APPENDIX 2
UNIFORM CODE OF MILITARY JUSTICE

CHAPTER 47. UNIFORM CODE OF MILITARY JUSTICE

SUBCHAPTER 1. GENERAL PROVISIONS

§ 801. Art. 1. Definitions

In this chapter—

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

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

(3) The term "commanding officer" includes only commissioned officers.

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

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

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

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

(8) The term "military" refers to any or all of the armed forces.

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

(10) The term "military judge" means an official of a general or special court-martial detailed in accordance with section 826 of this title (article 26).

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

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

(13) The term "judge advocate" means—

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

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

(C) an officer of the Coast Guard who is designated as a law specialist.

(14) The term "record" , when used in connection with the proceedings of a court-martial, means -

(A) an official written transcript, written summary, or other writing relating to the proceedings; or

(B) an official audiotape, videotape, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced.

(15) The term "classified information" means—

(A) any information or material that has been determined by an official of the United States pursuant to law, an Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security, and

(B) any restricted data, as defined in section 11(y) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(16) The term "national security" means the national defense and foreign relations of the United States.

§ 802. Art. 2. Persons subject to this chapter

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

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

(1) submitted voluntarily to military authority;

(2) met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) received military pay or allowances;and

(4) performed military duties;

(d)

(1) A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 81 (article 15) or section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of

(A) investigation under section 832 of this title (article 32);

(B) trial by court-martial; or

(C) nonjudicial punishment under section 815 of this title (article 15).

(2) A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was

(A) on active duty; or

(B) on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(3) Authority to order a member to active duty under paragraph (1) shall be exercised under regulations prescribed by the President.

(4) A member may be ordered to active duty under paragraph (1) only by a person empowered to convene general courts-martial in a regular component of the armed forces.

(5) A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not

(A) be sentenced to confinement; or

(B) be required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive-duty training or active duty (other than active duty ordered under paragraph (l)).

(e) The provisions of this section are subject to section 876(d)(2) of this title (article 76b(d)(2).

§ 803. Art. 3. Jurisdiction to try certain personnel

(a) Subject to section 843 of this title (article 43), a person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

(b) Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to section 843 of this title (article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

(c) No person who has deserted from the armed forces may be relieved from amenability to the jurisdiction of this chapter by virtue of a separation from any later period of service.

(d) A member of a reserve component who is subject to this chapter is not, by virtue of the termination of a period of active duty or inactive-duty training, relieved from amenability to the jurisdiction of this chapter for an offense against this chapter committed during such period of active duty or inactive-duty training.

§ 804. Art. 4. Dismissed officer's right to trial by court-martial

(a) If any commissioned officer, dismissed by order of the President, makes a written application for trial by court-martial setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try that officer on the charges on which he was dismissed. A court-martial so convened has jurisdiction to try the

dismissed officer on those charges, and he shall be considered to have waived the right to plead any statute of limitations applicable to any offense with which he is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal, but if the court-martial acquits the accused or if the sentence adjudged, as finally approved or affirmed, does not include dismissal or death, the Secretary concerned shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issue.

(b) If the President fails to convene a general court-martial within six months from the preparation of an application for trial under this article, the Secretary concerned shall substitute for the dismissal order by the President a form of discharge authorized for administrative issue.

(c) If a discharge is substituted for a dismissal under this article, the President alone may reappoint the officer to such commissioned grade and with such rank as, in the opinion of the President, that former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to the existence of a vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and the reappointment shall be considered as actual service for all purposes, including the right to pay and allowances.

(d) If an officer is discharged from any armed force by administrative action or is dropped from the rolls by order of the President, he has no right to trial under this article.

§ 805. Art. 5. Territorial applicability of this chapter

This chapter applies in all places.

§ 806. Art. 6. Judge Advocates and legal officers

(a) The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspection in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General.

(c) No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing authority upon the same case.

(d)(1) A judge advocate who is assigned or detailed to perform the functions of a civil office in the Government of the United States under section 973(b)(2)(B) of this title may perform such duties as may be requested by the agency concerned, including representation of the United States in civil and criminal cases.

(2) The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations providing that reimbursement may be a condition of assistance by judge advocates assigned or detailed under section 973(b)(2)(B) of this title.

§ 806a. Art. 6a. Investigation and disposition of matters pertaining to the fitness of military judges

(a) The President shall prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of a military judge or military appellate judge to perform the duties of the judge's position. To the extent practicable, the procedures shall be uniform for all armed forces.

(b) The President shall transmit a copy of the procedures prescribed pursuant to this section to the Committees on Armed Services of the Senate and the House of Representatives.

SUBCHAPTER II. APPREHENSION AND RESTRAINT

§ 807. Art. 7. Apprehension

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

(b) Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it.

(c) Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays and disorders among persons subject to this chapter and to apprehend persons subject to this chapter who take part therein.

§ 808. Art. 8. Apprehension of deserters

Any civil officer having authority to apprehend offenders under the laws of the United States or of a State, Territory, Commonwealth, or possession, or the District of Columbia may summarily apprehend a deserter from the armed forces and deliver him into the custody of those forces.

§ 809. Art. 9. Imposition of restraint

(a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

(b) An enlisted member may be ordered into arrest or confine-

ment by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement.

(c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

(d) No person may be ordered into arrest or confinement except for probable cause.

(e) Nothing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

§ 810. Art. 10. Restraint of persons charged with offenses

Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

§ 811. Art. 11. Reports and receiving of prisoners

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

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after that commitment or as soon as he is relieved from guard, report to the commanding officer the name of the prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

§ 812. Art. 12. Confinement with enemy prisoners prohibited

No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.

§ 813. Art. 13. Punishment prohibited before trial

No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

§ 814. Art. 14. Delivery of offenders to civil authorities

(a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

(b) When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of his sentence.

SUBCHAPTER III. NON-JUDICIAL PUNISHMENT

§ 815. Art. 15. Commanding Officer's non-judicial punishment

(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. Under similar regulations, rules may be prescribed with respect to the suspension of punishments authorized hereunder. If authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under this article to a principal assistant.

(b) Subject to subsection (a) any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers of his command

(A) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;

(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command

(i) arrest in quarters for not more than 30 consecutive days;

(ii) forfeiture of not more than one-half of one month's pay per month for two months;

(iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(iv) detention of not more than one-half of one month's pay per month for three months;

(2) upon other personnel of his command—

(A) if imposed upon a person attached to or embarked in a

vessel, confinement on bread and water or diminished rations for not more than three consecutive days;

(B) correctional custody for not more than seven consecutive days;

(C) forfeiture of not more than seven days' pay;

(D) reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

(E) extra duties, including fatigue or other duties, for not more than 14 consecutive days;

(F) restriction to certain specified limits, with or without suspension from duty, for not more than 14 consecutive days;

(G) detention of not more than 14 days' pay;

(H) if imposed by an officer of the grade of major or lieutenant commander, or above

(i) the punishment authorized under clause (A);

(ii) correctional custody for not more than 30 consecutive days;

(iii) forfeiture of not more than one-half of one month's pay per month for two months;

(iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade above E4 may not be reduced more than two pay grades;

(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

(vi) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(vii) detention of not more than one-half of one month's pay per month for three months.

