referred to collectively as the “DoD Components”); any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States to serve as a prosecutor in trials before military commissions; any civilian attorney retained as civilian defense counsel (*see* Rule for Military Commissions 502(d)(3)); and to any attorney who has been qualified as a member of the civilian defense counsel pool. *See* Chapter 9-5.

I hereby prescribe the 2011 Regulation for Trial by Military Commission.



Ashton B. Carter
Deputy Secretary of Defense

NOV 6 2011

Chapter 1

INTRODUCTION

1-1. PURPOSE

a. The Regulation for Trial by Military Commission (hereinafter Regulation) prescribes policies and provisions for the administration of military commissions and implements the Manual for Military Commissions, United States, 2010 (M.M.C.). In drafting this Regulation, every effort was made to ensure that its policies and provisions are not in conflict with the Military Commissions Act of 2009 (M.C.A.) or the M.M.C. In the case of any conflict between this Regulation and the rules and procedures prescribed by the M.C.A. and M.M.C., the latter two will always be controlling over this Regulation.

b. This Regulation is not intended to, and does not, create any substantive right enforceable by any party. All persons subject to this Regulation are required to adhere to the guidance in this Regulation in all matters related to military commissions.

1-2. EXPLANATION OF ABBREVIATIONS AND TERMS

Abbreviations, special terms, and definitions used in this Regulation are explained in Rule for Military Commission (R.M.C.) 103.

1-3. RESPONSIBILITIES

a. The Secretary of Defense is responsible for the overall supervision and administration of military commissions within the DoD.

b. The Chief Trial Judge, Military Commissions Trial Judiciary, as a designee of the Secretary of Defense or his designee, is responsible for the supervision and administration of the Military Commissions Trial Judiciary.

c. The Deputy General Counsel for Personnel and Health Policy of the DoD, as designee of the Secretary of Defense, is responsible for the oversight of defense counsel services for military commissions.

1-4. UNLAWFUL INFLUENCE IN MILITARY COMMISSIONS PROCEEDINGS

10 U.S.C. § 949b, prohibits unlawful influence in military commissions proceedings. All persons involved in the administration of military commissions must avoid the appearance or actuality of unlawful influence and otherwise ensure that the military commission system is free of unlawful influence. In addition, all persons, even those not officially involved in the commissions process, should be sensitive to the existence, or appearance, of unlawful influence, and should be vigilant and vigorous in their efforts to prevent it.

1-5. APPLICATION OF PROFESSIONAL RESPONSIBILITY RULES

- a. In addition to complying with State and service-specific Rules of Professional Conduct, all attorneys practicing before military commissions shall adhere to any rules of professional responsibility prescribed by the Secretary of Defense. *See* R.M.C. 109(b)(1) and Chapter 10 of this Regulation. Compliance with all rules, regulations, and instructions applicable to trials by military commission convened pursuant to the M.C.A. shall be deemed a professional responsibility obligation for the practice of law within the DoD. *See also* Chapter 10.
- b. Those who fail to adhere to the rules, procedures, regulations, and instructions applicable to trials by military commission may be subject to appropriate action by the Secretary of Defense or his designee, the Convening Authority for Military Commissions, or the military judge of a military commission. *See* R.M.C. 109(b)(2) and Chapter 10.
- c. Such action may include permanently barring an individual from participating in any military commission proceeding convened pursuant to the M.C.A., and any other lawful sanction. *See* R.M.C. 109(b)(2) and Chapter 10.

Chapter 2

CONVENING AUTHORITY

2-1. ORGANIZATION

a. The Office of the Convening Authority for Military Commissions is established in the Office of the Secretary of Defense under the authority, direction, and control of the Secretary of Defense. The Office of the Convening Authority shall consist of the the Convening Authority, Director of the Office of the Convening Authority, the Legal Advisor to the Convening Authority, and such other subordinate officials (including the Chief of the Office of Court Administration) and organizational elements as are within the resources of the Secretary of Defense.

b. The Legal Advisor is an official appointed by authority of the Secretary of Defense who fulfills the responsibilities of that position, as delineated in the Manual for Military Commissions and this Regulation, and otherwise provides legal advice and recommendations to the Convening Authority and to the Director, Office of the Convening Authority, similar in nature to that provided by a staff judge advocate under the Uniform Code of Military Justice. A Legal Advisor may be military or civilian and may include a staff judge advocate, if so appointed. *See* R.M.C. 103(a)(17). Additionally, the Legal Advisor shall supervise the Chief Prosecutor, Office of Military Commissions (OMC-P). *See* Chapter 8-2, *but see* Chapter 8-6(b)(1). While supervising the Chief Prosecutor, the Legal Advisor will insure that he or she maintains the ability to objectively and independently provide legal advice to the Convening Authority and the Director, Office of the Convening Authority. Insofar as the Legal Advisor supervises the Chief Prosecutor, the Deputy General Counsel (Legal Counsel) of the DoD shall directly supervise the Legal Advisor in the performance this duty, and shall be the reporting senior who fulfills all performance evaluation responsibilities.

2-2. AUTHORITY TO CONVENE MILITARY COMMISSIONS

Pursuant to 10 U.S.C. § 948h, the Secretary of Defense or any officer or official of the United States designated by the Secretary for that purpose may convene military commissions. No specific form or order is required to effect the appointment of one or more convening authorities by the Secretary of Defense.

2-3. RESPONSIBILITIES AND FUNCTIONS

a. *Convening Authority for Military Commissions.* In performing duties directly related to military commissions, the Convening Authority for Military Commissions (Convening Authority) shall:

1. Dispose of charges (*see* R.M.C. 401), including returning charges to trial counsel with direction for further action;

2. Issue orders convening one or more military commissions to try alien unprivileged enemy belligerents for violations of the law of war or other crimes triable by military commissions;

3. Detail as military commission members and alternate members those commissioned officers (including reserve component officers on active duty and retired officers recalled to active duty) who are, in the opinion of the Convening Authority, best qualified for duty by reason of age, education, training, experience, length of service, and judicial temperament;

4. Detail or employ court reporters qualified to make a quality verbatim record of all commission sessions so these records may be posted on the Office of Military Commissions (OMC) website accordance with Chapter 19-4 of this Regulation;

5. Detail or employ qualified interpreters who shall interpret for the commissions and, as necessary, for the accused;

6. Ensure that the Trial Judiciary is properly staffed with a Chief Clerk of the Trial Judiciary (hereinafter Chief Clerk) and any additional staff necessary to perform the various support roles and duties necessary to maintain the proper and efficient administration of the Trial Judiciary (*see* Chapters 17 and 19 of this Regulation), assign other personnel necessary (*e.g.*, security personnel, bailiffs, and clerks) to facilitate military commissions;

7. Approve or disapprove requests from the prosecution to communicate with news media representatives regarding military commission cases and other matters related to military commissions, coordinate with the Assistant Secretary of Defense for Public Affairs on issues relating to policy and plans for media coverage of military commissions proceedings, and designate individuals to communicate with news media representatives on behalf of the Convening Authority regarding cases and other matters related to military commissions (such matters shall be coordinated with the Assistant Secretary of Defense for Public Affairs);

8. Coordinate with the Deputy Assistant Secretary of Defense for Detainee Policy, under the authority, direction, and control of the Under Secretary of Defense for Policy, on all issues dealing with policy, including conditions of detention;

9. Approve or disapprove plea agreements with an accused;

10. Order that such investigative or other resources be made available to defense counsel and the accused as deemed necessary by the Convening Authority for a fair trial;

11. Review requests from the prosecution and the defense for experts and determine whether the experts sought are relevant and necessary;

12. Be responsible for effecting preparation of the Record of Trial;
13. Review military commission records of trial and consider matters submitted by an accused with respect to the findings and sentence of a military commission and take such action deemed appropriate by the Convening Authority (*see* R.M.C. 1107);
14. Establish, maintain, and preserve records that serve as evidence of the organization, functions, policies, decisions, procedures, operations, and other activities of the Office of the Convening Authority, in accordance with Title 44, United States Code;
15. Consistent with the statutory obligation that proceedings be public (*see* 10 U.S.C. § 949d(c)), ensure the collection, maintenance, use, and release of personally identifiable information contained in records associated with the execution of designated responsibilities and functions provided in this Directive are appropriately safeguarded and comply with DoD Directive 5400.11 and DoD 5400.11-R;
16. Communicate with members of Congress and coordinate such matters, including correspondence involving members of Congress, with the Assistant Secretary of Defense for Legislative Affairs and the Under Secretary of Defense (Comptroller) as appropriate; and coordinate and exchange data and information with other Office of the Secretary of Defense (OSD) officials, the Heads of the DoD Components, and other Federal officials having collateral or related functions. Communications to the military departments shall be transmitted through the Secretaries of the military departments, their designees, or as otherwise provided by law or directed by the Secretary of Defense. Communications to the Commanders of the Combatant Commands, except in unusual circumstances, shall be transmitted through the Chairman of the Joint Chiefs of Staff;
17. Communicate with other Government officials, members of the public, and representatives of foreign governments, as applicable, in carrying out assigned functions;
18. Obtain reports and information, in accordance with DoD Instruction (DoDI) 8910.01, as necessary to carry out assigned responsibilities and functions;
19. Subject to the concurrence of the General Counsel of the DoD, approve DoD Manuals and one-time Directive-Type Memoranda in accordance with DoDI 5025.01 (Reference (j)), and such other guidance as necessary or appropriate for the conduct of proceedings by military commissions established pursuant to References (e) and (f). Instructions to the Military Departments shall be issued through the Secretaries of the Military Departments. Instructions to the Combatant Commands normally shall be communicated through the Chairman of the Joint Chiefs of Staff;
20. Perform such other functions as the Secretary of Defense or his or her designee, or an appellate court may prescribe.

b. *General Counsel of the DoD.* The General Counsel of the DoD, shall:

1. Review and approve such regulations, instructions, memorandums, and DoD issuances prepared by the Convening Authority (*see* Chapter 2-3(a)(19)) for the conduct of proceedings by military commissions established pursuant to chapter 47A of Title 10 U.S.C.
2. Provide guidance pertaining to military commission-related offices, performance evaluations, and reporting relationships.

c. *Chairman of the Joint Chiefs of Staff and the OSD Principal Staff Assistants.* The Chairman of the Joint Chiefs of Staff and the OSD Principal Staff Assistants shall exercise their designated authorities and responsibilities as established by law or DoD guidance to support the Convening Authority for Military Commissions in the implementation of the responsibilities and functions specified herein.

d. *Secretaries of the Military Departments.* The Secretaries of the Military Departments shall support the personnel requirements of the Convening Authority as validated by the General Counsel of the DoD, and provide other requested assistance and support within their capabilities.

2-4. RELATIONSHIPS

a. In the performance of assigned responsibilities and functions, the Convening Authority for Military Commissions shall:

1. Report directly to the Secretary of Defense or his designee.
2. Use existing systems, facilities, and services of the DoD and other Federal agencies, when possible, to avoid duplication and to achieve maximum efficiency and economy.

b. Other OSD officials and the Heads of the DoD Components shall coordinate with the Convening Authority on all matters under their purview related to the responsibilities and functions assigned in Chapter 2-3(a) of this Regulation.

c. Nothing herein shall be interpreted to subsume or replace the responsibilities, functions, or authorities of the OSD Principal Staff Assistants, the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, the Commanders of Combatant Commands, or the Heads of Defense Agencies and the DoD Field Activities prescribed by law or DoD guidance.

Chapter 3

SWEARING OF CHARGES

3-1. GENERAL

Although charges under the M.C.A. may be sworn by anyone subject to the Uniform Code of Military Justice (U.C.M.J.), charges will normally be sworn by an appropriate official in the office of the Chief Prosecutor of the Office of Military Commissions (OMC-P). If charges are sworn by someone other than an OMC-P official, the charges should be forwarded as soon as possible to the Chief Prosecutor for further processing and action.

3-2. PREPARATION OF CHARGES TO BE SWORN

a. *Discretion as to swearing charges.* The person swearing charges need not plead all possible charges that the evidence could support. However, the person swearing charges shall refrain from swearing any charge that is not supported by probable cause. In addition, what is substantially one transaction should not be made the basis for an unreasonable number of charges against one person. *See* R.M.C. 307(c)(4).

b. *Charging Factors.* In deciding how an offense or offenses should be disposed of, the person swearing charges should consider, to the extent they are known, the following factors:

1. The character, age, and/or mental capacity of the accused;
2. The nature of and circumstances surrounding the offense(s) and the extent of the harm caused by the offense(s);
3. The appropriateness of the authorized punishment to the particular accused or offense(s);
4. The possible improper motives of the accused;
5. The reluctance of any victims or others to testify;
6. The cooperation of the accused in the apprehension or conviction of others or in connection with intelligence and operational matters;
7. The availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;
8. The availability and admissibility of evidence;
9. The existence of jurisdiction over the accused and the offense(s); and

10. Issues involving classified evidence and national security.

c. *Preparation of Charges.* The person preparing charges and specifications shall use an MC Form 458, Charge Sheet (Figure 3.1). R.M.C. 307 and MC Form 458 provide instructions on the preparation of charges and specifications. The Charge Sheet should be unclassified. If there is any possibility that the charges and specifications, as drafted, could contain classified information, the person preparing the draft charges and specifications will submit them to the DoD Security Classification/Declassification Review Team and the original classification authority for any pertinent non-DoD federal departments and agencies for declassification review. See Chapter 18. The Charge Sheet shall be signed and forwarded to the Convening Authority. Each accused will be charged on separate Charge Sheets. The person preparing the Charge Sheet shall use plain 8 1/2 x 11 paper for continuation pages when extra space is needed for charges and specifications. Each page shall bear appropriate classification markings, with paragraph markings being required only where any paragraph contains information classified CONFIDENTIAL or above. Each page shall also indicate the page number, number of pages, and, if it is a continuation page, that it is a continuation of the charges and specifications.

d. *Who signs.* Charges and specifications against an accused in a military commission must be signed, under oath, by a person subject to the U.C.M.J. See 10 U.S.C. § 948q(a); R.M.C. 307.

e. *Who administers the oath.* Any commissioned officer empowered by Article 136, U.C.M.J. (10 U.S.C. § 936) may administer the oath to the person signing the Charge Sheet. See MC Form 458; see also R.M.C. 307(b)(2) for suggested oath. These officials include all judge advocates, legal officers, and adjutants, as well as all commanding officers of the Navy, Marine Corps, and Coast Guard.

f. *Notice to the Accused.* Upon the swearing of the charges and specifications, the accused shall be informed, by the trial counsel, of the charges and specifications sworn against the accused as soon as practicable. Such charges shall be in English and, if appropriate, in another language that the accused understands. The charges shall be read to the accused in English or, if appropriate, another language that the accused understands. See 10 U.S.C. § 948q(b); R.M.C. 308. The notification shall also include any recommendation of the trial counsel to the Convening Authority to refer the case to a capital military commission. See R.M.C. 308. When detailed, defense counsel will also be provided a copy of the sworn charges in English and, if appropriate, a language that the accused understands. When the notice is given, the certificate attesting to such notice that is included on the Charge Sheet should be completed to indicate the date of the notice. The Notification of Charges Memo may be used to inform the accused and defense counsel of the charges and specifications. See Figure 3.3.

g. *Notice to the Legal Advisor to the Convening Authority and to the Chief Defense Counsel for Military Commissions.* The trial counsel or Chief Prosecutor shall provide a copy of the sworn charges to the Legal Advisor of the Convening Authority and the

Chief Defense Counsel for military commissions within 24 hours after the charges are sworn. Pursuant to 10 U.S.C. § 948k, defense counsel for a military commission shall be detailed as soon as practicable after the swearing of charges against the accused. In any case in which the trial counsel makes a recommendation to the Convening Authority pursuant to R.M.C. 307(d) that a charge be referred to a capital military commission, the accused has a right to be represented by at least one additional counsel who is learned in applicable law relating to capital cases. *See* R.M.C. 506(b).

3-3. FORWARDING OF CHARGES

a. Trial counsel will forward charges, with the accompanying materials or other evidence, supporting the charges through the Chief Prosecutor to the Legal Advisor to the Convening Authority and then to the Convening Authority, or the Secretary of Defense, if serving as the Convening Authority for the case, with a transmittal letter. The transmittal letter itself should be unclassified. The charges may be referred to a military commission for trial if “the Convening Authority finds, or is advised by a Legal Advisor that there are reasonable grounds to believe that an offense triable by military commission has been committed and that the accused committed it, and that the specification alleges an offense.”

1. If the offenses charged are offenses for which the maximum possible punishment is death, the trial counsel will make a recommendation as to whether the Convening Authority should refer the case to a military commission empowered to adjudge the penalty of death. *See* R.M.C. 307. If a charge transmitted by trial counsel to the Convening Authority is a charge for which the death penalty is authorized, the Convening Authority may not refer the charge as a capital offense unless the provisions regarding learned counsel under R.M.C. 506(b) have been met. *See* R.M.C. 601(d)(2).

2. The trial counsel will include in the transmittal letter which aggravating factor(s) the prosecution intends to prove or rely on to pursue a death sentence pursuant to R.M.C. 1004(b)(1) and (c).

b. In the transmittal letter, the trial counsel will indicate whether the government anticipates the need to disclose classified information to the military judge or the members during the course of the trial. If the trial counsel anticipates disclosure of classified information, the trial counsel shall indicate in the transmittal letter the highest level of classified information concerned, either CONFIDENTIAL, SECRET or TOP SECRET. The transmittal letter shall not identify the caveats or name compartments or special access programs. The trial counsel shall notify the Convening Authority's Chief Security Officer (CSO) by separate, secure communication if the trial counsel anticipates disclosure of classified information subject to specified caveats or restricted to compartments or special access programs. Because the trial counsel's notice to the Convening Authority's CSO of anticipated disclosure of classified information, subject to specified caveats or restricted to compartments or special access programs, when aggregated with the information associated with the trial may disclose the intelligence sources, methods and activities protected by the caveats, compartments or programs, the

trial counsel's notice shall be classified and restricted at the level of the most restricted information noticed. The trial counsel's notification to the Convening Authority's CSO shall not be subject to disclosure and shall not be made part of the record of trial unless otherwise ordered by the military judge subject to 10 U.S.C. 949p-1 through 949p-7 and Military Commissions Rules of Evidence (hereinafter Mil. Comm R. Evid.) 505 and 506.

c. Prior to swearing and forwarding proposed charges against an accused, trial counsel shall consult with the Office of the Director of National Intelligence (ODNI) regarding the information and evidence that the government anticipates will be disclosed during the course of the trial to determine whether the trial of the charges would be harmful to national security. The trial counsel shall indicate in the transmittal letter that trial counsel has coordinated with ODNI and whether ODNI concluded that trial of the charges would or would not be harmful to national security.

d. The trial counsel shall indicate whether there are any issues involved in the trial of the case that may be inimical to the prosecution of a war or harmful to national security.

e. The Chief Prosecutor will make his recommendation by an endorsement to the transmittal letter to the Convening Authority. The charges, supporting documentation, and transmittal letter will then be forwarded through the Legal Advisor to the Convening Authority.

3-4. CHANGES TO CHARGES AND SPECIFICATIONS

a. *Major changes.* Major changes add a party, offense, or substantial matter not fairly included in the charge or specification not previously sworn or which is likely to mislead the accused as to the offense charged. All other changes are minor changes. Specifications and charges with major changes must be re-sworn and signed unless there is no objection from the accused. *See* R.M.C. 603(d).

b. *Minor corrections:* Changes to charges and specifications must be done in accordance with R.M.C. 603. Minor corrections to charges and specifications may be made by pen and ink changes on the Charge Sheet. The officer making corrections on the Charge Sheet should initial and date them.

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:

2. ALIASES OF ACCUSED:

3. ISN NUMBER OF ACCUSED (LAST FOUR):

II. CHARGES AND SPECIFICATIONS

4. CHARGE: | VIOLATION OF M.C.A. SECTION AND TITLE OF CRIME.

SPECIFICATION

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (LAST, FIRST, MI)

5b. GRADE

5c. ORGANIZATION OF ACCUSER

5d. SIGNATURE OF ACCUSER

5e. DATE (YYYYMMDD)

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the ____ day of _____, _____, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Typed Name of Officer

Organization of Officer

Grade

Official Capacity to Administer Oath
(See R.M.C. 307(b) must be commissioned officer)

Signature

IV. NOTICE TO THE ACCUSED

6. On _____, _____ the accused was notified of the charges against him/her (See R.M.C. 308).

*Typed Name and Grade of Person Who Caused
Accused to Be Notified of Charges*

*Organization of the Person Who Caused
Accused to Be Notified of Charges*

Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at _____ hours, on _____, at _____

Location

For the Convening Authority: _____

Typed Name of Officer

Grade

Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY

8b. PLACE

8c. DATE (YYYYMMDD)

Referred for trial to the (non)capital military commission convened by military commission convening order _____

_____ subject to the following instructions¹: _____

By _____ of _____
Command, Order, or Direction

Typed Name and Grade of Officer

Official Capacity of Officer Signing

Signature

VII. SERVICE OF CHARGES

9. On _____, _____ I (caused to be) served a copy these charges on the above named accused.

Typed Name of Trial Counsel

Grade of Trial Counsel

Signature of Trial Counsel

FOOTNOTES

¹See R.M.C. 601(e) concerning instructions. If none, so state.

Figure 3.2 – Instructions for Completing MC Form 458, Charge Sheet

1. Number of copies. Prepare an original and five copies of the Charge Sheet.
2. Accuracy in typing. The use of correction tape or correction fluid is prohibited. Pen-and-ink changes are permitted if the original wording is legible and if the change is dated and provides the initials of the official making the change.
3. Page 1 of MC Form 458.
 - a. Block #1: Name of the Accused: Use all capital letters in the last name.
 - b. Block #2: Aliases of Accused: Enter all known aliases of the accused, use all capital letters in the last name.
 - c. Block #3: ISN of the Accused.
 - d. Block #4: General – Charges and Specifications: Pleadings in military law are called charges and specifications. This is the formal written indictment by which an accused is charged with an offense.
 - (1) Use Roman numerals for numbering charges. If there is only one charge, do not number.
 - (2) Use Arabic numbers for numbering specifications. If there is only one specification, do not number.
 - e. Block 5a. Name of Accuser: Enter the name of the accuser. (The accuser may be any person subject to the Uniform Code of Military Justice.)
 - f. Block 5b. Grade: Enter the rank and grade of the accuser (MAJ/0-4, Lt. Col/0-5, etc.)
 - g. Block 5c. Organization of Accuser: Enter the organization of the accuser.
 - h. Block 5d. Signature of Accuser: Self-explanatory.
 - i. Block 5e. Date: Enter the date the Charge Sheet is signed.
 - j. Affidavit. The oath must be administered by a commissioned officer or commissioned warrant officer and must actually be administered substantially as follows:

“Do you swear (or affirm) that you are a person subject to the Uniform Code of Military Justice; that you have personal knowledge of or have investigated the matters set forth

in the foregoing charge(s) and specification(s); and that the same are true in fact to the best of your knowledge and belief (so help you God)?”

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

“*Official Capacity to Administer Oath*” may be shown simply as “Article 136(a)(1)” in the case of a judge advocate.

4. Page 2 of MC Form 458.

a. Block #6. The Office of the Chief Prosecutor or trial counsel must cause the accused to be notified of charges sworn against the accused.

b. Block #7. Receipt of Charges by Convening Authority. Immediately upon the receipt of sworn charges, the Office of the Convening Authority will cause the hour and date of receipt to be entered in the spaces provided. The block must be signed by either the Convening Authority or another officer authorized in writing to sign for the Convening Authority.

c. Blocks #8a, b, and c. Leave this section blank until the Convening Authority refers the case to a military commission for trial.

1. “Designation of Convening Authority” refers to the authority of the Convening Authority to convene military commissions. For example, in Block 8a, indicate “Convening Authority, 10 U.S.C. § 948h, Secretary of Defense Memo dated _____” or “Secretary of Defense, 10 U.S.C. § 948h”.

2. “Place” would refer to the physical location of the Convening Authority.

3. “Date” refers to the date of the referral.

4. The block “Referred for trial . . .” portion should be completed with the appropriate Convening Order or orders and then with instructions if any (adapt to fit the circumstances of the referral). If none, indicate “None.”

Examples: Referred for trial to the (non)capital military commission convened by military commission Convening Order 1-07, subject to the following instructions:

o NONE.

o “these charges will be tried in conjunction with the charges referred against the accused on _____.”

o “the charges against the above named accused will be tried at a joint or common trial with the trial of (name of another accused)”

o “this case is referred non-capital.”

o “this case is referred capital. See R.M.C. 103(a)(3)and (4).”

5. Signature: When the Convening Authority personally signs this section; the words “By ___ of ___” shall be stricken.

d. Block #9: This section will be completed by the trial counsel, certifying that the accused was personally served a copy of the charges.

Figure 3.3 – Notification of Charges Memo

**DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610**

____ / ____ / ____
(day) (month) (year)

MEMORANDUM FOR

(Name of Detainee and Last 4 of ISN)
Guantanamo Bay, Cuba

SUBJECT: Notification of the Swearing of Charges

1. You are hereby notified that criminal charges were sworn against you on the _____ day of _____, 2011, pursuant to the Military Commissions Act of 2009 (MCA)) and the Manual for Military Commissions (MMC). A copy of this notice is being provided to you and your detailed defense counsel.

2. Specifically, you are charged with the following offenses: *(Read the charges and specifications to the accused, as stated below. If necessary, an interpreter may read the charges in a language, other than English, that the accused understands):*

AFFIDAVIT OF NOTIFICATION

I hereby certify that a copy of this document was provided to the named detainee this _____ day of _____, 201_.

Signature

Organization

Typed or Printed Name and Grade
Address of Organization

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:

2. ALIASES OF ACCUSED:

3. ISN NUMBER OF ACCUSED (LAST FOUR):

II. CHARGES AND SPECIFICATIONS

4. CHARGE I: M.C.A. Section 950t(1) Murder of Protected Persons

SPECIFICATION 1: In that [name of accused], [last four of ISN], an alien unprivileged enemy belligerent, did, at [region], [country], on or about [date of alleged offense], in the context of and associated with hostilities, intentionally and unlawfully kill [name of alleged victim], a protected person.

SPECIFICATION 2: In that [name of accused], [last four of ISN], an alien unprivileged enemy belligerent, did, at [region], [country], on or about [date of alleged offense], in the context of and associated with hostilities, intentionally and unlawfully kill [name of alleged victim], a protected person.

CHARGE III: M.C.A. Section 950t(4) Pillaging

SPECIFICATION: In that [name of accused], [last four of ISN], an alien unlawful enemy combatant, at [region], [country], on or about [date of alleged offense], in the context of and associated with armed conflict, without the consent of the owner, seized certain property, to wit: a Rolex watch, six goats, and twenty dollars, U.S. currency, with the intent to appropriate all such property for the private use of the said [name of accused]

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (LAST, FIRST, MI)

5b. GRADE

5c. ORGANIZATION OF ACCUSER

5d. SIGNATURE OF ACCUSER

5e. DATE (YYYYMMDD)

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the _____ day of _____, _____, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Typed Name of Officer

Organization of Officer

Grade

Official Capacity to Administer Oath
(See R.M.C. 307(b) must be commissioned officer)

Signature

IV. NOTICE TO THE ACCUSED

6. On _____, _____ the accused was notified of the charges against him/her (See R.M.C. 308).

*Typed Name and Grade of Person Who Caused
Accused to Be Notified of Charges*

*Organization of the Person Who Caused
Accused to Be Notified of Charges*

Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at _____ hours, on _____, at _____

Location

For the Convening Authority: _____

Typed Name of Officer

Grade

Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY

Convening Authority, Chapter 47A of Title 10 U.S.C. § 948 h, designated on [date of Convening Authority designation by the Secretary of Defense]

8b. PLACE

Arlington, VA

8c. DATE (YYYYMMDD)

Referred for trial to the (non)capital military commission convened by military commission convening order 11-03

_____ subject to the following instructions¹: NONE, this case is referred non-capital

XX _____ XX _____
Command, Order, or Direction

Convening Authority, Chapter 47A of Title 10 USC § 948h

Typed Name and Grade of Officer

Official Capacity of Officer Signing

Signature

VII. SERVICE OF CHARGES

9. On _____, _____ I (caused to be) served a copy these charges on the above named accused.

Typed Name of Trial Counsel

Grade of Trial Counsel

Signature of Trial Counsel

FOOTNOTES

¹See R.M.C. 601 concerning instructions. If none, so state.

Chapter 4

REFERRAL OF CHARGES

4-1. GENERAL

- a. The Secretary of Defense or a Convening Authority designated by the Secretary of Defense may order charges against an accused be tried by a specified military commission.
- b. The Convening Authority will personally determine whether to refer the charges to trial by military commission and the type of military commission (capital or non-capital) to which charges will be referred. This function may not be delegated.

4-2. RECOMMENDATION FROM LEGAL ADVISOR

The charges and specifications are forwarded to the Legal Advisor from the Chief Prosecutor. The Legal Advisor will advise the Secretary of Defense or the Convening Authority of the following:

1. Whether each specification alleges an offense under the M.C.A.;
2. Whether the allegation of each offense is warranted by the evidence;
3. Whether a military commission would have jurisdiction over the accused and the offense;
4. Whether, after consultation with the ODNI and appropriate intelligence agencies, trial of the charges would be harmful to national security; and
5. Recommendation of the action to be taken by the Convening Authority.

4-3. REFERRAL

- a. The Convening Authority refers cases by personal order and may include instructions regarding the disposition of the charges and how they are to be tried. The Convening Authority may refer cases to a non-capital commission even if the offenses referred are capital offenses. If a case is referred to a capital commission, the Convening Authority must, with a special instruction on the referral, indicate that the case is to be tried as capital; and a sentence of death must be specifically authorized under Chapter 47A of Title 10 U.S.C., or the law of war for one or more of the referred offenses. *See* R.M.C. 201(d)(2). The Convening Authority may not refer the charge as a capital offense unless the provisions regarding the provision of learned counsel under R.M.C. 506(b) have been met. *See* R.M.C. 601(d)(2).
- b. The Convening Authority must sign either the Charge Sheet, MC Form 458, an endorsement or another document reflecting the intention to refer charges to trial. Such

other documents may include concurrence with the Legal Advisor's advice and recommendation to refer the case to a military commission. The Legal Advisor or another designated member of the Legal Advisor's staff may sign for the Convening Authority, or by direction of the Convening Authority, if the Convening Authority has provided written authorization. In such cases, use an authority line such as ~~FOR THE CONVENING AUTHORITY~~" or ~~BY DIRECTION OF THE CONVENING AUTHORITY~~."

c. *Non-capital*. In a case where the death penalty is authorized, and the Convening Authority decides to refer the case as non-capital, the referral should include special instructions stating the case is referred as non-capital.

1. Instructions. The Convening Authority may include instructions in his or her referral order that:

- A. Charges against an accused be tried with other charges previously referred;
- B. Charges against one accused be referred for joint or common trial with another accused; and
- C. Capital offenses be referred as non-capital offenses. *See* R.M.C. 601 (e).

d. *Capital Referral*. If the Convening Authority intends to refer a case capital, the Convening Authority must state or cause to be stated in the referral block on the Charge Sheet the ~~charge is referred capital,~~" and specify which charge(s) is(are) referred capital if there is more than one charge, in order to effect a capital referral. *See* R.M.C. 201(d).

1. Notification to the Secretary of Defense of Capital Referral. Upon referral of a case to a capital military commission, the Convening Authority or the Convening Authority's designee will notify the Secretary of Defense of the following:

- A. Name of the accused, date of birth, country of birth or citizenship of accused;
- B. Offenses with which the accused is charged;
- C. The names, gender, ages, and status of any victims; and
- D. The date of any referral.

e. *Designation*. Use the same date the Convening Authority refers the charges. If the Convening Authority personally signs the referral, strike out ~~by . . . of . . .,~~" and include the Convening Authority's signature block. If the Convening Authority delegated the authority to sign the referral block on the Charge Sheet to another, the

delegate signs the charges —~~OR~~ THE CONVENING AUTHORITY.” When additional charges are referred, include in the referral the special instruction: —~~Be~~ tried with the original (charge) (charges), dated _____.” See R.M.C. 601.

f. *Withdrawing charges.* An officer authorized to sign referrals may withdraw charges at the direction of the Convening Authority. To withdraw a case from the military commission to which it was referred, the authorized officer shall line through the original referral, date the withdrawal, and reflect the name and status of the officer effecting the withdrawal of the charges.

g. *Re-referring charges in rehearing and other cases.* If, after charges are referred to trial, it becomes necessary to refer them again on the same Charge Sheet, use the following procedures:

1. *New Referral Endorsement.* Complete a new referral endorsement in the same form as that on page 2 of the Charge Sheet. The new referral may be accomplished by typing the entire endorsement on bond paper or by using the referral section from page 2 of another Charge Sheet, MC Form 458. When completed, attach it to the original referral. If a third or subsequent referral is necessary, attach it in the same way as the second. Never remove or obliterate prior referrals (~~flap~~ the original Charge Sheet).

2. *Referral Instructions.* When referring a case for a rehearing (whether in full, for a limited purpose, or for a new trial (*see* R.M.C. 810), incorporate the appropriate instructions in the referral form. For example, in a rehearing on sentence only, include the special instruction: ~~For~~ a rehearing on sentence only, as ordered by Military Commission Order # 15, Office of the Convening Authority, Office of Military Commissions, dated 4 June 2010, as to the charge and specification of which the accused was found guilty and affirmed by the United States Court of Military Commission Review’s decision, dated 10 May 2010,” or a similar instruction.

h. *Disqualification of the Convening Authority.* If the Convening Authority is unable to refer the case to trial, the Convening Authority shall forward the case to the Secretary of Defense for further action. If the Secretary of Defense cannot take action in a particular case, the Secretary of Defense should designate an official to serve as the Convening Authority for a particular case.

4-4. NOTIFICATION

a. When charges are referred to trial by military commission, a copy of the Charge Sheet and a copy of the Convening Order shall be forwarded to the trial counsel detailed to the case or to the Chief Prosecutor and the Chief Trial Judge by the next duty day. The Charge Sheet and associated documents will be transmitted by facsimile or electronically, if physical delivery is impracticable.

b. The trial counsel shall cause a copy of the charges to be served on the accused and, upon detail, to the defense counsel, as soon as practicable. The charges shall be served in English and, if appropriate, in another language that the accused understands. *See* 10 U.S.C. § 948s and R.M.C. 602. Trial counsel will complete the certificate on the Charge Sheet indicating when charges were served. *See* Block VII, Figure 3.1. Trial counsel will notify defense counsel of the date and time when the accused was served with the charges. If the accused has questions when served with the charges, the accused should be told to discuss the matter with defense counsel.

4-5. DOCKETING

Upon receipt of the Charge Sheet and the Convening Order, the Chief Trial Judge will detail a military judge to preside over a case. Military judges control and are responsible for docketing the case for trial. Trial counsel and defense counsel shall attempt to negotiate a trial date, consistent with R.M.C. 707. Within ten working days of service of charges, trial counsel, defense counsel, and the military judge shall conduct a teleconference or communicate via e-mail to set the arraignment date. If the parties have agreed to an arraignment or trial date in advance of the docketing teleconference, the military judge will confirm the dates with the parties during the conference. If no agreement has been reached, the military judge shall set dates in accordance with R.M.C. 707 after considering the respective positions of each counsel. The military judge may discuss other pretrial matters pursuant to R.M.C. 802. Counsel shall make arrangements to participate in the docketing teleconference even on days they are scheduled for other courts, boards, or other hearings.

Chapter 5

COMMISSION MEMBERSHIP

5-1. GENERAL

This chapter does not create any independent exemption from military commission duty.

5-2. DETAIL OF MILITARY COMMISSION MEMBERS

- a. The minimum number of military commission members required for a quorum in a military commission is five, except in cases referred to a capital military commission. 10 U.S.C. § 948m(a)(1); *see also* R.M.C. 501(a)(1). In a capital military commission, the minimum number of military commission members required for a quorum is twelve. 10 U.S.C. §§ 948m(a)(2) and 949m(c); *see also* R.M.C. 501(a)(2) and (3).
- b. Pursuant to 10 U.S.C. § 948i(b) and R.M.C. 503(a) the Convening Authority shall detail as members, or alternate members, of the military commission such commissioned officers, including commissioned officers of the reserve components, who are on active duty, commissioned officers of the National Guard on active duty in Federal service, or retired commissioned officers recalled to active duty who in the opinion of the Convening Authority are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission when such member is the accuser or a witness or has acted in the same case as an investigator or counsel. *See also* R.M.C. 502(a)(1).
- c. The Convening Authority may excuse a member from participating in a case before a military commission is assembled for trial. 10 U.S.C. § 948i(c); *see also* R.M.C. 505(c)(1).
- d. After assembly of the court, the Convening Authority may excuse a member for good cause. 10 U.S.C. § 948m(b)(3); *see also* R.M.C. 505(c)(2).

5-3. MILITARY COMMISSION CONVENING ORDERS (MCCO)

- a. *Convening Orders.* A Convening Order is used to announce the detail of a military commission. A military commission is created by a Convening Order of the Convening Authority. *See* R.M.C. 504(a). The Convening Authority for a military commission shall detail the members and alternate members as well as designate where the military commission will meet. If the Convening Authority has been designated by the Secretary of Defense, the Convening Order will so state. *See* R.M.C. 504(d).
- b. The Convening Authority will issue Convening Orders for each military commission as soon as practicable after he or she personally selects the members of a military

commission. Oral Convening Orders will be confirmed by written orders as soon as practicable. Convening Orders may be amended.

c. A list of the individuals, organizations, and installations to which copies of the order will be sent and the number of copies to be furnished will be indicated under "DISTRIBUTION." Distribution includes one copy for the reference set, when needed, and the record set of the military publications.

5-4. SPECIAL PROVISIONS FOR THE DETAIL OF ALTERNATE MILITARY COMMISSION MEMBERS.

a. The Convening Authority shall detail a sufficient number of military commission members to ensure the presence of the minimum number of members required to establish a quorum. The Convening Authority may also detail alternate members to sit through all military commission sessions and be retained through deliberations on findings and the sentence. *See* R.M.C. 503(a); *See also United States v. Mack*, 58 M.J. 413 (C.A.A.F. 2003). In a case that will be referred to a capital military commission, the Convening Authority is required to include a mechanism in the Convening Order that will permit the automatic detail of alternate members from a specific list of alternates in the event the number of members detailed to the military commission falls below quorum. *See* Chapter 5-4(c) of this Regulation; *see also* R.M.C. 504(d).

b. *Qualifications and duties of alternate members.* The qualifications and duties of members detailed to a military commission are provided in 10 U.S.C. § 948i(b), R.M.C. 502(a)(1) and (2), and Chapter 5-2(b) of this Regulation. *See also* R.M.C. 503(a)(1). Alternate members are required to meet the same qualifications as members. In the event that an alternate member succeeds a member on a panel, that alternate member becomes a member and shares in the same duties as the other members on the military commission panel.

c. *Procedure for automatic detail of alternate members.* A Convening Order may, and in a capital case shall, include mechanisms for the automatic detail of alternate members from a separate list of detailed alternate members that is included in the Convening Order. The automatic detail of alternate members would be triggered if the number of members fell below quorum before or after assembly of the members. *See* R.M.C 505(c) and 912(f). The alternate members shall appear on this separate list in an order of succession that is to be followed in the event the automatic detail of members is triggered. Additional mechanisms may also permit, but are not limited to, the following:

1. The attendance of a specific number of alternate members, as determined by the Convening Authority, at trial during the presentation of evidence on the merits and during pre-sentencing, and the excusal of the remaining alternate members, if any;

2. That alternate members may be retained after the members retire to deliberate on findings and/or the sentence and instructed that they shall not discuss the case with anyone;

3. That, if the number of members falls below quorum during deliberations on findings or the sentence, a sufficient number of alternate members will be automatically detailed to ensure a quorum is present during deliberations, provided that the members are instructed to begin deliberations on findings or the sentence anew.

d. *Examination and challenge of alternate members.* The alternate members shall be examined and challenged along with the members in order to promote efficiency. *See* R.M.C. 912.

Figure 5.1 – Sample Order Convening Military Commission

(CO 09-___ dated _____, was the last Convening Order of the Office of the Military Commissions published in 2009.) (There were no Convening Orders published in 2009.)

OFFICE OF MILITARY COMMISSIONS
OFFICE OF THE CONVENING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING ORDER
10-11

day month year

Pursuant to the authority vested in the Secretary of Defense in accordance with the Military Commissions Act of 2009, 10 U.S.C. § 948h, and my appointment as Convening Authority for Military Commissions on _____, 2011, a military commission is hereby convened. It may proceed at Guantanamo Bay, Cuba, unless otherwise directed, to try such persons as may be properly brought before it. The military commission is convened with the following members:

MEMBERS

GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station

(Savings Clause---“All cases referred to Convening Order number _____ dated _____ in which the proceedings had not begun or the court has not yet been assembled or which the proceedings were otherwise terminated, will be brought to trial before the military commission hereby convened.”)

FIRST MI LAST
CONVENING AUTHORITY

BY DIRECTION OF THE CONVENING AUTHORITY:
FIRST MI LAST
GRADE, AR
Title

DISTRIBUTION:
Individual (1)
Record of Trial (1)
Record Set (1)

Figure 5.2 – Sample Amending Convening Order (Excusal Vice Order)

OFFICE OF MILITARY COMMISSIONS
OFFICE OF THE CONVENING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING ORDER
11-0#

day month year

The officers listed below are detailed as members of the military commission convened by the undersigned Convening Authority by Convening Order _____, dated _____.

Vice _____, _____, _____, _____, and _____, relieved (for the case of _____ only).

MEMBERS

GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station

FIRST MI LAST
CONVENING AUTHORITY

BY DIRECTION OF THE CONVENING AUTHORITY

FIRST MI LAST
GRADE, ARMY
Legal Tech

DISTRIBUTION:
Individual (1)
Record of Trial (1)
Record Set (1)

Figure 5.3 – Sample Convening Order Re-referral (Specific Case)

OFFICE OF MILITARY COMMISSIONS
OFFICE OF THE CONVENING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING ORDER
11-0#

day month year

Pursuant to the authority of the Secretary of the Defense in accordance with the Military Commissions Act of 2009, 10 U.S.C. § 948h, and the appointment of this Convening Authority on _____, 2011, a military commission is hereby convened. It may proceed at Guantanamo Bay, Cuba, unless otherwise directed, to try such persons as may be properly brought before it. The following members are detailed to the military commission convened by this order for the trial of _____ only.

MEMBERS

GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station
GRADE First MI Last BR Unit of Assignment Duty Station

[All cases referred to order number _____ dated _____ in which the proceedings have not begun or which the proceedings were otherwise terminated, will be brought to trial before the military commission hereby convened.]

FIRST MI LAST
CONVENING AUTHORITY

BY DIRECTION OF THE CONVENING AUTHORITY

FIRST MI LAST
GRADE, ARMY
Legal Tech

DISTRIBUTION:
Individual (1)
Record of Trial (1)
Record Set (1)

Chapter 6

MILITARY JUDGES

6-1. GENERAL

- a. Military judges will preside over the military commissions. *See* 10 U.S.C. § 948j; and R.M.C. 503(b).
- b. *Organization.* The Military Commissions Trial Judiciary will consist of military judges nominated by the Judge Advocates Generals from the military departments. The Chief Trial Judge will be selected from that pool of military judges by the Secretary of Defense or his or her designee. *See* R.M.C. 503(b)(2).

6-2. DETAIL OF MILITARY JUDGES

The Chief Trial Judge will detail a military judge from the Military Commissions Trial Judiciary for each military commission trial. Military judges in the Military Commissions Trial Judiciary may be detailed to other duties by the Chief Trial Judges of their respective services, provided that such other duties do not conflict with their primary duty as military judges for military commissions trials.

6-3. QUALIFICATIONS

- a. A military judge must be a commissioned officer of the armed forces and a member in good standing of the bar of Federal court, or a member of the bar of the highest court of a State or the District of Columbia.
- b. A military judge must be certified to be qualified for duty under section 10 U.S.C. § 826 (Article 26 of the U.CM.J) as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member. *See* 10 U.S.C. § 948j(b).
- c. Military judges must be on active duty at the time of their detail to a military commission.
- d. Military judges must have a current TOP SECRET clearance. A TOP SECRET/SCI(Sensitive Compartmented Information) clearance or a TOP SECRET clearance with eligibility for SCI is preferred and may be required for certain cases. Military judges must have at least two years of experience as a military judge while certified to be qualified for duty as a military judge in general courts-martial. *See* R.M.C. 503(b).

CHAPTER 7

COMMISSION PERSONNEL, REPORTERS, INTERPRETERS

7-1. GENERAL

All commission personnel will be required to swear an oath or affirmation as set out in Chapter 11 of this Regulation. All commission personnel are required to attain the appropriate personnel security clearances and to comply at all times with the security procedures set out in Chapter 18 of this Regulation.

7-2. COURT REPORTERS

a. *Qualifications.* Civilian and military court reporters shall be proficient in recording in shorthand or by mechanical, voice, or other means, the proceedings of, and the testimony taken before, the military commission, and shall be able to transcribe verbatim the testimony taken.

b. *Duties.* The primary role of the military commission court reporter is to report, transcribe, and assemble military commission records of proceedings and testimony taken before the commission. The court reporter is neutral and shall not express personal opinions about the case being reported. The court reporter records everything that is said or done verbatim. This court reporter is distinct from the court reporter who prepares the unofficial, public release transcript as described in Chapter 19-4(f).

c. *Detail.* The Convening Authority of the military commission shall detail court reporters to perform the functions specified in 7-2(b) above. *See* 10 U.S.C. § 9481(a), R.M.C. 501(c), 502(e)(3).

7-3. INTERPRETERS

a. In each case before a military commission and in each instance of the taking of a deposition, the Convening Authority or the officer directing such proceeding shall appoint, when necessary, an interpreter for the commission or officer taking the deposition.

b. *Qualifications.* The interpreter(s) shall be capable of:

1. Translation. The transference of the full meaning of a written text or spoken word from one language to another;

2. Transcription. The creation in written form of a message that was originally in spoken form. In the event that the commission requests transcription of original words spoken on tape or other audio material, there generally is also a need for a translation into English of the transcription;

3. Sight Translation. The oral rendition of the text of a written document. The interpreter first reviews the original text, then renders it orally into the other language. Sight translation is distinguished from ordinary translation in that it is done on sight (upon reading); the parallel text is spoken verbally, not prepared in writing. In ordinary translation, the translator is given a text and prepares an accurate parallel text in writing, without the pressure of immediate delivery;

4. Simultaneous interpretation. The instantaneous oral reproduction of speech from one language to another. This requires the interpreter to listen, comprehend, translate, and reproduce a speaker's or signer's message while the speaker or signer continues to speak or sign, typically lagging a matter of seconds behind the speaker's or signer's communication. An interpreter, when interpreting all that is said in commission proceedings for non-English speaking accused and witnesses, will use the simultaneous mode;

5. Consecutive interpretation. Interpretation which requires the interpreter to listen, comprehend, translate, and reproduce the original message after the speaker or signer pauses such as in the "question and answer" mode in which the speaker completes his statement and the interpreter begins to interpret after the statement is completed. The consecutive mode is used with non-English speaking witnesses testifying before military commissions; and

6. Team interpreting. Two or more interpreters working together as a team to ensure the sustained accuracy of interpretation in longer or more complex proceedings. The team members will determine the intervals for switching the role of primary interpreter. The other interpreter assumes a supporting role and continues to follow the proceedings in order to provide the appropriate level of continuity when the task as primary interpreter is rotated.

c. *Duties.* The interpreters shall interpret for the commission and as necessary for the trial counsel and defense counsel and for the accused. See 10 U.S.C. § 9481(b) and R.M.C. 501(d).

d. *Detail.* Appointment of interpreters by the Convening Authority may be effected personally by him or her, or, at his or her discretion, by any other person. Such appointment may be oral or in writing.

7-4. SECURITY PERSONNEL

The Convening Authority may detail a security officer to advise a military commission on matters related to classified and protected information. The security officer is not an original classification authority, and is not a substitute for the requirements of Chapter 18 regarding the review and treatment of documents by the DoD Security Classification/Declassification Review Team and any pertinent non-DoD federal departments and agencies. In addition to any other duties assigned by the Convening Authority, the security officer shall ensure that all classified or protected evidence and

information is appropriately safeguarded at all times and that only personnel with the appropriate clearances and authorizations are present when classified or protected evidence or information is presented before military commissions.

7-5. OTHER PERSONNEL

Other personnel, including but not limited to, bailiffs, clerks, litigation security specialists, escorts and orderlies, may be detailed or employed as appropriate but need not be detailed by the Convening Authority personally. Other personnel detailed for the assistance of the military commission shall have such duties as may be imposed by the military judge. The trial counsel or military judge shall administer an oath or affirmation to any additional personnel in accordance with Chapter 11.

7-6. DISQUALIFICATION

Reporters, interpreters, escorts, security personnel, and clerks shall be disqualified as provided in R.M.C. 502(e)(2).

7-7. SOURCE AND EXPENSES OF COURT REPORTERS AND INTERPRETERS

Reporters, interpreters, security personnel, and clerical assistants may be detailed from either military or civilian personnel serving under the Convening Authority or, in the case of reporters and interpreters, through a commercial provider. When necessary, the Convening Authority may employ or authorize the employment of a reporter or interpreter, at the prevailing wage scale, for duty with a military commission or at the taking of a deposition. No expense to the Government shall be incurred by the employment of a reporter, interpreter, or other person to assist in a military commission or the taking of a deposition, except when authorized by the Convening Authority.

Chapter 8

TRIAL COUNSEL

8-1. GENERAL

Pursuant to 10 U.S.C. § 948k(a) and (d)(1), there shall be a Chief Prosecutor appointed by the Secretary of Defense or his or her designee. The Chief Prosecutor shall supervise the overall prosecution efforts under the M.C.A., the M.M.C. and this Regulation. The Chief Prosecutor shall further ensure proper management of personnel and resources assigned to the Office of the Chief Prosecutor (OMC-P).

8-2. OFFICE OF THE CHIEF PROSECUTOR

a. *Generally.* The OMC-P shall be a component of the Office of Military Commissions (OMC), and shall be comprised of the Chief Prosecutor, Deputy Chief Prosecutor(s), trial counsel, and other persons properly under the supervision of the Chief Prosecutor.

b. *Qualifications of Chief Prosecutor.* The Chief Prosecutor shall be a judge advocate of any United States armed force certified under 10 U.S.C. § 827(b) (Article 27(b) of the U.C.M.J.). Further, the Chief Prosecutor shall be a graduate of an accredited law school or a member of the bar of a Federal court or of the highest court of a State or the District of Columbia, and certified as competent to serve as trial counsel before general courts-martial by the Judge Advocate General of the armed force of which he or she is a member.

c. *Duties of Chief Prosecutor.*

1. The Chief Prosecutor shall ensure that all trial counsel and assistant trial counsel faithfully represent the United States in discharging their prosecutorial duties before military commissions conducted pursuant to the M.C.A. and M.M.C.

2. Pursuant to R.M.C. 807 and Chapter 11 of this Regulation, the Chief Prosecutor shall ensure that all trial counsel and assistant trial counsel have taken an oath to perform their duties faithfully.

3. The Chief Prosecutor shall ensure that all personnel under the supervision of the OMC-P including those detailed from agencies other than DoD possess the appropriate security clearances as required by regulation issued pursuant to DoD DIRECTIVE 5200.2-R "Personnel Security Program."

4. The Chief Prosecutor shall establish, within the OMC-P, a section dedicated to providing appellate representation for the government on appeal, and shall establish procedures for the appointment of appellate counsel to represent the government before the United States Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and the United States Supreme Court. *See*

also Chapter 24-4. Appellate government counsel shall meet the requirements for counsel appearing before military commissions.

8-3. DEPUTY CHIEF PROSECUTOR

The Chief Prosecutor may designate one or more Deputy Chief Prosecutors who shall be a judge advocate of any United States armed force, a civilian attorney of the DoD, or a civilian attorney for the Department of Justice. The Deputy Chief Prosecutor(s) shall exercise the authority and perform the duties of the Chief Prosecutor in the absence of the Chief Prosecutor, as consistent with the M.C.A.

8-4. TRIAL COUNSEL

a. *Generally.* Pursuant to 10 U.S.C. § 949c(a), trial counsel shall prosecute cases on behalf of the United States. Judge advocates assigned to the OMC-P shall be deemed unavailable for service as defense counsel under Chapter 9-2.

b. *Qualifications of Trial Counsel.* Persons certified under 10 U.S.C. § 827(b) (Article 27(b) of the U.C.M.J.) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as trial counsel in a military commission. A civilian who is a member of the bar of a Federal court or the highest court of a State or the District of Columbia and is otherwise qualified by means of training and has attained the requisite security clearance pursuant to regulation issued under DoD DIRECTIVE 5200.2-R may also serve as trial counsel. Both detailed trial counsel and civilian trial counsel must be determined to be eligible for access to information classified at the level SECRET or higher, as required, in accordance with the procedures prescribed in Chapter 18 of this Regulation, and have signed a Non-Disclosure Agreement Form 4414, (Figure 9.3), and an agreement to comply with all applicable regulations or instructions for counsel, including any rules or orders of the commission pertaining to conduct during the course of the proceedings.

c. *Detail of Trial Counsel.* The Chief Prosecutor shall detail a trial counsel and, as appropriate, one or more assistant trial counsel to perform the duties of the prosecution as set forth in R.M.C. 502(d)(6). The role of the Chief Prosecutor as the leader of OMC-P is an important and sensitive one. It requires the Chief Prosecutor to give his or her attention to all potential and ongoing prosecution cases, while maintaining objectivity for each case. These responsibilities may be inconsistent with participation, by the Chief Prosecutor, as the member of any specific trial team. However, in rare cases, it might be appropriate for the Chief Prosecutor to participate on a trial team. The Chief Prosecutor should decide to participate as a member of a trial team only when circumstances demand it, and there is no other practical alternative.

d. *Duties of Trial Counsel.*

1. Trial counsel shall fulfill all responsibilities detailed in the M.C.A., the M.M.C., specifically R.M.C. 502(d)(6) and Discussion, those set forth in this Regulation, and those assigned by the Chief Prosecutor.

2. Pursuant to Chapter 11 of this Regulation, trial counsel in coordination with the Chief of Court Reporting, shall ensure that all court reporters, security personnel, and interpreters who are to perform duties in relation to a military commission proceeding have taken an oath or affirmation to perform their duties faithfully. As directed by the military judge, trial counsel also shall administer appropriate oaths or affirmations to witnesses during military commission proceedings.

3. Trial counsel must strictly comply with 10 U.S.C. §§ 949p-1– 949p-7, R.M.C. 701, Mil. Comm. R. Evid. 505, and Chapter 18 of this Regulation to ensure they do not improperly disclose classified or protected information.

4. Trial counsel shall submit all documents or other materials containing classified or protected information either intended for use in the litigation by Trial counsel, or to be provided to defense counsel in discovery, to the DoD Security Classification/Declassification Review Team and/or to the appropriate original classification authority at any other pertinent non-DoD federal department and agency, for classification review and use authorization. It is the responsibility of the Chief Defense Counsel and the Chief Prosecutor to ensure that counsel assigned to their office receive use authority and classification review pursuant to this Regulation. In accordance with Mil. Comm. R. Evid. 505(a)(3), trial counsel shall also work with the DoD Security Classification/Declassification Review Team and/or the appropriate original classification authorities for any other pertinent non-DoD federal departments and agencies to ensure that evidence that may be used at trial is declassified to the maximum extent possible, consistent with the requirements of national security. *See* 10 U.S.C. § 949p-1(c) and Chapter 18-1(b).

5. Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the Legal Advisor, Convening Authority, or their duly authorized representatives. *See* R.M.C. 705(d). Trial counsel may conduct plea negotiations with defense counsel whenever the possibility of a negotiated plea develops. If trial counsel receives a written, signed offer for a negotiated plea from defense counsel, each such offer shall be forwarded by trial counsel (through the Chief Prosecutor) to the Convening Authority, through his or her Legal Advisor, for approval or disapproval.

8-5. LOGISTICAL SUPPORT OF TRIAL COUNSEL

The Chief Prosecutor shall inform the Convening Authority of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the OMC-P.

8-6. RATINGS AND SUPERVISION OF TRIAL COUNSEL

a. The Chief Prosecutor shall supervise all trial counsel and other personnel assigned to the OMC-P, including any special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States. The Chief Prosecutor, or his designee, shall fulfill applicable performance evaluation requirements associated with trial counsel and other personnel properly under the supervision of the OMC-P.

b. Individuals appointed, assigned, detailed, designated or employed in any capacity related to the conduct of military commission proceedings conducted in accordance with the M.C.A. and M.M.C. shall be subject to the relationships set forth below. Unless stated otherwise, the person to whom an individual “reports” as set forth below, shall be deemed to be such individual’s supervisor and shall, to the extent possible, fulfill all performance evaluation responsibilities normally associated with the function of direct supervisor in accordance with the subordinate’s Military Service performance evaluation regulations.

1. Chief Prosecutor: The Chief Prosecutor shall report to the Legal Advisor to the Convening Authority. In the event that the Chief Prosecutor is in the military pay grade of O-7 or above, he or she shall report directly to the Deputy General Counsel (Legal Counsel).

2. Deputy Chief Prosecutor: The Deputy Chief Prosecutor shall report to the Chief Prosecutor and then to the supervisor of the Chief Prosecutor.

3. Trial Counsel and Assistant Trial Counsel: The trial counsel and assistant trial counsel report to the rating official designated by the Chief Prosecutor consistent with applicable service regulations.

4. Other Personnel: All other military commission personnel, such as paralegals, interpreters, analysts, security personnel, and clerks detailed to or employed by the OMC-P, shall report to the Chief Prosecutor or his or her designee.

8-7. COMMUNICATIONS WITH THE MEDIA

Personnel assigned to the OMC-P may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Convening Authority.

Chapter 9

DEFENSE COUNSEL

9-1. DETAIL OF DEFENSE COUNSEL

Every accused shall have a qualified military defense counsel detailed to the accused at government expense during every stage of the proceedings. Should the military judge approve the request of an accused to represent himself, detailed defense counsel may act as standby counsel at the direction of the military judge. Should the accused retain civilian counsel, a military defense counsel shall remain detailed to the accused.

a. *Chief Defense Counsel.*

1. The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the Secretary of Defense or his designee. The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the DoD.

2. The Chief Defense Counsel shall supervise all defense activities and the efforts of detailed defense counsel and other office personnel and resources pursuant to the M.C.A. and the M.M.C., ensure proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel (OCDC), and facilitate the proper representation of all accused referred to trial before a military commission appointed pursuant to the M.C.A. In cases where a conflict of interest between or among accused precludes the Chief Defense Counsel from supervising the efforts of a detailed defense counsel, such supervisory authority may be exercised by another individual who is designated by the Chief Defense Counsel.

3. The Chief Defense Counsel shall ensure that all personnel assigned to the OCDC review and attest that they understand, and will comply with, the M.C.A., the M.M.C., this Regulation, all Supplementary Regulations and Instructions issued in accordance therewith, and the orders of the commission. Furthermore, the Chief Defense Counsel shall regulate the conduct of detailed defense counsel as deemed necessary, consistent with the aforementioned legal authorities as well as subordinate instructions and regulations. The Chief Defense Counsel also shall ensure that military counsel who remain detailed when an accused is represented by civilian counsel are familiar with the provisions and restrictions contained in MC Form 9-2, Affidavit and Agreement By Civilian Defense Counsel, and are prepared to assist civilian defense counsel in complying with that agreement.

4. The Chief Defense Counsel shall detail a judge advocate of any United States armed force, who is assigned to or performing duty with the OCDC, to perform the duties of the detailed defense counsel as set forth in R.M.C. 502(d)(7). The Chief Defense Counsel shall also detail other personnel or, as approved by the Convening Authority, employ civilian personnel and any other personnel to provide administrative and other support

services. The Chief Defense Counsel may not detail himself to perform the duties of detailed defense counsel.

5. The Chief Defense Counsel may, when appropriate, detail an additional judge advocate or qualified civilian attorney performing duty with the OCDC, as assistant detailed defense counsel to assist in performing the duties of the detailed defense counsel.

6. *Learned Counsel.* In any case in which trial counsel makes a recommendation to the Convening Authority pursuant to R.M.C. 307(d) that a charge be referred to a capital military commission, the accused has the right to be represented by at least one additional counsel who is learned in applicable law relating to capital cases. *See* R.M.C. 506(b). If a charge transmitted by trial counsel to the convening authority is a charge for which the death penalty is authorized, the Convening Authority may not refer the charge as a capital offense unless the provisions regarding learned counsel in Rule 506(b) have been met. *See* R.M.C. 601(d)(2).

A. The Chief Defense Counsel shall notify the Convening Authority in writing as to whether it is practicable to detail a military or civilian attorney assigned to, or employed by, the OCDC as learned counsel in a particular case. This notice shall be made by the Chief Defense Counsel within 14 business days of receiving notice that charges be referred to a capital military commission

B. If it is practicable to detail a military or civilian attorney assigned to, or employed by, the OCDC as learned counsel, the Chief Defense Counsel shall detail such counsel within 30 business days of receiving notice that charges may be referred to a capital military commission. Once learned counsel has been detailed, the Chief Defense Counsel shall inform the Convening Authority accordingly.

C. If it is not practicable to detail an attorney assigned to, or employed by, the OCDC, the Chief Defense Counsel shall select a member of the civilian pool, or other civilian counsel not yet a member of the civilian defense pool, who has the appropriate qualifications as outside learned counsel and forward a request for approval of funding for this counsel to the Convening Authority. This request for the approval of funding for outside learned counsel shall be made within 45 business days of receiving notice that charges may be referred to a capital military commission. This request shall include all the completed and executed applications, forms, and other materials as required by the government in order to qualify the selected outside learned counsel pursuant to R.M.C. 502(d)(3) and Chapter 9-5 of this Regulation, including:

i. A memorandum from the Chief Defense Counsel indicating that the outside counsel has been properly admitted as a member of the pool of civilian defense counsel (if applicable) under Chapter 9-5c. of this Regulation, or is eligible for the same, and that the outside counsel has executed and submitted the Affidavit and Agreement (Figure 9.2) and the Non-disclosure Agreement (Figure 9.3) required for civilian defense counsel; and

ii. Proof that the outside civilian counsel possesses a current security clearance at the level required for the case to which he is to be assigned, or a statement by the Chief Defense Counsel that the outside civilian counsel has executed and submitted an application for Security Clearance, SF-86, and other necessary documents. If after selected learned counsel has complied with all the requirements set forth by the government, and the government determines the selected outside learned counsel is not eligible for access to information classified at the level necessary for the trial of the case to which such counsel is to be assigned, the Chief Defense Counsel shall, within 45 business days of receiving notice of such ineligibility of the selected outside learned counsel, select another member of the civilian pool, or other civilian counsel not yet a member of the civilian defense pool, as outside learned counsel, and shall comply with the rules set forth in this Regulation pertaining to selection of same.

D. The Convening Authority shall approve the Chief Defense Counsel's reasonable request for the appointment of qualified outside learned counsel.

E. If the Chief Defense Counsel is unable to forward this request for the approval of funding for outside learned counsel within 45 business days of receiving notice that charges may be referred to a capital military commission, the Chief Defense Counsel shall make a written request for additional time, and shall state the reasons for making the request. The Convening Authority shall grant the Chief Defense Counsel's reasonable request for additional time, and may recommend up to three outside learned counsel to the Chief Defense Counsel for consideration. The Chief Defense Counsel may consider these candidates as well as any others he or she may have identified.

F. The Convening Authority is authorized to identify and appoint outside learned counsel (regardless of whether they are yet members of the civilian defense pool), to include military counsel, if the Chief Defense Counsel fails, within 45 business days of receiving notice that charges may be referred to a capital military commission, to submit a written request for additional time, if the Chief Defense Counsel's request for additional time is unreasonable, or if the Chief Defense Counsel fails to identify and appoint outside learned counsel within the period of time granted by the Convening Authority in response to the Chief Defense Counsel's request for additional time.

G. Outside learned counsel shall be retained and compensated in a manner consistent with the procedures employed by federal courts under 18 U.S.C. §§ 3005 and 3006A. The applicable hourly rate for the appointment of qualified outside learned counsel shall be the maximum hourly rate for federal capital prosecutions, as provided by the Administrative Office of the United States Courts. Consistent with practice in federal courts, the military judge shall review payment for reasonable requests for attorney's fees and expenses submitted by outside learned counsel, keeping in mind the complexity of capital cases and validate the request for the Convening Authority to make the reasonable payment of those funds. For representation relating to an appeal in the U.S. Court of Military Commission Review, the Chief Judge of that Court shall review and validate the payment of all reasonable fee and expense requests. Fee and expense requests shall be submitted to the military judge in a manner consistent with 18 U.S.C. § 3006A(d)(5) and

each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and the fees and expenses incurred in the performance of representation services. If outside learned counsel request payment prior to detailing of a military judge, payment for reasonable requests for attorney's fees and expenses shall be approved by the Convening Authority.

H. Outside learned counsel shall have access to OCDC Defense paralegals, interpreters, analysts, investigators, supplies, and other resources. Outside learned counsel shall not be entitled to reimbursement for expenses associated with the hiring of interpreters, analysts, or investigators.

I. When appointed outside learned counsel is approved for travel by the Chief Defense Counsel, the Office of the Convening Authority shall issue invitational travel orders.

J. Consistent with 18 U.S.C. § 3006A(d)(4), information regarding validated requests for payment of services to outside learned counsel shall be made available to the public. The military commission shall redact any detailed information on the payment voucher provided by defense counsel to justify the expense to the military commission and make public only the amounts approved for payment to the outside learned counsel. Upon completion of the trial, the military commission shall, consistent with 18 U.S.C. § 3006A(d)(4)(C), make available an unredacted copy of the expense voucher.

K. It is the responsibility of the Chief Defense Counsel to ensure that outside learned counsel are adhering to the provisions of the M.C.A., M.M.C and this Regulation.

7. The Chief Defense Counsel may structure the OCDC to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to defense counsel.

8. The Chief Defense Counsel shall take appropriate measures to preclude defense counsel conflicts of interest arising from the representation of accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including classified information, to the extent authorized by the M.C.A., M.M.C. and this Regulation) to fulfill this responsibility.

9. The Chief Defense Counsel shall take appropriate measures to ensure that each detailed defense counsel is capable of zealous representation and unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all defense counsel (detailed and civilian) and take appropriate measures to ensure that defense counsel remain unencumbered by conflicts of interest. *See also* Chapter 10.

10. The Chief Defense Counsel shall ensure that when an accused proceeds *pro se* a detailed defense counsel is assigned to the case. Detailed defense counsel may act as standby counsel at the direction of the military judge

11. The Chief Defense Counsel shall administer all requests for individual military defense counsel requested in accordance with Chapter 9-2 of this chapter. The Chief Defense Counsel shall determine the availability of such counsel in accordance with 10 U.S.C. § 949a(b)(2)(C)(i), R.M.C. 506(c), and this Regulation.

12. The Chief Defense Counsel shall administer the civilian defense counsel pool, screening all requests for qualification and making qualification determinations and recommendations in accordance with Chapter 9-5(b), and ensuring appropriate notification to an accused of civilian attorneys available to represent an accused before a military commission.

13. The Chief Defense Counsel shall administer the selection of learned counsel, screening all requests for qualification and determining which military and civilian counsel assigned to, or employed by, the OCDC and members of the civilian defense pool are qualified to serve as learned counsel pursuant to the standards set out in Chapters 9-1(b)(1)(C) and 9-5. The Convening Authority shall determine the compensation of learned counsel selected from the civilian defense pool in a manner consistent with that employed by federal courts under 18 U.S.C. § 3005 and § 3006A.

14. The Chief Defense Counsel shall ensure that all detailed defense counsel and civilian defense counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully.

15. The Chief Defense Counsel shall ensure that all personnel under the supervision of the OCDC possess the appropriate security clearances.

16. The Chief Defense Counsel may appoint one or more deputies to assist him in his duties as Chief Defense Counsel.

17. The Chief Defense Counsel shall establish, within the OCDC, a section dedicated to providing appellate representation for the accused on appeal, to include appellate representation by counsel learned in the law applicable to capital cases for cases in which the appellant has been sentenced to death, and shall establish procedures for the appointment of appellate counsel to represent an accused before the United States Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and the United States Supreme Court. Appellate defense counsel shall meet the requirements for counsel appearing before military commissions.

b. *Detailed defense counsel.*

1. *Qualifications of detailed defense counsel.*

A. Ordinarily, only persons certified under 10 U.S.C. § 827(b) (Article 27(b) of the U.C.M.J.) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as defense counsel in a military commission. However, a civilian who is a member of the bar

of a Federal court or the highest court of a State or the District of Columbia and is otherwise qualified by means of training and has attained the requisite security clearance pursuant to regulation issued under DoD DIRECTIVE 5200.R-2 may also serve as defense counsel. Both detailed defense counsel and civilian defense counsel must be eligible for access to information classified at the level SECRET or higher, as required, in accordance with the procedures prescribed in Chapter 18 of this Regulation, and have signed the appropriate non-disclosure agreement(s) (Form 4414, SF 312, and/or DD Form 1847, *see* Figure 9.3), and an agreement to comply with all applicable regulations or instructions for counsel, including any rules or orders of the commission pertaining to conduct during the course of the proceedings.

B. The Chief Defense Counsel may detail, in addition to military defense counsel, a DoD civilian attorney performing duties with the OCDC, as an assistant defense counsel.

C. A counsel learned in the applicable law relating to capital cases is an attorney (i) who is a military or civilian counsel assigned to, or employed by, the OCDC, or a civilian counsel qualified for membership in the civilian defense pool pursuant to Chapter 9-5; and (ii) whose background, knowledge and/or experience would enable him or her to properly represent an accused in a capital case, with due consideration of the seriousness of the possible penalty and the unique and complex nature of the litigation. A counsel who meets the requirements of 18 U.S.C. § 3005 qualifies as learned counsel under this section.

D. Each prospective detailed defense counsel shall identify to the Chief Defense Counsel each jurisdiction wherein the prospective detailed defense counsel is licensed to practice law. Consistent with R.M.C. 109(b)(3)(D), the Chief Defense Counsel will review the licensing bar association rules of each prospective detailed defense counsel, and verify that such bar association rules cannot reasonably be foreseen as an impediment to that counsel's adherence to the rules of professional responsibility expressly applicable to trials by military commission under Chapter 10. Only after this review is a candidate eligible for service in the OCDC.

E. Detailed defense counsel must be determined to be eligible for access to information classified at the level SECRET or higher, as required, in accordance with the procedures prescribed in Chapter 18 of this Regulation; and have signed a Non-Disclosure Agreement (Form 4414) and an agreement to comply with all applicable regulations or instructions for counsel, including any rules or orders of the commission for conduct during the course of the proceedings.

2. Duties of detailed defense counsel.

A. Express duties of the detailed defense counsel are articulated in 10 U.S.C. §949c(b), and R.M.C. 502(d)(7) Discussion. The detailed defense counsel shall defend the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused.

B. Detailed defense counsel shall comply with the procedures accorded the accused pursuant to 10 U.S.C. §§ 948a – 948d, the M.M.C. and this Regulation.

C. Detailed defense counsel shall serve as standby counsel should the military judge approve an accused's request to represent himself *pro se*. Detailed defense counsel shall serve as associate counsel, should the accused retain civilian counsel of his own choosing under Chapter 9-5 of this Regulation.

D. Detailed defense counsel shall have primary responsibility to prevent any conflicts of interest related to the handling of the cases to which he or she is detailed.

E. Detailed defense counsel shall fulfill all responsibilities set forth in the M.C.A., M.M.C., this Regulation, and those assigned by the Chief Defense Counsel.

F. At all times, detailed defense counsel must strictly comply with 10 U.S.C. §§ 949p-1 – 949p-7, R.M.C. 701, and Mil. Comm. R. Evid. 505, and Chapter 18 of this Regulation, to ensure that they do not disclose classified and protected information to any person not authorized to receive such information.

G. All requests for the declassification of classified materials intended to be used by the Defense in a military commission shall be in writing, and submitted, through trial counsel, to the DoD Security Classification/Declassification Review Team, when the materials originate with DoD, or to the original classification authority of any non-DoD federal departments or agencies. *See* 10 U.S.C. § 949p-1(c). Requests for further declassification of classified materials, or for reconsideration of a declassification decision, shall be in writing, and submitted, through trial counsel, to the DoD Security Classification/Declassification Review Team, when the materials originate with DoD, or to the original classification authority of any pertinent non-DoD federal department or agency. *See* 10 U.S.C. § 949p-1(c).

9-2. REQUEST FOR INDIVIDUAL MILITARY COUNSEL

An accused may be represented by a military counsel of his own selection, if reasonably available. *See* 10 U.S.C. § 949a(b)(2)(C)(i).

a. An accused must request, either through detailed defense counsel, on the record, or directly to the Chief Defense Counsel, the desire to be represented by a specific military counsel. To be a valid request, the accused must provide the name of a specific military attorney at the time of the request, and acknowledge his understanding of the requirements for requests for individual military counsel (IMC).

b. Once in receipt of a valid request from an accused for IMC counsel, the Chief Defense Counsel shall determine if the requested military attorney is reasonably available.

1. A military attorney is not reasonably available unless assigned to the Office of Military Commissions, OCMC, at the time of the request. If the requested military attorney

is not assigned to that office, the Chief Defense Counsel shall deny the request because the requested military counsel is not reasonably available.

2. If the requested military counsel is assigned to the OCDC at the time of the request, the Chief Defense Counsel shall, in his sole discretion, make an administrative determination whether the requested military counsel is reasonably available.

c. When a request for IMC is denied, the Chief Defense Counsel shall notify the accused directly of his decision in writing. The notification shall be made a part of the record of trial.

d. When a request for IMC is granted, the Chief Defense Counsel shall detail the requested counsel and the accused shall be informed of the decision. An accused's request for IMC shall be considered a request to release the detailed defense counsel from further representation. As such, the approval of a request for IMC shall automatically constitute the removal of the detailed defense counsel from the case effective upon the detailing of the IMC. However, if requested by the accused, with the consent of the IMC, the Chief Defense Counsel, in his sole discretion, may allow the detailed defense counsel to continue to represent the accused.

9-3. RATINGS AND SUPERVISION OF DEFENSE COUNSEL

a. The Chief Defense Counsel shall supervise all defense counsel and other personnel assigned to the OCDC.

b. The Chief Defense Counsel, or his designee, shall fulfill applicable performance evaluation requirements associated with defense counsel and other personnel under the supervision of the Chief Defense Counsel.

c. Individuals appointed, assigned, detailed, designated or employed in a capacity related to the conduct of military commission proceedings conducted in accordance with the M.C.A. and M.M.C. shall be subject to the relationships set forth below. Unless stated otherwise, the person to whom an individual "reports" as set forth below, shall be deemed to be such individual's supervisor and shall, to the extent possible fulfill performance evaluation responsibilities normally associated with the function of direct supervisor in accordance with the subordinate's military service performance evaluation regulations.

1. Chief Defense Counsel: The Chief Defense Counsel shall report to the Deputy General Counsel (Personnel and Health Policy) of the DoD.

2. Deputy Chief Defense Counsel: The Principal Deputy Chief Defense Counsel shall report to the Chief Defense Counsel and then to the Deputy General Counsel (Personnel and Health Policy) of the DoD. Subordinate Deputy Chief Defense Counsel shall report to the Principal Deputy Chief Defense Counsel, and then to the Chief Defense Counsel.

3. Detailed defense counsel: Detailed defense counsel shall report either to the Deputy Chief Defense Counsel or to the Chief Defense Counsel.

4. Other Personnel: All other defense personnel such as paralegals, interpreters, security personnel, and clerks detailed or employed by the OCDC shall report to the Chief Defense Counsel or his or her designee.

9-4. LOGISTICAL SUPPORT OF DEFENSE COUNSEL

The Chief Defense Counsel shall inform the Convening Authority of all requirements for personnel, office space, equipment, and supplies to ensure the successful functioning and mission accomplishment of the OCDC. The Chief Defense Counsel shall provide the Deputy General Counsel (Personnel and Health Policy) of the DoD an information copy of such requests.

9-5. CIVILIAN DEFENSE COUNSEL

a. Accused's option for civilian counsel.

1. Pursuant to 10 U.S.C. § 949c(b) and R.M.C. 502(d)(3), the accused may retain the services of a qualified civilian attorney of the accused's own choosing and at no expense to the United States Government.