Detention of pay shall be for a stated period of not more than one year but if the offender's term of service expires earlier, the detention shall terminate upon that expiration. No two or more of the punishments of arrest in quarters, confinement on bread and water or diminished rations, correctional custody, extra duties, and restriction may be combined to run consecutively in the maximum amount imposable for each. Whenever any of those punishments are combined to run consecutively, there must be an apportionment. In addition, forfeiture of pay may not be combined with detention of pay without an apportionment. For the purpose of this subsection, "correctional custody" is the physical restraint of a person during duty or nonduty hours and may include extra duties, fatigue duties, or hard labor. If practicable, correctional custody will not be served in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial.

(c) An officer in charge may impose upon enlisted members assigned to the unit of which he is in charge such of the punishments authorized under subsection (b)(2)(A)-(G) as the Secretary concerned may specifically prescribe by regulation.

(d) The officer who imposes the punishment authorized in subsection (b), or his successor in command, may, at any time, suspend probationally any part or amount of the unexecuted punishment imposed and may suspend probationally a reduction in grade or a forfeiture imposed under subsection (b), whether or not executed. In addition, he may, at any time, remit or mitigate any part or amount of the unexecuted punishment imposed and may set aside in whole or in part the punishment, whether executed or unexecuted, and restore all rights, privileges and property affected. He may also mitigate reduction in grade to forfeiture or detention of pay. When mitigating—

(1) arrest in quarters to restriction;

(2) confinement on bread and water or diminished rations to correctional custody;

(3) correctional custody or confinement on bread and water or diminished rations to extra duties or restriction, or both; or

(4) extra duties to restriction; the mitigated punishment shall not be for a greater period than the punishment mitigated.When mitigating forfeiture of pay to detention of pay, the amount of the detention shall not be greater than the amount of the forfeiture. When mitigating reduction in grade to forfeiture or detention of pay, the amount of the forfeiture or detention shall not be greater than the amount that could have been imposed initially under this article by the officer who imposed the punishment mitigated.

(e) A person punished under this article who considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (d) by the officer who imposed the punishment.Before acting on an appeal from a punishment of -

(1) arrest in quarters for more than seven days;

(2) correctional custody for more than seven days;

(3) forfeiture of more than seven days' pay;

(4) reduction of one or more pay grades from the fourth or a higher pay grade;

(5) extra duties for more than 14 days;

(6) restriction for more than 14 days; or

(7) detention of more than 14 days' pay;

the authority who is to act on the appeal shall refer the case to a judge advocate or a lawyer of the Department of Transportation for consideration and advice, and may so refer the case upon appeal from any punishment imposed under subsection (b).

(f) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial for a serious crime or offense growing out of the same act or omission, and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

(g) The Secretary concerned may, by regulation, prescribe the form of records to be kept of proceedings under this article and may also prescribe that certain categories of those proceedings shall be in writing.

SUBCHAPTER IV. COURT-MARTIAL JURISDICTION

§ 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of—

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

§ 817. Art. 17. Jurisdiction of courts-martial in general

(a) Each armed force has court-martial jurisdiction over all persons subject to this chapter. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.

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

§ 818. Art. 18. Jurisdiction of general courts-martial

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-marital of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

§ 819. Art. 19. Jurisdiction of special courts-martial

Subject to section 817 of this title (article 17), special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than one year, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than one year. A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) was detailed to represent the accused, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed.

§ 820. Art. 20. Jurisdiction of summary courts-martial

Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

§ 821. Art. 21. Jurisdiction of courts-martial not exclusive

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

SUBCHAPTER V. COMPOSITION OF COURTS-MARTIAL

§ 822. Art. 22. Who may convene general courts-martial

(a) General courts-martial may be convened by—

(1) the President of the United States;

(2) the Secretary of Defense;

(3) the commanding officer of a unified or specified combatant command;

(4) the Secretary concerned;

(5) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;

(6) the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States;

(7) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps;

(8) any other commanding officer designated by the Secretary concerned; or

(9) any other commanding officer in any of the armed forces when empowered by the President.

(b) If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.

§ 823. Art. 23. Who may convene special courts-martial

(a) Special courts-martial may be convened by—

(1) any person who may convene a general court-martial;

(2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary air field, or other place where members of the Army or the Air Force are on duty;

(3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;

(4) the commanding officer of a wing, group, or separate squadron of the Air Force;

(5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; the commanding officer of any Marine brigade, regiment, detached battalion, or corresponding unit; the commanding officer of any Marine barracks, wing, group, separate squadron, station, base, auxiliary air field, or other place where members of the Marine Corps are on duty;

(6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or

(7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

(b) If any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered advisable by him.

§ 824. Art. 24. Who may convene summary courts-martial

(a) Summary courts-martial may be convened by—

(1) any person who may convene a general or special court-martial;

(2) the commanding officer of a detached company or other detachment of the Army;

(3) the commanding officer of a detached squadron or other detachment of the Air Force; or

(4) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

(b) When only one commissioned officer is present with a command or detachment he shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him. Summary courts-martial may, however, be convened in any case by superior competent authority when considered desirable by him.

§ 825. Art. 25. Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c)(1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

(2) In this article, "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d)(1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.

§ 826. Art. 26. Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

§ 827. Art. 27. Detail of trial counsel and defense counsel

(a)

(1) Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial.

(2) No person who has acted as investigating officer, military judge, or court member in any case may act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant or associate defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

(b) Trial counsel or defense counsel detailed for a general court-martial—

(1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

(c) In the case of a special court-martial—

(1) the accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies. If counsel having such qualifications cannot be obtained, the court may be convened and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained;

(2) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified; and

(3) if the trial counsel is a judge advocate or a member of the bar of a Federal court or the highest court of a State, the defense counsel detailed by the convening authority must be one of the foregoing.

§ 828. Art. 28. Detail or employment of reporters and Interpreters

Under such regulations as the Secretary concerned may prescribe, the convening authority of a court-martial, military commission, or court of inquiry shall detail or employ qualified court

reporters, who shall record the proceedings of and testimony taken before that court or commission. Under like regulations the convening authority of a court-martial, military commission, or court of inquiry may detail or employ interpreters who shall interpret for the court or commission.

§ 829. Art. 29. Absent and additional members

(a) No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.

(b) Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below five members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.

(c) Whenever a special court-martial, other than a special court-martial composed of a military judge only, is reduced below three members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than three members. The trial shall proceed with the new members present as if no evidence had previously been introduced at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a stipulation thereof is read to the court in the presence of the military judge, if any, the accused and counsel for both sides.

(d) If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 8 16(l)(B) or (2)(C) of this title (article 16(1)(B) or (2)(C)), after the detail of a new military judge as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new military judge, the accused, and counsel for both sides.

SUBCHAPTER VI. PRE-TRIAL PROCEDURE

§ 830. Art. 30. Charges and specifications

(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that they are true in fact to the best of his knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

§ 831. Art. 31. Compulsory self-incrimination prohibited

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

§ 832. Art. 32. Investigation

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as provided in section 838 of this title (article 38) and in regulations prescribed under that section. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigation officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and pre-

sentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) If evidence adduced in an investigation under this article indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of that offense without the accused having first been charged with the offense if the accused—

(1) is present at the investigation;

(2) is informed of the nature of each uncharged offense investigated; and

(3) is afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b).

(e) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

§ 833. Art. 33. Forwarding of charges

When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the Investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

§ 834. Art. 34. Advice of staff judge advocate and reference for trial

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice. The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that—

(1) the specification alleges an offense under this chapter;

(2) the specification is warranted by the evidence indicated in the report of investigation under section 832 of this title (article 32) (if there is such a report); and

(3) a court-martial would have jurisdiction over the accused and the offense.