2. At all times, civilian defense counsel must comply with 10 U.S.C. §§ 949p-1–949p-7, R.M.C. 701, and Mil. Comm. R. Evid. 505, and Chapter 18 of this Regulation, to ensure that they do not disclose classified, protected, or privileged information, to any person not authorized to receive such information.

b. Qualifications of civilian defense counsel.

1. A qualified civilian defense counsel is an attorney who: (i) is a member of the bar of a Federal court or of the bar of the highest court of a State, the District of Columbia, or U.S. possession; (ii) is a United States citizen; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher, as required, in accordance with the procedures prescribed in Chapter 18 of this Regulation; and (v) has signed the appropriate non-disclosure agreement(s) (Form 4414, SF 312, and/or DD Form 1847, *see* Figure 9.3) Non-Disclosure Agreement Form 4414, Figure 9.3 and (vi) has signed an Affidavit and Agreement by Civilian Defense Counsel, MC Form 9-2 (Figure 9.2).

2. Representation by civilian defense counsel does not relieve detailed defense counsel of the duties specified in 10 U.S.C. § 949c(b), R.M.C. 502(d)(7) and this Regulation. The detailed defense counsel shall continue to serve as associate counsel under R.M.C. 502(d)(2) unless formally excused pursuant to R.M.C. 505(d)(2).

c. *Qualification pool for civilian defense counsel.* Civilian attorneys may be qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis based upon a specific request by an accused.

1. Applications Procedures

A. An attorney seeking qualification as a member of the pool of available civilian defense counsel shall submit an application, by letter, to:

Office of the General Counsel, Department of Defense
(Attn: Chief Defense Counsel, Office of the Chief Defense Counsel)
1600 Defense Pentagon
Washington, DC 20301-1600

B. Applications will be comprised of the letter requesting qualification for membership, together with the following:

i. Applicants will provide proof of citizenship (*e.g.*, certified true copy of passport, birth certificate, or certificate of naturalization).

ii. Applicants will submit an official certificate showing that the applicant is an active member in good standing with the bar of a qualifying jurisdiction. The certificate must be dated within three months of the date of the Chief Defense Counsel's receipt of the application.

iii. An applicant will submit a statement detailing all sanctions or disciplinary actions, pending or final, to which he has been subject, whether by a court, bar or other competent governmental authority, for misconduct of any kind. The statement shall identify the jurisdiction or authority that imposed the sanction or disciplinary action, together with any explanation deemed appropriate by the applicant. Additionally, the statement shall identify and explain any formal challenge to the attorney's fitness to practice law, regardless of the outcome of any subsequent proceedings. In the event that no sanction, disciplinary action or challenge has been imposed on or made against an applicant, the statement shall so state. Further, the applicant's statement shall identify each jurisdiction in which he has been admitted or to which he has applied to practice law, regardless of whether the applicant maintains a current active license in that jurisdiction, together with any dates of admission to or rejection by each such jurisdiction and, if no longer active, the date of and basis for inactivation. The above information shall be submitted either in the form of a sworn notarized statement or as a declaration under penalty of perjury of the laws of the United States. The sworn statement or declaration must be executed and dated within three months of the date of the Chief Defense Counsel's receipt of the application. Further, applicants shall submit a properly executed Authorization for Release of Information [Form 9-1], authorizing the Chief Defense Counsel or his designee to obtain information relevant to qualification of the applicant as a member of the Civilian Defense Counsel pool from

each jurisdiction in which the applicant has been admitted or to which he has applied to practice law.

iv. Civilian defense counsel applicants who possess a valid current security clearance of SECRET or higher shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the adjudicating authority. Civilian defense counsel applicants who do not possess a valid current security clearance of SECRET or higher shall state in writing their willingness to submit to a background investigation in accordance with regulation issued pursuant to DoD Directive 5200.2-R, "Personnel Security Program" and to pay any actual costs associated with the processing of the same. The security clearance application, investigation, and adjudication process will not be initiated until the applicant has submitted an application that otherwise fully complies with this Regulation and the Chief Defense Counsel has determined that the applicant would otherwise be qualified for membership in the civilian defense counsel pool. Favorable adjudication of the applicant's personnel security investigation must be completed before an applicant will be qualified for membership in the pool of civilian defense counsel. The Chief Defense Counsel may, at his discretion, withhold qualification and wait to initiate the security clearance process until such time as the civilian defense counsel's services are likely to be sought.

v. Civilian defense counsel shall have signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules or orders of the commission for conduct during the course of proceedings. This requirement shall be satisfied by the execution of the Affidavit and Agreement by Civilian Defense Counsel [Form 9-2]. Form 9-2 shall be executed and agreed to without change (*i.e.*, no omissions, additions or substitutions). Proper execution shall require the notarized signature of the applicant. Form 9-2 shall be dated within three months of the date of the Chief Defense Counsel's receipt of the application. Applications mailed in a franked U.S. Government envelope will not be considered. Failure to provide all of the requisite information and documentation may result in rejection of the application. A false statement in any part of the application may preclude qualification and/or render the applicant liable for disciplinary or criminal sanction

C. Application review.

1. The Chief Defense Counsel or his designee shall review all civilian defense counsel pool applications for compliance with 10 U.S.C. § 949c(b), R.M.C. 502(d)(3) and this Regulation. The Chief Defense Counsel shall consider all applicants for qualifications as members of the pool of available civilian defense counsel without regard to race, religion, color, sex, age, national origin, or non-disqualifying physical or mental disability. The Chief Defense Counsel may reject any civilian defense counsel application that is incomplete or otherwise fails to comply with 10 U.S.C. § 949c(b), R.M.C. 502(d)(3) and this Regulation.

2. Subject to review by the Deputy General Counsel (Personnel and Health Policy), the Chief Defense Counsel shall determine the number of qualified attorneys that

shall constitute the pool of available civilian defense counsel. Subject to review by the Deputy General Counsel (Personnel and Health Policy), the Chief Defense Counsel shall determine the qualification of applicants for membership in such pool. This shall include determinations as to whether any sanction, disciplinary action, or challenge is related to relevant misconduct that would disqualify the civilian defense counsel applicant. The Chief Defense Counsel's determination as to each applicant's qualification for membership in the pool of qualified civilian defense counsel shall be deemed effective as of the date of the Chief Defense Counsel's written notification publishing such determination to the applicant. Subsequent to this notification, the retention of qualified civilian defense counsel is effected upon written entry of appearance, communicated to the military commission through the Chief Defense Counsel.

3. The Chief Defense Counsel may reconsider his determination as to an individual's qualification as a member of the pool of available civilian defense counsel on the basis of subsequently discovered information indicating material nondisclosure or misrepresentation in the civilian counsel's application, or material violation of obligations of the civilian defense counsel, or other good cause, or he or she may refer the matter to the Convening Authority or the Deputy General Counsel (Personnel and Health Policy), who may revoke or suspend the qualification of any member of the civilian defense counsel pool.

9-6. CONSULTANTS

- a. Pursuant to R.M.C. 506(e), an accused before a military commission may have present and seated at the counsel table, for purpose of consultation, persons who are not qualified to serve as counsel under R.M.C. 502. These consultants may or may not be United States citizens.
- b. The detailed defense counsel shall provide written notice to the Convening Authority of any request by the accused to have a consultant present at any stage of the proceedings. The notice shall include the name, address and, if known, the phone number and email address of the requested consultant. If the consultant is approved by the Convening Authority or military judge, the Convening Authority will coordinate the travel arrangements necessary to bring the consultant to Guantanamo Bay or other designated location for the proceedings.
- c. Any consultant authorized by the Convening Authority or military judge to attend commission proceedings during which classified material or information is presented or discussed, or to review classified material or information must have the requisite security clearance required by regulation issued pursuant to DoD 5200.2-R, "Personnel Security Program," and have signed a non-disclosure agreement, and an agreement to comply with all applicable regulations, including any rules of court for conduct during the course of the proceedings. Existing agreements with other countries pertaining to the recognition of security clearances for the purposes of military commissions apply. Subject to the discretion of the military judge, these consultants may be removed from the courtroom for any in camera presentation or proceeding to which only the parties are permitted to attend. A consultant shall be removed from the courtroom at any other point when material will be

considered that is classified at a level higher than that of the security clearance of the consultant.

d. For any person, including consultants, access to and communication with the accused is, at all times, contingent upon the individual seeking access having obtained the requisite security clearance as determined by the appropriate classification authority.

Access for consultants may be granted during an unclassified commission proceeding at the discretion of the Convening Authority or the military judge. Outside the courtroom, the time, place and procedures for access and communication with the accused is subject to the discretion of the custodian of the accused. For the purposes of this paragraph, commission proceedings are deemed to have begun at the time charges are sworn.

e. Attorneys and legal consultants not qualified to serve as counsel under R.M.C. 502 are not entitled to compensation at government expense.

9-7. STATEMENTS TO THE MEDIA

Personnel assigned to the OCDC, as well as all members of the civilian defense counsel pool and associated personnel, may communicate with news media representatives regarding cases and other matters related to military commissions. Comments to the media and in other public forums by both civilian and detailed defense counsel are subject to the Rules of Professional Conduct of their licensing jurisdictions and of the Judge Advocates General of their respective military departments, protective orders issued by the Convening Authority, and any rulings or orders from the military judge of a military commission.

Figure 9.1 – Authorization for Release of Information (MC Form 9-1)

AUTHORIZATION FOR RELEASE OF INFORMATION

UNITED STATES OF AMERICA

(Carefully read this authorization to release information about you, then sign and date it in ink.)

I authorize the Chief Defense Counsel, Office of Military Commissions, Department of Defense, his designee or other duly authorized representative of the Department of Defense who may be charged with assessing or determining my qualification for membership in the pool of Civilian Defense Counsel available to represent Accused before military commissions, to obtain any information from any court, the bar of any State, locality, district, territory or possession of the United States, or from any other governmental authority.

This information may include, but is not limited to, information relating to: any application for a security clearance; my admission or application for admission to practice law in any jurisdiction, including action by the jurisdiction upon such application, together with my current status with regard to the practice of law in such jurisdiction; any sanction or disciplinary action to which I have been subject for misconduct of any kind; and any formal challenge to my fitness to practice law, regardless of the outcome of subsequent proceedings.

I authorize custodians of such records or information and other sources of information pertaining to me to release such at the request of the officials named above, regardless of any previous agreement to the contrary.

I understand that for certain custodians or sources of information a separate specific release may be required and that I may be contacted for the purposes of executing such at a later date.

I understand that the records or information released by custodians and other sources of information are for official use by the Department of Defense only for the purposes provided herein, and that they may be disclosed by the Department of Defense only as authorized by law.

Copies of this authorization that show my signature are as valid as the original signed by me. This authorization is valid for five (5) years from the date signed or upon termination of my affiliation with the Department of Defense, whichever is later.

Signature (sign in ink) SSN Date

**Figure 9.2 – Affidavit and Agreement by Civilian Defense Counsel
(MC Form 9-2)**

AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

Pursuant to the Military Commissions Act of 2009, Pub. L. No. 111-84, , *codified in part at* 10 U.S.C. §§ 948a– 948d, the Manual for Military Commissions promulgated April 27, 2010, and Chapter 9 of the Regulation for Trial by Military Commission, I _____ [Name of Civilian Attorney] _____, make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of civilian defense counsel available to represent the accused before military commissions and serving in that capacity.

I. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the Secretary’s Manual for Military Commissions, and all other Military Commissions Regulations, Orders, Instructions and Directives applicable to trial by military commissions. I will read all amendments, rescissions or promulgations pertinent to the aforementioned.

B. I am aware that my qualification as a civilian defense counsel does not guarantee my access to any information subject to the national security privilege under 10 U.S.C. §§ 949p-1– 949p-7.

II. Agreements. I hereby agree to comply with all applicable regulations and rules for counsel, including any rules of court governing proceedings and any protective orders, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant military judge immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the Court of Military Commission Review), there is any material change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the civilian defense counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I will be well prepared and will conduct the defense zealously, representing the accused throughout the military commission process, from the inception of my representation through the completion of any post-trial proceedings as detailed in 10 U.S.C. §§ 950a-950j and R.M.C. 1101-1209. Prior to undertaking representation of the accused, I will ensure that I can commit sufficient time and resources to handle the accused’s case expeditiously and competently. In making this assessment, I am aware that the military judge may deny any request for a delay or continuance of proceedings based on reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission

proceedings, if in the military judge's determination such a continuation would unreasonably delay the proceedings.

C. The defense team shall consist entirely of myself, detailed defense counsel, and other personnel provided by the Chief Defense Counsel, the military judge, or the Convening Authority. I understand I must include the justification for particular individuals to be added to the defense team in a request to the Chief Defense Counsel, the military judge, or the Convening Authority as appropriate, and I will state any special requests regarding access to the accused, classified information, as defined at 10 U.S.C. § 948a(2), or privileged under 10 U.S.C. §§ 949p-1 – 949p-7, R.M.C. 701, and Mil. Comm. R. Evid. 505, or the ability to enter into a confidential relationship. Regarding entering into a confidential relationship, I understand that those determined eligible to receive attorney confidences or attorney work product containing facts specific to the case will be required to complete an affidavit similar to this Form prior to receiving any attorney confidences or attorney work product containing facts specific to the case. I further understand that those I request to have access to the accused, other detainees, or classified information will be required to obtain a security clearance and be specifically approved for access to each individual or item of classified information requested, prior to access being granted. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information or privileged information. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve detailed defense counsel of duties specified in 10 U.S.C. § 949c(b) and R.M.C. 502(d)(7), I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During my representation of an accused before a military commission, I will comply with the following restrictions on my communications and travel:

1. I will not discuss, transmit, communicate, or otherwise share documents or information that are classified or protected/privileged, with anyone who does not have the necessary security clearance, and will only share with properly cleared persons as is necessary to represent my client before a military commission. In any case of doubt regarding whether I may share information about a case with another, I understand that I have an affirmative duty to request clarification from the Deputy General Counsel (Personnel and Health Policy) or military judge before discussing, transmitting, communicating, or otherwise sharing documents or information. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information and material, or other protected information.

2. I understand that once proceedings have begun, I may be required by the military judge to remain at the site of the proceedings until he or she approves my departure.

3. I understand I will obtain prior approval from the Convening Authority for a country clearance for travel to Guantanamo Bay, Cuba.

F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any document or material constituting classified, protected, or privileged information under 10 U.S.C. § 948a(24) or subject to the national security privilege under 10 U.S.C. §§ 949p-1 – 949p-7, R.M.C. 701, and Mil. Comm. R. Evid. 505. This restriction does not apply to discussions with other members of the defense team or the Chief Defense Counsel who are appropriately authorized to receive the specific classified information and privileged information in question, when such disclosure is related to the defense efforts on behalf of the accused during military commission proceedings or subsequent review. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, instructions, or protective orders governing the handling of classified or privileged information.

G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material or other privileged information.

H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Convening Authority, the military judge, detention authorities, or regulation.

I. I understand that communications with an accused are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal services to the client.

J. I agree that I shall reveal to the Chief Defense Counsel, and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).

/s/: _____

Print Name: _____

Address: _____

Date: _____

STATE OF)
COUNTY OF)

Sworn to and subscribed before me, by _____, this ___ day of _____, 20__.

Notary
My commission expires:

SENSITIVE COMPARTMENTED INFORMATION NONDISCLOSURE AGREEMENT

An Agreement Between _____

and the United States.

(Name—Printed or Typed)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to information or material protected within Special Access Programs, hereinafter referred to in this Agreement as Sensitive Compartmented Information (SCI). I have been advised that SCI involves or derives from intelligence sources or methods and is classified or is in the process of a classification determination under the standards of Executive Order 12356 or other Executive order or statute. I understand and accept that by being granted access to SCI, special confidence and trust shall be placed in me by the United States Government.
2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of SCI, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information or material have been approved for access to it, and I understand these procedures. I understand that I may be required to sign subsequent agreements upon being granted access to different categories of SCI. I further understand that all my obligations under this Agreement continue to exist whether or not I am required to sign such subsequent agreements.
3. I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of SCI by me could cause irreparable injury to the United States or be used to advantage by a foreign nation. I hereby agree that I will never divulge anything marked as SCI or that I know to be SCI to anyone who is not authorized to receive it without prior written authorization from the United States Government department or agency (hereinafter Department or Agency) that last authorized my access to SCI. I understand that it is my responsibility to consult with appropriate management authorities in the Department or Agency that last authorized my access to SCI, whether or not I am still employed by or associated with that Department or Agency or a contractor thereof, in order to ensure that I know whether information or material within my knowledge or control that I have reason to believe might be SCI, or related to or derived from SCI, is considered by such Department or Agency to be SCI. I further understand that I am also obligated by law and regulation not to disclose any classified information or material in an unauthorized fashion.
4. In consideration of being granted access to SCI and of being assigned or retained in a position of special confidence and trust requiring access to SCI, I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information or material, any writing or other preparation in any form, including a work of fiction, that contains or purports to contain any SCI or description of activities that produce or relate to SCI or that I have reason to believe are derived from SCI, that I contemplate disclosing to any person not authorized to have access to SCI or that I have prepared for public disclosure. I understand and agree that my obligation to submit such preparations for review applies during the course of my access to SCI and thereafter, and I agree to make any required submissions prior to discussing the preparation with, or showing it to, anyone who is not authorized to have access to SCI. I further agree that I will not disclose the contents of such preparation to any person not authorized to have access to SCI until I have received written authorization from the Department or Agency that last authorized my access to SCI that such disclosure is permitted.
5. I understand that the purpose of the review described in paragraph 4 is to give the United States a reasonable opportunity to determine whether the preparation submitted pursuant to paragraph 4 sets forth any SCI. I further understand that the Department or Agency to which I have made a submission will act upon it, coordinating within the Intelligence Community when appropriate, and make a response to me within a reasonable time, not to exceed 30 working days from date of receipt.
6. I have been advised that any breach of this Agreement may result in the termination of my access to SCI and removal from a position of special confidence and trust requiring such access, as well as the termination of my employment or other relationships with any Department or Agency that provides me with access to SCI. In addition, I have been advised that any unauthorized disclosure of SCI by me may constitute violations of United States criminal laws, including the provisions of Sections 793, 794, 798, and 952, Title 18, United States Code, and of Section 783(b), Title 50, United States Code. Nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.
7. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement. I have been advised that the action can be brought against me in any of the several appropriate United States District Courts where the United States Government may elect to file the action. Court costs and reasonable attorneys fees incurred by the United States Government may be assessed against me if I lose such action.
8. I understand that all information to which I may obtain access by signing this Agreement is now and will remain the property of the United States Government unless and until otherwise determined by an appropriate official or final ruling of a court of law. Subject to such determination, I do not now, nor will I ever, possess any right, interest, title, or claim whatsoever to such information. I agree that I shall return all materials that may have come into my possession or for which I am responsible because of such access, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship with the United States Government entity providing me access to such materials. If I do not return such materials upon request, I understand this may be a violation of Section 793, Title 18, United States Code.
9. Unless and until I am released in writing by an authorized representative of the Department or Agency that last provided me with access to SCI, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to SCI, and at all times thereafter.
10. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect. This Agreement concerns SCI and does not set forth such other conditions and obligations not related to SCI as may now or hereafter pertain to my employment by or assignment or relationship with the Department or Agency.
11. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available Sections 793, 794, 798, and 952 of Title 18, United States Code, and Section 783(b) of Title 50, United States Code, and Executive Order 12356, as amended, so that I may read them at this time, if I so choose.

12. I hereby assign to the United States Government all rights, title and interest, and all royalties, remunerations, and emoluments that have resulted, will result, or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement.

13. These restrictions are consistent with and do not supersede conflict with or otherwise alter the employee obligations rights or liabilities created by Executive Order 12356; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the Military); section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 USC 421 et seq.) (governing disclosures that could expose confidential Government agents), and the statutes which protect against disclosure that may compromise the national security, including section 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. section 783(b)). The definitions, requirements, obligations, rights, sanctions and liabilities created by said Executive Order and listed statutes are incorporated into this Agreement and are controlling.

14. This Agreement shall be interpreted under and in conformance with the law of the United States.

15. I make this Agreement without any mental reservation or purpose of evasion.

Signature _____
Date

The execution of this Agreement was witnessed by the undersigned who accepted it on behalf of the United States Government as a prior condition of access to Sensitive Compartmented Information.

WITNESS and ACCEPTANCE: _____
Signature _____
Date

<h2 style="margin: 0;">SECURITY BRIEFING / DEBRIEFING ACKNOWLEDGMENT</h2>		
_____ _____ (Special Access Programs by Initials Only)		
_____ SSN (See Notice Below)	_____ Printed or Typed Name	_____ Organization
<p>BRIEF DATE _____</p> <p>I hereby acknowledge that I was briefed on the above SCI Special Access Program(s):</p> <p>_____ Signature of Individual Briefed</p>	<p>DEBRIEF DATE _____</p> <p>Having been reminded of my continuing obligation to comply with the terms of this Agreement, I hereby acknowledge that I was debriefed on the above SCI Special Access Program(s):</p> <p>_____ Signature of Individual Debriefed</p>	
<p>I certify that the briefing presented by me on the above date was in accordance with relevant SCI procedures.</p>		
_____ Signature of Briefing/Debriefing Officer	_____ SSN (See Notice Below)	
_____ Printed or Typed Name	_____ Organization (Name and Address)	

NOTICE: The Privacy Act, 5 U.S.C. 522a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised authority for soliciting your Social Security Account Number (SSN) is Executive Order 9397. Your SSN will be used to identify you precisely when it is necessary to 1) certify that you have access to the information indicated above, 2) determine that your access to the information indicated has terminated, c certify that you have witnessed a briefing or debriefing. Although disclosure of your SSN is not mandatory, your failure to do so may impede such certification or determinations.

Figure 9.3

Figure 9.4 – AFFIDAVIT AND AGREEMENT BY DEFENSE CONSULTANT

Pursuant to the Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190, *codified in part at* 10 U.S.C. § 948a, *et seq.*, the Manual for Military Commissions, United States, promulgated April 27, 2010, and Chapter 9 of the Regulation for Trial by Military Commission, I, _____, make this Affidavit and Agreement for the purposes of applying for recognition as a consultant for the accused during military commission proceedings in the case of *United States* v. _____.

I. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the Secretary's Manual for Military Commissions, and all other Military Commissions Regulations, Orders, Instructions and Directives applicable to trial by military commissions. I will read all amendments, rescissions or promulgations pertinent to the aforementioned.

B. I am aware that my qualification as a defense consultant does not grant any access to the accused or to any information subject to the national security privilege under 10 U.S.C. § 949p-1.

II. Agreements. I hereby agree to comply with all applicable regulations and rules pertaining to members of the defense team, including any rules of court governing proceedings and any protective orders, and specifically agree, without limitation, to the following:

A. I will notify the Chief Defense Counsel and, as applicable, the relevant military judge immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the United States Court of Military Commission Review), there is any material change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as a defense consultant. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.

B. I understand that my service as a consultant is for the purpose of providing assistance to the accused during the military commission proceedings, and that commission proceedings are deemed to have begun at the time charges are sworn. I will be prepared to assist the defense from the inception of my recognition through the completion of any proceedings at which my presence or participation may be required by the accused. Prior to undertaking this duty as a consultant, I aver that I can commit sufficient time and resources to assist in the accused's case expeditiously and competently. I am aware that the military judge may deny any request for a delay or continuance of proceedings based on my absence due to other professional, academic, personal, or philanthropic obligations, if in the military judge's determination such a continuation would unreasonably delay the proceedings.

C. Regarding entering into a confidential relationship, I understand that those determined eligible to receive attorney confidences or attorney work product containing facts specific to the case will be required to complete an affidavit similar to this Form prior to receiving any attorney confidences or attorney work product containing facts specific to the case. I understand that access to, and communication with, the accused or other detainees are, at all times, contingent upon my receipt of the requisite security clearance as determined by the appropriate classification authority. I further understand that if I am granted access to classified information, I will be required to obtain a security clearance and will require specific approval for access to each individual or item of classified information requested, prior to access being granted. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information or privileged information. I understand that, in order to review classified information, or to attend commission proceedings during which classified information is reviewed or discussed, I must have the requisite security clearance required by regulation issued pursuant to DoD Directive 5200.2-R, "Personnel Security Program." I acknowledge that I will be removed from the courtroom when material will be considered that is classified at a level higher than my security clearance, if any, or that is controlled within an SCI or other special access compartment to which I have not been authorized access or that is subject to a dissemination control, such as "NOFORN," that precludes access. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. As a consultant to the accused before a military commission, I will comply with the following restrictions on my communications and travel: :

1. I will not discuss, transmit, communicate, or otherwise share documents or information that are classified or protected prior to their use at trial, with anyone except as is necessary to assist the accused in proceedings before a military commission. In the case of doubt regarding whether I may share information about a case with another, I understand that I have an affirmative duty to request clarification from the Deputy General Counsel (Personnel and Health Policy) or military judge before discussing, transmitting, communicating, or otherwise sharing documents or information. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information and material, or other protected information.

2. I will coordinate with the Office of the Convening Authority the travel arrangements necessary for me to travel to the location of the proceedings. I understand that once proceedings have begun, I may be required by the military judge to remain at the site of the proceedings until he or she approves my departure.

3. I will obtain prior approval through the Convening Authority for a country clearance for travel to Guantanamo Bay, Cuba.

E. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any document or material constituting classified information under 10 U.S.C. § 948a(2) or subject to the national security privilege under 10 U.S.C. § 949p-1, R.M.C. 701, and Mil.

Comm. R. Evid. 505. This restriction does not apply to discussions with other members of the defense team or the Chief Defense Counsel who are appropriately authorized to receive the specific classified information and privileged information in question, when such disclosure is related to the defense efforts on behalf of the accused during military commission proceedings or subsequent review. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified or privileged information.

F. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material or other privileged information.

G. I understand that communications with an accused are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal services to the accused.

H. I agree that I shall reveal to the Chief Defense Counsel, and any other appropriate authorities, information relating to my service as a member of the defense team to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

I. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as a consultant, or for the accused.

/s/ _____
Print Name: _____
Address: _____
Date: _____

STATE OF)
COUNTY OF)

Sworn to and subscribed before me, by _____, this ___ day of _____, 20__.

Notary

My commission expires:

Chapter 10

ALLEGATIONS OF MISCONDUCT, PROFESSIONAL RESPONSIBILITY AND CONFLICTS RESOLUTION

10-1. GENERAL

- a. Each Judge Advocate General is responsible for technical supervision and, when necessary, discipline of military lawyers from the respective armed services who practice in proceedings governed by the M.C.A. and the M.M.C. Technical supervision includes providing professional responsibility training and determining the credibility of allegations of, or suspected violations of, applicable rules of professional responsibility.
- b. Failure, by any individual, including military or civilian counsel, to adhere to the rules, procedures, regulations, and instructions applicable to trials by military commission may result in action by the Secretary of Defense or his or her designee, the Convening Authority, or the military judge of a military commission. Such action may include permanently barring an individual from participating in any military commission proceeding convened pursuant to the M.C.A., punitive measures imposed under R.M.C. 809, and any other lawful sanction.
- c. Consistent with R.M.C. 109(b)(3)(A), rules, regulations, and instructions applicable to trials by military commission are paramount to those of a military or civilian counsel's licensing jurisdiction, unless expressly forbidden by the licensing jurisdiction of the practitioner.
- d. Allegations of failure by a counsel to comply with an armed service's Rules of Professional Conduct in the context of that counsel's participation in military commissions proceedings will be directed to The Judge Advocate General of the appropriate military department. In resolving such allegations, appropriate officials will adhere to the guidance in R.M.C. 109 and this Regulation.
- e. Allegations of failure by a counsel to comply with the professional responsibility rules of that counsel's licensing jurisdiction(s) will be processed as required by each such jurisdiction.
- f. Nothing in this Regulation prevents any person from reporting any allegation of personal or professional misconduct directly to the appropriate standards of conduct officer within the Office of the Judge Advocate General of the appropriate military department or to the appropriate official or agency of an attorney's licensing jurisdiction.

10-2. ACTION ON ALLEGATIONS OF MISCONDUCT AGAINST COUNSEL

- a. *Consultation recommended.* Although not required, any counsel participating in military commissions proceedings or assigned to the OMC who suspects another attorney of unprofessional conduct or is contemplating a complaint to that effect,

should, given the gravity and potential distraction of such an allegation or complaint, consult with the Chief Prosecutor, Chief Defense Counsel, or Legal Advisor, as appropriate, before initiating action this chapter.

b. *Definitions.*

1. For the purpose of this chapter, ~~misconduct~~” is defined as any act or omission that is a violation of an applicable standard of professional responsibility or serves to demonstrate the unfitness of the respective attorney to perform his or her legal duties. This chapter does not affect any other criminal or administrative proceedings arising from the underlying alleged misconduct. This chapter addresses only the authority of military judges, military attorneys and civilian attorneys to practice as a judge or attorney before a military commission.

2. For purposes of this chapter, ~~Licensing Jurisdiction~~” means the state or federal bar, or regulatory equivalent responsible for supervision and governance of the professional responsibility of the attorney.

c. *Conflict with other rules of professional responsibility.* Officials responsible for receiving, processing, and/or resolving allegations of professional misconduct arising in commissions practice should recognize the specialized nature of that practice, and apply the following principles and procedures:

1. In effecting a choice of law between the professional responsibility rules of a counsel’s licensing jurisdiction(s) and the rules, regulations, and instructions applicable to trials by military commission, the latter shall be considered paramount, unless such consideration is expressly forbidden by the rules of a counsel’s licensing jurisdiction(s).

A. Any military counsel who believes such an express prohibition exists shall immediately bring the matter to the attention of the Chief Prosecutor or Chief Defense Counsel, the Convening Authority, and the military judge, if one has been detailed. If the conflict cannot be resolved, the military judge or the Chief Prosecutor or Chief Defense Counsel, as appropriate, shall remove the affected counsel from the case. Thereafter, an appropriate official may effect detail of another military counsel.

B. Any civilian counsel who believes such a prohibition exists may elect to remain on the case, but may not thereafter raise the conflict as an impediment to complying with any statute, rule, regulation, and/or instruction applicable to trials by military commissions, and waives any issue arising from any alleged prohibition or conflict on appeal, either interlocutory or due course.

C. Military commissions shall be deemed a ~~court,~~ ~~forum,~~ or ~~tribunal~~” for the purposes of construing any choice of law provision in the professional responsibility rules of a counsel’s licensing jurisdiction(s) that defers to the rules of a court, tribunal, or other forum.

i. If an express conflict exists between the rules applicable to trials by military commission and the branch specific armed forces Rules of Professional Conduct, the Convening Authority will coordinate with The Judge Advocate General of the appropriate armed force, or his or her designee, to resolve the conflict. If the conflict cannot be resolved, the Chief Prosecutor or Chief Defense Counsel, as appropriate, or the military judge, shall remove the affected counsel from the case. Thereafter, an appropriate official may effect detail of another military counsel.

ii. Prior to accepting assignment of a military defense counsel to the OCDC, the Chief Defense Counsel will verify that licensing bar association rules of each such counsel cannot reasonably be foreseen as an impediment to each such counsel's adherence to the rules of professional responsibility expressly applicable to trials by military commission.

iii. Consistent with court-martial practice, no automatic conflict of interest arises for a defense counsel working within the OCDC when that counsel represents an accused whose alleged co-conspirator(s) is/are represented by one or more other defense counsel in the OCDC.

10-3. ACTION ON ALLEGATIONS OF MISCONDUCT AGAINST A MILITARY JUDGE

a. Information as to alleged personal or professional misconduct by the military judge presiding over a military commission should be reported, together with appropriate supporting information, to the Chief Trial Judge for Military Commissions. If the Chief Trial Judge determines a complaint against a military judge is substantiated, the Chief Trial Judge shall forward the complaint to the Chief Trial Judge of the military department to which the subject military judge is assigned, or The Judge Advocate General of that department. The Chief Trial Judge may also take no action or take minor professional disciplinary action. In the event the personal or professional misconduct is alleged against the Chief Trial Judge, the complaint along with the appropriate supporting information shall be forwarded to The Judge Advocate General of the military department to which the Chief Trial Judge is assigned.

b. Minor professional disciplinary action is defined as verbal or written counseling.

c. Only the appropriate Judge Advocate General may take other than minor professional disciplinary action against a military judge pursuant to R.M.C. 109(c).

Chapter 11

OATHS

11-1. GENERAL

The military judge, members, trial counsel, assistant trial counsel, defense counsel, associate defense counsel, assistant defense counsel, reporters, interpreters, and escorts shall take an oath or affirmation to perform their duties faithfully. This oath may be administered by any person authorized by Article 136, U.C.M.J., to administer oaths; however, unless a request is made for a specific authorized party to do so, trial counsel will administer the oath.

11-2. MILITARY JUDGE

A military judge, certified in accordance with Article 26(b), U.C.M.J., may take a onetime oath to perform his or her duties faithfully and impartially in all military commission cases to which detailed. This oath may be taken at any time and may be administered by any person authorized by Article 136, U.C.M.J. to administer oaths. Once such an oath for military commissions is taken, the military judge need not be sworn again at any military commission to which subsequently detailed. Military judges will customarily be given a one-time oath. In the event a military judge detailed to a particular military commission has not been previously sworn, the trial counsel shall administer the oath to the military judge at the appropriate point in the proceedings. The following oath shall be used for the swearing in of military judges. *See R.M.C. 807(b)(2).*

Do you swear (or affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trials by military commission, all the duties incumbent on you as a military judge to this military commission, (so help you God)?

11-3. MEMBERS

Members will be given an oath for each case on which they serve as a member. In the event the Convening Order is amended, a new member shall be sworn when he or she arrives. This oath may be administered by any officer authorized by Article 136, U.C.M.J., to administer oaths, but will normally be administered by trial counsel. The oaths used for members will be those prescribed in R.M.C. 807(b)(2):

Do you swear (or affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this military commission; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trial by military commission, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court (upon a challenge or) upon the findings or sentence unless required to do so in due course of law (so help you God)?

11-4. COUNSEL

Any military counsel certified in accordance with Article 27(b), U.C.M.J., may be given a one-time oath. Such oath will customarily be administered when military counsel is detailed to the office of either the prosecution or the defense. The oath may be given at any time and by the Chief Prosecutor or Chief Defense Counsel or their designee so long as the designee meets the criteria of Article 136, U.C.M.J. Once such an oath is taken, certified military counsel need not be sworn again at any trial to which he or she is detailed. Counsel who are not certified in accordance with Article 27(b), U.C.M.J., including all civilian counsel, must be sworn in each case. The following oath shall be used in administering a one-time oath to counsel. *See R.M.C. 807(b)(2).*

Do you swear (or affirm) that you will faithfully perform the duties of (trial)(assistant trial)(defense)(associate defense)(assistant defense) counsel (in the case now in hearing) (all cases in which you perform duties), (so help you God)?

11-5. REPORTERS

Any court reporter, military or civilian, may be given a one-time oath. The oath normally will be administered by trial counsel in the first military commission to which the court reporter is assigned. Once such an oath is taken, the court reporter need not be sworn again at any trial to which assigned. When the court reporter is not sworn at trial, the fact the he or she has been previously sworn will be recorded in the transcript or record of trial. The following oath may be used in administering a one-time oath to court reporters. *See R.M.C. 807(b)(2).*

Do you swear (or affirm) that you will faithfully perform the duties of court reporter (in this military commission) (for all cases in which you perform duties) (so help you God)?

11-6. INTERPRETERS

Interpreters will be sworn by trial counsel as provided in R.M.C. 807(b)(2).

Do you swear (affirm) that in the case now in hearing you will interpret truly the testimony you are called upon to interpret (so help you God)?

11-7. RECORDING OF ONE-TIME OATHS

The military judge and certified counsel who take the oath prescribed above shall transmit a signed copy of their respective oaths to Convening Authority. A signed copy of the oath taken by the court reporter shall be filed in the Office of the Convening Authority. The copies shall bear below the signature of the person sworn a statement signed by the person who administered the oath, in a form as follows:

[Quote the oath and state the purpose why administered; followed by]

The undersigned personally administered the foregoing oath to the above-named

[Person sworn], this ____ day of _____, 20____, *[Location]*.

Signature and Rank

Chapter 12

PRETRIAL AGREEMENTS

12-1. AUTHORITY TO CONCLUDE AGREEMENT

Unless such authority is withheld by a superior competent authority, the Convening Authority is authorized to enter into or reject offers to enter into Pretrial Agreements (PTAs) with the accused. The decision to accept or reject a PTA offer submitted by an accused is within the sole discretion of the Convening Authority who referred the case to trial. *See* R.M.C. 705.

12-2. FORMAT AND TERMS

a. PTAs must be in writing and signed by the accused and counsel. If the Convening Authority accepts a PTA, the Convening Authority shall personally sign it, unless the Convening Authority previously authorized another individual, such as the Legal Advisor to sign. If the Legal Advisor signs the PTA, he or she shall use an authority line such as "FOR THE CONVENING AUTHORITY." Oral PTAs are prohibited, as are promises to intervene on the accused's behalf in any manner in exchange for a guilty plea. All documentation and correspondence pertaining to a PTA, including Appendix A, changes, or modifications, shall be included in the record of trial. (Figure 12.1 is a sample PTA, but it may be modified to fit the circumstances of a case.)

b. Any promise by the Convening Authority related to immunity for an accused must comply with R.M.C. 704 and Chapter 15 of this Regulation.

12-3. WITHDRAWAL FROM PTAs

If either party withdraws from a PTA, it becomes void.

a. *Convening Authority.* The Convening Authority may withdraw from a PTA at any time before the accused begins performance of promises contained in the a PTA, upon the failure by the accused to fulfill any material promise or condition in the PTA, or if findings are set aside because a plea of guilty entered pursuant to the PTA is held improvident on appellate review. The Convening Authority should exercise this authority with due regard for fairness. Withdrawals by the Convening Authority must be in writing and signed by the Convening Authority. A copy will be given to the accused and defense counsel. *See* R.M.C. 705(d)(4)(B).

b. *Accused.* Withdrawals by the accused must be in writing and submitted to the Convening Authority unless made by the accused on the record.

12-4. IN-COURT INQUIRY

a. *Generally.* Trial counsel shall notify the military judge of a PTA as soon as practicable. The military judge must question the accused prior to accepting the plea to

determine whether the accused understands and agrees to the meaning and effect of each PTA condition and the agreed-upon sentence limitations. PTAs, whether or not approved by the military judge, are appellate exhibits in the record of trial. Any unaccepted PTAs and any statements of the accused related to the PTA negotiation shall not be disclosed to the members.

b. *Stipulations of Fact.* In order to make members sufficiently aware of the circumstances of the offenses with which an accused is charged, the Convening Authority may require the accused and counsel to enter into stipulations of fact or testimony as a part of the PTA. *See* R.M.C. 705(e) for PTA nondisclosure requirements.

12-5. JURISDICTION

Failure to comply with the provisions of this chapter does not constitute a jurisdictional defect.

12-6. CONSULTATION WITH THE OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

If a PTA negotiation involves classified information entitled to protection (*see* Chapter 47A of Title 10 U.S.C. §§ 949p-1 – 949p-7), the Convening Authority and his or her Legal Advisor should consult with the ODNI prior to entering into a PTA negotiation with the accused or his counsel.

12-7. COORDINATION WITH COMMANDERS FOR CERTAIN PURPOSES

a. The Convening Authority and the accused may agree to include provisions related to the nature of confinement. Prior to reducing any such arrangement to print, the Convening Authority shall coordinate with the Commander of Joint Task Force Guantanamo (or the successor military or civilian organization tasked with responsibility for confinement of individuals subject to or sentenced by a military commission (hereinafter Successor) and receive written confirmation that such an arrangement is acceptable and will be honored. Should such an arrangement be agreeable to the Commander (or Successor), the Commander (or Successor) will return a signed writing to that effect and the Convening Authority may proceed with the PTA. Any counter-offer or adjustment to the PTA must be concurred with by the Commander (or Successor).

b. Should, after acceptance and execution of the terms of the PTA, conditions change such that the commander (or Successor) may no longer comply with the agreed upon provisions, and there are no alternatives to satisfy the PTA, the PTA shall become voidable, and the accused may elect to withdraw his plea and appeal to the highest court which last reviewed his case preceding any review conducted by the United States Supreme Court.

c. The Convening Authority may agree to make recommendations regarding the place or conditions of confinement; however, a failure to comply with the Convening Authority's recommendation does not render the PTA voidable, and is not grounds for the accused to withdraw from the PTA.

Figure 12.1 – Sample Offer For Pretrial Agreement

UNITED STATES)
)
 V) U.S. NAVAL STATION
) GUANTANAMO BAY, CUBA
 [NAME OF ACCUSED])
 [LIST OF ANY ALIAS]) [DATE]

OFFER FOR PRETRIAL AGREEMENT

I, (name, ISN), am presently the accused under military commission charges, dated _____ (and _____). I read the charge(s) and specification(s) alleged against me, and they have been explained to me by my defense counsel, (rank, if military, and name). I understand the charge(s) and specification(s), and I am aware I have a legal and moral right to plead not guilty and to leave the prosecution with the burden of proving my guilt beyond a reasonable doubt by legal and competent evidence. Understanding the above, and under the conditions set forth below, and in consideration of agreement by the Convening Authority to approve a sentence in accord with the limitations set forth in Appendix A (and to) (withdraw Charge _____, Specification _____) (modify Specification _____ of Charge _____ to the lesser offense of) (refer the case to a non-capital commission), I offer to plead

Guilty To all Charges and Specifications

or

To the Charge and Specification(s)

or

To the following Charge(s) and Specification(s):

(set forth by number or in full the charge(s) and specification(s) to which the guilty plea will apply. If the plea is to be a lesser included offense as to one or more specifications, set forth the exceptions and substitutions correctly and in full.)

I understand that this offer, if accepted by the Convening Authority, constitutes a binding agreement. I assert that I am, in fact, guilty of the offense(s) to which I am offering to plead guilty, or that I have been appraised of the evidence against me and agree that the evidence could prove me guilty beyond a reasonable doubt of the offenses to which I am pleading guilty. I understand that this agreement permits the government to avoid presentation in a military commission of sufficient evidence to prove my guilt. I offer to plead guilty because it will be in my best interest that the Convening Authority grant me the relief set forth above and in Appendix A. I understand that I waive my right to a trial of the facts and to be confronted by the witnesses against me, and my right to avoid self-incrimination insofar as a plea of guilty will incriminate me.

In making this offer, I state that:

1. I am satisfied with the defense counsel who advised me with respect to this offer and consider (him) (her) (them) competent to represent me in this military commission.

2. No person or persons made any attempt to force or coerce me into making this offer or to plead guilty.

3. My counsel fully advised me of the nature of the charges against me, the possibility of my defending against them, any defense which might apply, and the effect of the guilty plea which I am offering to make, and I fully understand (his) (her) advice and the meaning, effect, and consequences of this plea.

4. I understand the signature of the Convening Authority to this offer and to Appendix A, or to any modified version of Appendix A which I also sign, will transform this offer into an agreement binding upon me and the Government.

5. I understand that I may withdraw my plea of guilty at any time before sentence but not after sentence is announced and that, if I do so, the agreement that may result from this offer is canceled and of no effect. Any such agreement will also be canceled and of no effect, if any of the following occurs:

a. Refusal of the court to accept my plea of guilty, as set forth above, or modification of the plea by anyone during the trial to not guilty or to a lesser degree of guilt.

b. Withdrawal by either party to the agreement before the trial.

c. My failure to agree with the trial counsel on stipulations concerning facts and circumstances.

6. I understand the Convening Authority's obligation to approve a sentence (or range of punishment) no greater than that provided in Appendix A to this agreement may be canceled if I commit any offense chargeable under the M.C.A. between the announcement of sentence and the Convening Authority's approval of any sentence (or fail to provide restitution to

_____ in the amount of _____ by _____) (fail to return _____ to _____ by _____) (fail to refrain from _____ between the announcement of sentence and the Convening Authority's approval of any sentence) (engage in misconduct, including violation of detention rules and regulations).

7. I further understand that the sentence limitation in this agreement has no effect on either my status as a law of war detainee, or on the duration that I may be detained under the law of war.

8. [To effect my agreement to a range of confinement, and after full and satisfactory consultation with my defense counsel, I understand and agree that the military judge will instruct the members, prior to deliberation, that the sentence to confinement must be at least ____ (years)(months) and may not exceed ____ (years)(months), as reflected in Appendix A.]

I understand that if any agreement resulting from this offer is canceled for any reason stated above, this offer for an agreement cannot be used against me in any way or at any time to establish my guilt of the offense(s), and the limitations upon disposition of my case set forth in Appendix A will have no effect.

This document and Appendix A include all of the terms of this offer to plead guilty, and no other inducements have been made by the Convening Authority or any other person which affect my offer to plead guilty.

Date

Signature

I certify I gave the accused the advice referred to above, I explained to him or her the elements of the offense(s) and I witnessed his or her voluntary signature to this offer for a pretrial agreement. (I am a member of the bar of _____) (I am a judge advocate) (certified/not certified under Article 27(b)).

Date

Defense Counsel

I recommend (acceptance) (rejection) of this offer.

Date

Legal Advisor to the
Convening Authority

The foregoing instrument, including Appendix A, dated _____, is (approved and accepted) (disapproved).

Date

Signature
Convening Authority

Figure 12.2 – Sample Appendix A To Offer For Pretrial Agreement¹

UNITED STATES)
)
 V) U.S. NAVAL STATION
) GUANTANAMO BAY, CUBA
 [NAME OF ACCUSED &)
 UNCLASS ISN])
 [LIST OF ANY ALIAS]) [DATE]

APPENDIX A TO OFFER FOR PRETRIAL AGREEMENT

As consideration for the offer of the accused to plead guilty as set forth in the Offer for Pretrial Agreement, dated _____, the Convening Authority will undertake that:

(the approved sentence will not exceed _____)(the confinement will not be less than ___(years)(months), nor more than ___(years)(months), and will otherwise not exceed _____).

(This is the original Appendix A submitted with the Offer for Pretrial Agreement.)

Date

Signature

I certify I advised the accused of the effect of the foregoing and I witnessed his or her voluntary signature to this Appendix A.

Date

Defense Counsel

I recommend (acceptance) (rejection) of this Appendix A.

Date

Legal Advisor to the
Convening Authority

¹ Use of an Appendix is not mandatory.

The foregoing Appendix A is approved in conjunction with the Pretrial Agreement,
dated _____.

Date

Signature
Convening Authority

NOTES for Figure 12.2 Sample Appendix A To Offer For Pretrial Agreement:

1. The Convening Authority signs Appendix A only if approving the agreement.
2. If the negotiation results in agreement on different relief for the accused than that included in the original offer, prepare and sign a different offer and or Appendix A reflecting the agreed terms. If only a new Appendix A is prepared, the date of the original offer will appear in the first paragraph and the date of the new Appendix A appears next to the accused's signature.
3. If another Appendix A or offer is prepared, attach the original Appendix A or offer to the record of trial as an allied paper.
4. Many of the clauses contained in paragraph 6 of this figure are optional. If used, carefully tailor them to include adequate protections against arbitrary revocation of the agreement to prevent their being declared void as against public policy. *See R.M.C. 705(c).*
5. Overall sentence caps may be confusing. If the parties wish to cap the sentence in the aggregate (allowing substitution of punishments for those specifically adjudged, so long as the aggregate effect does not exceed the aggregate adjudged), the pretrial agreement should be specific on this point. Otherwise, to avoid confusion, consider using the following, or similar, language when limiting more than one form of the punishment:

“The Convening Authority will approve no confinement, if confinement is adjudged, in excess of [state time in months or years]. There are no restrictions on his ability to approve other forms of punishment that may be adjudged.”

6. Contrary to limitations imposed by case-law in the court-martial system, the Convening Authority may approve an accused's option to plead guilty when the sentence limitation proposed by the accused includes a “range limitation” of confinement. A range provides both a minimum and a maximum confinement, for example:

“The accused and the Convening Authority agree that the sentence shall include a minimum term of confinement of not less than two years nor more than five years.”

Chapter 13

WITNESSES, FUNDING, TRAVEL, COMPULSORY PROCESS, AND EXPERT WITNESSES

13-1. FUNDING AUTHORITY

The funding for all witness travel will be approved by the Convening Authority and arranged by the Office of Military Commissions. Witness travel for the purpose of testifying at hearings held in military commission proceedings shall be arranged by the Victim Witness Assistance Program within the Office of the Chief Prosecutor, Office of Military Commissions.

13-2. REQUESTING TRAVEL FUNDS

R.M.C. 703(c) governs the initial determination of whether to produce a witness. Once the trial counsel decides to produce a witness, including a witness submitted by defense counsel, the trial counsel requests travel funds by letter sent by electronic transmission to the Office of the Convening Authority, who determines whether to approve funding. This request for funds must be accompanied by the “Witness Information – Office of Military Commissions” (Figure 13.1). Prosecution and defense witnesses who have been approved for production by trial counsel must submit an OMC Witness Travel Request to the designated contact in the Victim Witness Assistance Program (Figure 13.2). All requests for witnesses to testify in military commissions convened outside the United States should include area clearance information. *See* DoD Directive 4500.54E, “Foreign Clearance Program” and the Electronic Foreign Clearance Guide at <https://www.fcg.pentagon.mil>.

13-3. MILITARY WITNESSES

a. To arrange for the attendance of military witnesses on active duty, trial counsel shall notify the witness’s commander of the time, place, and date the witness’ presence is required. The trial counsel shall ask the commander to issue any necessary orders to the witness. Included in the request shall be travel order numbers and accounting data. A command receiving a proper request for a military witness must provide that witness as requested or promptly notify the trial counsel that the witness will not be provided so the trial counsel can report the matter to the Convening Authority and, if necessary, to the Military Judge. Failure to order a military witness to the trial can have severe consequences and may delay the trial. Military witnesses’ attendance at a military commission shall be facilitated through the submission of a DD Form 1610, a TDY request for orders.

b. Reserve and National Guard component military members may only appear as witnesses in uniform if their duty time to provide that testimony has been coordinated with their Reserve Command or State Adjutant General and orders have been issued placing the member on active duty, active duty for special work, or inactive duty for

training. Members of the National Guard must be on Federal (Title 10) orders. If the reserve component member is not authorized to be in such status at the time of their travel and testimony, then the witness will be treated as a civilian as in Chapter 13-4, below.

13-4. CIVILIAN WITNESSES IN GOVERNMENT EMPLOY

Civilian employees of the United States can be required to testify incident to their employment with appropriate travel orders issued for this purpose. It is not necessary to issue a subpoena to a civilian employee of the government. To arrange for the attendance of a witness who is a civilian employee of the government, trial counsel shall notify the witness's supervisor of the time, place, and date the witness's presence is required. A civilian employee of the government, when summoned as a witness, shall be issued temporary additional duty orders and shall receive the transportation and per diem allowances for temporary additional duty for civilian employees. When summoned as a witness, a civilian in the employ of the government shall be paid as authorized by the JTR, Vol. 2 (for DoD civilian employees) or by the Federal Travel Regulation, 41 C.F.R. §§ 300-304 (for non-DoD civilian employees). Generally, if an employee is called to present testimony involving the agency with which the employee is employed, the employing agency pays all witness expenses. *See* CFR, Part 21, 21.2(d).

13-5. CIVILIAN WITNESSES, SUBPOENAS AND INVITATIONAL TRAVEL ORDERS

- a. Travel of civilian witnesses who appear to testify before a military commission shall be facilitated through Invitational Travel Orders (ITOs). *See* Sample Invitational Travel Order (ITO) (Figure 13.3). A current passport is required to travel outside the United States.

- b. A civilian may not be compelled by subpoena to leave the United States and travel to a foreign country; therefore, a subpoena issued to a civilian to testify at Guantanamo Bay may not be enforced in the United States. *See United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982). A civilian witness may be subpoenaed to testify at a military commission hearing from a site in the United States through remote audiovisual device (RAVD), or through a deposition scheduled pursuant to R.M.C. 702. *See* R.M.C. 703(e)(2)(D); Use Sample Subpoena Request Cover Letter (Figure 13.4) and MC Form 453, "Subpoena" (Figure 13.5). The witness must be provided all allowable fees and mileage at the time the subpoena is served. If the witness refuses the subpoena and fees, a member of the Victim Witness Assistance Program may be designated as the accounting and finance certifying payment official in order to receive the witness travel funds for a personal service on the witness. This individual must provide these funds to the trial counsel immediately, who then effects service. In the alternative, the Convening Authority may draft a check to the witness which shall accompany the subpoena for service or attempted service upon the witness. The subpoena should be served in person, either by the trial counsel or by a designee, including a U.S. Marshal.

Personal service may also be requested through the local law enforcement office nearest the witness. If travel is required, ITOs must be issued.

c. When a witness will appear voluntarily and a subpoena is issued, informal service of process may be made. Informal service may include fax and/or email of the subpoena.

d. *Warrant of attachment.* If the witness fails or refuses to appear, the trial counsel shall exhaust every reasonable means to secure live testimony. If necessary, trial counsel may use MC Form 454, "Warrant of Attachment" (Figure 13.6) to compel the witness to appear or produce evidence.

e. *Fees, per diem and mileage for civilian witnesses not in government employ.* Pay fees and allowances authorized under 28 U.S.C. § 1821 (per diem, mileage, subsistence). JTR, Vol. 2, para. C4562 and Appendix E. Civilian witnesses not in the employ of the government shall receive the following:

1. An attendance fee for each day's actual attendance and for the time necessarily occupied in going to and returning from the location of the military commission hearing, remote audiovisual site, or the deposition location.

2. A subsistence allowance (per diem or actual expense) in an amount not to exceed the maximum per diem allowance for official travel in the area of attendance by employees of the federal government when an overnight stay is required at the place of attendance because such place is so far removed from the witness' residence as to prohibit return home from day- to-day.

3. Travel expenses:

A. If travel is by common carrier, the witness (and necessary escort, in the case of a minor or older witness in need of an escort) shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled from the place of residence to and from the place of attendance by the shortest practicable route. The common carrier shall be utilized at the most economical rate reasonably available. A receipt or other evidence of cost shall be attached to the travel claim.

B. If travel is by privately owned vehicle, the witness shall be paid a travel allowance equal to that prescribed for official travel of federal civilian employees.

C. Toll charges for toll roads, bridges, tunnels and ferries; taxi cab fares between places of lodging and carrier terminals; and parking fees (upon presentation of valid parking receipts) shall be paid in full to a witness incurring such expenses.

13-6. ASSISTANCE TO WITNESSES

a. The trial and defense counsel, or their designees, shall contact their respective witnesses who will attend proceedings at Guantanamo Bay and provide them with a witness information packet. This packet will include, as appropriate, an introductory letter, a Subpoena, an ITO, and a military commission travel brief that will include a description of the island, travel, lodging and any other necessary and relevant information. *See also* Sample Suggested Timelines for Witnesses Testifying in Person at Guantanamo Bay, Cuba (Figure 13.7).

b. The trial and defense counsel, or their designees, shall arrange for the logistical needs of their respective witnesses while on the ground at Guantanamo Bay, including transportation, meals, and escorts when required.

c. If the witness is fearful for his or her physical safety as a result of a request for the witness to testify before the commission, the trial or defense counsel shall ensure that the military judge is made aware of this fact. The trial or defense counsel, or their designee, shall implement any measures ordered by the military judge to ensure the safety of the witness and/or the witness's family.

d. The Office of Military Commissions shall, when directed by the Convening Authority or the military judge, be responsible for the procurement of security measures for witnesses and victims testifying in the courtroom. This shall include, but not necessarily be limited to, voice distortion equipment, screens that are capable of physically shielding the victim/witness from the public, modifications to the witness box, and the entry and exit of protected witnesses in and out of the courtroom.

e. If requested by the witness, the trial or defense counsel, or their designee, shall take reasonable steps to inform the witness's employer of the reasons for the witness's absence from work.

13-7. PROCEDURES FOR SUBMITTING CIVILIAN WITNESS TRAVEL CLAIMS

a. The following documents are required to ensure a timely and accurate payment:

1. A copy of the subpoena, MC Form-453, (if used) or official orders directing the witness to the location of the military commission hearing, remote audiovisual site, or place of deposition;

2. The Invitational Travel Order (if used) informing the witness of their entitlements; and

3. A completed travel claim similar to the Sample Travel Voucher or Subvoucher Form, DD Form 1351-2 (Figure 13.8). All lodging receipts and receipts for claimed items are required.

b. The witness shall present the completed travel claim and all supporting documents to personnel in the Victim Witness Assistance Program who shall process and review the claim. The travel voucher and supporting documentation shall be forwarded to the Branch Chief, Logistics, Office of the Convening Authority, for approval and certification. Once certified, the Victim Witness Assistance Program personnel shall submit the certified documents to Defense Finance and Accounting for payment.

13-8. ADVANCE TENDER OF PAYMENT

Any person assigned to the OMC-P or the Office of the Convening Authority, may be authorized by the Branch Chief, Logistics, Office of the Convening Authority, to tender to the witness advance fees. The person receiving those funds shall provide a signed receipt to the individual who disbursed the funds.

13-9. EXPERT WITNESSES AND CONSULTANTS

a. The Convening Authority may fund the travel and expenses of expert witnesses and expert consultants. Each such expert will be compensated through a Memorandum of Agreement (MOA) for Expert, MC Form 13-1 (Figure 13.9). An expert originally employed as a consultant may become a government-funded expert witness if the Convening Authority approves that proposed change in status.

b. Only the Convening Authority may authorize the employment of an expert witness at government expense. Such authorization shall be in writing and shall fix the limit of compensation to be paid such expert based on the normal compensation paid by the Department of Justice for attendance of a witness of such standing in the United States courts in the area involved. An expert may receive expert fees only for the hours they spend performing the approved services. Experts are not authorized expert fees for hours spent travelling. The expert witness fee prescribed by the Convening Authority however, will be paid in lieu of the ordinary attendance fee only on those days the witness is required to attend the court at government expense. The time an expert witness is “required to attend court” is the time of the arrival of the last available government authorized transportation to the location of the commission prior to their testimony until the time of the departure of the first available government authorized transportation from the location of the commission after the witness completes their testimony, at the maximum rate of eight hours per day, unless the witness’s actual testimony exceeds eight hours in one day.

c. An expert employed in accordance with this section may be paid compensation in advance at the rate authorized by the Convening Authority. An expert witness’s claim for fees and mileage shall also include a copy of the MOA. Absent such authorization, only the fees paid to an ordinary witness may be paid. The Convening Authority may approve recompense for inconvenience or cancellation fees for prior approved experts. There must be a showing of actual inconvenience and financial loss to the expert, and cancellation within five days of the trial date. Expert witnesses are expected to mitigate

any financial loss caused by cancellation. Normally, payment will not be considered appropriate, unless a written agreement provided for such payment at the time the expert's services were contracted.

d. If an expert witness is granted access to classified information or other information for which clearance or other access restrictions apply, such access shall be granted in accordance with procedures prescribed in Chapter 18 of this Regulation, including the signing of a Non-Disclosure Agreement (Form 4414) if applicable.

13-10. FOREIGN WITNESSES

a. The Office of the Convening Authority, through the trial counsel, will arrange for witnesses located outside of the United States to travel to the location of the military commission to give live testimony, to travel to the United States or a U.S. installation to provide deposition testimony, or provide remote audio-visual technology to permit the witness to testify (use Figure 13.5).

b. The Office of the Convening Authority shall facilitate the necessary country clearance if possible after consultation with the Department of State and Department of Homeland Security as appropriate.

Figure 13.1 – Sample Witness Information-Office of Military Commissions

Witness Information-Office of Military Commissions

Witness Name: _____

If military, what is their rank & service? _____

If civilian, are they an 0-6 equivalent? _____

Aliases (if any): _____

Citizenship: _____

Passport number and issuing country: _____

Home address: _____

Does this person have a security clearance, and if so, what level?
YES (Level- _____) NO

Home telephone number (including all digits to dial from USA): _____

Work telephone number: _____

Cell phone: _____

Alternate point of contact: _____

If an expert witness, have fees been approved for their testimony?
YES NO

If non-US citizen, does witness require assistance from INS to enter the USA?
YES * NO

*If yes, has INS been contacted? Who is POC at INS for this witness?

If US government employee, what agency does witness work for?

If foreign government employee, what agency does witness work for?

Supervisor or point of contact at agency, including name, address, and telephone number(s): _____

Does Witness have any special needs (diet, security, language, handicap)?
YES (Specify- _____) NO

If the witness does not speak English, what language will they need for a translator when they testify? _____

Does witness have protected identity? (If “yes”, provide pseudo name, pseudo SSN, pseudo home address, etc. for above questions). Also, do not provide written answer here, instead discuss with witness liaison).

Are there any person(s) that this witness cannot share housing with?

Why? _____

Who will be responsible for getting the witness to and from the OMC building during trial? _____

Who will be responsible to assist this witness with their travel voucher?

Does this witness need a travel advance? _____

Approximately what date(s) will this witness be needed to testify?

Has this witness been approved by the Military Judge if one party has objected to their testimony? YES NO N/A

Will this witness be bringing any evidence with them which will need to be cleared by customs/JTF security?

YES NO N/A

Who is the attorney or paralegal POC for this witness?

FOR COMMISSION USE:

Date orders issued: _____ (attach copy)

Date of flight/type of flight to GTMO: _____

Date Country Clearance requested: _____ Date approved: _____

Housing Information: _____

Will a vehicle be issued? If not, will a rental car be authorized?

If translator required, name of translator: _____

Date of flight/type of flight from GTMO: _____

Additional flight information (if necessary): _____

Office of Military Commissions Witness Travel Request

*THE PRIVACY ACT OF 1974 5 U.S.C. § 552a Principle Purpose:
To Obtain Information for purpose of OMC operations. Routine Use: Information may be disclosed to Federal, State and local agencies solely for OMC related business Disclosure: Voluntary. However, failure to provide information may impact your ability to effectively accomplish your mission with OMC.*

Submit by Email

Print Form

Case: _____ Travel Start Date: _____ Travel Return Date: _____

Last Name _____ First Name _____ Middle Initial _____

Grade _____ Gender _____ Blood Type _____ Date of Birth _____

Social Security Number _____ Local Physical Address _____

Home Phone _____ Cell Phone _____ Email Address _____

Next of Kin _____ Next of Kin Phone Number _____

Next of Kin Address _____

Security Clearance Type _____ Security Clearance Date _____

Passport Number _____ Passport Exp date _____

Witness will Testify by _____ Military Status _____

Does Witness Require Military Orders _____

POC for coordinate issuance of active duty or Title 10 orders _____

If Reserve will witness be activate status for testimony? _____

Remarks _____

Figure 13.3 – Sample Invitation Travel Order (ITO)

LETTERHEAD

ORG:
Invitational Travel
Order Number: DFTD

Date:

Name
Title
Address

Dear Mr. or Ms. (Full Name of Witness):

You are invited to travel from _____, _____ on or about (date) to Guantanamo Bay, Cuba and return to _____, _____ on or about (return date). The purpose of the travel is to participate in the military commission proceedings. These orders formalize our prior conversations regarding this trip.

Travel to and from Guantanamo Bay, Cuba may be by Commercial Airlines or Military Air for which reimbursement of travel may be provided, if applicable. A copy of your itinerary or notification of your intent to fly with the Office of Military Commissions on military air must be received at least seven days prior to proceedings. A copy of this Invitational Travel Order and Identification (Passport) is required for travel.

Your lodging in Guantanamo Bay has been arranged and will cost \$15.00 per day. There is a dining facility where you can obtain meals for less than \$5.00 per meal and numerous restaurants at your disposal.

Address any inquires regarding this travel order to the Branch Chief, Logistics, Office of the Convening Authority, at (703) 428-0333.

The travel order number:
Social Security Number:

Sincerely,

Figure 13.4 – Sample Subpoena Request Cover Letter

Date

MEMORANDUM FOR Chief Prosecutor, Office of Military Commissions

FROM: (Name of Counsel, or if signed by a paralegal, the name of the counsel making the request.)

SUBJECT: SUBPOENA REQUEST COVER LETTER

1. The undersigned requests that the attached subpoena be signed by the Chief Prosecutor or his designee and served on the person named in the subpoena. A witness checklist is also attached.

2. Certification:

a. PROSECUTION. (Check the applicable paragraph).

I certify that:

_____ The witness appears on the witness list required by the Discovery Order issued in the case.

_____ The witness does NOT appear on the witness list required by the Discovery Order issued in the case, but a synopsis of the witness' testimony has been provided to the defense.

b. DEFENSE. (Check the applicable paragraph).

I certify that:

_____ The prosecution has agreed to produce the witness.

_____ The military judge or Convening Authority (if prior to referral), has granted a defense witness request.

3. If the subpoena is to be served on a national or resident of the United States who is in a foreign country, attach a signed statement by counsel requesting the subpoena stating how personal appearance complies with 28 U.S.C. § 1783.

Signature/Title

Date

SUBPOENA

The President of the United States, to _____
(Name and Title of being Subpoenaed)

You are hereby summoned and required to appear on the _____ day of _____, _____, at _____
o'clock _____M., at _____, (before _____
(Place of Proceeding) (Name and Title of Deposition Officer)

designated to take your deposition) (a Military Commission) (appointed by
_____, dated _____,
(Identification of Convening Order or Convening Authority)

to testify as a witness in the matter of _____
(Name of Case)

(and bring with you _____).
(Specific Identification of Documents or Other Evidence)

Failure to appear may result in you being taken into custody and brought before the Military Commission (_____
_____) under a Warrant of Attachment (MC Form 454) or imposition of other lawful sanctions.
Manual for Military Commission R.M.C. 703(e)(2)(G).

Bring this subpoena with you and do not depart from the proceeding without proper permission.

Subscribed at _____ this _____ day of _____, _____,

(Signature (See R.M.C. 703 (e)(2)(C))

The witness is requested to sign one copy of this subpoena and return the signed copy to the person serving the subpoena.

I hereby accept service of the above subpoena. _____
Signature of Witness

NOTE: If the witness does not sign, complete the following:

Personally appeared before me, the undersigned authority, _____,
who, being first duly sworn according to law, deposes and says that at _____,
_____, he personally delivered to _____ in person a duplicate of this subpoena.

Grade

Signature

Subscribed and sworn to before me at _____, this _____ day of

_____, _____.

Grade

Signature

Official Status

WARRANT OF ATTACHMENT

Military Commission of the United States

UNITED STATES
v.

)
)
)
)
)
)

The President of the United States, to _____
(United States, marshal or such other person as may be directed,

Manual for Military Commission R.M.C. 703(e)(2)(G)(iv).

WHEREAS, _____, of _____

was on the _____ day of _____,

at _____, duly subpoenaed to appear and attend

at _____, on the _____ day of

_____, at _____ o'clock _____m., before a Military Commission duly convened by

_____, dated _____,

to testify on the part of the _____ in the above-entitled case; and whereas he/she has

willfully neglected or refused (to appear and attend) ¹ (to produce documentary evidence which he/she was legally subpoenaed to

produce) before said Military Commission, as by said subpoena required, although sufficient time has elapsed for that purpose; and

whereas he/she has offered no valid excuse for his/her failure to appear; and whereas he/she is a necessary and material witness

in behalf of the _____ in the above-entitled case:

¹ Line out inappropriate words.

NOW, THEREFORE, by virtue of the power vested in me, the undersigned, as military judge ¹ of said Military Commission, by Article 46 of the Uniform Code of Military Justice (10 USC 846), you are hereby commanded and empowered to apprehend and attach the said _____ wherever he/she may be found within the United States, it's territories and possessions, and forthwith bring him/her before the said Military Commission to testify as required by said subpoena.

Military Judge of said ¹ MILITARY COMMISSION

Dated at _____
_____, _____

¹ If there is no military judge, line out the words "military judge" and enter "convening authority."

Suggested Timelines for Witnesses Testifying in Person at Guantanamo Bay, Cuba

Witness Categories	Lead time for Witness Availability
US military CONUS	2 weeks
US military OCONUS, not in a combat zone	2 weeks
US military, OCONUS, in a combat zone	4 weeks
Government civilians and contractors, not in a combat zone	2 weeks
Government civilians and contractors, in a combat zone	4 weeks
US citizens residing in the US, no formal service of process necessary	4 weeks
US citizens residing in the United States, formal service required	6 weeks
US citizens residing OCONUS, with current passport	4 weeks
US citizens residing OCONUS, passport expired	6 weeks
Witnesses in the custody of BOP or USMS	60 days minimum
Witnesses in custody by a government outside the United States	90 days minimum
Non US citizens outside the US whose ability to enter the US is questionable (no visa, terrorist watch list, those in need of INS parole)	90 days minimum

Note: Persons without a current passport or visa, if necessary, will increase these lead times. The Director, Victim Witness and CCTV Programs is a passport agent and can procure official passports quickly. This is not possible for tourist passports and visas.

TRAVEL VOUCHER OR SUBVOUCHER

Read Privacy Act Statement, Penalty Statement, and Instructions on back before completing form. Use typewriter, ink, or ball point pen. PRESS HARD. DO NOT use pencil. If more space is needed, continue in remarks.

1. PAYMENT		SPLIT DISBURSEMENT: The Paying Office will pay directly to the Government Travel Charge Card (GTCC) contractor the portion of your reimbursement representing travel charges for transportation, lodging, and rental car if you are a civilian employee, unless you elect a different amount. Military personnel are required to designate a payment that equals the total of their outstanding government travel card balance to the GTCC contractor.							
<input type="checkbox"/> Electronic Fund Transfer (EFT) <input type="checkbox"/> Payment by Check		Pay the following amount of this reimbursement directly to the Government Travel Charge Card contractor: \$ _____							
2. NAME (Last, First, Middle Initial) (Print or type)				3. GRADE		4. SSN		5. TYPE OF PAYMENT (X as applicable)	
<input type="checkbox"/> TDY <input type="checkbox"/> PCS <input type="checkbox"/> Dependent(s)				<input type="checkbox"/> Member/Employee <input type="checkbox"/> Other <input type="checkbox"/> DLA					
6. ADDRESS. a. NUMBER AND STREET			b. CITY			c. STATE		d. ZIP CODE	
e. E-MAIL ADDRESS									10. FOR D.O. USE ONLY
7. DAYTIME TELEPHONE NUMBER & AREA CODE		8. TRAVEL ORDER/AUTHORIZATION NUMBER		9. PREVIOUS GOVERNMENT PAYMENTS/ ADVANCES				a. D.O. VOUCHER NUMBER	
11. ORGANIZATION AND STATION								b. SUBVOUCHER NUMBER	
12. DEPENDENT(S) (X and complete as applicable)				13. DEPENDENTS' ADDRESS ON RECEIPT OF ORDERS (Include Zip Code)				c. PAID BY	
<input type="checkbox"/> ACCOMPANIED <input type="checkbox"/> UNACCOMPANIED									
a. NAME (Last, First, Middle Initial)		b. RELATIONSHIP		c. DATE OF BIRTH OR MARRIAGE					
				14. HAVE HOUSEHOLD GOODS BEEN SHIPPED? (X one)				d. COMPUTATIONS	
				<input type="checkbox"/> YES <input type="checkbox"/> NO (Explain in Remarks)					
15. ITINERARY				c. MEANS/MODE OF TRAVEL	d. REASON FOR STOP	e. LODGING COST	f. POC MILES		
a. DATE	b. PLACE (Home, Office, Base, Activity, City and State; City and Country, etc.)								
								e. SUMMARY OF PAYMENT	
								(1) Per Diem	
								(2) Actual Expense Allowance	
								(3) Mileage	
								(4) Dependent Travel	
								(5) DLA	
								(6) Reimbursable Expenses	
								(7) Total	
								(8) Less Advance	
								(9) Amount Owed	
								(10) Amount Due	
16. POC TRAVEL (X one)		OWN/OPERATE		PASSENGER		17. DURATION OF TDY TRAVEL			
						<input type="checkbox"/> 12 HOURS OR LESS <input type="checkbox"/> MORE THAN 12 HOURS BUT 24 HOURS OR LESS <input type="checkbox"/> MORE THAN 24 HOURS			
18. REIMBURSABLE EXPENSES				19. GOVERNMENT/DEDUCTIBLE MEALS					
a. DATE	b. NATURE OF EXPENSE		c. AMOUNT	d. ALLOWED	a. DATE		b. NO. OF MEALS	a. DATE	b. NO. OF MEALS
20.a. CLAIMANT SIGNATURE			b. DATE	c. SUPERVISOR SIGNATURE			d. DATE		
21.a. APPROVING OFFICER SIGNATURE							b. DATE		
22. ACCOUNTING CLASSIFICATION									
23. COLLECTION DATA									
24. COMPUTED BY		25. AUDITED BY		26. TRAVEL ORDER/AUTHORIZATION POSTED BY		27. RECEIVED (Payee Signature and Date or Check No.)		28. AMOUNT PAID	

PRIVACY ACT STATEMENT

AUTHORITY: 5 U.S.C. Section 5701, 37 U.S.C. Sections 404 - 427, 5 U.S.C. Section 301, DoDFMR 7000.14-R, Vol. 9, and E.O. 9397.

PRINCIPAL PURPOSE(S): This record is used for reviewing, approving, accounting, and disbursing money for claims submitted by Department of Defense (DoD) travelers for official Government travel. The Social Security number (SSN) is used to maintain a numerical identification filing system for filing and retrieving individual claims.

ROUTINE USE(S): Disclosures are permitted under 5 U.S.C. 552a(b), Privacy Act of 1974, as amended. In addition, information may be disclosed to the Internal Revenue Service for travel allowances, which are subject to Federal income taxes, and for any DoD "Blanket Routine Use" as published in the Federal Register.

DISCLOSURE: Voluntary; however, failure to furnish the information requested may result in total or partial denial of the amount claimed.

PENALTY STATEMENT

There are severe criminal and civil penalties for knowingly submitting a false, fictitious, or fraudulent claim (U.S. Code, Title 18, Sections 287 and 1001 and Title 31, Section 3729).

INSTRUCTIONS

ITEM 1 - PAYMENT

Member must be on electronic funds (EFT) to participate in split disbursement. Split disbursement is a payment method by which you may elect to pay your official travel card bill and forward the remaining settlement dollars to your predesignated account. For example, \$250.00 in the "Amount to Government Travel Charge Card" block means that \$250.00 of your travel settlement will be electronically sent to the charge card company. Any dollars remaining on this settlement will automatically be sent to your predesignated account. Should you elect to send more dollars than you are entitled, "all" of the settlement will be forwarded to the charge card company. Notification: you will receive your regular monthly billing statement from the Government Travel Charge Card contractor; it will state: paid by Government, \$250.00, 0 due. If you forwarded less dollars than you owe, the statement will read as: paid by Government, \$250.00, \$15.00 now due. Payment by check is made to travelers only when EFT payment is not directed.

REQUIRED ATTACHMENTS

1. Original and/or copies of all travel orders/authorizations and amendments, as applicable.
2. Two copies of dependent travel authorization if issued.
3. Copies of secretarial approval of travel if claim concerns parents who either did not reside in your household before their travel and/or will not reside in your household after travel.
4. Copy of GTR, MTA or ticket used.
5. Hotel/motel receipts and any item of expense claimed in an amount of \$75.00 or more.
6. Other attachments will be as directed.

ITEM 15 - ITINERARY - SYMBOLS

15c. MEANS/MODE OF TRAVEL (Use two letters)

GTR/TKT or CBA (See Note) - T	Automobile - A
Government Transportation - G	Motorcycle - M
Commercial Transportation (Own expense) - C	Bus - B
Privately Owned	Plane - P
Conveyance (POC) - P	Rail - R
	Vessel - V

Note: Transportation tickets purchased with a CBA must not be claimed in Item 18 as a reimbursable expense.

15d. REASON FOR STOP

Authorized Delay - AD	Leave En Route - LV
Authorized Return - AR	Mission Complete - MC
Awaiting Transportation - AT	Temporary Duty - TD
Hospital Admittance - HA	Voluntary Return - VR
Hospital Discharge - HD	

ITEM 15e. LODGING COST

Enter the total cost for lodging.

ITEM 19 - DEDUCTIBLE MEALS

Meals consumed by a member/employee when furnished with or without charge incident to an official assignment by sources other than a government mess (see JFTR, par. U4125-A3g and JTR, par. C4554-B for definition of deductible meals). Meals furnished on commercial aircraft or by private individuals are not considered deductible meals.

29. REMARKS

- a. INDICATE DATES ON WHICH LEAVE WAS TAKEN:
- b. ALL UNUSED TICKETS (including identification of unused "e-tickets") MUST BE TURNED IN TO THE T/O OR CTO.

Figure 13.9 – Sample Memorandum of Agreement for Use with Civilian Expert Witness (MC Form 13-1)

**SAMPLE MEMORANDUM OF AGREEMENT FOR USE OF CIVILIAN EXPERT
(CONSULTANT) (WITNESS)**

1. (Dr.)(Mr.)(Ms.) _____ is hereby retained as an expert (witness/consultant) to provide review, analysis, consultation (and testimony), as needed, in the military commission of United States v. _____, on behalf of the (government) (defense).