(b) The advice of the staff judge advocate under subsection (a) with respect to a specification under a charge shall include a written and signed statement by the staff judge advocate

(1) expressing his conclusions with respect to each matter set forth in subsection (a); and

(2) recommending action that the convening authority take regarding the specification.

If the specification is referred for trial, the recommendation of the staff judge advocate shall accompany the specification.

(c) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence, may be made.

§ 835. Art. 35. Service of charges

The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person may, against his objection, be brought to trial or be required to participate by himself or counsel in a session called by the military judge under section 839(a) of this title (article 39(a)), in a general court-martial case within a period of five days after the service of charges upon him or in a special court-martial within a period of three days after the service of the charges upon him.

SUBCHAPTER VII. TRIAL PROCEDURE

§ 836. Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

§ 837. Art. 37. Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to

this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

§ 838. Art. 38. Duties of trial counsel and defense counsel

(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(b)(1) The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.

(2) The accused may be represented by civilian counsel if provided by him.

(3) The accused may be represented—

(A) by military counsel detailed under section 827 of this title (article 27); or

(B) by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7)).

(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused.

(5) Except as provided under paragraph (6), if the accused is represented by military counsel of his own selection under paragraph (3)(B), any military counsel detailed under paragraph (3)(A) shall be excused.

(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 827 of this title (article 27) to detail counsel in his sole discretion—

(A) may detail additional military counsel as assistant defense counsel; and

(B) if the accused is represented by military counsel of his own selection under paragraph (3)(B), may approve a request from the accused that military counsel detailed under paragraph (3)(A) act as associate defense counsel.

(7) The Secretary concerned shall, by regulation, define "reasonably available" for the purpose of paragraph (3)(B) and establish procedures for determining whether the military counsel selected by an accused under that paragraph is reasonably available. Such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member. To the maximum extent practicable, such regulations shall establish uniform policies among the armed forces while recognizing the differences in the circumstances and needs of the various armed forces. The Secretary concerned shall submit copies of regulations prescribed under this paragraph to the Committees on Armed Services of the Senate and House of Representatives.

(c) In any court-martial proceeding resulting in a conviction, the defense counsel—

(1) may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate);

(2) may assist the accused in the submission of any matter under section 860 of this title (article 60); and

(3) may take other action authorized by this chapter.

(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

§ 839. Art. 39. Sessions

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules

prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court. These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of members of the court and without regard to section 829 of this title (article 29).

(b) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and in cases in which a military judge has been detailed to the court, the military judge.

§ 840. Art. 40. Continuances

The military judge or a court-martial without a military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

§ 841. Art. 41. Challenges

(a)(1) The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge, or, if none, the court, shall determine the relevance and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(2) If exercise of a challenge for cause reduces the court below the minimum number of members required by section 816 of this title (article 16), all parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any challenge for cause then apparent against the remaining members of the court before additional members are detailed to the court. However, peremptory challenges shall not be exercised at that time.

(b)(1) Each accused and the trial counsel are entitled initially to one peremptory challenge of the members of the court. The military judge may not be challenged except for cause.

(2) If exercise of a peremptory challenge reduces the court below the minimum number of members required by section 816 of this title (article 16), the parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any remaining peremptory challenge (not previously waived) against the remaining members of the court before additional members are detailed to the court.

(c) Whenever additional members are detailed to the court, and after any challenges for cause against such additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge.

(As amended Nov. 5, 1990, Pub.L. 101–510, Div. A, Title V, § 541(b)–(d), 104 Stat. 1565.)

§ 842. Art. 42. Oaths

(a) Before performing their respective duties, military judges, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant or associate defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary concerned. These regulations may provide that an oath to perform faithfully duties as a military judge, trial counsel, assistant trial counsel, defense counsel, or assistant or associate defense counsel may be taken at any time by any judge advocate or other person certified to be qualified or competent for the duty, and if such an oath is taken it need not again be taken at the time the judge advocate, or other person is detailed to that duty.

(b) Each witness before a court-martial shall be examined on oath.

§ 843. Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation.

(b)(1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(2) A person charged with an offense is not liable to be punished under section 815 of this title (article 15) if the offense was committed more than two years before the imposition of punishment.

(c) Periods in which the accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation prescribed in this section (article).

(d) Periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article.

(e) For an offense the trial of which in time of war is certified to the President by the Secretary concerned to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article is extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

(f) When the United States is at war, the running of any statute of limitations applicable to any offense under this chapter—

(1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not;

(2) committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States; or

(3) committed in connection with the negotiation, procurement, award, performance, payment, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency;

is suspended until three years after the termination of hostilities as

proclaimed by the President or by a joint resolution of Congress.

(g)(1) If charges or specifications are dismissed as defective or insufficient for any cause and the period prescribed by the applicable statute of limitations—

(A) has expired; or

(B) will expire within 180 days after the date of dismissal of the charges and specifications, trial and punishment under new charges and specifications are not barred by the statute of limitations if the conditions specified in paragraph (2) are met.

(2) The conditions referred to in paragraph (1) are that the new charges and specifications must—

(A) be received by an officer exercising summary court-martial jurisdiction over the command within 180 days after the dismissal of the charges or specifications; and

(B) allege the same acts or omissions that were alleged in the dismissed charges or specifications (or allege acts or omissions that were included in the dismissed charges or specifications).

§ 844. Art. 44. Former jeopardy

(a) No person may, without his consent, be tried a second time for the same offense.

(b) No proceeding in which an accused has been found guilty by court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.

(c) A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article.

§ 845. Art. 45. Pleas of the accused

(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

§ 846. Art. 46. Opportunity to obtain witnesses and other evidence

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

§ 847. Art. 47. Refusal to appear or testify

(a) Any person not subject to this chapter who—

(1) has been duly subpoenaed to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board;

(2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States; and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce;

is guilty of an offense against the United States.

(b) Any person who commits an offense named in subsection (a) shall be tried on indictment or information in a United States district court or in a court of original criminal jurisdiction in any of the Territories, Commonwealths, or possessions of the United States, and jurisdiction is conferred upon those courts for that purpose. Upon conviction, such a person shall be fined or imprisoned, or both, at the court's discretion.

(c) The United States attorney or the officer prosecuting for the United States in any such court of original criminal jurisdiction shall, upon the certification of the facts to him by the military court, commission, court of inquiry, or board, file an information against and prosecute any person violating this article.

(d) The fees and mileage of witnesses shall be advanced or paid out of the appropriations for the compensation of witnesses.

§ 848. Art. 48. Contempts

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

§ 849. Art. 49. Depositions

(a) At any time after charges have been signed as provided in section 830 of this title (article 30), any party may take oral or written depositions unless the military judge or court-martial without a military judge hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate commissioned officers to represent the prosecution and the defense and may authorize those officers to take the deposition of any witness.

(b) The party at whose instance a deposition is to be taken shall

give to every other party reasonable written notice of the time and place for taking the deposition.

(c) Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

(d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears

(1) that the witness resides or is beyond the State, Territory, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing;

(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(3) that the present whereabouts of the witness is unknown.

(e) Subject to subsection (d), testimony by deposition may be presented by the defense in capital cases.

(f) Subject to subsection (d), a deposition may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence in any case in which the death penalty is authorized but is not mandatory, whenever the convening authority directs that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial.