2. The expert agrees to provide the following services:

a. To review all documentation relevant to the area of expertise which pertains to the guilt or innocence of the accused, and which has been provided by the (trial counsel) (defense counsel);

b. To act as an expert technical consultant for the (government) (defense);

c. To assist the (trial counsel) (defense counsel) in preparing for the expert witness' potential in-court testimony, and to be available for pretrial interview by opposing counsel;

d. To travel to the location of the trial or any other designated site on invitational travel orders and to testify on behalf of the (Government) (defense), and, if requested by the (trial counsel) (defense counsel), to observe and evaluate the testimony of any expert witness for the opposing side;

e. To provide a copy of the expert's resume or curriculum vitae to the (trial counsel) (defense counsel);

f. To submit a government travel voucher for payment, following the instructions provided, and accompanied by required documentation of travel, lodging, and other expenses;

g. To certify that the fee charged for expert services is no greater than the expert's normal professional rate;

3. The Government agrees to pay the expert witness or consultant, as follows:

a. To reimburse actual travel costs, either coach air travel, or mileage, according to the Joint Travel Regulation;

b. To pay per diem for meals, and the lesser of actual cost of lodging or the government local lodging rate, including payment for all travel days, according to the Joint Travel Regulation;

c. To pay a fee of \$____.____ per day for in-court testimony;

d. To pay a fee of \$____.____ when professional advice and services are rendered, but no travel or in-court testimony is involved; and

e. To pay an inconvenience fee of up to \$____.____ if the travel and testimony of the expert witness is canceled or rescheduled within 5 days prior to the expert's scheduled travel day. The witness is expected to reasonably mitigate any financial loss caused by cancellation. This fee is to be reduced to the extent other gainful activities may be undertaken.

4. Payment under this agreement has been approved by the Office of Military Commissions. Payment will be made up to a maximum of \$____.____. The balance has been approved by the military commission Convening Authority in this case and will be paid by the United States government.

Convening Authority/ Date

Expert Witness/ Date

Chapter 14

INTERROGATORIES AND DEPOSITIONS

14-1. GENERAL

- a. Under exceptional circumstances, a deposition may be taken to preserve for trial the testimony of a witness who may be unavailable to testify at trial. R.M.C. 702 governs the use of depositions at trial. R.M.C. 703 governs the unavailability of witnesses.
- b. A deposition is the out-of-court testimony of a witness under oath in response to questions by the parties, which is reduced to writing or recorded on videotape or audiotape or similar material. A deposition taken on oral examination is an oral deposition, and a deposition taken on written interrogatories is a written deposition. Written interrogatories are questions, prepared by the prosecution, defense, or both, which are reduced to writing before submission to a witness whose testimony is to be taken by deposition. The answers, reduced to writing and properly sworn to, constitute the deposition testimony of the witness. A deposition may be taken by agreement of the parties without necessity of an order.

14-2. REQUEST FOR DEPOSITION

A request for a deposition may be made by either party. A deposition may be ordered after the charges are sworn. The Convening Authority, who has the charges for disposition, or, after referral, the military judge, may order a deposition taken upon request of a party pursuant to R.M.C. 702. The parties may also agree to take a deposition without cost to the United States. Requests to the Convening Authority should be forwarded through the Convening Authority's Legal Advisor.

14-3. TRANSCRIPT AND FORMAT

- a. The record should reflect the qualification of counsel for all parties.
- b. *Written interrogatories and depositions.* MC Form 456, Interrogatories and Depositions (Figure 14.1) may be used to record written interrogatories and depositions. Do not use the MC Form 456 for oral depositions. The written deposition will be signed by the witness if the witness is available. If the deposition is not signed by the witness, the deposition officer shall record the reason and will execute the certificate of authentication. *See* R.M.C. 702(g)(2)(D).
- c. *Oral deposition format.* Record and transcribe oral depositions verbatim, noting the opening and closing times and times and dates of recesses or adjournment. Use a format similar to the format in Oral Deposition Format (Figure 14.2).
- d. *Authentication.* The deposition officer certifies the transcript, videotape, audiotape, and/or sound film of the deposition as true and accurate and as a verbatim account of

the proceeding. The last page of the deposition should contain an authentication similar to that shown in Authentication of Deposition (Figure 14.3).

e. *Classified depositions and interrogatories.* Interrogatories and transcripts of depositions shall be properly classified, and depositions shall be conducted in locations and by means appropriate for the level of classified information expected to be discussed. The parties should consult the court security officer for direction and guidance regarding proper procedures for the protection of classified information.

14-4. DETAIL OF DEPOSITION OFFICERS

Upon request of the Convening Authority, the secretary of each military department, or his designee, shall detail one or more officers qualified under R.M.C. 702 to conduct depositions.

1 This form is to be used when a deposition is taken on written interrogatories. (See generally, R.M.C. 702)

2 Strike out words not applicable.

3 Insert name or title of person who is requested to authorize the taking of the deposition. A separate letter complying with R.M.C. 702(c)(2) should be en-closed.

4 To be subscribed by the trial counsel or other person requesting the deposition with name, and official title, as "trial counsel," "defense counsel." Describe legal qualifications, as "certified in accordance with Article 27(b)," "member of the bar of the Supreme Court of _____" etc.; if none, so state.

5 if it is desired to give special instructions, there should be added "special instructions attached."

INTERROGATORIES AND DEPOSITION 1

UNITED STATES)
V.)

In the Matter of 2)
_____))
_____)

Deposition of _____ (stationed) (residing) 2

at _____ to be read into evidence before a

Military Commission of the United States, convened to meet at _____

_____ by _____

_____ dated _____, _____.

TO: 3 _____

It is requested that you authorize the deposition of the above-named witness to be taken on the following interrogatories.

TRIAL COUNSEL OR OTHER PERSON REQUESTING DEPOSITION 4

a. TYPED NAME (Last, First, Middle Initial)		b. OFFICIAL TITLE	
c. UNIT/COMMAND NAME		d. LEGAL QUALIFICATIONS	
e. SIGNATURE		f. RANK	g. DATE SIGNED

_____, _____, _____.

TO: _____.

You will take or cause to be taken the deposition of the above-named witness on the following interrogatories, cross-interrogatories, and additional interrogatories, if any. 5

By _____ of _____.

PERSON ORDERING DEPOSITION OR PERSON SIGNING THEREFOR

a. TYPED NAME (Last, First, Middle Initial)	b. RANK	c. SIGNATURE
d. OFFICIAL TITLE	e. UNIT/COMMAND NAME	

<p>1 The officer taking the deposition shall administer the following oath to the deponent prior to deposing: "You (swear) (affirm) that the evidence you give shall be the truth, so help you God?"</p> <p>2 If the spaces for answers are not sufficient, extra sheets may be inserted by the officer taking the deposition. In such case, he/she will rewrite the interrogatories, writing the answers immediately below the respective interrogatories.</p>	<p>Interrogatories propounded by the above-named person requesting the deposition are as follows: 1</p> <p>First interrogatory: Are you in the military service of the United States? If so, what is your full name, rank, unit/command name, and station? If not, what is your full name, occupation, and residence?</p> <p>Answer: 2</p>
	<p>Second interrogatory: Do you know the accused? If so, how long have you known him/her?</p> <p>Answer:</p>
	<p>Third interrogatory:</p> <p>Answer:</p>

<p>1 To be subscribed by the defense counsel or other person with name, pay grade, unit/command name, and official title. Describe legal qualifications, as "certified in accordance with Article 27(b)," "member of the bar of the Supreme Court of _____," etc.; if none, so state. When deposition is requested by the defense, the trial counsel propounds the cross-interrogatories.</p> <p>2 If none, so state.</p> <p>3 Insert "court," Commission," "board," if appropriate. If not applicable, or if no interrogatories are propounded, so state.</p>	The following cross-interrogatories are propounded by:		
	PERSON PROPOUNDING CROSS-INTERROGATORIES 1		
	a. TYPED NAME <i>(Last, First, Middle Initial)</i>	b. OFFICIAL TITLE	
	c. UNIT/COMMAND NAME	d. LEGAL QUALIFICATIONS	
	e. SIGNATURE	f. RANK	g. DATE SIGNED
<p>First cross-interrogatory: 2</p> <p>Answer:</p>			
<p>Additional interrogatories by the _____ are as follows: 3</p> <p>Answer:</p>			

My answers to the foregoing interrogatories, cross-interrogatories, if any, are indicated above.

WITNESS

a. TYPED NAME *(Last, First, Middle Initial)*

b. SIGNATURE

c. DATE
SIGNED

CERTIFICATE OF PERSON TAKING DEPOSITION

I certify that the above deposition was duly taken by me on the _____ day of _____, _____; the above-named witness, having been first sworn by me, gave the foregoing answers to the several interrogatories; that the above-named witness was given an opportunity to read his/her testimony after it was reduced to writing, and all corrections desired by the above-named witness were made; and the above-named witness subscribed the foregoing deposition in my presence at _____
this _____ day of _____, _____. I further certify that the detailed reporter was duly sworn by me and that said reporter signed in my presence the reporter's certificate appearing below.

OFFICER TAKING DEPOSITION

a. TYPED NAME *(Last, First, Middle Initial)*

b. RANK

c. SIGNATURE

d. DATE
SIGNED
(YYYYMMDD)

e. UNIT/COMMAND NAME

f. OFFICIAL TITLE

REPORTER'S CERTIFICATION

I certify that the foregoing interrogatories and answers thereto are a true, complete and accurate transcription of the interrogatories propounded to and the answers by the above-named witness.

REPORTER

a. TYPED NAME *(Last, First, Middle Initial)*

b. SIGNATURE

c. DATE
SIGNED
(YYYYMMDD)

d. UNIT/COMMAND NAME

Figure 14.2 – Oral Deposition Format

SAMPLE DEPOSITION

UNITED STATES)
)
VS.) DEPOSITION
)
Name of Accused)
)
)

DO: The proceedings will now come to order at (time, date and place).

DO: The persons present are: (Name), Deposing Officer (DO); (Name), Trial Counsel (TC); Defense Counsel (DC); (Name), Accused (AC); (Name), Reporter.

DO: Counsel and the reporter have been previously sworn.

[If a civilian defense counsel is present, the civilian defense counsel must be sworn.
Oath for civilian defense counsel:

Do you, _____, (swear) (affirm) that you will faithfully perform the duties of individual defense counsel in the case now in hearing (so help you God)?]

DO: The purpose of this proceeding is to take the deposition of (Name), to be used in evidence in the case of the United States versus (name of accused). Charges were referred to trial on (date), by order of (Convening Authority). Authority to take the deposition is vested in me, (deposing officer), as Deposing Officer, by order of (Convening Authority) by letter dated (date), a copy of which is furnished to the reporter for insertion in the record of this deposition as Exhibit 1. I am a judge advocate certified according to Article 27(b), UCMJ.

DO: (Name), a judge advocate certified according to Article 27(b), UCMJ, will represent the government in the taking of the deposition of (Name and Address).

DO: I will advise the accused and counsel for the government that objections are to be noted by the reporter and will be ruled upon at the time of the trial. However, objections as to the form of any question which could be corrected should be made at this time.

DO: Before we go any further, I will advise the accused of his rights to counsel. (Advise of right to counsel).

Do you understand your rights to counsel? Do you wish to be represented by (Captain _____); (civilian attorney) in this deposition?

DO: (Administer the oath to each witness).

Figure 14.3 – Authentication of Deposition

AUTHENTICATION OF DEPOSITION

of

(Typed name of witness)

In the Case of

UNITED STATES

vs.

(Typed name of Accused)

I certify that on the ____ day of _____ 20__, at _____, the above deposition was duly taken by me in the presence of the accused and his counsel, and that the above-named witness, having been duly sworn by me, gave the foregoing testimony. I further certify that the detailed reporter, _____, was duly sworn (by one-time oath at a time prior to the taking of such deposition) (during the deposition hearing) (_____) and that said reporter will sign in my presence the reporter's Certificate appearing below.

(Signature and Signature Block of Deposing Officer)

REPORTER'S CERTIFICATE

I certify that I recorded the above deposition and the foregoing transcript is a true, accurate and verbatim account of the testimony of the above-named witness.

(Reporter's Signature and Signature Block)

Chapter 15

IMMUNITY

15-1. GENERAL

a. In certain cases the interests of justice may make it advisable to grant immunity, either transactional or testimonial, in consideration of testimony for the Government or the defense in the trial of an accused. Transactional immunity, as that term is used in this section, shall mean immunity from prosecution for any offense or offenses triable by military commission or court-martial to which the compelled testimony relates. Testimonial immunity, as that term is used in this section, shall mean immunity from the use, in aid of future prosecution, of testimony, statements and any other information directly or indirectly derived from such testimony or other information.

b. *Authority to grant immunity.*

1. *Persons subject to the M.C.A.* The military commissions Convening Authority may grant immunity to any persons subject to the M.C.A with respect to any offense or offenses chargeable under the M.C.A. However, the Convening Authority may grant immunity to a person subject to the M.C.A., extending to a prosecution in a United States District Court, only when specifically authorized to do so by the Attorney General of the United States. *See* 18 U.S.C. § 6004.

2. *Persons subject to the U.C.M.J.* The military commissions Convening Authority may grant immunity with respect to any offense or offenses chargeable under the U.C.M.J. to a person subject to the U.C.M.J. when specifically authorized to do so by a general court-martial Convening Authority.

3. *Persons subject to the Federal Criminal Code.* The military commissions Convening Authority may grant immunity with respect to any offense or offenses under the federal criminal code only when specifically authorized to do so by the Attorney General of the United States. *See* 18 U.S.C. § 6004.

4. *Other Limitations.* The authority to grant immunity may not be delegated. The authority to grant immunity may be limited by a superior authority.

15-2. PROCEDURE

a. The party requesting that a witness be granted immunity shall forward a written recommendation to the Convening Authority for Military Commissions who will then forward it to the convening authority having jurisdiction over the witness or to the Attorney General of the United States or other authority designated under 18 U.S.C. §§ 6002 and 6004. For recommendations to convening authorities in the DoD, the recommendation shall state the type of immunity sought and shall state in detail why the testimony of the witness is deemed necessary to the public interest, including the needs of good order and discipline, and that the person has refused or is likely to refuse to

testify or provide other information on the basis of the privilege against self-incrimination. The convening authority having jurisdiction over the witness shall act upon such request after referring it to his or her Legal Advisor, or staff judge advocate, for consideration and advice. If approved, a copy of the written grant of immunity must be served upon the accused and his defense counsel within a reasonable time before the witness testifies. For requests to the Attorney General of the United States, see Chapter 15-3.

b. *Possible additional relief when defense request is denied.* If after review and in the discretion of the Convening Authority a defense request to immunize a witness is denied, the military judge may, upon a motion by the defense counsel, grant testimonial relief directing that either an appropriate Convening Authority grant testimonial immunity to the defense witness, or as to the affected charges and specifications, abate the proceedings against the accused. In order to abate the proceedings against the accused, the military judge must make a written finding for the record of trial that:

1. The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify;

2. The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and

3. The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses. *See* R.M.C. 704(e).

c. *Civilians.* Pursuant to 18 U.S.C. §§ 6002 and 6004, if the testimony or other information of a civilian witness at a military commission may be necessary to the public interest, and if the civilian witness has refused or is likely to refuse to testify and/or provide other information on the basis of the privilege against self-incrimination, then the request for authorization to grant immunity should be forwarded to the Attorney General of the United States through the United States Department of Justice, Criminal Division, Immunity Unit, Washington, DC 20530.

d. *Cases involving national security.* In all cases involving national security or foreign relations of the United States, the Convening Authority shall forward, in the form prescribed in 15-2(e), any proposed grant of immunity to the Department of Justice for consultation.

e. *Form.* In any case in which a military witness is granted transactional immunity or testimonial immunity, the Convening Authority should execute a written grant of immunity substantially in the form set forth in the Sample Grant of Immunity (Figure 15.2).

15-3. CONTENT OF IMMUNITY REQUESTS WHEN APPROVAL OF THE ATTORNEY GENERAL IS REQUIRED

a. *Approval.* In all cases in which approval of the Attorney General of the United States is required prior to the issuance of a grant of immunity, the officer exercising general courts-martial jurisdiction or the Convening Authority shall transmit the order to testify and proposed grant of immunity for approval to the United States Department of Justice, Criminal Division, Immunity Unit, Washington, DC 20530.

b. *Request for Grants of Immunity.* Requests for immunity shall be in writing, and should allow at least three weeks for consideration. The grant of immunity and order to testify should be substantially in the format set forth in the Sample Grant of Immunity (figure 15.2). The requests must contain the following information:

1. Name, citation, or other identifying information of the proceeding in which the order is to be used;

2. Name and other identifying data (*e.g.*, unclassified ISN, passport number, social security number), where possible, of the witness for whom the immunity is requested. There may be a requirement for the individual to sign a Privacy Act Notification. *See* Sample Privacy Act Notification (Figure 15.1);

3. Name of the employer or company with which a witness is associated or the military unit or organization to which a witness is assigned, if applicable;

4. Date and place of birth, if known, of the witness;

5. FBI or local police file number, if any, and if known;

6. Whether any state or Federal charges are pending against the witness and the nature of any such charges;

7. Whether the witness is currently incarcerated, under what conditions, and for what length of time;

8. A brief description of the background of the investigation or proceeding before the agency or department;

9. A concise statement of the reasons for the request, including:

- A. What testimony the witness is expected to give.
- B. How this testimony will serve the public interest.
- C. Whether the witness:

i. Has invoked the privilege against self-incrimination; or

ii. Is likely to invoke the privilege (and if so, based on what information);

10. An estimate as to whether the witness is likely to testify in the event immunity is granted; and

11. A statement reflecting whether or not the local district or state attorney and the U.S. Attorney have any intention of prosecuting the witness. The names and telephone numbers of those attorneys should also be provided.

15-4. POST-TESTIMONY PROCEDURE WHEN AUTHORITY TO GRANT IMMUNITY WAS OBTAINED FROM THE ATTORNEY GENERAL

a. *Information.* After a witness immunized in accordance with Chapter 15-3 has testified, the following information shall be provided to the United States Department of Justice, Criminal Division, Immunity Unit, Washington, DC 20530, via the Convening Authority:

1. Name, citation, or other identifying information, of the proceeding in which the order was requested;

2. Date of the examination of the witness;

3. Name and residence address of the witness;

4. Whether the witness invoked the privilege;

5. Whether the immunity order was used;

6. Whether the witness testified pursuant to the order; and

7. If the witness refused to comply with the order, whether contempt proceedings were instituted, or are contemplated, and the result of the contempt proceeding, if concluded.

b. *Verbatim transcript.* A verbatim transcript of the witness's testimony, authenticated by the military judge, and separate from the record of trial should be provided to the Convening Authority at the conclusion of the trial. No testimony or other information given by a civilian witness pursuant to such an order to testify (or any information directly or indirectly derived from such testimony or other information) may be used against the civilian witness in a federal criminal case, except in a prosecution for perjury, false swearing, making a false official statement, or otherwise failing to comply with the order to testify.

Figure 15.1 – Sample Privacy Act Notification

PRIVACY ACT NOTIFICATION

Authority: 18 U.S.C. § 6004, Executive Order 12473, R.M.C. 704, Manual for Military Commissions, 2010.

Principal Purpose: The requested information will be provided to law enforcement agencies in order to expedite review of this request for immunity, and is requested for the purpose of allowing those agencies the opportunity to review the propriety of granting immunity to you in this case.

Routine Use: This information will be provided to law enforcement agencies, both State and Federal, in the performance of their duties under law to review this request for immunity.

Disclosure is Voluntary: Your provision of this information is voluntary; however, your failure to provide the requested information may result in delay or denial of the granting of immunity to you in this case.

Signature

Date

Witness

Date

Figure 15.2 – Sample Grant of Immunity

SAMPLE GRANT OF IMMUNITY

MEMORANDUM FOR (Rank, name, SSN (if available) of witness)

FROM: (Convening Authority for Military Commissions)

SUBJECT: Grant of [Testimonial] [Transactional] Immunity and Order to Testify

1. An investigation revealed you have knowledge of offenses allegedly committed by (name, of accused). The offenses in question involve (describe general nature of offenses pertaining to the witness' knowledge).

[For witness subject to UCMJ]

2. By authority vested in me as the Convening Authority for military commissions, under Rule for Military Commissions 704(c)(2), Manual for Military Commissions, United States, 2010, and by the general court-martial Convening Authority of

_____,

[For witness not subject to UCMJ]

2. By authority vested in me as the Convening Authority for military commissions, under Rule for Military Commissions 704(c)(1) or (3), Manual for Military Commission, United States, 2010, and by the Attorney General of the United States pursuant to 18, U.S.C. Section 6004, I hereby grant you [testimonial] [transactional] immunity and order you to answer any questions posed to you by investigators and counsel pertaining to, and to testify at any proceeding held pursuant to the Military Commissions Act of 2009 (Chapter 47A of Title 10 U.S.C. Sections 948a, *et seq.*) concerning any offenses alleged against the accused identified above.

[For testimonial immunity]

3. Under this immunity, your testimony and statements, as well as information directly or indirectly derived therefrom, may not be used against you in a later [trial by military commission] [criminal proceeding conducted by any federal, state, or military authority].

However, this immunity does not bar the use of your testimony, or information derived from it, in prosecuting you for perjury, false swearing, making a false official statement, or otherwise failing to comply with this order to testify.

[For transactional immunity]

3. Under this immunity, you may not be prosecuted for offenses to which your testimony relates. Specifically, [you may not be tried by military commission for offenses under the M.C.A.] [list offenses], [you may not be tried under articles of the Uniform Code of Military Justice] [List articles] [you may not be tried by any federal, state, or military authority for criminal violations of [list criminal offenses and statutory citation, if applicable]. However, this immunity does not bar the use of your testimony, or information derived from it, in prosecuting you for perjury, false swearing, making a false official statement, or otherwise failing to comply with this order to testify.

Chapter 16

VICTIM AND WITNESS ASSISTANCE

16-1. GENERAL

This chapter describes the Military Commissions Victim and Witness Assistance Program (VWAP), and is consistent with the intent of DoD Directive 1030.1, *Victim and Witness Assistance*, April 13, 2004, and DoD Instruction 1030.2, *Victim and Witness Assistance Procedures*, June 4, 2004.

16-2. PURPOSE

This chapter identifies the role of the VWAP and provides guidance for the treatment of victims of offenses under the M.C.A. These provisions create no cause of action or defense in favor of any person arising out of a failure to comply with the VWAP.

16-3. DEFINITIONS

a. *Victim*. A victim is a person who has suffered direct physical, emotional or pecuniary harm or loss as a result of the commission of an offense as defined in chapter 47A of title 10, United States Code, or the law of war. See R.M.C. 103(a)(31). Victims may include:

1. Military members, civilians and citizens of foreign countries;
2. A person who is an immediate family member of the victim of a crime, if so designated by the Convening Authority or her designee. Examples of immediate family members are spouses, children, parents and siblings; and
3. Any person can make an application to the VWAP Director to be designated as a victim in a particular case. The VWAP Director shall forward the request to the Convening Authority with a recommendation for approval or disapproval. The decision of the Convening Authority is not appealable.

b. *Witness*. A witness is a person who has information or evidence about a criminal offense within the jurisdiction of the M.C.A. When the witness is a minor, that term includes a family member or legal guardian. The term does not include a defense witness or an individual involved in the crime as a perpetrator or accomplice.

16-4. POLICY

It is the policy of the DoD that:

- a. The role of crime victims and witnesses in the military commission process should be protected; and
- b. Each crime victim should:

1. Be treated with fairness and respect for the victim's privacy and dignity;
2. Be reasonably protected from the accused offender;
3. Be notified of commission proceedings;
4. Be present at all public commission proceedings related to the offense to the extent permitted by available resources, unless the military judge determines that testimony by the victim would be materially affected if the victim heard other testimony at trial;
5. Confer with the attorney for the Government in the case;
6. Receive available restitution;
7. Be provided information about the conviction, sentencing, imprisonment, transfer or release of the offender; and
8. Be allowed to provide information, in writing, to any authority considering the offender's potential release or transfer from custody of the United States.

16-5. RESPONSIBILITIES

- a. The Convening Authority shall designate the Component Responsible Official who coordinates, implements, and manages the Victim Witness Assistance Program established by this Regulation in accordance with DoD Directive 1030.1, *Victim and Witness Assistance*, April 13, 2004.
- b. The Component Responsible Official shall designate in writing the Local Responsible Official (also referred to as the Victim/Witness Liaison) who is responsible for identifying victims of prosecutable crimes by military commission and for coordinating the delivery of services described in this Regulation. *See* DoD Directive 1030.1, *Victim and Witness Assistance*, April 13, 2004.
- c. The Victim/Witness Liaison shall be responsible for identifying victims and witnesses of offenses allegedly committed by the accused(s) and providing the services required by the military commissions VWAP.

16-6. VICTIM/WITNESS LIAISON DUTIES

- a. The Victim/Witness Liaison should obtain from the Chief Prosecutor or trial counsel a list of all victims as soon as possible. The trial counsel will identify and designate those victims who will testify in some form as a witness for the prosecution in a military commission. This includes victims who will testify in person, by videotape or any other means authorized under commission law.

b. *Initial Information and Services.* The Victim/Witness Liaison shall provide the following information and services, either by direct communication or by referring the victim to an information website:

1. Information about available military and civilian emergency medical and social services, victim advocacy services for victims of sexual assault, and, when necessary, assistance in securing such services;

2. Information about restitution or other relief a victim may be entitled to under applicable laws, and the manner in which such relief may be obtained;

3. Information about public and private programs which are available to provide counseling, treatment, and other support, including available compensation through Federal, State, and local agencies;

4. Information about the prohibition against intimidation and harassment of victims and witnesses, and arrangements for the victim or witness to receive reasonable protection from threat, harm, or intimidation from a suspected offender and from people acting in concert with or under the control of the suspected offender;

5. Information concerning military and civilian protective orders, as appropriate;

6. Information about the military commission process, the role of the victim or witness in the process, and how the victim or witness can obtain additional information concerning the process and the case; and

7. If necessary, assistance in contacting the people responsible for providing victim and witness services and relief.

c. *Information to be Provided During Investigation of a Crime.* The Victim/Witness Liaison, law enforcement investigators and criminal investigators shall inform all victims and witnesses, as appropriate, of:

1. The status of the investigation of the crime, to the extent providing such information does not interfere with the investigation;

2. The apprehension or detention of the suspected offender; and

3. A decision not to pursue further investigation.

d. *Information and Services to be Provided Concerning the Prosecution of an Offense under the Military Commissions Act.* If applicable, the following shall be provided by trial counsel or designee to victims and witnesses:

1. Consultation concerning the decision not to swear charges against the suspected offender;
2. Consultation concerning the disposition of the offense if other than trial by military commission;
3. The decision to pursue military commission charges against the suspected offender;
4. Notification of the initial appearance of the suspected offender before a military judge;
5. Notification of the release of the suspected offender from law of war detention;
6. Consultation concerning the decision not to refer charges against the suspected offender for trial by military commission;
7. Explanation of the military commission process upon referral to trial;
8. Prior to the actual military commission hearing, assistance in obtaining available services such as transportation, parking, child care, lodging, and courtroom translators or interpreters that may be necessary to allow the victim or witness to participate in court proceedings;
9. During the court proceedings, provide a private waiting area out of the sight and hearing of the accused and defense witnesses. In the case of proceedings conducted aboard ship or in a deployed environment, provide a private waiting area to the greatest extent practicable;
10. Notification of the scheduling, including changes and delays, of each of the court proceedings the victim is entitled to or required to attend. Upon request of a victim or witness whose absence from work or inability to pay an account is caused by the crime or cooperation in the investigation or prosecution, the employer or creditor of the victim or witness shall be informed of the reasons for the absence from work or inability to make timely payments on an account. This requirement does not create an independent entitlement to legal assistance or a legal defense against claims of indebtedness;
11. Consultation concerning any decision to dismiss charges or to enter into a pretrial agreement;
12. Notification of the disposition of the case, to include the acceptance of a plea of "guilty," the rendering of a verdict, or the withdrawal or dismissal of charges;
13. Notification to victims of the opportunity to present to the court at sentencing, in compliance with applicable law and regulations, a statement of the impact of the crime on

the victim, including financial, social, psychological, and physical harm suffered by the victim;

14. After military commission proceedings, take appropriate action to ensure that property of a victim or witness held as evidence is safeguarded and returned as expeditiously as possible; and

15. Notification of the offender's sentence and general information regarding minimum release date, parole, clemency, and mandatory supervised release, if applicable.

Although the victim's views should be considered, this provision is not intended to limit the responsibility or authority of government officials to act in the interests of public safety and national security.

e. Information and Services to be Provided Upon Order to Confinement. The following services shall be provided by the trial counsel or designee to victims and witnesses upon sentencing of an offender to confinement:

1. General information regarding convening authority action, clemency, the confinement process, administrative review or law of war detention, or other forms of release from custody, and eligibility for each; and

2. Specific information regarding the election to be notified of changes in custody status. Victims and appropriate witnesses (those who fear harm by the offender) may elect to be notified of changes in the offender's status in confinement.

f. Information and Services to be Provided Upon Entry into Confinement. The Victim/Witness Liaison shall:

1. Determine whether any victim or witness has requested notification of changes in the confinee's status in the case; and

2. When a victim or witness has requested notification of changes in the confinee's status, notify the victim or witness of:

A. The scheduling of an administrative review hearing for the confinee;

B. The transfer of the confinee from one facility to another;

C. The escape or any other form of release from custody of the confinee;

D. The death of the confinee, if the confinee dies while in custody; and

E. A change in the scheduled release date of more than 30 days from the last notification due to a disposition or administrative review board.

PRE-TRIAL MATTERS

17-1. MOTIONS

a. R.M.C. 108 authorizes the Chief Trial Judge for Military Commissions to issue rules of court not inconsistent with the M.C.A. and M.M.C. R.M.C. 801(b)(1) authorizes the military judge to promulgate and enforce rules of court.

b. There shall be a Chief Clerk of the Trial Judiciary (Chief Clerk) with the following responsibilities:

1. Receive all filings in all cases before a military commission convened pursuant to the M.C.A. Upon receipt, the Chief Clerk shall enter on the filings inventory and docket or calendar the title of the filing if the title itself would not tend to reveal classified information, the date it was filed, and, if appropriate, the fact that it was filed under seal with the Chief Clerk. *See* Chapter 17-1(c) of this Regulation.

2. Create, maintain, and update a filings inventory for all cases referred to a military commission. In addition to ensuring that the filings inventory is updated with information pertaining to filings (*see* Chapter 17-1(b)(1) of this Regulation), the Chief Clerk shall ensure the filings inventory is updated with the title of any order or ruling issued by a military judge, upon issuance, if the title itself would not tend to reveal classified information, the date it was issued, and, if appropriate, the fact that it was issued under seal. *See also* Chapter 19-4(d) of this Regulation.

3. Create, maintain, and update a docket or calendar for all cases referred to a military commission. In addition to ensuring that the docket or calendar is updated with information pertaining to filings (*see* Chapter 17-1(b)(1) of this Regulation), the Chief Clerk shall ensure the docket or calendar is updated with the title of any order or ruling issued by a military judge, upon issuance, if the title itself would not tend to reveal classified information, the date it was issued, and, if appropriate, the fact that it was issued under seal.

4. Coordinate with the Court Security Officer (CSO) in effecting the requirements of Chapter 17-1(c)(3).

5. Coordinate with the individual identified by the Office of the Convening Authority as the custodian of the OMC website.

6. Any other responsibilities specifically assigned by this regulation or any duties assigned by the Chief Judge of the Trial Judiciary that are not inconsistent with this regulation.

c. For all filings and orders other than those filed pursuant to Mil. Comm. R. Evid. 505:

1. In which counsel know, reasonably should know, or are uncertain as to whether, the filing contains classified information or other information covered by Chapter

19-3(b), counsel shall submit the filing by secure means under seal with the Chief Clerk, and the filing shall be marked “Filed in Camera and Under Seal with the Chief Clerk of the Trial Judiciary.”

2. The time of physical submission to the Chief Clerk shall be considered the date and time of filing, in accordance with the rules set forth by the Trial Judiciary concerning date and time of filing.

3. Once a filing is properly filed with the Chief Clerk, the CSO for the Trial Judiciary shall promptly examine the filing or document and, in consultation with DoD Security Classification/Declassification Review Team and any appropriate non-DoD federal department and agency, determine whether the filing or document contains classified information or any information covered by Chapter 19-3(b).

A. If it is determined that the filing contains classified information or information covered by Chapter 19-3(b), the filing or document shall be properly marked and provided to the DoD Security Classification/Declassification Review Team and any appropriate non-DoD federal department and agency original classification authority for classification review. The DoD Security Classification/Declassification Review Team or appropriate non-DoD federal department and agency original classification authority shall review and make appropriate redactions as necessary to render the material suitable for public posting. This process will ensure the redaction of all classified or otherwise protected information implicating a department or agency’s equities.

B. The security classification review and preparation of a publicly releasable filing will be completed within the timeline described in Chapter 19-4. Upon confirming a filing is publicly releasable, or redacted so that it can be publicly released, the DoD Security Classification/Declassification Review Team and any appropriate non-DoD federal department and agency shall forward the publicly releasable filing to the CSO who shall provide the filing to the Chief Clerk to ensure posting of the publicly releasable filing on the OMC website. *See* Chapter 19-4.

4. Once a filing is deemed to be publicly releasable, the publicly releasable version shall be posted on the OMC website unless the military judge articulates some other basis for it to remain under seal, consistent with the statutes, rules and regulations governing military commissions.

5. In order to ensure the efficient administration of a case referred to a military commission, once properly filed with the Chief Clerk, anything filed under seal shall be made immediately available to any properly cleared detailed or appointed counsel, the Chief Defense Counsel, the Chief Prosecutor, the Military Judge or member of the Trial Judiciary staff, any member of the Office of the Convening Authority, or any member of the Office of the General Counsel for the Department of Defense for the purpose of using that filing in the course of official business. Motions, responses or replies filed *ex parte* and under seal will only be released to the public upon order of the military judge. Motions, responses or

replies filed under seal for reasons other than security review will only be released to the public upon order of the military judge.

d. Consistent with the requirement of Chapter 19-4 that filings be publicly released, hearings on motions should not occur sooner than 15 business days after the last of the filings made in support of, or in opposition to, the motion. This provision may be waived at the discretion of the military judge if the interests of justice so require.

e. Motions and filings shall not be contained in the body of electronic mail message. No correspondence between the parties or any party and the military judge that would normally belong in a record of trial may be contained in the body of an electronic mail message. Electronic mail message may be used to file motions and other filings only by attaching the motion or other filing to the message. Electronic mail message is acceptable only to transmit, as attachments, filings, requests, rulings, orders or any other correspondence that would normally be included in a record of trial.

f. Requests by defense counsel for further declassification, or reconsideration of a declassification decision, or reconsideration of a decision to designate information as protected, shall be in writing and submitted through trial counsel to the DoD Security Classification/Declassification Review Team and/or to the appropriate original classification authority at any other pertinent non-DoD federal departments and agencies. *See* 10 U.S.C. § 949p-1(c).

17-2. PRIVACY PROTECTION FOR FILINGS MADE WITH THE COMMISSION

a. Unless otherwise ordered by a presiding trial or appellate judge, a party or nonparty making an electronic or paper filing with the commission or U.S.C.M.C.R. that contains an individual's social security number, taxpayer identification number, or birth date, the name of an individual known to be a minor, a financial account number, or the home address of an individual, shall prepare the filing, or redact it as necessary beforehand, so as to include only:

1. The last four digits of the social security number or taxpayer identification number;
2. The year of the individual's birth;
3. The minor's initials;
4. The last four digits of the financial account number; and
5. The city and state of the home address.

17-3. ACCESS TO EVIDENCE AND DISCOVERY

a. Pursuant to Chapter 47A of Title 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703 and Mil. Comm. R. Evid. 505.

b. Discovery shall be conducted by both trial counsel and defense counsel in accordance with the M.M.C.

c. At the appropriate time in the trial process, the military judge will issue a discovery order. The order will comply with the format prescribed by the Chief Trial Judge and will be modified to fit each particular case. Such an order may be issued even though discovery and access to evidence may already be underway.

d. The involvement of the military judge will not ordinarily be required when the parties comply with discovery orders, and the requirements of R.M.C. 701-703 and Mil. Comm. R. Evid. 505.

17-4. PROTECTIVE ORDERS

a. The Convening Authority, prior to the referral of charges, may issue a protective order, consistent with R.M.C. 701-703, 806(d), and Mil. Comm. R. Evid. 505-506 either *sua sponte* or at the request of either party any time he or she believes information must be protected or limited in its disclosure. It is the duty of the trial counsel to move the Commission to adopt the terms of the Protective Order issued by the Convening Authority to the maximum extent possible.

b. Requests for protective orders not invoking R.M.C. 701(f) or Mil. Comm. R. Evid. 505 may be reviewed by the military judge, in whole or in part, *in camera* and *ex parte*, through R.M.C. 802 conferences or at an R.M.C. 803 session. The motion should be accompanied by a draft order and shall include the following: (1) to whom the order shall apply; (2) the type of protection sought; (3) the reasons why the order is necessary; and (4) any proposed alternative. If the military judge grants relief after an *ex parte* showing, the military judge shall state the reasons for that decision without revealing the *ex parte* nature of the underlying showing. Evidence or material reviewed during the *ex parte* showing will be sealed and marked as an appellate exhibit or annex to the record of trial. The appellate exhibit or annex must be available to reviewing authorities with the proper security clearances to review the determination of the military judge.

c. If trial counsel intends to invoke the national security privilege under R.M.C. 701(f) or Mil. Comm. R. Evid. 505, counsel shall provide the military judge with the following: (1) a draft order; (2) the classified material for which the privilege is sought to be claimed or a summary thereof (if the military judge finds that the circumstances permit the use of such a summary in lieu of the classified material); (3) information necessary for the judge to determine whether the privilege is properly claimed; and (4) a proposed alternative, if practicable, to disclosure as authorized by Chapter 47A of Title 10 U.S.C. §§ 949p-1 and 949p-3, R.M.C. 701(f) and Mil. Comm. R. Evid. 505. If materials are reviewed by the military judge, the military judge should order those materials sealed and marked as an appellate exhibit or annex to the record of trial. If the military judge hears oral argument on the matter, a verbatim transcript shall be made and appended to the record of trial. The appellate exhibit or annex must be available to reviewing authorities with proper security clearances to review the determination of the military judge.