§ 850. Art. 50. Admissibility of records of courts of inquiry

(a) In any case not capital and not extending to the dismissal of a commissioned officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible under the rules of evidence, be read in evidence by any party before a court-martial or military commission if the accused was a party before the court of inquiry and if the same issue was involved or if the accused consents to the introduction of such evidence.

(b) Such testimony may be read in evidence only by the defense in capital cases or cases extending to the dismissal of a commissioned officer.

(c) Such testimony may also be read in evidence before a court of inquiry or a military board.

§ 850a. Art. 50a. Defense of lack of mental responsibility

(a) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge, or the president of a court-martial without a military judge, shall instruct the members of the court as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of lack of mental responsibility.

(d) Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall find the accused—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of lack of mental responsibility.

(e) Notwithstanding the provisions of section 852 of this title (article 52), the accused shall be found not guilty only by reason of lack of mental responsibility if—

(1) a majority of the members of the court-martial present at the time the vote is taken determines that the defense of lack of mental responsibility has been established; or

(2) in the case of court-martial composed of a military judge only, the military judge determines that the defense of lack of mental responsibility has been established.

§ 851. Art. 51. Voting and rulings

(a) Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(b) The military judge and, except for questions of challenge, the president of a court-martial without a military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused, or by the president of a court-martial without a military Judge upon any question of law other than a motion for a finding of not guilty, is final and constitutes the ruling of the court. However, the military judge or the president of a court-martial without a military judge may change his ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title (article 52), beginning with the junior in rank.

(c) Before a vote is taken on the findings, the military judge or the president of a court-martial without a military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them—

(1) that the accused must be presumed to be innocent until his

guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

(3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.

(d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

§ 852. Art. 52. Number of votes required

(a)(1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.

(2) No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

(b)(1) No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this chapter expressly made punishable by death.

(2) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty or to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member challenged. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

§ 853. Art. 53. Court to announce action

A court-martial shall announce its findings and sentence to the parties as soon as determined.

§ 854. Art. 54. Record of trial

(a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by that of a member if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. In a court-martial consisting of only a military judge the record shall be authenticated by the court reporter under the same conditions which would impose such a duty on a member under the subsection.

(b) Each special and summary court-martial shall keep a separate record of the proceedings in each case, and the record shall be authenticated in the manner required by such regulations as the President may prescribe.

(c)(1) A complete record of the proceedings and testimony shall be prepared—

(A) in each general court-martial case in which the sentence adjudged includes death, a dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court-martial; and

(B) in each special court-martial case in which the sentence adjudged includes a bad-conduct discharge.

(2) In all other court-martial cases, the record shall contain such matters as may be prescribed by regulations of the President.

(d) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is authenticated.

SUBCHAPTER VIII. SENTENCES

§ 855. Art. 55. Cruel and unusual punishments prohibited

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

§ 856. Art. 56. Maximum limits

The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

§ 856a. Art. 56a. Sentence of confinement for life without eligibility for parole

(a) For any offense for which a sentence of confinement for life may be adjudged, a court-martial may adjudge a sentence of confinement for life without eligibility for parole.

(b) An accused who is sentenced to confinement for life without eligibility for parole shall be confined for the remainder of the accused's life unless—

(1) the sentence is set aside or otherwise modified as a result of—

(A) action taken by the convening authority, the Secretary concerned, or another person authorized to act under section 860 of this title (article 60); or

(B) any other action taken during post-trial procedure and review under any other provision of subchapter IX;

(2) the sentence is set aside or otherwise modified as a result of action taken by a Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court; or

(3) the accused is pardoned.

§ 857. Art. 57. Effective date of sentences

(a)

(1) Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-martial takes effect on the earlier of—

(A) the date that is 14 days after the date on which the sentence is adjudged; or

(B) the date on which the sentence is approved by the convening authority.

(2) On application by an accused, the convening authority may defer a forfeiture of pay or allowances or reduction in grade that would otherwise become effective under paragraph (1)(A) until the date on which the sentence is approved by the convening authority. Such a deferment may be rescinded at any time by the convening authority.

(3) A forfeiture of pay and allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence takes effect.

(4) In this subsection, the term "convening authority", with respect to a sentence of a court-martial, means any person authorized to act on the sentence under section 860 of this title (article 60).

(b) Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement.

(c) All other sentences of courts-martial are effective on the date ordered executed.

§ 857a. Art. 57a. Deferment of sentences

(a) On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the officer who granted it or, if the accused is no longer under his jurisdiction, by the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned.

(b)

(1) In any case in which a court-martial sentences a person referred to in paragraph (2) to confinement, the convening authority may defer the service of the sentence to confinement, without the consent of that person, until after the person has been permanently released to the armed forces by a state or foreign country referred to in that paragraph.

(2) Paragraph (1) applies to a person subject to this chapter who—

(A) While in the custody of a state or foreign country is temporarily returned by that state or foreign country to the armed forces for trial by court-martial; and

(B) After the court-martial, is returned to that state or foreign country under the authority of a mutual agreement or treaty, as the case may be.

(3) In this subsection, the term "state" means a state of the United States, the District of Columbia, a territory, or a possession of the United States.

(c) In any case in which a court-martial sentences a person to confinement and the sentence to confinement has been ordered executed, but in which review of the case under section 867(a)(2) of this title (article 67(a)(2)) is pending, the Secretary concerned may defer further service of sentence to confinement while that review is pending.

§ 858. Art. 58. Execution of confinement

(a) Under such instructions as the Secretary concerned may prescribe, a sentence of confinement adjudged by a court-martial or other military tribunal, whether or not the sentence includes discharge or dismissal, and whether or not the discharge or dismissal has been executed, may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use. Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated.

(b) The omission of the words "hard labor" from any sentence of a court-martial adjudging confinement does not deprive the au-

thority executing that sentence of the power to require hard labor as a part of the punishment.

§ 858a. Art. 58a. Sentences: reduction in enlisted grade upon approval

(a) Unless otherwise provided in regulations to be prescribed by the Secretary concerned, a court-martial sentence of an enlisted member in a pay grade above E–1, as approved by the convening authority, that includes—

(1) a dishonorable or bad-conduct discharge;

(2) confinement; or

(3) hard labor without confinement;

reduces that member to pay grade E-1, effective on the date of that approval.

(b) If the sentence of a member who is reduced in pay grade under subsection (a) is set aside or disapproved, or, as finally approved, does not include any punishment named in subsection (a)(l), (2), or (3), the rights and privileges of which he was deprived because of that reduction shall be restored to him and he is entitled to the pay and allowances to which he would have been entitled for the period the reduction was in effect, had he not been so reduced.

§ 858b. Art. 58b. Sentences: forfeiture of pay and allowances during confinement

(a)

(1) A court-martial sentence described in paragraph (2) shall result in the forfeiture of pay, or of pay and allowances, due that member during any period of confinement or parole. The forfeiture pursuant to this section shall take effect on the date determined under section 857(a) of this title (article 57(a)) and may be deferred as provided in that section. The pay and allowances forfeited, in the case of a general court-martial, shall be all pay and allowances due that member during such period and, in the case of a special court-martial, shall be two-thirds of all pay due that member during such period.

(2) A sentence covered by this section is any sentence that includes—

(A) confinement for more than six months or death; or

(B) confinement for six months or less and a dishonorable or bad-conduct discharge or dismissal.