17-5. COMMUNICATION AMONG TRIAL PARTICIPANTS AND MILITARY JUDGE

- a. After referral, the military judge may, upon request of any party or *sua sponte*, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial. *See* R.M.C. 802; *see also* Chapter 4.
- b. Such conferences may be in person, telephonic, by video, or a combination thereof. Absent permission from the military judge not to participate, all necessary counsel will participate in a scheduled R.M.C. 802 conference.
- c. Conferences may be held when necessary, before, during and after trial sessions, and may be used to inform the military judge of anticipated issues and expeditiously resolve matters on which the parties can agree. No legal issues will be litigated at an R.M.C. 802 conference and no admissions made by the accused or defense counsel shall be used against the accused unless the admissions are reduced to writing and signed by the accused and defense counsel. However, all participants may exchange their various viewpoints on legal matters and references.
- d. Conferences may be used to resolve issues such as: scheduling; seating and other courtroom arrangements; the method or manner by which *voir dire* is to be conducted; procedures involving multiple accused; and continuances. Additionally, they may be used to resolve non-routine or non-administrative issues with the consent of the parties such as: witness availability or the proper wording of orders or instructions, when doing so at the conference will prevent undue delay in the proceedings.
- e. A summary of the conference, including any matter resolved or agreed upon, will be entered into the record of proceedings by the military judge, either orally or in writing at the military judge's discretion, at or before the next commission session in the case. Counsel may note any objection, correction, or addition to the summary. Failure to do so will waive any issue as to the summary of the matters addressed at the conference.
- f. These conferences may not be used in the case of an accused who is not represented by counsel.
- g. Participation in a R.M.C. 802 conference will not bar any party from making an objection, motion, argument, or offering evidence on any issue that has been discussed during the conference.

Chapter 18

CLASSIFIED INFORMATION

18-1. GENERAL

a. Convening authorities, military judges, trial counsel, defense counsel, security personnel, members and all military commission officers as appropriate shall protect the security of classified and protected information. If a commission involves classified and/or protected information, the Convening Authority, military judge, trial counsel and defense counsel, as appropriate, are charged with ensuring compliance with the applicable provisions of Chapter 47A of Title 10 U.S.C. §§ 948a *et seq.*, R.M.C. 701-703, and Mil. Comm. R. Evid. 505. The requirements of Chapter 18 do not supersede the requirements of Mil. Comm. R. Evid. 505 or other statutes or regulations dealing with classified information.

b. Pursuant to OSD Memorandum 09260-08, OSD Memorandum 10522-08 and OSD Memorandum 12079-08, the DoD has established a Security Classification/Declassification Review Team consisting of original classification authorities from DoD components and commands. This neutral entity has the authority to classify and declassify information produced by DoD, to designate information produced by DoD that, pursuant to Mil. Comm. R. Evid. 505 and 506 should be protected from public or other unauthorized disclosure and to authorize the use of such information in legal proceedings. Trial counsel has principal responsibility for liaising with the DoD Security Classification/Declassification Review Team and appropriate original classification authorities at pertinent non-DoD federal departments and agencies to ensure that: (i) they are afforded the opportunity to review all documents or other materials containing classified or protected information either intended for use in the litigation by trial counsel, or to be provided to defense counsel in discovery, for classification review and use authorization; and (ii) in accordance with Mil. Comm. R. Evid. 505(a)(3), evidence that may be used at trial is declassified to the maximum extent possible, consistent with the requirements of national security. *See also* Chapters 8-4 and 9-1.

c. Trial counsel shall submit all documents or other materials containing classified or protected information intended for use in litigation by trial counsel or to be produced to defense counsel in discovery to the DoD Security Classification/Declassification Review Team and/or to the appropriate original classification authority at any other pertinent non-DoD federal department and agency, for classification review and use authorization. No such documents or materials may be used in any aspect of the military commission proceeding until the DoD Security Classification/Declassification Review Team and any other pertinent non-DoD federal department and agency has reviewed the documents or materials and has authorized their use at the appropriate level of classification. Approved documents or other materials that have been declassified may be used at counsel's discretion in further proceedings or in future cases, subject to the terms of any protective orders governing the use of classified or protected information that may remain in such documents or materials.

18-2. PERSONNEL SECURITY CLEARANCES

If classified information is to be used in the military commission process, appropriate personnel security clearances in accordance with Executive Order (E.O.) 13526, "Classified National Security Information," must be held by all members of the court, members of the prosecution and defense, court reporters and interpreters and all other persons, including expert witnesses, whose presence is required when classified information is used in any aspect before the military commission. If, during the course of a trial, it appears that classified information will be disclosed, and if the provisions of this subsection, R.M.C. 701, Mil. Comm. R. Evid. 505, or any other provision of the M.M.C. have not been complied with, the military judge shall adjourn the court to review the matter. *See* R.M.C. 701-703, Mil. Comm. R. Evid. 505.

18-3. PROCEDURES CONCERNING SPECTATORS

Special considerations and procedures apply to prevent dissemination of classified or protected information to other than authorized persons. The military judge may close the proceedings pursuant to the standards set forth in MCA § 949d(c) and R.M.C. 806 when necessary to protect information the disclosure of which could reasonably be expected to damage national security, including but not limited to, by revealing intelligence or law enforcement sources, methods or activities. The military judge's finding shall be appended to the record of trial. *See* R.M.C. 806 and Mil. Comm. R. Evid. 505.

18-4. CONSULTANTS' PRESENCE DURING PROCEEDINGS

a. Pursuant to R.M.C. 506(e), an accused before a military commission may request the presence of persons who are not qualified to serve as counsel under R.M.C. 502, and to have them present and seated at the counsel table for the purpose of consultation. These consultants may or may not be United States citizens. Any such person authorized by the Convening Authority or military judge to attend commission proceedings during which classified information is presented or discussed must have the requisite security clearance and be notified of any applicable protective orders, agreements and memoranda of understanding. Existing agreements pertaining to the recognition of other nation's security clearances may apply to military commissions.

b. Subject to the discretion of the military judge, these consultants may be removed from the courtroom for any *in camera* presentation or proceeding that only the parties are permitted to attend. A consultant shall be removed from the courtroom at any other point when material will be considered that is classified at a level higher than that of the security clearance of the consultant or that is controlled within an SCI or other special access program to which the consultant has not been authorized access or that is subject to a dissemination control, such as "NOFORN," that precludes access.

c. For any person, including consultants, access to and communication with the accused is, at all times, contingent upon the individual seeking access having obtained the

requisite security clearance as determined by the appropriate classification authority and is subject to any applicable protective orders.

18-5. RECORD OF TRIAL EVIDENCE

Special procedures apply to the preparation of records of trial that include classified information. *See* R.M.C. 1103(d). The trial counsel, in coordination with the DoD Security Classification/Declassification Review Team and the appropriate original classification authorities of any other pertinent non-DoD federal department and agency, shall cause a proper security classification to be assigned to the record of trial and on each page thereof on which classified material appears, and the designation of each page and the lines and words therein containing classified or protected information. The Convening Authority will seal those portions deemed classified and/or protected and include them as an appendix to the official record of trial.

18-6. SERVICE OF AN AUTHENTICATED RECORD OF TRIAL UPON THE ACCUSED

The Convening Authority will provide the accused a copy of the record of trial with the sealed portions removed. In place of the sealed portions, the Convening Authority shall prepare and deliver a certificate to the accused indicating that the Convening Authority has reviewed the material and the nature of the material that has been removed. The certificate will inform the accused that the original record has been reviewed by the Convening Authority and will be made available in its entirety to the U.S.C.M.C.R. for consideration during any appeal. The certificate shall further indicate, by number, the pages from the record which have material that has been deleted; the pages, by number, which have been entirely deleted; and the exhibits, by number, which have been withdrawn.

Chapter 19

PUBLIC ACCESS TO COMMISSION PROCEEDINGS AND DOCUMENTS

19-1. GENERAL

Section 949d(c)(2) of the Military Commissions Act of 2009 provides that “[t]he military judge may close to the public all or a portion of the proceedings . . . only upon making a specific finding that such closure is necessary to— (A) protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods or activities; or (B) ensure the physical safety of individuals.” Consistent with this statutory requirement, the goal of the DoD is to make military commissions accessible to the public to the maximum extent possible, consistent with the interests of national security, the rights of the accused, and other interests protected by law. Making military commissions accessible to the public includes providing access to military commission proceedings, transcripts, pleadings, filings, rulings, orders and other materials used at military commission proceedings, to the extent that these materials are not classified, covered by a protective order, or otherwise protected by law, including the rules and regulations governing military commissions.

19-2. APPLICABILITY

The provisions of this Chapter apply to persons who may obtain information as the result of duties performed in connection with the processing of an accused, the investigation of suspected offenses, or proceedings conducted by military commission. These provisions are applicable to all military commission cases from the swearing of charges until the completion of trial and appellate proceedings or any final disposition of the case. These provisions also provide guidelines for the release or dissemination of information to the public, including news media representatives, or other persons or agencies.

19-3. PROTECTED INFORMATION

- a. Pursuant to RMC 806, the military judge may issue protective orders limiting the public disclosure of “protected information.”
- b. Protected information, for purposes of commission proceedings, is non-classified information subject to a properly issued protective order by an official authorized to issue such an order to prevent public dissemination of such information.
- c. The military judge may resolve any dispute raised by the parties or by members of the public, including news media representatives (or their counsel), regarding whether material presented at trial, at a hearing or in a filing, ruling, order or transcript, may be released to the public or is not appropriately designated as “protected.” *See* Chapter 17-4. These disputes, once properly raised, shall be resolved promptly. Classification decisions by the DoD Security Classification/Declassification Review Team and the

original classification authorities of other non-DoD federal departments and agencies are not subject to review by the military judge.

d. A non-party's request to challenge the applicability of a protective order to the military judge's designation of information as protected information shall be submitted in writing to the Chief Clerk with a copy to the attorneys of record. Written challenges must identify with specificity (i) the protected information at issue (ii) the reason(s) for believing the "protected" designation is not valid, and (iii) any supporting documentation relevant to substantiating that claim. The attorneys of record may, at their discretion, file a written document in support of, or in opposition to, a non-party's challenge. The military judge may request the views of counsel of record, if not otherwise provided. The military judge need not hear oral arguments on any such motions. If the military judge concludes that the information must be protected in order to prevent damage to national security or ensure the physical safety of individuals, the military judge shall issue a finding that protective measures are necessary. *See* 10 U.S.C. § 949d(c).

19-4. PUBLIC RELEASE OF TRANSCRIPTS, FILINGS, RULINGS, ORDERS AND OTHER MATERIALS

a. With the exception of transcripts, information subject to release under this regulation shall be released by the Chief Clerk to the custodian of the OMC website.

b. Releasable filings, opinions and orders are those versions of such materials that contain no classified or protected information, or from which all such information has been redacted by the DoD Security Classification/Declassification Review Team and/or the pertinent non-DoD federal department and agency, and have been filed with the court in accordance with the provision of Chapter 17-1(c) of this Regulation.

c. Except as otherwise provided in the M.C.A. and the M.M.C., the Chief Clerk shall release to the individual identified by the Convening Authority as the custodian of the OMC website all releasable filings and orders for posting on the OMC website. The releasable filings and orders shall be posted in accordance with the following timelines:

1. Filings and orders that do not require classification security review under Chapter 17-1 shall be posted within one business day of filing with the military commission;

2. All other filings and orders shall be publicly released after the DoD Security Classification/Declassification Review Team and/or the appropriate non-DoD federal department and agency original classification authority confirms to the commission that such filings and orders are in publicly releasable form. The classification review by the DoD Security Classification/Declassification Review Team and/or the appropriate non-DoD federal department and agency original classification authority shall generally take no longer than 15 business days. *See* Chapter 17-1(b). The 15 business day security classification review period shall be extended for a reasonable period if the appropriate non-DoD federal department and agency original classification authority or the Officer

in Charge of the DoD Security Classification/Declassification Review Team submits a notification to the Chief Clerk declaring that such additional time is required by exceptional circumstances. Any additional time provided shall be the minimum additional time required in light of the exceptional circumstances set out in the request for additional time.

d. Within one business day of a military judge's decision on a motion not containing classified or protected information, the Chief Clerk shall coordinate with the custodian of the OMC website to ensure the filings inventory on the OMC website is updated by the custodian to reflect the disposition of the motion, and, if written, the Chief Clerk shall provide the unclassified opinion to the custodian for posting on the OMC website. Decisions on motions or filings containing classified or protected information must be reviewed and redacted by the DoD Security Classification/Declassification Review Team and any relevant non-DoD federal department and agency original classification authority as described in 19-4(c)(2) prior to public release.

e. Except under exceptional circumstances, including equipment failure, the Convening Authority shall ensure the custodian of the OMC website posts a draft, unofficial, unauthenticated transcript of the public portions of the military commission proceedings to the OMC website as soon as practicable after the conclusion of a hearing each day the military commission is in session (whether the hearing is recessed, adjourned, or closed). This draft, unofficial, unauthenticated transcript shall be prepared by a court reporter seated in a room that receives an audio feed of the proceedings that is identical to the audio feed broadcast in the public gallery. This procedure will avoid inclusion in the draft, unofficial, unauthenticated transcript of any inadvertent utterances of classified or protected information inside the courtroom. Further, this draft, unofficial, unauthenticated transcript shall indicate that it is an unofficial, unauthenticated draft that may be further revised, and that it is being released to facilitate the public's access to military commission proceedings.

19-5. EXCEPTIONAL CASES

The provisions of this section are not intended to restrict the release of unclassified, unprotected information designed to enlist public assistance in apprehending an accused or suspect who is a fugitive from justice or to warn the public of any danger that a fugitive accused or suspect may present. Further, because the purpose of this section is to prescribe generally applicable guidelines, there may be exceptional circumstances that warrant the release or non-release of unclassified or unprotected information. In these cases, the military judge shall be responsible for determining whether such material shall be released.

19-6. SPECTATORS AT MILITARY COMMISSION SESSIONS

The proceedings of military commissions shall be public to the maximum extent practicable. In general, all persons granted permission to attend a session, except those who may be required to give evidence, shall be admitted as spectators. The Office of

Military Commissions shall coordinate travel and attendance of all spectators except news media representatives. The Office of the Assistant Secretary of Defense for Public Affairs shall coordinate all matters involving media attendance at military commission sessions, subject to the authority of the military judge. The military judge may close proceedings of military commissions to the public only upon making the findings required by M.C.A. § 949d(c) and R.M.C. 806.

Chapter 20

TRIAL MATTERS

20-1. GENERAL

This chapter provides information and guidance on certain aspects of trial practice applicable to military commissions. The guidance in this chapter may be augmented by rules of court published at the direction of the Chief Trial Judge. Neither this chapter nor any rules of court may be interpreted or applied so as to contravene the Rules for Military Commissions or the Military Commissions Rules of Evidence.

20-2. WITHDRAWAL OF CHARGES OR SPECIFICATIONS

- a. If charges are withdrawn or dismissed, trial counsel will renumber any remaining charges or specifications as appropriate.
- b. If charges or specifications are withdrawn before arraignment, trial counsel will renumber the remaining charges or specifications on the Charge Sheet and throughout the record of trial.
- c. When charges or specifications are withdrawn or dismissed after arraignment and before the commission members are aware of the charges, trial counsel should request the military judge to approve renumbering of the remaining charges or specifications. Upon approval of the military judge, charges or specifications should thereafter be referred to in and on the record as changed.
- d. When charges and specifications are withdrawn or dismissed after arraignment and after commission members are made aware of the charges, the remaining charges and specifications should not be renumbered. *See* Chapter 20-9, Findings and Sentence Worksheets.

20-3. R.M.C. 803 SESSIONS

- a. Sessions without members, convened under R.M.C. 803 will be called by order of the military judge; however, any counsel may request that such a session be called. For example, the military judge may, at an R.M.C. 803 session, arraign the accused, hear arguments, consider evidence, rule upon motions and receive the pleas of the accused. At such a session, the military judge may rule upon other matters that may legally be ruled upon by the military judge.
- b. *Arraignment.* At an R.M.C. 803 session called for the purpose of arraignment, the military judge will advise the accused of his rights to counsel and to be present and the accused will elect by whom he wishes to be represented. The charges and specifications shall then be read to the accused (unless he waives the reading) and the accused will be called upon to state his motions and enter a plea. If the accused or his counsel so requests, and within the discretion of the military judge, the accused may

defer making motions or entering a plea until a later session. If an accused is not arraigned on all the charges and specifications referred to trial, the trial counsel should indicate the disposition of the other charges on the record during the arraignment session.

c. Pleas and findings based on a plea of guilty.

1. If the accused pleads not guilty to all charges and specifications, the military judge will schedule appropriate trial sessions. The trial schedule may be issued in the form of an order and at the discretion of the military judge.

2. If the accused pleads guilty to one or more charges and specifications, the military judge will make appropriate inquiry into the basis for the accused's plea, including the terms and conditions of any pretrial agreement. *See* Chapter 12-4. Following a satisfactory inquiry, the military judge may accept the guilty plea(s) of the accused and may then enter a finding of guilty to any charge and/or specification for which a guilty plea has been accepted, except when the plea is to a lesser-included offense and the prosecution intends to proceed to trial on a greater offense. In such case, the military judge will not enter a finding, pending resolution of the affected charge and specification by the members.

3. If, in conjunction with a plea of guilty to one or more charges and specifications, the accused pleads not guilty to one or more charges and specifications, and the government elects to proceed to trial on the contested charges, the military judge, after completing the inquiry and entering the findings noted in Chapter 20-3(c)(2) above, shall issue a trial schedule, or immediately proceed to trial, after considering the positions of the parties as to a trial date.

20-4. MARKING AND USE OF EXHIBITS AT TRIAL

Exhibits, after being approved for use in the commission by the DoD Security Classification/Declassification Review Team and appropriate non-DoD federal departments and agencies, will be marked, used, and appended to the record of trial as provided in this paragraph, except as otherwise directed by the military judge. At the discretion of the military judge, copies or photographs may be substituted in the record of trial for the original evidence.

a. Any document or object used by or disclosed to any witness or court member in the course of military commissions proceedings will be marked as directed by the military judge and appended to the record of trial.

b. Any information considered by the military judge *in camera* (whether or not *ex parte*), at the request of either party, will be marked as an appellate exhibit, sealed, if appropriate, and appended to the record of trial. Classified or protected information will be appropriately sealed, labeled and maintained for subsequent review by the appropriate authorities.

c. Any evidence, document or object reviewed by the military judge during an R.M.C. 803 session, whether or not admitted into evidence, will be marked as a prosecution, defense or appellate exhibit, as directed by the military judge.

d. Any document or other object offered into evidence, whether or not admitted, will be marked as a prosecution or defense exhibit, as appropriate, and appended to the record of trial.

e. Essential findings of fact, foreign law judicially noticed, findings and sentence worksheets, written questions or requests submitted by members, written instructions to the members by the military judge, written rulings of the military judge, briefs, motions and other ancillary documents or objects not offered or admitted into evidence, but deemed by the military judge to be germane to the proceedings, will be marked as appellate exhibits and appended to the record of trial. Items or documents not marked as appellate, prosecution or defense exhibits may be appended to the record of trial as allied papers. *See* Guide for Preparation of Record of Trial by Military Commission (Figure 22.4).

f. When a document or object is first offered for marking as an exhibit, or if it has been marked prior to the session, then at first mention of the document or object on the record, it will be identified for the record and shall thereafter be identified during all sessions of the commission by referring to its exhibit number, unless otherwise directed by the military judge.

1. Prosecution exhibits will be marked using Arabic numerals (*e.g.*, P.E. 1).
2. Defense exhibits will be marked using capital letters (*e.g.*, D.E. A).
3. Appellate exhibits will be marked using Arabic numerals (*e.g.*, App. Ex. 1).

20-5. CONDITIONAL GUILTY PLEA

Conditional guilty pleas should be accepted only when the issue preserved for appeal is case dispositive. The decision whether to accept or reject an offer, by the accused, to enter into a plea agreement containing a conditional plea of guilty is within the sole discretion of the Convening Authority. *See* R.M.C. 705(d)(3). A conditional plea must be in writing, must be signed by the accused, and must specify the issue being preserved for review or appeal. No conditional plea of guilty may be accepted without the approval of the military judge and the consent, on the record, of the Government. *See* R.M.C. 910.

20-6. INFORMATION FOR MEMBERS

a. *Pleas.* If an accused pleads not guilty to all charges and specifications, the members shall be so informed before presentation of evidence begins. If the guilty plea of an

accused to one or more charges and specifications has been accepted by the military judge under Chapter 20-3(c)(2) above, but the accused pleads not guilty to the remaining charges and specifications, the defense may elect whether the members should be informed of the charges and specifications and the accused's guilty plea prior to presentation of evidence on the contested charges.

b. *Other relevant information.* Unless directed otherwise by the military judge, the trial counsel will provide a copy of the below-listed items to each member for their examination prior to *voir dire*. Before this information is presented to any commission member, counsel for the accused will be afforded an opportunity to inspect, comment on, and object to the information.

1. *Flyer.* The flyer consists of one or more sheets of plain white bond on which the charges and specifications are typed or reproduced in the form described below, as they exist at the time the members are sworn, and taken verbatim from the Charge Sheet. The flyer omits all other data included in the Charge Sheet.

A. Trial counsel shall provide a copy of all charges and specifications if (i) the accused has pleaded not guilty to all charges and specifications; or (ii) the military judge has accepted the accused's pleas of guilty to one or more charges and specifications, the accused has pleaded not guilty to other charges and specifications and the accused has consented, on the record, to have the members informed of the charges and specifications to which he has pleaded guilty; or (iii) the accused has pleaded guilty to all charges and specifications (in this latter case the court members will decide only the sentence).

B. Trial counsel shall provide a copy of only those charges and specifications to which the accused has pleaded not guilty, if the military judge has accepted guilty pleas of the accused to one or more charges and specifications and the accused has elected, on the record, not to inform the members of the offenses to which he has pleaded guilty.

2. *Convening order, including any amending orders.*

3. *Seating chart.* Following challenges, a revised seating chart will be provided to each member, if required.

20-7. PERSONAL IDENTIFICATION OF WITNESSES

Unless providing testimony under the privileges and protections of Mil. Comm. R. Evid. 505 and 506, or under the order of the military judge providing for witness anonymity per Chapter 16-5(c)(8) and/or Chapter 19-3, after a witness is sworn, the witness should be identified for the record (full name, rank and unit, if military, or full name, if civilian). Social security numbers and home addresses will not be used to verify the witness's identity in court; however, the full names should appear in the record of trial or allied papers, unless directed otherwise by the military judge.

20-8. APPEALS BY THE UNITED STATES OF ADVERSE RULINGS

a. The United States may take an interlocutory appeal pursuant to 10 U.S.C. § 950d and R.M.C. 908. *See also* Chapter 25-5. Trial counsel may file a notice of appeal by the United States under R.M.C. 908 only after consultation with the Chief Prosecutor, or a Deputy Chief Prosecutor for Military Commissions.

b. Following receipt of a ruling by the military judge that the trial counsel believes should be appealed by the United States, the trial counsel may request a delay of proceedings under R.M.C. 908(b)(4), not to exceed 72 hours, and will, within that period, consult as required in Chapter 20-8(a) above, and, if appropriate, file a notice of appeal conforming to the requirements of R.M.C. 908(b) with the military judge.

c. Trial counsel shall promptly send a copy of the notice of appeal to the Chief Prosecutor, or if not reasonably available, a Deputy Chief Prosecutor, who will, if appropriate, expeditiously cause the appeal to be filed with the United States Court of Military Commission Review (USCMCR). The trial counsel's notice will specifically identify the ruling or order to be appealed and will include the following:

1. A copy of the charges and specifications;
2. Unless submitted electronically, an original and four copies of the verbatim record of the applicable proceedings, or, if not available, a summary of the evidence and facts;
3. Trial counsel's certification that the appeal is not taken to delay the case;
4. Trial counsel's certification that, if the appeal is taken pursuant to R.M.C. 908(b)(2), the excluded evidence is substantial proof of a fact material in the proceeding; and
5. A memorandum opinion on the law applicable to the issues appealed, including an explanation why the issues appealed are significant enough to require appeal by the United States.

d. If the appeal is taken pursuant to R.M.C. 908(a)(4), trial counsel shall ensure appropriate protection of classified or protected information.

e. Following the government appeal.

1. *Notification of the decision.* The Clerk of Court of the USCMCR will notify the military judge and the Convening Authority, who will then ensure the accused is promptly notified as required by R.M.C. 908. Whether the accused is notified orally on the record or by other means, the trial counsel's certificate as to the fact, date and method of notification will be sent immediately to the Clerk of Court, USCMCR.

2. *Appeal from adverse ruling.* The United States may petition the United States Court of Appeals for the District of Columbia Circuit to review an adverse ruling of the USCMCR within 20 days after the date on which written notice of the final decision of the USCMCR is served on the government. The decision to review shall be made at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

20-9. FINDINGS AND SENTENCE WORKSHEETS

Unless directed otherwise by the military judge, trial counsel should use the general formats at Appendices 10 and 11, Manual for Courts-Martial (2008) to create Findings and Sentence Worksheets. Each worksheet drafted by trial counsel should be shown to defense counsel prior to being presented to the military judge for approval. After approval of these adapted forms by the military judge at an R.M.C. 803 session, the worksheets may be used to assist court members in putting military commission findings and sentences in a form consistent with the M.M.C.

20-10. APPELLATE RIGHTS ADVICE

a. Prior to adjournment, the defense counsel will inform the accused orally and in writing of:

1. The right to submit matters to the Convening Authority to consider before taking action;

2. The right to appellate review and the effect of waiver or withdrawal of such right;

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

b. The written advice to the accused concerning the post-trial and appellate rights shall be signed by the accused and the defense counsel and the accused will make an election concerning representation by military or civilian counsel before the USCMCR. The form will be inserted in the record of trial as an appellate exhibit.

c. The Chief Defense Counsel will prescribe policies and procedures to ensure compliance with this paragraph.

d. With regard to appellate advice after decision by the USCMCR, counsel may use MC Form 4917 (Advice as to Appellate Rights), MC Form 4918 (Petition for Grant of Review in the United States Court of Appeals for the District of Columbia Circuit) and MC Form 4919 (Request for Final Action). Appeals to the United States Court of Appeals for the District of Columbia Circuit can be mailed to the United States Court of Appeals for the District of Columbia Circuit, E. Barrett Prettyman United States Courthouse, (Attn: Clerk of Court, Room 5423), 333 Constitution Avenue, N.W., Washington, D.C. 20001-2866).

Chapter 21

RESULT OF TRIAL

21-1. REPORT ON RESULT OF TRIAL

Under R.M.C. 1101(a) the trial counsel will prepare a report of the result of trial at the end of the military commission proceedings. It will be prepared on MC FORM 21-1, Report of Result of Trial (Figure 21.1). A copy of the MC FORM 21-1 will be included in allied papers accompanying the record of trial. Post-trial prisoners who are transferred to the custody of other confinement or detention facilities must carry a copy of the MC FORM 21-1. It will also include the names and unclassified identification numbers of any co-accused. The completed MC FORM 21-1 will be typewritten, if practicable, or legibly handwritten.

21-2. PUBLICATION OF THE RESULT OF TRIAL

The trial counsel will ensure that a copy of the MC FORM 21-1 is sent expeditiously to the Convening Authority, or his or her designee, the Chief of the Office of Court Administration, the commander or other official currently exercising control of the accused and, if possible, the official in charge of the confinement or detention facility.

21-3. POST-TRIAL CONFINEMENT

Personnel accountability for post-trial prisoners in confinement will be administratively transferred immediately after trial from their current place of confinement to the appropriate confinement facility, or elsewhere, based on direction from the Secretary of Defense or his or her designee. Such administrative transfer of personnel accountability will not affect the authority of the Convening Authority who referred the case to trial to take action on the findings and sentence.

REPORT OF RESULT OF TRIAL

To: The Convening Authority, Office of Military Commissions

1. Notification under R.M.C. 1101(a) is hereby given in the military commission of United States v.

2. Trial by military commission on _____, _____ at _____

convened by: MCCO Number(s) _____

3. Summary of offenses, pleas and findings:

<u>Charge</u>	<u>§950t (1-32) M.C.A. SPEC</u>	<u>DESCRIPTION OF OFFENSE</u>	<u>PLEA</u>	<u>FINDING</u>
---------------	-------------------------------------	-----------------------------------	-------------	----------------

4. Sentence:

5. Date sentence adjudged and effective date of any additional penalty (YYYY/MM/DD): _____

6. UNCLASS Name(s) and ISN(s) of companion accused or co-accused, if any:

cc: Accused, Defense Counsel, Military Judge, Chief Prosecutor, Chief Defense Counsel, Chief Clerk of the Trial Judiciary, Chief of Court Reporting, Office of Military Commissions Public Affairs Officer, Legal Advisor to the Convening Authority,

_____ TYPED NAME OF TRIAL COUNSEL _____ SIGNATURE

_____ RANK _____ BRANCH OF SERVICE

Chapter 22

RECORDS OF TRIAL

22-1. GENERAL

This chapter implements 10 U.S.C. § 949o. A complete record of the proceedings and testimony shall be prepared in every military commission. Each military commission shall keep a separate record of the proceedings in each case brought before it.

22-2. MANNER OF RECORDING PROCEEDINGS

a. *Manner of recording.* All sessions of a military commission will be recorded either by a qualified court reporter using recording software and equipment or other digital audio recording device from which a verbatim transcript may be produced, or by simultaneous court-reporting. In addition to the recording by the court reporter, the military commission may be recorded by videotape, audiotape or similar material from which sound or visual images may be reproduced to accurately depict the entire trial. When directed by the Convening Authority or military judge, such means of recording may be used in lieu of recording by a qualified court reporter. The authorization will be attached to the record of trial as part of the authentication documents.

b. *Retention of trial notes or recordings.* The court reporters in every case shall ensure that any notes (stenographic or otherwise) or any recordings (mechanical, video or voice) from which the record of trial was prepared are retained until such time as review of the case is final.

22-3. PREPARATION OF WRITTEN RECORD

When the military commission, or any part of it, is recorded by videotape, audiotape or similar material, a written transcript is required and shall be prepared in accordance with Guide for Preparation of Record of Trial by Military Commission (Figure 22.4) before the record of trial is forwarded.

22-4. AUTHENTICATION

a. *Authentication.* The record of trial shall be authenticated by the signature of the military judge. The military judge will only authenticate that portion of the record of trial over which he or she presided.

b. *Substitute authentication.* If the record of trial cannot be authenticated by the military judge by reason of his or her death, disability or absence, it shall be authenticated by the signature of the trial counsel or by a member of the commission if the trial counsel is unable to authenticate it by reason of his death, disability or absence. Substitute authentication is authorized only in emergencies. A brief, temporary inability of the military judge to authenticate the record of trial does not justify a substitute authentication. Prolonged absence, to include permanent change of duties or

station or change of assignment as a military judge for the Commissions ordinarily justifies substitute authentication.

c. Review by the DoD Security Classification/Declassification Review Team and non-DoD federal departments and agencies original classification authorities . After Final Action by the Convening Authority, each record of trial will be submitted to the DoD Security Classification/Declassification Review Team and/or the appropriate original classification authority of any pertinent non-DoD federal department and agency for the preparation of a publicly releasable version of the record of trial.

22-5. SERVICE ON THE ACCUSED

a. A copy of the record of trial of the military commission shall be given to the accused as soon as it is authenticated. If the record or any annex thereto contains classified or protected information, the accused shall be given a redacted version of the record consistent with the requirements of 10 U.S.C. § 949p-1, *et seq.* Defense counsel shall have access to the unredacted record, (except insofar as the record contains any material reviewed by the military judge on an *ex parte* basis).

b. The trial counsel shall cause a copy of the record of trial to be served on the accused as soon as the record of trial is authenticated.

c. The trial counsel shall cause the accused's receipt for the copy of the record of trial to be attached to the original record of trial. If it is impracticable to secure a receipt from the accused before the original record of trial is forwarded to the Convening Authority, the trial counsel shall prepare a certificate indicating that a copy of the record of trial has been transmitted to the accused, including the means of transmission and the address, and cause the certificate to be attached to the original record of trial. In such case, the accused's receipt shall be forwarded to the Convening Authority as soon as it is obtained.

d. *Substitute service.* If it is impracticable (*see* R.M.C. 1104(c) for guidance on impracticability) to serve the record of trial on the accused, or if the accused so requests on the record at the trial or in writing, the accused's copy of the record of trial shall be forwarded to the accused's defense counsel, if any. Trial counsel shall attach a statement to the record of trial explaining why the accused was not served personally. The explanation and the accused's copy of the record of trial shall be forwarded with the original record of trial. The accused shall be provided with a copy of the record of trial as soon as practicable.

22-6. CLASSIFIED OR PROTECTED INFORMATION

a. *Classified or protected information.* Records of trial containing classified or protected information shall be marked with the proper security classification and/or designated as protected. Where appropriate, the record of a military commission may contain a classified or protected annex. If the record of trial or an annex thereto

contains classified or protected information, the accused shall be given a redacted version of the record of trial. *See* 10 U.S.C. §§ 949o and 949p-1, *et seq*; *see also* R.M.C. 1103(d) and 1104(d). Defense counsel shall have access to the unredacted record of trial (except insofar as the record contains information reviewed by the military judge on an *ex parte* basis). If the record of trial contains material which must be classified under applicable security regulations, the trial counsel shall cause a proper security classification to be assigned to the record of trial and on each page thereof on which classified material appears. If the record of trial contains protected information, trial counsel shall cause to be designated each page and the lines and words therein containing protected information.

b. *Other privileged information.* Copies of records of trial for delivery to the accused should be handled in accordance with R.M.C. 1104(d).

1. *Forwarding record with sealed annex to the Convening Authority.* If the copy of the record of trial prepared for the accused contains classified or privileged information, the trial counsel, unless directed otherwise by the Convening Authority, shall forward the accused's copy to the Convening Authority, before it is served on the accused.

2. *Responsibility of the Convening Authority.* The Convening Authority shall after consultation with the DoD Security Classification/Declassification Review Team, ODNI, and the appropriate intelligence agencies:

A. Cause any classified or protected information to be deleted or withdrawn from the accused's copy of the record of trial;

B. Cause a certificate indicating that classified or protected information has been deleted or withdrawn to be attached to the record of trial; and

C. Cause the expurgated copy of the record of trial and the attached certificate regarding classified or protected information to be served on the accused as provided in this Chapter except that the accused's receipt shall show that the accused has received an expurgated copy of the record of trial.

3. *Contents of certificate.* Pursuant to R.M.C. 1104(d)(C), the certificate regarding deleted or withdrawn classified or protected information shall indicate:

A. That the original record of trial may be inspected in the Office of Military Commissions or at some other designated location;

B. The pages of the record of trial from which matter has been deleted;

C. The pages of the record of trial which have been entirely deleted; and

D. The exhibits which have been withdrawn.

22-7. NUMBER AND DISTRIBUTION OF RECORD OF TRIAL COPIES

a. After action by the Convening Authority, in cases where the accused has not waived appellate review, the record of trial will be forwarded by the Convening Authority to the United States Court of Military Commission Review (USCMCR). *See* Chapter 24-2. In addition, four additional and complete copies are required to be forwarded with the original record of trial to the USCMCR. The four copies required above do not include the copy that would have been provided to the accused and or the defense counsel. The copies may be in a hard copy or electronic format. The original record of trial must be in a hard copy format with the original exhibits included.

b. In cases where the accused waives appellate review, the record of trial will be forwarded to the Chief of the Office of Court Administration, for appropriate disposition.

22-8. DISPOSITION OF RECORDS OF TRIALS

On completion of any required review and supplemental action, the Convening Authority will arrange for permanent storage or filing of original records of trial. The original records of trial should be returned to the Chief of the Office of Court Administration, Office of the Convening Authority, 1600 Defense Pentagon, Washington, DC 20301-1600.

22-9. MAILING RECORDS OF TRIAL

Certified first class mail with return receipt requested or delivery by commercial means with return receipt requested should be used to transmit unclassified records of trial for any official purpose.

22-10. DELEGATION OF AUTHORITY TO MODIFY PROCEDURES

Notwithstanding any other provision in this regulation and to the extent permitted by the M.C.A. and the M.M.C., and for the purpose of making better use of technological improvements, the Convening Authority has the authority to issue directions through technical channels, changing the procedures for preparing, copying, serving, certifying, authenticating or distributing records of trial, including allied papers and orders.

Figure 22.1 – Sample Authentication Form

AUTHENTICATION OF RECORD OF TRIAL

In the Case of

(First Middle Last Name of Accused, Identification Number, if Any)

DEFENSE COUNSEL’S EXAMINATION OF RECORD

I have examined the Record of Trial in the above referenced case in accordance with R.M.C. 1103(f).

//s// signature

Date

FIRST MI LAST NAME
GRADE, JA
Defense Counsel

AUTHENTICATION OF RECORD OF TRIAL BY MILITARY JUDGE

I examined the Record of Trial in the above referenced case and find that it accurately reports the proceedings. I authenticate this Record of Trial in accordance with R.M.C. 1104.

(or)

(I examined pages 1 thru 18 in the Record of Trial in the above referenced case and find that they accurately report the proceedings. I authenticate pages 1 thru 18 of this Record of Trial in accordance with R.M.C. 1104.)

//s// signature

Date

FIRST MI LAST NAME
GRADE, JA
Military Judge

Figure 22.2 – Sample Substitute Authentication Form

AUTHENTICATION OF RECORD OF TRIAL

In the Case of

(First Middle Last Name of Accused, Identification Number, if Any)

DEFENSE COUNSEL’S EXAMINATION OF RECORD

I have examined the Record of Trial in the above referenced case in accordance with R.M.C. 1103(f).

//s// signature

Date

FIRST MI LAST
GRADE, JA
Defense Counsel

**SUBSTITUTE AUTHENTICATION OF
RECORD OF TRIAL BY TRIAL COUNSEL**

I have examined the Record of Trial in the above referenced case and find that it accurately reports the proceedings. I authenticate this Record of Trial in accordance with R.M.C. 1104. I have authenticated this Record of Trial because COL Harold V. Smith, the Military Judge, in this case (has retired) (is deceased) (has PCS'd) (is disabled). I was the trial counsel in this case.