(b) In a case involving an accused who has dependents, the convening authority or other person acting under section 860 of this title (article 60) may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed six months. Any amount of pay or allowances that, except for a waiver under this subsection, would be forfeited shall be paid, as the convening authority or other person taking action directs, to the dependents of the accused.

(c) If the sentence of a member who forfeits pay and allowances under subsection (a) is set aside or disapproved or, as finally approved, does not provide for a punishment referred to in subsection (a)(2), the member shall be paid the pay and allowances which the member would have been paid, except for the forfeiture, for the period which the forfeiture was in effect.

SUBCHAPTER IX. POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL

§ 859. Art. 59. Error of law; lesser included offense

(a) A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

(b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.

§ 860. Art. 60. Action by the Convening authority

(a) The findings and sentence of a court-martial shall be reported promptly to the convening authority after the announcement of the sentence. Any such submission shall be in writing.

(b)(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence. Any such submissions shall be in writing. Except in a summary court-martial case, such a submission shall be made within 10 days after the accused has been given an authenticated record of trial and, if applicable, the recommendation of the staff judge advocate or legal officer under subsection (d). In a summary court-martial case, such a submission shall be made within seven days after the sentence is announced.

(2) If the accused shows that additional time is required for the accused to submit such matters, the convening authority or other person taking action under this section, for good cause, may extend the applicable period under paragraph (1) for not more than an additional 20 days.

(3) In a summary court-martial case, the accused shall be

promptly provided a copy of the record of trial for use in preparing a submission authorized by paragraph (1).

(4) The accused may waive his right to make a submission to the convening authority under paragraph (1). Such a waiver must be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which the accused may make a submission under this subsection shall be deemed to have expired upon the submission of such a waiver to the convening authority.

(c)(1) The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority. Under regulations of the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

(2) Action on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this section. Subject to regulations of the Secretary concerned, such action may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier. The convening authority or other person taking such action, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.

(3) Action on the findings of a court-martial by the convening authority or other person acting on the sentence is not required. However, such person, in his sole discretion, may—

(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

(B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

(d) Before acting under this section on any general court-martial case or any special court-martial case that includes a bad-conduct discharge, the convening authority or other person taking action under this section shall obtain and consider the written recommendation of his staff judge advocate or legal officer. The convening authority or other person taking action under this section shall refer the record of trial to his staff judge advocate or legal officer, and the staff judge advocate or legal officer shall use such record in the preparation of his recommendation. The recommendation of the staff judge advocate or legal officer shall include such matters as the President may prescribe by regulation and shall be served on the accused, who may submit any matter in response under subsection (b). Failure to object in the response to the recommendation or to any matter attached to the recommendation waives the right to object thereto.

(e)(1) The convening authority or other person taking action under this section, in his sole discretion, may order a proceeding in revision or a rehearing.

(2) A proceeding in revision may be ordered if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a court-martial with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. In no case, however, may a proceeding in revision—

(A) reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty;

(B) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this chapter; or

(C) increase the severity of some article of the sentence unless the sentence prescribed for the offense is mandatory.

(3) A rehearing may be ordered by the convening authority or other person taking action under this section if he disapproves the findings and sentence and states the reasons for disapproval of the findings. If such person disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges. A rehearing as to the findings may not be ordered where there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered if the convening authority or other person taking action under this subsection disapproves the sentence.

§ 861. Art. 61. Waiver or withdrawal of appeal

(a) In each case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)), except a case in which the sentence as approved under section 860(c) of this title (article 60(c)) includes death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review. Such a waiver shall be signed by both the accused and by defense counsel and must be filed within 10 days after the action under section 860(c) of this title (article 60(c)) is served on the accused or on defense counsel. The convening authority or other person taking such action, for good cause, may extend the period for such filing by not more than 30 days.

(b) Except in a case in which the sentence as approved under section 860(c) of this title (article 60(c)) includes death, the accused may withdraw an appeal at any time.

(c) A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 866 or 869(a) of this title (article 66 or 69(a)).

§ 862. Art. 62. Appeal by the United States

(a)

(1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal the following (other than an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification):

(A) An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification.

(B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.

(C) An order or ruling which directs the disclosure of classified information.

(D) An order or ruling which imposes sanctions for nondisclosure of classified information.

(E) A refusal of the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information.

(F) A refusal by the military judge to enforce an order

described in subparagraph (E) that has previously been issued by appropriate authority.

(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

(3) An appeal under this section shall be diligently prosecuted by appellate Government counsel.

(b) An appeal under this section shall be forwarded by a means prescribed under regulations of the President directly to the Court of Criminal Appeals and shall, whenever practicable, have priority over all other proceedings before that court. In ruling on an appeal under this section, the Court of Criminal Appeals may act only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c)).

(c) Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.

§ 863. Art. 63. Rehearings

Each rehearing under this chapter shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence may be approved, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory. If the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the approved sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.

§ 864. Art. 64. Review by a judge advocate

(a) Each case in which there has been a finding of guilty that is not reviewed under section 866 or 869(a) of this title (article 66 or 69(a)) shall be reviewed by a judge advocate under regulations of the Secretary concerned. A judge advocate may not review a case under this subsection if he has acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense. The judge advocate's review shall be in writing and shall contain the following:

(1) Conclusions as to whether—

(A) the court had jurisdiction over the accused and the offense;

(B) the charge and specification stated an offense; and

(C) the sentence was within the limits prescribed as a matter of law.

(2) A response to each allegation of error made in writing by the accused.

(3) If the case is sent for action under subsection (b), a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

(b) The record of trial and related documents in each case reviewed under subsection (a) shall be sent for action to the person exercising general court-martial jurisdiction over the accused at the time the court was convened (or to that person's successor in command) if—

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

(2) the sentence approved under section 860(c) of this title (article 60(c)) extends to dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six months; or

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

(c)(1) The person to whom the record of trial and related documents are sent under subsection (b) may—

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

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

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

(D) dismiss the charges.

(2) If a rehearing is ordered but the convening authority finds a rehearing impracticable, he shall dismiss the charges.

(3) If the opinion of the judge advocate in the judge advocate's review under subsection (a) is that corrective action is required as a matter of law and if the person required to take action under subsection (b) does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and action thereon shall be sent to Judge Advocate General for review under section 869(b) of this title (article 69(b)).

§ 865. Art. 65. Disposition of records

(a) In a case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)) in which the right to such review is not waived, or an appeal is not withdrawn, under section 861 of this title (article 61), the record of trial and action thereon shall be transmitted to the Judge Advocate General for appropriate action.

(b) Except as otherwise required by this chapter, all other records of trial and related documents shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.

§ 866. Art. 66. Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate

military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determinate on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the office of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report documents used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces shall be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

§ 867. Art. 67. Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record. The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has

ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

§ 867a. Art. 67a. Review by the Supreme Court

(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.

(b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

§ 868. Art. 68. Branch offices

The Secretary concerned may direct the Judge Advocate General to establish a branch office with any command. The branch office shall be under an Assistant Judge Advocate General who, with the consent of the Judge Advocate General, may establish a Court of Criminal Appeals with one or more panels. That Assistant Judge Advocate General and any Court of Criminal Appeals established by him may perform for that command under the general supervision of the Judge Advocate General, the respective duties which the Judge Advocate General and a Court of Criminal Appeals established by the Judge Advocate General would otherwise be required to perform as to all cases involving sentences not requiring approval by the President.

§ 869. Art. 69. Review in the office of the Judge Advocate General

(a) The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both.