//s// signature

Date

FIRST MI LAST
GRADE, JA
Trial Counsel

Figure 22.3 – Sample Certificate of Correction

UNITED STATES)
)
)
 VS) **CERTIFICATE OF**
) **CORRECTION**
)
 _____)
)
 _____)
)

The record of trial in the above case, which was tried by Military Commission convened by Convening Order _____, Office of the Convening Authority, Office of Military Commissions, Washington, DC, dated _____, at Guantanamo Bay, Cuba, is corrected by the insertion on page _____, immediately following line _____, of the following:

“[The detailed reporter, _____ was sworn.]”

This correction is made because the reporter was sworn in at the time of trial but a statement to that effect was omitted, by error, from the record.

R.M.C. 1104(f) has been complied with.

AUTHENTICATION OF CORRECTION

I have examined the correction to the in the above referenced case and find it accurately reports the proceedings. I authenticate the correction in accordance with R.M.C. 1104.

Date

//s// signature

FIRST MI LAST
GRADE, JA
Military Judge

DEFENSE COUNSEL'S EXAMINATION OF RECORD

I have examined the correction to the record of trial in the above referenced case in accordance with R.M.C. 1103(f).

//s// signature

FIRST MI LAST
GRADE, JA
Defense Counsel

Date: _____

RECEIPT OF SERVICE

The copy of the certificate of correction was received by me on _____.

//s//signature

FIRST MI LAST ACCUSED

Figure 22.4 Guide for Preparation of Record of Trial by Military Commission

a. *Record of trial.* The following guidelines apply to the preparation of all records of trial by military commission.

1. *Paper.* All transcription will be completed only on one side of 8 1/2 x 11 inch paper. Use 15-pound or other high quality paper. Red-lined margins and other legal formats, such as numbered lines, are acceptable so long as they otherwise comport with the guidelines set forth herein.

2. *Margins.* A margin of 1 1/2 inches, or more as necessary, will be left at the top to permit binding. A one inch margin will be left on the bottom of the page and on the left side of each page.

3. *Font.* Use 10-pitch (pica) on typewriters and 12 point type on computers. Only Courier, Times-Roman, or Times-New Roman fonts may be used. Do not use cursive, script or italic fonts, except when appropriate in specific situations (*e.g.*, citation). Use bold print for initial identification of the members, military judge, court reporter and the parties to the trial. Certain standard stock entries (SSEs) will be in bold print within verbatim records of trial, as reflected in this appendix's Guide for Preparation of Trial (*i.e.*, calling a witness, stage of examination and questions by counsel, members or the military judge).

4. *Line spacing.* Double-space text, returning to the left margin on second and subsequent lines, with the exception of pleas, findings and sentence, which should be single spaced, indented and in bold print. Indent the elements of separate offenses in guilty plea cases.

5. *Justification.* Use left justification only with the exception of pleas, findings and sentence, which may be justified both left and right.

6. *Page Numbering.* All pages in the transcribed record of trial shall be numbered consecutively, beginning with "1." The page number shall be centered on the page 1/2 inch from the bottom.

7. *Additional/Inserted pages.* Use preceding page number plus either an alphanumeric letter after the corresponding whole numbered page (*e.g.* "19a") or a decimal and an Arabic number after the corresponding whole numbered page (*e.g.* "19.1"). Annotate the bottom of the preceding page to reflect the following inserted page (*e.g.* "next page 19a" or "next page 19.1"). Be consistent throughout the record of trial using either the alphanumeric or decimal system. Annotate the return to consecutive numbering at the bottom of the last inserted page (*e.g.* "next page 20").

8. *Omitted page numbers.* If a page number is omitted, but no page is actually missing from the transcript, note the missing page at the bottom of the page preceding the missing page number (*e.g.*, "there is no page 22; next page 23").

9. *Printing.* All records of trial forwarded for review shall be printed in such a manner as to produce a letter quality manuscript — a clear, solid, black imprint. All pen and ink changes to the transcribed record of trial shall be initialed.

10. *Organization of contents of record of trial.* The contents of a record of trial, including allied papers accompanying the record, are set forth in R.M.C.1103(b)(2)(B). To the extent applicable, the original record of trial shall contain signed originals of pertinent documents. Absence of an original document will be explained, and a certified true copy or signed duplicate original copy inserted in the record of trial. Arrangement of the contents of the record shall be as set forth on MC Form 490, with heavy stock dividers used to separate major components of the record as follows:

A. **MC Form 490, Front Cover.** The front cover will be followed by: (1) any orders transferring the accused to a confinement facility; (2) appellate rights statement and the accused's election as to appellate counsel or any waiver thereof; (3) Data Sheet, if any; (4) any briefs of counsel submitted after trial; (5) military commission orders promulgating the result of trial; (6) proof of service on the defense counsel of the Legal Advisor's post-trial recommendation and any response to the recommendation (if the defense response to the recommendation is combined into one document with the matters submitted by the accused pursuant to R.M.C. 1105, then the document should be placed in the record of trial as if it were solely matters submitted by the accused pursuant to R.M.C. 1105); (7) either proof of service on the accused of the Legal Advisor's recommendation or a statement explaining why the accused was not served personally; (8) signed review of the Legal Advisor including any addenda and attached clemency matters; (9) matters submitted by the accused pursuant to R.M.C. 1105; (10) any request for deferment of post-trial confinement and action thereon; (11) any request for suspension and any action thereon.

B. **Pretrial Allied Papers.** These papers should include:

- i. Advice of the Legal Advisor;
- ii. Requests by counsel and action of the Convening Authority taken thereon;
- iii. Any other papers, endorsements, investigations which accompanied the charges when referred for trial;
- iv. Record of any former trial;
- v. Any correspondence relating to the case to include correspondence between counsel and the military judge;
- vi. Any documents or witness statements not otherwise utilized or marked as exhibits;

vii. Any documents, items, or briefs not mentioned “on the record” during the proceedings by the parties and not marked or offered as an appellate, prosecution, or defense exhibits; and

viii. Any discovery documents not marked as exhibits.

C. Record of Proceedings of Military Commission. The record should be compiled in the following order:

i. Errata sheet;

ii. Index sheet with receipt of accused or defense counsel for copy of record or certificate in lieu of receipt;

iii. Convening and amending orders;

iv. Written orders detailing the military judge or counsel;

v. Verbatim transcript of the proceedings of the court, including all sessions without members and original “Charge Sheet”;

vi. Authentication sheet followed by Certificate of Correction, if any;
and

vii. Action of the Convening Authority.

D. Post-trial sessions. Post-trial sessions will be authenticated and served in accordance with R.M.C. 1103 and are part of the record of trial. Page numbering should continue in sequence from the end of the transcript of the original proceedings and will be separately authenticated if the initial proceedings have been previously authenticated. Additional exhibits should be lettered or numbered in sequence, following those already marked/admitted.

E. Prosecution exhibits admitted into evidence. The page(s) at which an exhibit is offered and admitted should be noted at the bottom of the exhibit, as appropriate, as well as noting those pages on the MC Form 490.

F. Defense exhibits admitted into evidence. The page(s) at which an exhibit is offered and admitted should be noted at the bottom of the exhibit, as appropriate, as well as noting those pages on the MC Form 490.

G. Prosecution exhibits marked but not offered and/or admitted into evidence. The page(s) at which an exhibit is offered and rejected should be noted at the bottom of the exhibit, as appropriate, as well as noting those pages on the MC Form 490.

H. Defense exhibits marked but not offered and/or admitted into evidence. The page(s) at which an exhibit is offered and rejected should be noted at the bottom of the exhibit, as appropriate, as well as noting those pages on the MC Form 490.

I. Appellate exhibits. The page(s) at which an exhibit is marked should be noted at the bottom of the exhibit, as appropriate, as well as noting those pages on the MC Form 490.

J. Any records of proceedings in connection with vacation of suspension.

11. *Stock dividers.* The foregoing bullets will be separated by the use of heavy stock dividers, colored and labeled with gummed labels.

12. *Binding.* Volumes of the record will be bound at the top with metal or plastic fasteners. Use only “slide” fasteners (with compressors) with two inch capacity. Do not sew or stack fasteners together in gangs to bind thick volumes. Do not use “book style” or “left-hand” binding, 3-ring binder, “screw and post” type fastener or report covers. Volumes shall be bound to withstand repeated handling, utilizing MC Form 490.

13. *Dividing records into volumes.* Divide records of trial that are over 1 1/2 inches thick into separate volumes. Make the first volume of a multi-volume record an inch thick or smaller. This will allow for inclusion of the Legal Advisor’s recommendation, clemency matters and other post-trial documents. Limit subsequent volumes to 1 1/2 inches thick, unless dividing them requires assembling additional volume smaller than 1/2 inch thick. If the transcript is split into two or more volumes, indicate on the front cover which pages of the transcript are in which volume (*e.g.*, Volume 1 of 4, Transcript, pages 1- 300). Number each volume of the record of trial as follows: “Volume 1 of.” In the upper right-hand corner of the MC Form 490, label the record of trial to reflect which copy it is, *i.e.*, “ORIGINAL” “ACCUSED,” etc.

14. *Copies of record of trial.* Copies shall be legible. Copies of the record of trial shall appear, to the extent possible, substantially as the original appears. For example: if the original has five one-inch thick volumes, the copies should each have five one-inch thick volumes. Copies of video or audio tapes, charts photographs, etc. shall appear substantially as they appear in the original. See R.M.C. 1104(d) regarding classified information. As a general rule, all proceedings in the case should be recorded verbatim. See R.M.C. 1103. Following this appendix does not necessarily produce a complete record of trial. It is to be used by the reporter and trial counsel as a guide in the preparation of the completed record of trial in all military commission cases in which a verbatim record is required.

RECORD OF TRIAL

of

(Name-last, first, middle initial)

(Identification Number)

by MILITARY COMMISSION. Convened by _____

(Title of Convening Authority)

(Command, if any of Convening Authority)

_____ on _____

(Place(s) of trial) (Date(s) of trial)

Note. The title should be followed by an index. It should cover important phases of the trial such as: introductory matters, arraignment, motions, pleas, providence inquiry, pretrial agreement inquiry, prosecution case-in-chief, defense case, prosecution case in rebuttal, trial counsel argument, defense counsel argument, instructions, findings, allocution rights, prosecution matters in aggravation, defense sentencing case, prosecution rebuttal, trial counsel argument, defense counsel argument, sentencing instructions, appellate rights, sentencing and review of the sentencing terms of any pretrial agreement. Moreover, the index should also reflect all exhibits (prosecution, defense and appellate) whether offered/accepted into evidence or not.

COPIES OF RECORD

_____ copy of record furnished the accused as per attached certificate or receipt.

_____ copies of record forwarded herewith.

RECEIPT FOR COPY OF RECORD

I hereby acknowledge receipt of a copy of the above-described record of trial, delivered to me at this day of,

(Signature of accused)

(Name of accused)

CERTIFICATE IN LIEU OF RECEIPT

(Place)

(Date)

I certify that on this day delivery of a copy of the above-described record of trial was made to the accused, _____, at _____,

by _____ (Name of accused) _____ (Place of delivery)
(Means of Delivery) and that the receipt of the accused had

not been received on the date this record was forwarded to the Convening Authority

The receipt of the accused will be forwarded as soon as it is received.

(Signature of trial counsel)
(Name of trial counsel)

Note. If the accused’s defense counsel receives the record, the trial counsel must attach an explanation to the record. *See* R.M.C. 1104(c). The following format may be used:

The accused’s defense counsel was served the accused’s copy of the record because (the accused so requested in a written request, which is attached) (the accused so requested on the record at the trial) (the accused was transferred to _____).

(Signature of trial counsel)
(Name of trial counsel)

Note. If the accused cannot be served and has no counsel to receive the record, an explanation for failure to serve the record will be attached to the record. *See* R.M.C. 1104(c). The following format maybe used:

The accused was not served a copy of this record because the accused (_____. Accused has no defense counsel to receive the record because (defense counsel has been excused under R.M.C. 505(d) or (506(d).)

(Signature of trial counsel)
(Name of trial counsel)

GUIDE FOR PREPARATION OF RECORD OF TRIAL

Note. While entries in this guide below are single-spaced, all records are to be double-spaced with the exception of the pleas, findings and sentence.

PROCEEDINGS OF A MILITARY COMMISSION

[The military judge called the R.M.C. 803 session to order at _____ at, _____ hours, _____, pursuant to the following orders:]

[Military Commission Convening Order Number _____, _____, _____ dated _____.] _____
(Convening Authority who issued the order)

[END OF PAGE]

Note. Here insert a copy of the orders convening the military commission and copies of any amending orders. Copies of any written orders detailing the military judge and counsel will be inserted here. *See* R.M.C. 503(b) and (c).

MJ: This R.M.C. 803 session is called to order.

TC: This military commission is convened by

Note. The reporter records all the proceedings verbatim from the time the military judge calls the court to order. Thereafter, the reporter will use only standard stock entries, reporter's notes or gestures.

Note. SSEs, reporter's notes and gestures (non-verbatim observations) will be placed in brackets, with the exception of SSEs identifying witnesses, stages of examination and individual *voir dire*.

Note. The court reporter shall utilize proper paragraphing techniques (*i.e.*, a new line of thought starts a new paragraph) when typing long narratives, such as the military judge's instructions, counsel arguments and lengthy Q and A. Additionally, start a new paragraph for each separate element in a list; *i.e.*, elements of an offense, legal definitions, accused's rights and oral stipulations.

Note. Do not use exclamation marks, capital letters, bolding or italics to inject emphasis into the record of trial. Two hyphens (--) or a one em dash (—) may be used where the speaker changes thought or subject and four hyphens (----) or a two

em dashes (— —) may be used where one participant interrupts another. Use periods at the end of complete thoughts to avoid lengthy sentences. Avoid phonetic spelling.

Note. Indent 5 spaces from the left margin and type the appropriate prefix to indicate identity of the speaker followed by a colon and two spaces.

Note. When typing 'Q and A,' ensure at least two lines or the entire text of a question or answer appear at the bottom of a page. Page break in appropriate places where necessary. Do not repeat the 'Q' or 'A' prefix at the top of the next page. To the extent practicable, use page breaks so that the answer to a question does not appear on a page separate from the question.

Note. Each session of court as well as each R.M.C. 803 session shall commence on a new page, separate from the other transcribed proceedings. 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 trial during trial. For example:

[The (military commission)(session) was called to order at _____hours.]

[The (military commission) (session) was (adjourned) (recessed) at _____hours.]

[The military commission closed at _____hours.]

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.M.C. 807, only the fact that a witness took an oath or affirmation is to be recorded. However, if preliminary qualifying questions are asked to 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 reporter, _____, was sworn.]

[The detailed interpreter, _____, was sworn.]

[The military judge and the personnel of the prosecution and defense were sworn.]

[The members were sworn.]

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 military commission, 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. 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 military commission.]

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.

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 (trial counsel) (assistant trial counsel):

Q. State your full name, (etc.) _____ .

A. _____ .

Q. _____ ?

A. _____ .

CROSS-EXAMINATION

Questions by the (defense counsel) (assistant defense counsel) (civilian defense counsel):

Q. _____ ?

A. _____ .

REDIRECT EXAMINATION

Questions by the (trial counsel) (assistant trial counsel):

Q. _____ ?

A. _____ .

RE-CROSS-EXAMINATION

Questions by the (defense counsel) (assistant defense counsel) (civilian defense counsel):

Q. _____ ?

A. _____ .

EXAMINATION BY THE COMMISSION

Questions by (the military judge) (member's name):

Q. _____ ?

A. _____ .

REDIRECT EXAMINATION

Questions by the (trial counsel) (assistant trial counsel):

Q. _____ ?

A. _____ .

RE CROSS-EXAMINATION

Questions by the (defense counsel) (assistant defense counsel) (civilian defense counsel):

Q. _____ ?

A. _____ .

a. Bench conferences and R.M.C. 803 sessions.

Note. Bench conferences and R.M.C. 803 sessions should be recorded and incorporated in the record of trial. *See* R.M.C. 803.

b. Examination of record by defense counsel.

Note. When the defense counsel has examined the record of trial prior to its being forwarded to the Convening Authority, the following form is appropriate:

“I have examined the record of trial in the foregoing case.
(Captain) (Lieutenant) _____, Defense Counsel.”

Note. If defense counsel was not given the opportunity to examine the record before authentication, the reasons should be attached to the record. *See* R.M.C. 1103(e).

c. Authentication of record of trial.

Note. The authentication should be dated.

(Captain) (Colonel) _____, Military Judge [or (LTJG)(1LT) _____, Trial Counsel,] because of (death) (disability) (absence) of the military judge] [or (LCDR) (Major), a member in lieu of the military judge and the trial counsel because of (death) (disability) (absence) of the military judge, and of (death) (disability) (absence) of the trial counsel].

Note. If the rank of any person authenticating the record has changed since the commission, the current rank should be indicated, followed by “formerly (list the former rank).”

d. Exhibits. *See* R.M.C. 1103(b)(2)(D) and (b)(3).

Note. Following the end of the transcript of the proceedings, insert any exhibits which were received in evidence, or, with the permission of the military judge, copies, photographs or descriptions of any exhibits which were received in evidence, followed by exhibits marked/offered, but not admitted, and any appellate exhibits.

e. Attachments.

Note. Attach to the record the matters listed in R.M.C. 1103(b)(2).

f. Certificate of correction. *See* R.M.C. 1104(f)

Note. The certificate should be dated.

United States

v.

The record of trial in the above case, which was tried by military commission convened by _____, _____ dated _____, at _____ is corrected by the insertion on page _____, immediately following line _____, of the following: _____

“[The detailed reporter, _____ was sworn.]”

This correction is made because the reporter was sworn at the time of trial but a statement of that effect was omitted, by error, from the record.

R.M.C. 1104(f) has been complied with.

Note. The certificate of correction is authenticated as indicated above for the record of trial in the case.

Copy of the certificate received by me this _____ day of _____.

(Signature of accused)

(Name of accused)

Note. The certificate of correction will be bound at the end of the original record immediately before the action of the Convening Authority.

g. Additional copies of the record. An original and a minimum of four copies of the record will be prepared of a verbatim record. In a joint or common trial, an additional copy of the record must be prepared for each accused. *See* R.M.C. 1103(b). Provide a complete copy of the record of trial by traceable means to defense counsel. If the record contains classified or protected information, defense counsel shall have access to an unredacted record.

RECORD OF TRIAL

(and accompanying papers)

of

(Name: Last, First, Middle Initial)

By

MILITARY COMMISSION

Convened by the Convening Authority under Chapter 47A of Title 10 USC §948h

(Name of Convening Authority)

Tried at

(Place or Places of Trial)

on

(Date or Dates of Trial)

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM – This form and the M.M.C., Rule 1103, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial for trials by military commission.

COPIES – See R.M.C. 1103(b). The convening authority may direct the preparation of additional copies.

ARRANGEMENT – When forwarded to the convening authority for review, the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 5, 6, and 13e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 12 will be inserted by either trial counsel or the convening authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of MC Form 490.
2. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
3. Briefs of counsel submitted after trial, if any.
4. MC Form 490, "Commission Data Sheet."
5. Military Commission orders promulgating the result of trial as to each accused, in 10 copies.
6. When required, signed recommendation of legal advisor, in duplicate, together with all clemency papers, including clemency recommendation by commission members.
7. Matters submitted by the accused.
8. MC Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).
9. Congressional inquiries and replies, if any.
10. Advice of legal advisor.
11. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

12. Records of former trials.

13. Record of trial in the following order:

- a. Errata sheet, if any.
- b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt
- c. Record of proceedings in court, including R.M.C. 803 sessions, if any.
- d. Authentication sheet, followed by certificate of correction, if any.
- e. Action of convening authority.
- f. Exhibits admitted in evidence.
- g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
- h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.

CHRONOLOGY SHEET ¹

In the case of _____
(Name of Accused and ISN)

Date of alleged commission of earliest offense tried: _____ , _____
(Enter Date)

Date record forwarded to Court of Military Commission Review: _____ , _____
(Enter Date)

(Signature and Rank of Legal Advisor)

<p>1 The Trial counsel is responsible for completion of the Chronology Sheet. Trial counsel should report any authorized deductions and reasons for unusual delay in the trial of the case.</p> <p>2 In computing days between two dates, disregard the first day and count the last day. The actual number of days in each month will be counted.</p> <p>3 Only this item may be deducted.</p> <p>4 If no further action is required, items 1 to 8 will be completed and chronology signed by such convening authority or his/her representative.</p>	<p>ACTION</p>	<p>DATE _____</p>	<p>CUMULATIVE ELAPSED DAYS ²</p>
	1. Charges sworn (date of affidavit)		
	2. Charges received by convening authority		
	3. Charges referred to trial		
	4. Sentence or acquittal		
	Less days:		
	Delay at request of defense		
	Total authorized deduction ³		
	5. Net elapsed days to sentence or acquittal		
	6. Record received by convening authority		
	Action ⁴		

REMARKS

RECORD OF TRIAL

of

_____ (Name: last, first, middle initial)

_____ (Identification number)

By

MILITARY COMMISSION

Convened by the Convening Authority under 10 USC §948h

_____ (Name of Convening Authority)

Tried at

_____ (Place or places of trial)

on

_____ (Date or dates of trial)

INDEX	RECORD
RMC 803 Sessions:	
On	R-
On	R-
On	R-
On	R-
Introduction of counsel	R-
Challenges	R-
Arraignment	R-
Motions	R-
Pleas	R-
Prosecution evidence	R-
Defense evidence	R-
Instructions on findings	R-
Findings	R-
Prosecution evidence	R-
Defense evidence	R-
Sentence	R-
Appellate rights advisement	R-
Proceedings in revision	R-

TESTIMONY

NAME OF WITNESS (last, first, middle initial)	DIRECT AND INDIRECT	CROSS AND RECROSS	COURT
PROSECUTION			
DEFENSE			
COURT			

EXHIBITS ADMITTED IN EVIDENCE

NUMBER OR LETTER	DESCRIPTION	PAGE WHERE –	
		OFFERED	ADMITTED

COPIES OF RECORD ¹

_____ copy of record furnished the accused or defense counsel as per attached certificate or receipt.

_____ Copy(ies) of record forwarded herewith.

RECEIPT FOR COPY OF RECORD ²

I hereby acknowledge receipt of a copy of the record of trial in the case of United States v. _____,

delivered to me at _____ this _____ of _____, _____

(Signature of accused)

I hereby acknowledge receipt of a copy of the record of trial in the case of United States v. _____,

delivered to me at _____ this _____ of _____, _____

(Signature of accused)

¹ For instructions as to preparation of copies of record, see Chapters 18-5 and 22 of this Regulation.

² If copy of record prepared for accused contains matters requiring security protection, see RMC 1104(d).

CERTIFICATE IN LIEU OF RECEIPT

(Place)

(Date)

I certify that on this date a copy of the record of trial in the case of United States v. _____
was transmitted (delivered) to the accused, _____
(Name of accused)

at _____, by _____
(Place of delivery, or address sent to) (Means of effecting delivery, e.g, mail, messenger, etc.)

and that the receipt of the accused had not been received on the date this record was forwarded to the convening authority. The receipt of the accused will be forwarded as soon as it is received.

(Signature of trial counsel)

OR

(Place)

(Date)

I certify that on this date a copy of the record of trial in the case of United States v. _____
was transmitted (delivered) to the accused's defense counsel, _____
(Rank and Name)

at _____, by _____
(Place of delivery, or address sent to) (Means of effecting delivery, i.e., mail, messenger, etc.)

because (it was impracticable to serve the record of trial on the accused because he/she was transferred to _____
_____) (the accused requested such at trial) (the accused so
(Place)

requested in writing, which is attached) (_____)
(Other reason)

(Signature of trial counsel)

OR

The accused was not served personally because (_____)
(Other reason)

_____).

Accused has no defense counsel to receive the record because (defense counsel has been excused under RMC 505(d)(2)(B))
(_____)
(Other reason)

(Date)

(Signature of trial counsel)

Chapter 23

POST-TRIAL ACTION—INITIAL REVIEW AND ACTION

23-1. GENERAL

After the record of trial is transcribed and authenticated, the record of trial is forwarded to the Legal Advisor for the preparation of the Legal Advisor's recommendation and, ultimately, the Convening Authority's action. The accused will have an opportunity to submit matters to the Convening Authority prior to the Convening Authority's action on the findings and sentence. The Convening Authority's post-trial action is the initial review of the findings and sentence of the accused's military commission conviction.

23-2. POST-TRIAL ADVICE

a. In accordance with R.M.C. 1010, prior to adjournment, the military judge will ensure that the defense counsel has informed the accused orally and in writing of the following post-trial and appellate rights:

1. The right to submit matters to the Convening Authority to consider before taking action;
2. The right to appellate review and the effect of waiver or withdrawal of such right; and
3. The right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

This advice will be signed by the accused and the defense counsel and inserted in the record of trial as an appellate exhibit.

b. If the accused is represented by more than one counsel at trial, the accused will designate which counsel (detailed or civilian) will be served with the post-trial recommendation. If there is no designation, the Legal Advisor will cause the recommendation to be served in the following order of precedence as applicable: (1) civilian defense counsel or (2) detailed defense counsel. If the accused has not retained civilian counsel and the detailed defense counsel has been relieved or is not reasonably available to represent the accused, substitute military counsel to represent the accused shall be detailed by an appropriate authority. Substitute counsel shall attempt to enter into an attorney client relationship with the accused before examining the recommendation and preparing any response. *See* R.M.C. 1106(e)(2).

23-3. MATTERS SUBMITTED BY THE ACCUSED

a. After the sentence is adjudged, the accused may submit any matters to the Convening Authority that may reasonably tend to affect the Convening Authority's decision whether to disapprove any findings of guilty or to approve the sentence. The

Convening Authority is only required to consider written submissions. *See* R.M.C. 1105.

- b. The accused may submit matters within the later of 20 days after service of:
 - 1. A copy of the authenticated record of trial or;
 - 2. If applicable, the recommendation of the Legal Advisor; or
 - 3. An addendum to the recommendation containing new matter is served on the accused.
- c. For good cause shown, the Convening Authority or the Legal Advisor to the Convening Authority may grant one 20-day extension upon written request by the accused. Only the Convening Authority may deny a request for an extension.
- d. Failure to submit matters within the time prescribed is deemed a waiver of the right to submit matters. Submission of matters is deemed a waiver of the right to submit any additional matters. *See* R.M.C. 1105 to determine what matters may be included in the submissions by the accused.

23-4. RECOMMENDATION OF LEGAL ADVISOR

- a. *Legal Advisor's recommendation.* R.M.C. 1106 establishes the requirements and contents for the Legal Advisor's recommendation. Although the Legal Advisor does not have to personally prepare the advice, he or she must personally sign the memorandum. The Legal Advisor's recommendation should be a clear and concise recommendation written in a memorandum format containing the information required by R.M.C. 1106.
- b. *Addendum to the Legal Advisor's recommendation.* R.M.C. 1106(e)(7) provides that the Legal Advisor may supplement the recommendation to address matters raised in the defense submissions. When a new matter is introduced, however, the defense counsel and accused must be served with the new matter and given 20 days from service in which to submit comments.

23-5. ACTION BY CONVENING AUTHORITY

The Convening Authority may take action only after the applicable time periods under R.M.C. 1105(b) have expired or the accused has waived the right to present matters under R.M.C. 1105(d) whichever is earlier.

23-6. WHEN IMPRACTICABLE FOR CONVENING AUTHORITY TO ACT

If it is impracticable for the person who has been appointed the Convening Authority by the Secretary of Defense pursuant to 10 U.S.C. § 948h to take action as the Convening

Authority, that person shall cause the record of trial to be forwarded to the Secretary of Defense to take action as a Convening Authority or to another officer or official the Secretary of Defense has appointed as a Convening Authority pursuant to the M.C.A. to take action. The letter or message which causes the record of trial to be forwarded shall contain a statement of the reasons why the normal Convening Authority could not act on the record of trial, and any other matters deemed appropriate by the forwarding official. *See* R.M.C. 1107.

23-7. MATTERS TO BE CONSIDERED

The Convening Authority shall follow the provisions of R.M.C. 1105(a) and 1107 in taking action on post-trial matters. The Convening Authority may, in his or her sole discretion, approve, disapprove, commute or suspend the sentence in whole or in part. The Convening Authority may not increase a sentence beyond that which is found by the military commission.

23-8. COMPANION CASES TRIED SEPARATELY

In military commission cases where there are separate trials of a companion case or co-accused, the Convening Authority shall so indicate in his or her action on the record in each case. The Convening Authority will also indicate on the front of the record of trial the name of the co-accused or companion case. If there are none, indicate ~~no~~ "no co-accused cases."

23-9. PUBLISHING THE ACTION

a. *Publishing the action.* The result of the military commission and the action taken on the proceedings, findings or sentence of a military commission by the Convening Authority shall be published by a promulgating order. The promulgating order and Convening Authority's action may be contained within the same document. The Convening Authority will personally sign the action. A separate action will be issued for each accused in the case of a joint or common trial.

b. *Not guilty findings.* In any case which results in a finding of not guilty on all charges and specifications, the Convening Authority shall not take any action approving or disapproving the findings of not guilty or any ruling amounting to a finding of not guilty; however, a promulgating order shall be issued publishing the result of the military commission. The promulgating order will indicate the case resulted in an acquittal on all charges and specifications and include the charges and specifications, findings and appropriate signature. *See* R.M.C. 1106(d).

c. *Contents of order.* The promulgating order shall contain the type of military commission (non-capital or capital); 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.

d. *Dates.* A promulgating order shall bear the date of the initial action, if any, of the Convening Authority. An order promulgating an acquittal, a military commission terminated before findings, a military commission resulting in a finding of not guilty by reason of lack of mental responsibility of all charges and specifications, or action on the findings or sentence taken after the initial action of the Convening Authority shall bear the date of its publication. A promulgating order shall state the date the sentence was adjudged, the date on which the acquittal was announced or the date on which the proceedings were otherwise terminated.

e. *Numbering the orders.* Each promulgating order and supplementary order is unique and numbered in a separate sequence, starting with 1-CY (where “CY” is the calendar year in which the order is signed) to identify the first promulgating order or supplementary order of the calendar year and continuing with 2-CY, 3-CY, etc., as a subsequent promulgating order or supplementary order is issued during the same calendar year.

f. *Orders containing classified or protected information.* When an order contains information that is classified or protected, only the order retained in the original copy of the record of trial shall contain the classified or protected information. The order shall be assigned the appropriate security classification or designation as protected. The order shall be forwarded to the DoD Security Classification/Declassification Review Team and/or the appropriate original classification authority of any pertinent non-DoD federal department and agency for preparation of a publicly releasable version in accordance with the schedule outlined in Chapter 19-4.

g. *Authentication.* The promulgating order shall be authenticated by the signature of the Convening Authority 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.

h. *Order form.* Various model forms for promulgating orders are contained in Appendix 17, Manual for Courts-Martial. The order shall be subscribed by the Convening Authority approving the action. The name, title and authority shall be given. Where an officer signs by direction of the Convening Authority, his or her name, title, and organization shall be followed by the words: “By direction of [name, and title of issuing officer].”

i. *Distribution.* Regardless of the sentence approved, the promulgating order will be distributed as follows:

1. One copy to the individual tried;

2. One copy each to the military judge, trial counsel and defense counsel of the military commission at which the case was tried;
3. One copy to the Chief of the Office of Court Administration;
4. One copy to the Clerk of Court, United States Court of Military Commission Review;
5. One copy to the Secretary of Defense;
6. One copy each to the commanding officer of the installation and to the facility where the individual tried is confined; and
7. Five copies in the original record of trial, one copy in the remaining copies of the ROT.

23-10. NOTICE OF ACTION

The Convening Authority shall serve the action on the accused or on the defense counsel. If the defense counsel is served, then the defense counsel will provide the accused with a copy of the action by the most expeditious means possible. *See R.M.C. 1107(h).*

23-11. SUPPLEMENTAL ORDERS

a. *Supplemental orders.* The Convening Authority will issue a promulgating order in every military commission. Any action taken after issuance of the initial order that changes the findings or sentence requires a supplementary order. The Convening Authority or Secretary of Defense or his or her designee will prepare the supplementary order with distribution the same as that of the initial order.

b. *When supplementary orders are not required.* Where the findings and sentence set forth in the initial promulgating order are affirmed without modification upon subsequent review of the case, no supplementary promulgating order is required except as necessary to order the execution of the sentence or to designate a place of confinement.

c. *Supplemental orders in United States Court of Military Commission Review cases.* If the sentence was ordered executed or suspended in its entirety by the Convening Authority or other authority and the approved findings and sentence have been affirmed without modification by the USCMCR and, in appropriate cases, the U.S. Court of Appeals for the District Court of Columbia Circuit or the U.S. Supreme Court, no supplementary order is necessary. A supplementary order shall be issued in all other cases.

23-12. INSPECTION OF RECORD OF TRIAL CONTAINING CLASSIFIED INFORMATION

In the event classified or protected information has been deleted or withdrawn from the copy of any military commission record of trial provided to defense counsel or the accused, other than those portions concerning *ex parte* communications from which the defense was originally excluded, appropriately cleared defense counsel may personally examine the original record of trial in the Office of Military Commissions after final review in the case has been completed. Requests for such inspection may be submitted to the Chief of the Office of Court Administration, Office of the Convening Authority, 1600 Defense Pentagon, Washington, DC 20301-1600.

Figure 23.1 – Sample Promulgating Order

MILITARY COMMISSION)	Convening Authority
)	Office of Military Commissions
ORDER NO. A-6)	1600 Defense Pentagon
)	Washington, DC 20301-1600
)	
)	2 March 2010
_____)	

Before a Military Commission, which convened at U.S. Naval Station, Guantanamo Bay, Cuba pursuant to Military Commission Convening Order No. A-1, dated 1 January 2010, as amended, was arraigned and tried:

John P. Jones (alias “Mike”), ISN: XX1234, (of Yemen).

The accused was arraigned and tried on the following offenses and the following findings or other dispositions were reached:

CHARGE I: Murder of Protected Person. Plea: Not Guilty. Finding: Guilty

Specification: Did kill Emerson Kelly, a protected person.

CHARGE II: Cruel or Inhumane Treatment. Plea: Not Guilty. Finding: Guilty

Specification: Did inflict severe mental pain with the intent to cause suffering of four U.S. citizens.

CHARGE III: Rape. Plea: Not Guilty. Finding: Not Guilty, but Guilty of Sexual Assault

Specification: Did wrongfully touch the genital opening of one U.S. citizen, with a foreign object.

CHARGE IV: Mutilating or Maiming. Plea: Not Guilty. Finding: Guilty

Specification: Did unlawfully and permanently disfigure the face of Amanda Johnson.

SENTENCE

The following sentence was adjudged by the members on 2 March 2010: Confinement for Life.

ACTION

In the case of John P. Jones (Alias "Mike"), ISN: XX1234, (of Yemen), the sentence is approved and will be executed. The accused will be confined in such place as may be prescribed by the Commander, Joint Task Force Guantanamo Bay, Cuba or superior authority.

Convening Authority
For Military Commissions

Chapter 24

POST-TRIAL APPELLATE REVIEW

24-1. GENERAL

This chapter provides information and procedures pertinent to appeal of convictions and sentence by military commissions pursuant to the M.C.A. and R.M.C. 1201-1209.

24-2. AUTOMATIC REVIEW BY THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW (USCMCR)

a. *Records to the USCMCR.* After the Convening Authority's action in each case in which the Convening Authority approved a finding of guilty, the Convening Authority will forward the complete and original record of trial, as well as four copies of that record of trial, to the Clerk of Court, USCMCR. The record of any post-trial session or rehearing will be appended to the original record of trial. Those records will be accompanied by a transmittal letter containing the identifying data for the accused, the dates of trial and the date of the Convening Authority's action, as well as any subsequent action.

b. *Waiver or withdrawal of appellate review by the USCMCR.* For any case resulting in an approved finding of guilty, but not including an approved sentence of death, an accused may waive appellate review or, if appellate review is already in progress, may withdraw his case from review by using MC Form 2330, Waiver/Withdrawal of Appellate Rights in Military Commissions Trials (Figure 24-1).

1. The accused may waive appellate review at any time within 10 days after being served with a copy of the Convening Authority's action. The accused may effect this waiver by submitting a completed MC Form 2330 to the Office of Military Commissions, 1600 Defense Pentagon, (3B652), Washington, D.C. 20301-1600. The request for waiver must be signed by the accused and his defense counsel pursuant to 10 U.S.C. § 950c(2). The deadline for submitting a waiver may be extended by the Convening Authority, at the request of the accused or his counsel, until a date not later than 40 days after the Convening Authority's action.

2. Following expiration of the period during which the accused may waive appellate review, the accused may withdraw his case from appellate review by completing and signing MC Form 2330, indicating thereon that he is requesting withdrawal, and submitting the form to the Clerk of Court, USCMCR. If the Convening Authority has already transmitted the record of trial to the USCMCR at the time the accused's request for withdrawal is received, the Convening Authority shall cause the MC Form 2330 to be transmitted to the Clerk of Court, USCMCR. However, if the Convening Authority or the USCMCR determines that the record of trial has been acted on by the USCMCR, or that the accused properly waived USCMCR review and that the case is pending before a higher appellate court, the Convening Authority or the Clerk of Court, USCMCR, as applicable, will cause the MC Form 2330 to be transmitted to the appropriate clerk of court.

3. Once submitted, a properly completed MC Form 2330, whether electing waiver or withdrawal of the USCMCR appellate process, may not be withdrawn.

4. USCMCR appellate review is mandatory for any case in which the Convening Authority has approved a sentence of death.

5. The Legal Advisor to the Convening Authority shall review any waivers or requests for withdrawal submitted to the Convening Authority for completeness. The USCMCR should decide the legal sufficiency of waivers.

6. This subsection does not apply to appeals before the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) or writs of certiorari to the United States Supreme Court. 10 U.S.C. §§ 950c, 950f and 950g.

c. Scope of Review. See 10 U.S.C. § 950f(d).

24-3. RELEASE OF USCMCR DECISIONS

Publicly releasable USCMCR decisions are those versions of such decisions that contain no classified or protected information, or from which all such information has been redacted by the DoD Security Classification/Declassification Review Team and/or a pertinent non-DoD federal department and agency. Decisions containing classified or protected information will be made available to the parties through appropriate communication channels.