(b) The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under section 866 of this title (article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. If such a case is considered upon application of the accused, the application must be filed in the office of the Judge Advocate General by the accused on or before the last day of the two-year period beginning on the date the sentence is approved under section 860(c) of this title (article 60(c)), unless the accused establishes good cause for failure to file within that time.

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

(d) A Court of Criminal Appeals may review, under section 866 of this title (article 66)—

(1) any court-martial case which (A) is subject to action by the Judge Advocate General under this section, and (B) is sent to the Court of Criminal Appeals by order of the Judge Advocate General; and,

(2) any action taken by the Judge Advocate General under this section in such case.

(e) Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Criminal Appeals under this section, the Court may take action only with respect to matters of law.

§ 870. Art. 70. Appellate counsel

(a) The Judge Advocate General shall detail in his office one or more commissioned officers as appellate Government counsel, and one or more commissioned officers as appellate defense counsel, who are qualified under section 827(b)(l) of this title (article 27(b)(l)).

(b) Appellate Government counsel shall represent the United States before the Court of Criminal Appeals or the Court of Appeals for the Armed Forces when directed to do so by the Judge Advocate General. Appellate Government counsel may represent the United States before the Supreme Court in cases arising under this chapter when requested to do so by the Attorney General.

(c) Appellate defense counsel shall represent the accused before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court—

(1) when requested by the accused;

(2) when the United States is represented by counsel; or

(3) when the Judge Advocate General has sent the case to the Court of Appeals for the Armed Forces.

(d) The accused has the right to be represented before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court by civilian counsel if provided by him.

(e) Military appellate counsel shall also perform such other functions in connection with the review of court-martial cases as the Judge Advocate General directs.

§ 871. Art. 71. Execution of sentence; suspension of sentence

(a) If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit. That part of the sentence providing for death may not be suspended.

(b) If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary or Assistant Secretary, as the case may be, may commute, remit, or

suspend the sentence, or any part of the sentence, as he sees fit. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

(c)(1) If a sentence extends to death, dismissal, or a dishonorable or bad-conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn, under section 861 of this title (article 61), that part of the sentence extending to death, dismissal, or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death or dismissal, approval under subsection (a) or (b), as appropriate). A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Criminal Appeals and—

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

(B) such a petition is rejected by the Court of Appeals for the Armed Forces; or

(C) review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and—

(i) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

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

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

(2) If a sentence extends to dismissal or a dishonorable or bad-conduct discharge and if the right of the accused to appellate review is waived, or an appeal is withdrawn, under section 861 of this title (article 61), that part of the sentence extending to dismissal or a bad-conduct or dishonorable discharge may not be executed until review of the case by a judge advocate (and any action of that review) under section 864 of this title (article 64) is completed. Any other part of a court-martial sentence may be ordered executed by the convening authority or other person acting on the case under section 860 of this title (article 60) when approved by him under that section.

(d) The convening authority or other person acting on the case under section 860 of this title (article 60) may suspend the execution of any sentence or part thereof, except a death sentence.

§ 872. Art. 72. Vacation of suspension

(a) Before the vacation of the suspension of a special court-martial sentence which as approved includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on the alleged violation of probation. The probationer shall be represented at the hearing by counsel if he so desires.

(b) The record of the hearing and the recommendation of the officer having special court-martial jurisdiction shall be sent for action to the officer exercising general court-martial jurisdiction over the probationer. If he vacates the suspension, any unexecuted part of the sentence, except a dismissal, shall be executed, subject to applicable restrictions in section 871(c) of this title (article 71(c)). The vacation of the suspension of a dismissal is not effective until approved by the Secretary concerned.

(c) The suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence.

§ 873. Art. 73. Petition for a new trial

At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Criminal Appeals or before the Court of Appeals for the Armed Forces, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition.

§ 874. Art. 74. Remission and suspension

(a) The Secretary concerned and, when designated by him, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the President.

(b) The Secretary concerned may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

§ 875. Art. 75. Restoration

(a) Under such regulations as the President may prescribe, all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and such executed part is included in a sentence imposed upon the new trial or rehearing.

(b) If a previously executed sentence of dishonorable or bad-conduct discharge is not imposed on a new trial, the Secretary concerned shall substitute therefor a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of this enlistment.

(c) If a previously executed sentence of dismissal is not imposed on a new trial, the Secretary concerned shall substitute therefor a form of discharge authorized for administrative issue, and the commissioned officer dismissed by the sentence may be reappointed by the President alone to such commissioned grade and with such rank as in the opinion of the President that former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to the existence of a vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and the reappointment shall be considered as actual service for all purposes, including the right to pay and allowances.

§ 876. Art. 76. Finality of proceedings, findings, and sentences

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as

approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74), and the authority of the President.

§ 876a. Art. 76a. Leave required to be taken pending review of certain court-martial convictions

Under regulations prescribed by the Secretary concerned, an accused who has been sentenced by a court-martial may be required to take leave pending completion of action under this subchapter if the sentence, as approved under section 860 of this title (article 60), includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge. The accused may be required to begin such leave on the date on which the sentence is approved under section 860 of this title (article 60) or at any time after such date, and such leave may be continued until the date which action under this subchapter is completed or may be terminated at any earlier time.

§ 876b. Art. 76b. Lack of mental capacity or mental responsibility: commitment of accused for examination and treatment

(a) Persons incompetent to stand trial—

(1) In the case of a person determined under this chapter to be presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case, the general court-martial convening authority for that person shall commit the person to the custody of the Attorney General.

(2) The Attorney General shall take action in accordance with section 4241(d) of title 18.

(3) If at the end of the period for hospitalization provided for in section 4241(d) of title 18, it is determined that the committed person's mental condition has not so improved as to permit the trial to proceed, action shall be taken in accordance with section 4246 of such title.

(4)

(A) When the director of a facility in which a person is hospitalized pursuant to paragraph (2) determines that the person has recovered to such an extent that the person is able to understand the nature of the proceedings against the person and to conduct or cooperate intelligently in the defense of the case, the director shall promptly transmit a notification of that determination to the Attorney General and to the general court-martial convening authority for the person. The director shall send a copy of the notification to the person's counsel.

(B) Upon receipt of a notification, the general court-martial convening authority shall promptly take custody of the person unless the person covered by the notification is no longer subject to this chapter. If the person is no longer subject to this chapter, the Attorney General shall take any action within the authority of the Attorney General that the Attorney General considers appropriate regarding the person.

(C) The director of the facility may retain custody of the person for not more than 30 days after transmitting the notifications required by subparagraph (A).

(5) In the application of section 4246 of title 18 to a case under this subsection, references to the court that ordered the commitment of a person, and to the clerk of such court, shall be deemed to refer to the general court-martial convening authority for that person. However, if the person is no longer subject to this chapter at a time relevant to the application of such section to the person, the United States district court for the district where the person is hospitalized or otherwise may be found shall be considered as the court that ordered the commitment of the person.

(b) Persons found not guilty by reason of lack of mental responsibility—

(1) If a person is found by a court-martial not guilty only by reason of lack of mental responsibility, the person shall be committed to a suitable facility until the person is eligible for release in accordance with this section.

(2) The court-martial shall conduct a hearing on the mental condition in accordance with subsection (c) of section 4243 of title 18. Subsections (b) and (d) of that section shall apply with respect to the hearing.

(3) A report of the results of the hearing shall be made to the general court-martial convening authority for the person.

(4) If the court-martial fails to find by the standard specified in subsection (d) of section 4243 of title 18 that the person's release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect—

(A) the general court-martial convening authority may commit the person to the custody of the Attorney General; and

(B) the Attorney General shall take action in accordance with subsection (e) of section 4243 of title 18.

(5) Subsections (f), (g), and (h) of section 4243 of title 18 shall apply in the case of a person hospitalized pursuant to paragraph (4)(B), except that the United States district court for the district where the person is hospitalized shall be considered as the court that ordered the person's commitment.

(c) General provisions—

(1) Except as otherwise provided in this subsection and subsection (d)(1), the provisions of section 4247 of title 18 apply in the administration of this section.

(2) In the application of section 4247(d) of title 18 to hearings conducted by a court-martial under this section or by (or by order of) a general court-martial convening authority under this section, the reference in that section to section 3006A of such title does not apply.

(d) Applicability—

(1) The provisions of chapter 313 of title 18 referred to in this section apply according to the provisions of this section notwithstanding section 4247(j) of title 18.

(2) If the status of a person as described in section 802 of this title (article 2) terminates while the person is, pursuant to this section, in the custody of the Attorney General, hospitalized, or on conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, the provisions of this section establishing requirements and procedures regarding a person no longer subject to this chapter shall continue to apply to that person notwithstanding the change of status.

SUBCHAPTER X. PUNITIVE ARTICLES

§ 877. Art. 77. Principals

Any person punishable under this chapter who

(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or

(2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.

§ 878. Art. 78. Accessory after the fact

Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct.

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

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

§ 880. Art. 80. Attempts

(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

§ 881. Art. 81. Conspiracy

Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall. if one

or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

§ 882. Art. 82. Solicitation

(a) Any person subject to this chapter who solicits or advises another or others to desert in violation of section 885 of this title (article 85) or mutiny in violation of section 894 of this title (article 94) shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of section 899 of this title (article 99) or sedition in violation of section 894 of this title (article 94) shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.

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

Any person who—

(1) procures his own enlistment or appointment in the armed forces by knowingly false representation or deliberate concealment as to his qualifications for the enlistment or appointment and receives pay or allowances thereunder; or

(2) procures his own separation from the armed forces by knowingly false representation or deliberate concealment as to his eligibility for that separation; shall be punished as a court-martial may direct.

§ 884. Art. 84. Unlawful enlistment, appointment, or separation

Any person subject to this chapter who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct.

§ 885. Art. 85. Desertion

(a) Any member of the armed forces who—

(1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently;

(2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or

(3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States; is guilty of desertion.

(b) Any commissioned officer of the armed forces who, after tender of his resignation and before notice of its acceptance, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.

(c) Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment, other than death, as a court-martial may direct.

§ 886. Art. 86. Absence without leave

Any member of the armed forces who, without authority—

(1) fails to go to his appointed place of duty at the time prescribed;

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed; shall be punished as a court-martial may direct.

§ 887. Art. 87. Missing movement

Any person subject to this chapter who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct.

§ 888. Art. 88. Contempt toward officials

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

§ 889. Art. 89. Disrespect toward superior commissioned officer

Any person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct.

§ 890. Art. 90. Assaulting or willfully disobeying superior commissioned officer

Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

§ 891. Art. 91. Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

Any warrant officer or enlisted member who

(1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office;

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

(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office;
shall be punished as a court-martial may direct.

§ 892. Art. 92. Failure to obey order or regulation

Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.

§ 893. Art. 93. Cruelty and maltreatment

Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

§ 894. Art. 94. Mutiny or sedition

(a) Any person subject to this chapter who—

(1) with intent to usurp or override lawful military authority, refuses, in concert with any other person, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny;

(2) with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence, or other disturbance against that authority is guilty of sedition;

(3) fails to do his utmost to prevent and suppress a mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior commissioned officer or commanding officer of a mutiny or sedition which he knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.

(b) A person who is found guilty of attempted mutiny, mutiny, sedition, or failure to suppress or report a mutiny or sedition shall be punished by death or such other punishment as a court-martial may direct.

§ 895. Art. 95. Resistance, flight, breach of arrest, and escape

Any person subject to this chapter who—

(1) resists apprehension;

(2) flees from apprehension;

(3) breaks arrest; or

(4) escapes from custody or confinement;

shall be punished as a court-martial may direct.

§ 896. Art. 96. Releasing prisoner without proper authority

Any person subject to this chapter who, without proper authority, releases any prisoner committed to his charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with law.

§ 897. Art. 97. Unlawful detention

Any person subject to this chapter who, except as provided by law, apprehends, arrests, or confines any person shall be punished as a court-martial may direct.

§ 898. Art. 98. Noncompliance with procedural rules

Any person subject to this chapter who—

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter;or

(2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;
shall be punished as a court-martial may direct.

§ 899. Art. 99. Misbehavior before the enemy

Any person subject to this chapter who before or in the presence of the enemy—

(1) runs away;

(2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;

(3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;

(4) casts away his arms or ammunition;

(5) is guilty of cowardly conduct;

(6) quits his place of duty to plunder or pillage;

(7) causes false alarms in any command, unit, or place under control of the armed forces;

(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or

(9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle;
shall be punished by death or such other punishment as a court-martial may direct.

§ 900. Art. 100. Subordinate compelling surrender

Any person subject to this chapter who compels or attempts to compel the commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces, to give it up to an enemy or to abandon it, or who strikes the colors or flag to any enemy without proper authority, shall be punished by death or such other punishment as a court-martial may direct.

§ 901. Art. 101. Improper use of countersign

Any person subject to this chapter who in time of war discloses the parole or countersign to any person not entitled to receive it

or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to his knowledge, he was authorized and required to give, shall be punished by death or such other punishment as a court-martial may direct.

§ 902. Art. 102. Forcing a safeguard

Any person subject to this chapter who forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

§ 903. Art. 103. Captured or abandoned property

(a) All persons subject to this chapter shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody, or control.

(b) Any person subject to this chapter who—

(1) fails to carry out the duties prescribed in subsection (a);

(2) buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he receives or expects any profit, benefit, or advantage to himself or another directly or indirectly connected with himself; or

(3) engages in looting or pillaging;

shall be punished as a court-martial may direct.

§ 904. Art. 104. Aiding the enemy

Any person who—

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or military commission may direct.

§ 905. Art. 105. Misconduct as prisoner

Any person subject to this chapter who, while in the hands of the enemy in time of war—

(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

(2) while in a position of authority over such persons maltreat them without justifiable cause;

shall be punished as a court-martial may direct.

§ 906. Art. 106. Spies

Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.

§ 906a. Art. 106a. Espionage

(a)(1) Any person subject to this chapter who, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any entity described in paragraph (2), either directly or indirectly, any thing described in paragraph (3) shall be punished as a court-martial may direct, except that if the accused is found guilty of an offense that directly concerns (A) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (B) war plans, (C) communications intelligence or cryptographic information, or (D) any other major weapons system or major element of defense strategy, the accused shall be punished by death or such other punishment as a court-marital may direct.

(2) An entity referred to in paragraph (1) is—

(A) a foreign government;

(B) a faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States; or

(C) a representative, officer, agent, employee, subject, or citizen of such a government, faction, party, or force.

(3) A thing referred to in paragraph (1) is a document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense.