24-4. SERVING USCMCR DECISIONS ON THE ACCUSED

a. A copy of each USCMCR decision (opinion or order disposing of an appeal or petition) must be served as expeditiously as possible on each accused and counsel for the accused and a record maintained of the date and manner of service.

b. The USCMCR Clerk of Court is responsible for serving decisions on counsel for the accused. In cases where all of the accused's appellate counsel are military counsel, service of the decision on the OCDC for Military Commissions will constitute service on the accused's appellate counsel of record.

c. The USCMCR Clerk of Court will provide the decision copy and a copy to be placed in the accused's correctional file to the convening authority currently exercising jurisdiction over the accused. If the authority who receives the correspondence is not currently exercising authority over the accused, he or she will cause the correspondence to be sent by endorsement to the new authority over the accused, with a copy of the endorsement to the USCMCR Clerk of Court.

d. Information copies of decisions will be sent to the confinement facility in which the accused is confined and to the convening authority at the time of trial and the convening authority who took initial action on the record of trial if one or both of them are different from the convening authority indicated in Chapter 23-9(c) above.

e. The Convening Authority will cause the USCMCR decision to be served on the accused in person whenever possible.

1. In addition to the decision, unless the decision sets aside all findings of guilt and the sentence and dismisses the charges, the accused will be given a completed copy of MC Form 4917, five copies of MC Form 4918 (on which the accused's name and the USCMCR docket number will be entered) and a postage paid envelope addressed to the D.C. Circuit.

2. The person who served the decision personally on the accused will complete the certificate in Section A of MC Form 4916 (Certificate of Service/Attempted Service) and ensure that the original and two copies are sent to the Clerk of Court, USCMCR.

3. If personal service cannot be made because the accused is no longer in confinement, Section B of MC Form 4916 will be used to certify the circumstances. The original and two copies with any available documentary evidence of the absence will be sent to the Clerk of Court, USCMCR.

4. If there is any other reason, such as illness of an accused, that appears to preclude personal service, the Clerk of Court, USCMCR should be contacted for advice.

5. As soon as the decision is mailed, the person mailing it must complete item 1 of Section C, MC Form 4916. The form is then held for return of service to the Clerk of Court, USCMCR, when the earliest of the following happens:

A. The signed certified mail receipt, PS Form 3811 (Domestic Return Receipt), is received (complete item 2a, Section C, MC Form 4916).

B. The packet is returned undeliverable (complete item 2b, Section C, MC Form 4916).

C. Sixty-five days have passed since the decision was mailed and nothing has been returned or received (complete item 2c, Section C, MC Form 4916).

6. When Section C of MC Form 4916 is used, the return of service to the Clerk of Court, USCMCR, will include the original and two copies of the completed MC Form 4916, and any material returned by the USPS, such as the signed return receipt (PS Form 3811), the receipt for certified mail, PS Form 3800 (Certified Mail Receipt) or the unopened envelope with its contents.

7. If a petition for grant of review by the D.C. Circuit is received by the Convening Authority, the date of receipt will be noted and the petition will be forwarded to the D.C. Circuit immediately.

24-5. APPELLATE COUNSEL

- a. Appellate trial counsel may represent the United States before the D.C. Circuit and the Supreme Court of the United States, if requested to do so by the Attorney General of the United States.
- b. The Government shall be represented before the USCMCR by counsel appointed for that purpose by the Chief Prosecutor. The Chief Prosecutor may appoint one or more counsel who prosecuted the case before a military commission. Instead of or in addition to such counsel, the Chief Prosecutor may appoint, in his sole discretion, any other counsel assigned or available to the OMC-P. If no counsel are available for assignment as appellate counsel, the Chief Prosecutor shall transmit via the General Counsel, DoD, a request for nominations from the service Judge Advocates General for appellate military attorneys to represent the government. Individuals nominated must possess the qualifications set forth in the R.M.C. and Chapter 8 of this regulation.
- c. The accused will be represented by defense counsel appointed by the Chief Defense Counsel at all levels of appeal. Except in those cases in which ineffective assistance or another representational impediment is claimed by the accused, the Chief Defense Counsel may appoint the trial defense counsel to represent the accused on appeal. Instead of or in addition to such counsel, the Chief Defense Counsel may appoint, in his sole discretion, any other counsel assigned or available to the OCDC. The accused may elect to retain properly cleared civilian defense counsel at no expense to the government to represent him on appeal; however, detailed counsel must also be appointed.
- d. For cases in which the Convening Authority has approved a sentence of death, the accused shall have, in addition to a detailed counsel, at least one additional counsel who is learned in capital cases, qualified, selected and compensated in accordance with Chapter 9.
- e. Once appointed, appellate counsel who do not already have a copy of the record of trial will obtain a copy from the OMC-P (for government counsel) or from the detailed trial defense counsel (for appellate defense counsel). If the detailed trial defense counsel does not have a copy of the record of trial, appellate defense counsel will obtain a copy of the record of trial from the Chief of the Office of Court Administration, Office of Military Commissions, 1600 Defense Pentagon (3B652), Washington, D.C. 20301-1600.
- f. The accused may not represent himself in person before the United States Court of Military Commission Review. The accused, however, may file briefs with or without the assistance of counsel before the courts. See Chapter 25 of this regulation for information on communications between the USCMCR and the accused and counsel.
- g. Counsel will follow the court rules and procedures promulgated by the Chief Judge, USCMCR.

24-6. IDENTIFYING COMPANION AND OTHER CASES

a. The trial counsel will annotate the cover of each original record of trial forwarded for review under the M.C.A. to identify each person by name and identification number, if any, tried or expected to be tried separately for a case potentially subject to appellate review in an offense that is the same as or related to one tried in the case being forwarded. These co-accused, co-actors, or co-conspirators, as the case may be, will be identified under a heading “Companion Cases.” The purpose of this is to facilitate assignment of cases among the panels of the USCMCR and to avoid conflicts of interest in the assignment of appellate defense counsel. If there are no companion cases, the words “no companion cases” will be entered under the above heading.

b. In addition, the trial counsel will annotate the cover of each original record of trial forwarded for review under the M.C.A. to identify any prosecution witness or victim known to have been tried for any offense by the M.C.A. for a case potentially subject to appellate reviews pursuant to the M.C.A. so that potential conflicts of interest in the assignment of appellate defense counsel can be avoided.

24-7. REVIEW BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (D.C. Circuit)

a. Pursuant to 10 U.S.C. § 950g(a), the D.C. Circuit shall have exclusive jurisdiction to determine the validity of the final judgment rendered by a military commission.

b. *Procedure.*

1. A petition for review by the court of appeals must be filed with the court by the accused no later than 20 days after (1) the date on which the accused or defense counsel was served with written notice of the final decision of the USCMCR, or (2) the date on which the accused submitted a request to waive or withdraw appellate review by the USCMCR. *See* 10 U.S.C. 950g(c) and R.M.C. 1205. The Clerk of Court, USCMCR, is required to establish procedures to demonstrate when the accused is notified of the decision of the USCMCR. That notification date will be included in the record of trial provided to the D.C. Circuit.

2. In accordance with D.C. Circuit Rule 26(a)(1), in computing times prescribed for filings, “exclude the day of the event that triggers the period; count every day, including intermediate Saturdays, Sundays, and legal holidays; and include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.” Filing of a motion may be by mail addressed to the Clerk, but the papers must reach the Clerk’s Office within the time prescribed in the D.C. Circuit’s Rules. Only briefs, not motions or other filings, are timely if mailed on the date due. The Court, however, prefers to receive briefs on the date due. Briefs must be filed according to the schedule set by the Court and in compliance with the D.C. Circuit’s requirements.

3. Petitions may be filed by mailing or delivering the petition to the United States Court of Appeals for the District of Columbia Circuit, E. Barrett Prettyman United States Courthouse, (Attn: Clerk of Court, Room 5423), 333 Constitution Avenue, N.W. Washington, D.C. 20001-2866. The public office is on the fifth floor in Room 5423. Filings may be made at the public office between 9:00 a.m. and 4:00 p.m. on regular business days. Additionally, most filings may be left in a drop box located at the John Marshall entrance of the Courthouse. Instructions, including size limitations for filings to be left in the drop box, are contained in the Court's *Handbook of Practice and Internal Procedures* 10 (2002), and are available at the public counter of the Clerk's Office, and on the Court's website at www.cadc.uscourts.gov. Counsel should not leave filings containing classified, confidential or sealed materials in the drop box. Only the Clerk or the Court can approve filing by FAX in an emergency.

c. Counsel should refer to the Court's Rules at www.cadc.uscourts.gov to ensure all filings are in compliance with the Federal Rules of Appellate Procedure and the Circuit Rules.

d. *Scope of D.C. Circuit Review.* See 10 U.S.C. § 950g(d). The D.C. Circuit reviews findings and sentences as approved by the Convening Authority and affirmed or set aside by the USCMCR for errors of law.

24-8. REVIEW BY THE UNITED STATES SUPREME COURT

a. The United States Supreme Court may review the final judgment of the D.C. Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254.

b. The accused has 90 days from the date of entry of the final judgment of the D.C. Circuit to file a petition for a writ of certiorari.

c. Filing in the United States Supreme Court means the actual receipt of documents by the Clerk; or their deposit in the United States mail, with first-class prepaid postage, on or before the final date allowed for filing; or their delivery to a third-party commercial carrier, on or before the final date allowed for filing, for delivery to the Clerk within 3 calendar days.

d. All documents to be filed in the United States Supreme Court must be addressed to the Clerk, Supreme Court of the United States, Washington, D.C. 20543, and must be served on opposing parties or their counsel in accordance with the Court's Rules.

e. See the Rules of the United States Supreme Court at www.supremecourtus.gov for requirements on filing materials before the Court.

24-9. CASES REMANDED BY USCMCR, UNITED STATES COURT OF APPEALS OR UNITED STATES SUPREME COURT

a. When a decision of the USCMCR, the D.C. Circuit, or the United States Supreme Court directs or authorizes further proceedings, such as a rehearing, a limited hearing, or a new action by the Convening Authority, the Convening Authority shall cause the accused to be located and furnished a copy of the decision. Further proceedings in USCMCR cases need not be delayed, however, solely to permit an accused to petition the D.C. Circuit or the United States Supreme Court for a grant of review or to otherwise appeal the matter.

b. Any special instructions deemed necessary to carry out the mandate of the reviewing court will be transmitted by the Clerk of Court, USCMCR, with the record of trial that was remanded. All copies of the record of trial remanded should be returned with the record of further proceedings. The original and any copies of a record of trial that was remanded for further proceedings must remain intact except for documents needed for reintroduction in the further proceedings, such as the original Charge Sheet and exhibits to be readmitted into evidence. Documents and copies of documents withdrawn should be replaced if not used, or, if used, replaced by a trial counsel memorandum explaining their disposition. In particular, the original copies of a decision of a court, action of a Convening Authority, post-trial review or recommendation, and pretrial advice must not be withdrawn. In addition to any new document in the nature of a pretrial advice and referral to a military commission, the authenticated record of further proceedings must be accompanied by the original of any new action by a Convening Authority and the same number of copies of an order promulgating the action as required when a record is initially forwarded for review. In the absence of specific advice to the contrary, the Convening Authority should consider that an accused's right to timely disposition of criminal charges, right to address matters to a Convening Authority, and right of counsel to comment on a Legal Advisor's recommendation to the Convening Authority apply to the further proceedings.

24-10. FINALITY OF PROCEEDINGS

a. *Finality.* The appellate review of records of trial provided pursuant to the M.C.A. and the proceedings, findings, and sentences of military commissions as approved, reviewed, and affirmed under this process and procedures are conclusive. Orders publishing the proceedings of military commissions are binding on all departments, courts, agencies and officers of the United States except as otherwise provided by the President.

b. *Final orders.* The Convening Authority shall issue final orders in cases that:

1. Are returned from the appellate courts for action in accordance with the decision of the court;

2. Implement the decision of the President to approve or to commute the sentence of death adjudged by the military commission; and

3. Involve a waiver of appellate review by the accused.

**WAIVER/WITHDRAWAL OF APPELLATE RIGHTS IN MILITARY COMMISSIONS TRIALS
SUBJECT TO REVIEW BY THE COURT OF MILITARY COMMISSION REVIEW**

NOTE: See R.M.C. 1201(c) concerning which cases are subject to review by the United States Court of Military Commission Review (USCMCR). See R.M.C. 1110 concerning waiver or withdrawal of appellate review.

I have read the attached action dated _____.

I have consulted with _____, my (appellate) (associate) (substitute) defense counsel concerning my appellate rights and I am satisfied with his/her advice.

I understand that:

1. If I do not waive or withdraw appellate review -
 - a. My military commission trial will be reviewed by the USCMCR.
 - b. The USCMCR will review my case, ensuring that the findings and sentence are correct in law and fact.
 - c. After review by the USCMCR, I may petition the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals) to review my case.
 - d. Decisions of the Court of Appeals may be reviewed by the Supreme Court of the United States (Supreme Court) by writ of certiorari.
 - e. I have the right to be represented by military counsel, at no cost to me, or by civilian counsel, at no expense to the United States, or both, before the USCMCR, the Court of Appeals, and the Supreme Court.
2. If I waive or withdraw from appellate review -
 - a. My case will not be reviewed by the USCMCR, or be subject to further review by the Court of Appeals, or by the Supreme Court under 28 U.S.C. 1259.
 - b. I may petition the Convening Authority for a new trial under R.M.C. 1210 on the ground of newly discovered evidence or fraud on the military commission. Such a petition must be filed within 2 years of the convening authority's approval of the sentence. A petition may not be submitted after my death. A petition for a new trial of the facts may not be submitted on the basis of newly discovered evidence when the accused was found guilty of the relevant offense pursuant to a guilty plea.
 - c. A waiver or withdrawal, once filed, cannot be revoked, and bars further appellate review.

Understanding the foregoing, I (waive my rights to appellate review) (withdraw my case from appellate review). I make this decision freely and voluntarily. No one has made any promises that I would receive any benefits from this waiver/withdrawal, and no one has forced me to make it.

TYPED NAME OF ACCUSED

ISN NUMBER OF ACCUSED (LAST FOUR)

SIGNATURE OF ACCUSED

DATE

STATEMENT OF COUNSEL

(Check appropriate block)

- 1. I represented the accused at his/her military commission trial.
- 2. I am associate appellate counsel detailed under R.M.C. 1110(b)(2)(B). I have communicated with the accused's (detailed) (civilian) defense counsel concerning the accused's waiver/withdrawal and discussed this communication with the accused.
- 3. I am substitute counsel detailed under R.M.C. 1110(b)(2)(C).
- 4. I am a civilian counsel whom the accused consulted concerning this matter. I am a member in good standing of the bar of _____.
- 5. I am appellate defense counsel for the accused.

I have advised the accused of his/her appellate rights and of the consequences of waiving or withdrawing appellate review. The accused has elected to (waive) (withdraw) appellate review.

_____	_____
TYPED NAME OF COUNSEL	UNIT OF COUNSEL
_____	_____
RANK OF COUNSEL	BUSINESS ADDRESS (If Civilian Counsel)
_____	_____
SIGNATURE OF COUNSEL	DATE

Chapter 25

THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW (USCMCR)

25-1. GENERAL

This chapter implements 10 U.S.C. §§ 949b, 950c and 950f.

25-2. THE USCMCR

a. *The court.* The USCMCR is established by 10 U.S.C. § 950f. A USCMCR judge must either be serving or have served as an appellate military judge on a service's Court of Criminal Appeals (CCA) who meets the qualifications set forth in 10 U.S.C. § 950f(b)(2) or must have been appointed to the USCMCR by the President, by and with the advice and consent of the Senate.

b. *Qualifications.*

1. Appellate military judges. As required by Chapter 47A of Title 10 U.S.C. § 948j(b), an appellate military judge serving on the USCMCR ~~shall~~ be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under article 26 of the Uniform Code of Military Justice as a military judge of general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.”

2. Other appellate judges. The President may appoint other appellate judges to the USCMCR under 10 U.S.C. § 950f(3).

3. Disqualification. No person may serve on the USCMCR as an appellate judge in any case in which that person acted as a military judge, counsel or reviewing officer.

c. *Selection of appellate military judges to serve on the USCMCR.* Each Judge Advocate General will nominate four appellate military judges for assignment as appellate judges on the USCMCR. All nominees must be currently certified as appellate military judges. Each nominee must be detailed as an appellate judge to one of the service Courts of Criminal Appeals (CCAs) at the time of nomination, but need not be so detailed to a service CCA while subsequently serving on the USCMCR. Nominees may be retired-retained officers. Of these nominees and any appointees under 10 U.S.C. § 950f(b)(3), the Secretary of Defense will assign no fewer than three appellate judges to the USCMCR. Each appellate military judge assigned to the USCMCR shall remain assigned to the Court unless reassigned, retired or separated from active duty pursuant to 10 U.S.C. § 949b(b)(4). When a service Judge Advocate General proposes reassignment of an appellate military judge serving on the USCMCR, the service Judge Advocate General will nominate a replacement appellate military judge for duty on the USCMCR. Appellate military judges serving on the

USCMCR may perform other military or legal duties, but USCMCR duties should take priority over all other duties. Once assigned as an appellate military judge serving on the USCMCR, at the discretion of the Secretary of Defense or his designee, a judge may continue to serve on the USCMCR so long as the judge remains in a judicial billet within his or her service and whose duties are not otherwise in conflict with continued service on the USCMCR. Additionally, officers assigned as USCMCR appellate military judges may continue to serve on the USCMCR at the discretion of the Secretary of Defense in a retired-retained status.

d. *Chief Judge and Deputy Chief Judge.* The Secretary of Defense, or designee, will designate from among those individuals nominated by the Judge Advocates General and from among others qualified to serve as appellate military judges, individuals to serve as the Chief Judge and Deputy Chief Judge of the USCMCR. The Chief Judge will serve for a term of two years and may be reappointed in the discretion of the Secretary or designee. The Deputy Chief Judge may exercise all the authority of the Chief Judge, subject to any restrictions imposed by the Chief Judge. The Chief Judge and Deputy Chief Judge may perform other military or legal duties; however, USCMCR duties should take priority over all other duties.

e. *Panels.* Except when the Court votes to consider a case *en banc*, the USCMCR shall consist of panels of not less than three appellate military judges. Judges will be assigned to the panels by the Chief Judge or his or her designee. Cases will be assigned to the panels by the Chief Judge or his or her designee. A majority of the judges must agree in a vote to consider a case *en banc*. The vote of any appellate military judge who has been reassigned under Chapter 25-2(f)(1)(3) and (4), or is beginning retirement leave within 90 days of the voting (*see* Chapter 25-2(f)(2)), or the vote of a civilian judge who has resigned or has been relieved of duty, will not be counted in a vote for *en banc* consideration. Furthermore, a judge who has been reassigned or retired shall not sit as part of the *en banc* panel.

f. *Reassignment of appellate military judges.* Pursuant to 10 U.S.C. § 949b(b)(4), no appellate military judge may be reassigned to other duties except under the circumstances set forth in section 949b(b)(4) and this chapter.

1. If the appellate military judge voluntarily requests reassignment, the request must be submitted to the Secretary of Defense, or his designee, via the appropriate Judge Advocate General. The Judge Advocate General shall forward the request along with a written recommendation as to disposition of the request to the Secretary of Defense or his designee. The Secretary of Defense, or his designee, will determine whether or not to approve the request and notify the appellate military judge via the appropriate Judge Advocate General. No appellate military judge may be reassigned under this provision until after the Secretary of Defense or his designee has approved reassignment.

2. If the appellate military judge retires or otherwise separates from the armed forces, the Judge Advocate General of the service of which the retiring or separating judge is a member shall promptly nominate a replacement appellate military judge. The appellate

military judge who is retiring or separating shall promptly notify the Chief Judge of the USCMCR of his or her decision to retire or separate from the armed forces.

3. Notwithstanding paragraph 1 above, the Secretary of Defense may reassign appellate military judges based on military necessity in consultation with the appropriate Judge Advocate General and any applicable service rotation regulations.

4. The Secretary of Defense may withdraw an appellate military judge from the USCMCR for cause in accordance with Chapter 47A of Title 10 U.S.C. § 949b(b)(4)(D) and the Uniform Code of Military Justice.

g. Designation of General Counsel. The General Counsel of the DoD is designated as the approval authority for requests for reassignment made pursuant to Chapter 25-2(f)(1).

h. Departure of other appellate judges. If a judge appointed to the USCMCR pursuant to 10 U.S.C. § 950f(b)(2) departs from the USCMCR for any reason, the Chief Judge shall notify the Secretary of Defense or his designee. If the departing judge is not replaced by the President, the Secretary of Defense may assign an additional appellate military judge from nominations previously received from the Judge Advocates General or, if necessary, request additional nominations.

i. Scope of review. For cases reviewed under 10 U.S.C. § 950f, the USCMCR may act only with respect to the findings and sentence as approved by the Convening Authority. The Court may affirm only such findings of guilty and the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses. *See* 10 U.S.C. § 950f(d).

25-3. RULES OF APPELLATE PROCEDURE

The Chief Judge of the USCMCR, in consultation with other members of the USCMCR, shall issue rules of practice and procedure for appellate review by the USCMCR consistent with the M.C.A., the M.M.C., and this Regulation.

25-4. CLERK OF COURT, UNITED STATES COURT OF MILITARY COMMISSION REVIEW

The General Counsel of the DoD shall appoint the Clerk of Court, the Deputy Clerk of Court, and all Assistant Clerks of Court. The Chief of the Office of Court Administration, Office of Military Commissions, will forward all records of trial to the Clerk of Court of the USCMCR. The Clerk of Court, USCMCR, receives records of trial, appeals by the United States, petitions for a new trial in pending cases, withdrawals of appeals and other appellate matters forwarded to the Court and acts in a ministerial capacity for the Court. The Clerk of Court will assist the Chief Judge in the overall administration of the Court and in the

management and assignment of cases. The Clerk of Court, Deputy Clerk of Court and Assistant Clerks of Court may perform other DoD duties; however, USCMCR duties take priority over all other duties.

25-5. INTERLOCUTORY APPEALS BY THE UNITED STATES

a. *General.* Pursuant to 10 U.S.C. § 950d and R.M.C. 908, the United States may take an interlocutory appeal to the USCMCR of any order or ruling of the military judge that:

1. Terminates proceedings of the military commission with respect to a charge or specification;

2. Excludes evidence that is substantial proof of a fact material in the proceeding; or

3. Relates to the closure of the proceedings from the public, the exclusion of the accused from certain proceedings, or the protection of classified matters pursuant to 10 U.S.C. § 949p-1 *et seq.*, or the protection of protected information.

The United States may not appeal an interlocutory order or ruling of the military judge or military commission that amounts to a finding of not guilty with respect to a charge or specification.

b. *Decision to appeal.* The trial counsel can request a delay of up to 72 hours after an order or ruling has been issued to determine whether to file an interlocutory appeal in a case. The trial counsel may not file notice of appeal unless authorized to do so by the Chief Prosecutor. Prior to a decision whether to appeal on issues that relate to the protection of national security information intelligence sources and methods, the ODNI must be meaningfully consulted.

c. *Certificate of notice of appeal.* In order to file an interlocutory appeal, the trial counsel must file a certificate of notice of appeal under R.M.C. 908(b)(2) with the military judge within five days after the date of the order or ruling. If the interlocutory appeal relates to classified information and the order or ruling is issued before trial, the certificate of notice of appeal must be filed with the military judge within ten days after the date of the order or ruling. *See* 10 U.S.C. § 950d(d). The certificate also will identify the date and time of the military judge's ruling or order to be appealed, the charges and specifications affected and the date and time of service on the military judge. The trial counsel will certify that the appeal is not taken for the purpose of delay and, if the order or ruling appealed is one that excludes evidence, that the evidence excluded is substantial proof of a fact material in the proceeding.

d. *Appeals forwarded.* In order to obtain authorization to file an interlocutory appeal, the trial counsel must forward the following to the Chief Prosecutor: the original record of trial and three copies of the verbatim record of trial (only those portions of the record

that relate to the issue to be appealed) or, if preparation of the record of trial has not been completed, a summary of the evidence and the proposed certificate of notice of appeal. If the decision is made not to file the appeal with the USCMCR, all copies of the record of trial will be returned to the trial counsel.

e. *The decision to appeal.* The trial counsel, after receiving the Chief Prosecutor's authorization and after consulting with the ODNI, if appropriate, will decide whether to file the appeal with the USCMCR and will notify the defense counsel and military judge of this decision by expeditious means.

f. *Appeals.* Once the decision to file the appeal is made, the appeal must be filed with the USCMCR within five days of the ruling. The USCMCR may act on matters of law only.

g. *Following the government appeal.*

1. *Notification of the decision.* The Clerk of Court of the USCMCR will notify the military judge and the Convening Authority of the government's decision to appeal, and the Convening Authority will ensure that the accused receives prompt notification of this decision. Whether the accused is notified orally on the record or by other means, the trial counsel's certificate as to the fact, date, and method of notification will be sent immediately to the Clerk of Court, USCMCR.

2. *Appeal from adverse ruling.* The United States may appeal an adverse ruling of the USCMCR within 10 days of the ruling to the United States Court of Appeals for the District of Columbia Circuit. Review shall be at that court.

ADVICE AS TO APPELLATE RIGHTS

NOTE: This form may be used to serve the Court of Military Commission Review (CMCR) decision by mail or as a guide to inform the accused of his rights when serving him personally.

TO: (Name and Address of Accused)	FROM: (Include Unit and Installation)
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1. In the attached decision, dated the _____ day of _____, _____ the Court of Military Commission Review (CMCR) in the Military Commission case of _____ (Name of Accused) _____ (Identification Number), _____ (Case Number) affirmed the findings of guilty and only so much of the sentence as provides for _____ (Partial affirmance of the findings of guilty and/or sentence)

2. You, _____ (Name of Accused), are hereby advised as follows:

a. You may petition the United States Court of Appeals for the District of Columbia Circuit with respect to any matter of law within (20) days from the time you or your defense counsel receive written notice of the final decision of the Court of Military Commission Review.

b. In connection with the preparation of the petition (the necessary forms are attached for your use) and representation before the Court of Appeals for the District of Columbia Circuit, you have the right either to have a civilian lawyer provided at no expense to the United States, a detailed military lawyer, or both a civilian lawyer and detailed military lawyer.

c. If you do not desire to petition the United States Court of Appeals for the District of Columbia Circuit, action will be taken to finalize your conviction and the sentence within (60) days from the time you receive the decision of the Court of Military Commission Review. Should you wish to finalize the findings of guilty as affirmed by the Court of Military Commission Review before such time, you may submit a "Request for Final Action," MC Form 4919 or submit a "Waiver/Withdrawal of Appellate Rights," MC Form 2330.

d. To assist you in making your determination of whether to petition the United States Court of Appeals for the District of Columbia Circuit, or whether to submit a "Request for Final Action," you may contact your appellate defense counsel who represented you before the Court of Military Commission Review. If you have difficulty contacting your appellate defense counsel, you may get help by calling your trial defense counsel collect at _____ or by contacting the Office of the Chief Defense Counsel office located at _____.

ADDRESS	TELEPHONE NUMBER
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e. In order to protect your rights you should take the following action:

(1) Contact your defense counsel as soon as possible for advice.

(2) If you wish to petition the United States Court of Appeals for the District of Columbia Circuit, complete all the forms entitled, "Petition for Grant of Review," MC Form 4918. Sign all the forms, and mail or deliver the forms to the United States Court of Appeals for the District of Columbia Circuit, E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, NW, Washington, DC 20001-2886, prior to the lapse of the (20) days period mentioned above.

(3) You may use the enclosed, properly addressed envelope, which requires no postage, for mailing the "Petition for Grant of Review" forms to the United States Court of Appeals for the District of Columbia Circuit.

LIST OF ENCLOSURES (Enclosures should include: 1) Decision CMCR (one); 2) MC Form 4918, Petition for Grant of Review (five); and 3) Envelope.)

TYPED NAME OF GOVERNMENT REPRESENTATIVE OR DESIGNEE	GRADE	SIGNATURE	DATE (YYYYMMDD)
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**PETITION FOR GRANT OF REVIEW
IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CMCR No. _____

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES,

Appellee

V.

Full typed name

ID No.

Appellant

PETITION FOR GRANT OF REVIEW

CMCR Docket No. _____

USADCC Docket No. _____

For Court Use only

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

1. I hereby petition the Court for review of my conviction.

2. I understand that, unless I specifically request the contrary, a military lawyer will be designated to represent me free of charge before the US Court of Appeals for the District of Columbia Circuit.

SIGNED: _____
(Put your signature here)

DATED (YYYYMMDD): _____
(Put mailing date here)

MAIL TO: United States Court of Appeals
for the District of Columbia Circuit,
Clerk of Court (Rm 5423)
E. Barrett Prettyman United States Courthouse,
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

REQUEST FOR FINAL ACTION

UNITED STATES, APPELLEE
V.

CMCR No.

(Appellant's Name/ISN-Last Four)

SECTION A – APPELLANT’S REQUEST

I, _____, _____ the undersigned accused,
(Name) *(Identification Number)*

having received a copy of the decision of the Court of Military Commission Review in the above entitled case on the _____ day of _____, _____ having been fully advised as to my rights to petition the
(Day) *(Month)* *(Year)*

United States Court of Appeals for the District of Columbia Circuit for a grant of review with respect to any matters of law within 20 days on which written notice of the final decision of the Court of Military Commission Review was served on me, and having consulted with legally qualified counsel and being informed that the sentence as affirmed by the Court of Military Commission Review will become final unless such a petition is filed, and having determined that I do not desire to petition for or prosecute an appeal to the United States Court of Appeals for the District of Columbia Circuit, hereby request for my own convenience that appropriate action be taken to finalize the affirmed sentence without further delay. I fully understand that this request will not operate to extend the period of 20 days in which I may petition for a grant of review that I may nevertheless so petition within the 20-day period notwithstanding this request.

SIGNATURE OF ACCUSED

DATE (YYYYMMDD)

SECTION B – COUNSEL’S DECLARATION

Prior to signing of the foregoing request, I advise the above accused fully of his/her rights to petition the United States of Appeals for the District of Columbia Circuit to review the decision of the Court of Military Commission Review and to be represented by a civilian lawyer provided at no expense to the United States, a detailed military lawyer, or both a civilian lawyer and detailed military lawyer.

TYPED NAME OF LEGALLY QUALIFIED COUNSEL

GRADE

SIGNATURE

DATE (YYYYMMDD)

Chapter 26

REHEARINGS AND OTHER REMEDIAL ACTIONS

26-1. GENERAL

- a. This chapter provides information and guidance on post-trial sessions (*see* R.M.C. 1102), rehearings (*see* R.M.C. 1107), and new trials (*see* R.M.C. 1210).
- b. *Records of trial.* The original and any copies of the record forwarded for a post-trial session, rehearing or new trial as well as any records remanded for further proceedings by the U.S. Supreme Court, U.S. Court of Appeals for the District of Columbia Circuit or the USCMCR, must remain intact, except for documents needed for reintroduction in the further proceedings, such as the original Charge Sheet and exhibits to be readmitted into evidence.

1. *Withdrawal of documents or exhibits.* Replace documents, copies of documents, or exhibits withdrawn from the original record of trial, if not used in the subsequent proceeding. If used in a subsequent proceeding, photocopy or photograph the documents, and substitute the description and the photocopy or photograph in the original and all copies of the record of trial. Indicate the reasons for withdrawal and the new location of the documents or exhibits. Do not withdraw the original copies of a decision of a court, action of a Convening Authority, post-trial review or recommendation or pretrial advice.

2. *Returning the record.* Return the original record of trial along with the original and two copies of the verbatim record of further proceedings to the Office of the Convening Authority for Military Commissions, Defense 1600 Pentagon, Washington, D.C. 20310-1600.

26-2. POST-TRIAL SESSIONS

- a. *Proceeding in revision.* Up to the point of action, only the Convening Authority may order the convening of a proceeding in revision. Such proceedings may be convened to correct errors, omissions or inconsistencies arising during or after trial, provided that such correction can be affected without material prejudice to the accused.

1. A proceeding in revision may be requested by the trial counsel, defense counsel or the military judge. Any request for a proceeding in revision must be acted on by the Convening Authority.

2. If the Convening Authority directs a proceeding in revision, the military judge, counsel and the accused will be provided a copy of that direction as soon as practicable. In such case, the trial counsel will ask the military judge to expeditiously schedule the session.

3. If the Convening Authority disapproves a request for a proceeding in revision, the military judge, counsel and the accused will be served with a copy of that disapproval.

b. *Post-trial R.M.C. 803 session.* Either the Convening Authority or the military judge may order a post-trial R.M.C. 803 session for the purpose of: (1) inquiring into or resolving a matter arising after trial that substantially affects the legal sufficiency of any finding of guilty or the sentence; or (2) reconsidering any ruling by the military judge that substantially affects the legal sufficiency of any finding of guilty or the sentence. An R.M.C. 803 session may not be called for the purpose of inquiring into any matter arising after trial or reconsidering any ruling of the military judge, if the inquiry or reconsideration pertains to any finding of not guilty. A request by either party for a post-trial R.M.C. 803 session may be directed to the Convening Authority or the military judge, or both. Either the Convening Authority or military judge may order such session *sua sponte*. If a post-trial R.M.C. 803 session is ordered, the official directing the session will ensure that counsel and the accused are notified as soon as practicable. Trial counsel will seek expeditious scheduling of the session with the military judge.

c. When either a proceeding in revision or a post-trial R.M.C. 803 session has been scheduled, the military judge shall cause the trial counsel, defense counsel and the accused to be notified of the date, time and place of the session. Except as provided in R.M.C. 804, the accused must be present at each such session.

26-3. REHEARINGS

a. If empowered or directed by the USCMCR, by the United States Court of Appeals for the District of Columbia Circuit, or by the United States Supreme Court to convene a rehearing as to one or more findings, the Convening Authority shall cause a rehearing to be convened or dismiss the affected finding(s), with prejudice. If the Convening Authority dismisses one or more findings pursuant to this paragraph and any finding of guilty remains, the Convening Authority will direct a sentence rehearing on the remaining finding(s) of guilty or approve a sentence of no punishment.

b. If empowered or directed by an appellate court to convene a rehearing as to sentence, the Convening Authority will either direct such a rehearing or approve a sentence of no punishment.

c. Although the Convening Authority is not required to take action on the findings or to review the case for factual sufficiency or legal errors prior to taking action under R.M.C. 1107, the Convening Authority may, in his or her sole discretion, order a rehearing of any offense for which a finding of guilty was entered, unless the Convening Authority also determines that there is insufficient evidence in the record to support a finding of guilty on the offense charged or any lesser included offense. Pursuant to R.M.C. 1107, the Convening Authority may also order a rehearing as to any lesser-included offense of any offense for which a finding of guilty was entered at trial,

so long as the Convening Authority does not also find that the record contains insufficient evidence to support that lesser included offense. In determining whether the evidence is sufficient to support a rehearing of findings under R.M.C. 1107, the Convening Authority may consider substitute evidence for evidence the Convening Authority determines should not have been admissible at trial. If, after a rehearing under this paragraph, any finding of guilty remains, the Convening Authority may direct a rehearing as to sentence or may approve a sentence of no punishment.

d. In acting on the sentence in any case under R.M.C. 1107, the Convening Authority may elect to approve all or part of the sentence, approve a sentence of a lesser type, direct a rehearing as to sentence or approve a sentence of no punishment.

e. Any rehearing under R.M.C. 1107(e) shall be convened at the direction of the Convening Authority and conducted as a military commission under the same rules of procedure and evidence that attend other trials by military commission, except that the scope of the rehearing is delineated in the Convening Order (*e.g.*, ~~as to all Charges and specifications;~~ ~~as to specification 2 of Charge IV;~~ “as to the lesser included offense of attempted murder under specification 3 of Charge I;” or ~~as to sentence only~~”).

f. When directing a rehearing under R.M.C. 1107 for a capital case in which the death penalty was adjudged, the Convening Authority may refer the rehearing as either a capital or noncapital military commission; however, any such rehearing of a capital case by a noncapital military commission precludes death as an authorized punishment. No case tried originally as a noncapital case may be referred for rehearing before a capital military commission.

g. Regardless of whether a rehearing is directed by the Convening Authority or by an appellate court with jurisdiction over the matter, a copy of that direction and a copy of the Convening Order will be provided to the Chief Trial Judge, the Chief Prosecutor and the defense counsel. The Chief Trial Judge may detail any qualified military judge to preside over the rehearing; the Chief Prosecutor shall detail a trial counsel. Neither the military judge nor the trial counsel need be those who participated in the original trial or a prior rehearing. Upon receipt of the referral documents, the trial counsel will act expeditiously to docket the case with the military judge.

26-4. NEW TRIALS

a. Within two years after the Convening Authority has approved the sentence in a military commission case, the accused may petition the Convening Authority for a new trial on the grounds of:

1. Newly discovered evidence (except as to any specification for which a guilty plea was accepted by the military judge); or
2. Fraud on the commission.

b. The petition must be in writing and, when practicable, will be typewritten, double-spaced. The petition will be signed under oath or affirmation by the petitioner, a person possessing the power of attorney of the petitioner for that purpose, or a person with the authorization of an appropriate court of law to sign the petition as the petitioner's representative. The petition will be forwarded to the Convening Authority for Military Commissions, 1600 Defense Pentagon, Washington, D.C. 20301-1600, with supporting documentation, if any. An accused may submit only one petition for new trial for the same reason within the two-year limitation period.

c. When the Convening Authority receives a petition for a new trial, he or she will refer the petition to the Legal Advisor for a recommendation regarding the need for additional investigation or supplemental legal briefs from the parties.

1. If further investigation is required, the Convening Authority will direct the Chief Prosecutor to conduct or effect such investigation. The results of any additional investigation shall be made known to the accused and his counsel, consistent with Mil. Comm. R. Evid. 505 and R.M.C. 701.

2. If the Convening Authority requires additional briefs, such briefs will be submitted by the parties to the Legal Advisor within seven days of receiving the request for briefs from the Convening Authority.

d. If the Convening Authority grants a petition for new trial, the Convening Authority may refer the charges and specifications of which the accused was found guilty to trial by the same type of military commission that tried the original case. The Convening Authority may refer to a noncapital military commission the new trial of any case in which the accused was sentenced to death. As a result of a noncapital referral, the penalty of death is not authorized.

e. At a new trial, the accused may not be tried for any new offense or for any offense of which he was acquitted at a prior trial.

f. If the Convening Authority declines to act on or denies an accused's petition, the accused may then petition the USCMCR within 60 days of denial of the petition. If the accused's petition is granted (by either the Convening Authority or the USCMCR) or the USCMCR has denied the accused's petition, no new or additional petition pertaining to the same case may be entertained by any authority. *See* R.M.C. 1210(i).