(b)(1) No person may be sentenced by court-martial to suffer death for an offense under this section (article) unless—

(A) the members of the court-martial unanimously find at least one of the aggravating factors set out in subsection (c); and

(B) the members unanimously determine that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including the aggravating factors set out under subsection (c).

(2) Findings under this subsection may be based on—

(A) evidence introduced on the issue of guilt or innocence;

(B) evidence introduced during the sentencing proceeding; or

(C) all such evidence.

(3) The accused shall be given broad latitude to present matters in extenuation and mitigation.

(c) A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.

(2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.

(3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.

(4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36).

§ 907. Art. 107. False official statements

Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-marital may direct.

§ 908. Art. 108. Military property of United States—Loss, damage, destruction, or wrongful disposition

Any person subject to this chapter who, without proper authority—

(1) sells or otherwise disposes of;

(2) willfully or through neglect damages, destroys, or loses; or

(3) willfully or through neglect suffers to be lost, damaged, sold, or wrongfully disposed of;

any military property of the United States, shall be punished as a court-martial may direct.

§ 909. Art. 109. Property other than military property of United States - Waste, spoilage, or destruction

Any person subject to this chapter who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct.

§ 910. Art. 110. Improper hazarding of vessel

(a) Any person subject to this chapter who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such punishment as a court-martial may direct.

(b) Any person subject to this chapter who negligently hazards or suffers to be hazarded any vessel of the armed forces shall be punished as a court-martial may direct.

§ 911. Art. 111. Drunken or reckless operation of a vehicle, aircraft, or vessel

Any person subject to this chapter who—

(1) operates or physically controls any vehicle, aircraft, or vessel in a reckless or wanton manner or while impaired by a substance described in section 912a(b) of this title (article 112a(b)), or

(2) operates or is in actual physical control of any vehicle, aircraft, or vessel while drunk or when the alcohol concentration in the person's blood or breath is 0.10 grams or more of alcohol per 100 milliliters of blood or 0.10 grams or more of alcohol per 210 liters of breath, as shown by chemical analysis, shall be punished as a court-martial may direct.

§ 912. Art. 112. Drunk on duty

Any person subject to this chapter other than a sentinel or lookout, who is found drunk on duty, shall be punished as a court-martial may direct.

§ 912a. Art 112a. Wrongful use, possession, etc., of controlled substances

(a) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.

(b) The substances referred to in subsection (a) are the following:

(1) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana and any compound or derivative of any such substance.

(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.

(3) Any other substance not specified in clause (1) or contained on a list prescribed by the President under clause (2) that is listed in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

§ 913. Art. 113. Misbehavior of sentinel

Any sentinel or lookout who is found drunk or sleeping upon his post or leaves it before being regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is at any other time, by such punishment other than death as a court-martial may direct.

§ 914. Art 114. Dueling

Any person subject to this chapter who fights or promotes, or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct.

§ 915. Art. 115. Malingering

Any person subject to this chapter who for the purpose of avoiding work, duty, or service—

(1) feigns illness, physical disablement, mental lapse, or derangement; or

(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.

§ 916. Art 116. Riot or breach of peace

Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.

§ 917. Art. 117. Provoking speeches or gestures

Any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct.

§ 918. Art. 118. Murder

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct.

§ 919. Art. 119. Manslaughter

(a) Any person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being -

(1) by culpable negligence; or

(2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (article 118), directly affecting the person;

is guilty of involuntary manslaughter and shall be punished as a court-martial may direct.

§ 920. Art. 120. Rape and carnal knowledge

(a) Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person—

(1) who is not that person's spouse; and

(2) who has not attained the age of sixteen years; is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(c) Penetration, however slight, is sufficient to complete either of these offenses.

(d)

(1) In a prosecution under subsection (b), it is an affirmative defense that—

(A) the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve years; and

(B) the accused reasonably believed that that person had at the time of the alleged offense attained the age of sixteen years.

(2) The accused has the burden of proving a defense under paragraph (1) by a preponderance of the evidence.

§ 921. Art. 121. Larceny and wrongful appropriation

(a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.

(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.

§ 922. Art. 122. Robbery

Any person subject to this chapter who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.

§ 923. Art. 123. Forgery

Any person subject to this chapter who, with intent to defraud—

(1) falsely makes or alters any signature, to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or

(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered;

is guilty of forgery and shall be punished as a court-martial may direct.

§ 923a. Art. 123a. Making, drawing, or uttering check, draft, or order without sufficient funds

Any person subject to this chapter who—

(1) for the procurement of any article or thing of value, with intent to defraud; or

(2) for the payment of any past due obligation, or for any other purpose, with intent to deceive;

makes, draws, utters, or delivers any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment, shall be punished as a court-martial may direct. The mak-

ing, drawing, uttering, or delivering by a maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control, is prima facie evidence of his intent to defraud or deceive and of his knowledge of insufficient funds in, or credit with, that bank or other depository, unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft, or order was not paid on presentment. In this section, the word "credit" means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft, or order.

§ 924. Art. 124. Maiming

Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which

(1) seriously disfigures his person by a mutilation thereof;

(2) destroys or disables any member or organ of his body; or

(3) seriously diminishes his physical vigor by the injury of any member or organ;

is guilty of maiming and shall be punished as a court-martial may direct.

§ 925. Art. 125. Sodomy

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

§ 926. Art. 126. Arson

(a) Any person subject to this chapter who willfully and maliciously burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein to the knowledge of the offender there is at the time a human being, is guilty of aggravated arson and shall be punished as court-martial may direct.

(b) Any person subject to this chapter who willfully and maliciously burns or sets fire to the property of another, except as provided in subsection (a), is guilty of simple arson and shall be punished as a court-martial may direct.

§ 927. Art. 127. Extortion

Any person subject to this chapter who communicates threats to another person with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and shall be punished as a court-martial may direct.

§ 928. Art. 128. Assault

(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

§ 929. Art. 129. Burglary

Any person subject to this chapter who, with intent to commit an offense punishable under section 918–928 of this title (article 118–128), breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct.

§ 930. Art. 130. Housebreaking

Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

§ 931. Art. 131. Perjury

Any person subject to this chapter who in a judicial proceeding or in a course of justice willfully and corruptly—

(1) upon a lawful oath or in any form allowed by law to be substituted for an oath, gives any false testimony material to the issue or matter of inquiry; or

(2) in any declaration, certificate, verification, or statement under penalty or perjury as permitted under section 1746 of title 28, United States Code, subscribes any false statement material to the issue or matter of inquiry;

is guilty of perjury and shall be punished as a court-martial may direct.

§ 932. Art. 132. Frauds against the United States

Any person subject to this chapter—

(1) who, knowing it to be false or fraudulent—

(A) makes any claim against the United States or any officer thereof; or

(B) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof;

(2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States or any officer thereof—

(A) makes or uses any writing or other paper knowing it to contain any false or fraudulent statements;

(B) makes any oath to any fact or to any writing or other paper knowing the oath to be false; or

(C) forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing it to be forged or counterfeited;

(3) who, having charge, possession, custody, or control of any money, or other property of the United States, furnished or intended for the armed forces thereof, knowingly delivers to any

person having authority to receive it, any amount thereof less than that for which he receives a certificate or receipt; or

(4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States;

shall, upon conviction, be punished as a court-martial may direct.

§ 933. Art. 133. Conduct unbecoming an officer and a gentleman

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

§ 934. Art. 134. General article

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

SUBCHAPTER XI. MISCELLANEOUS PROVISIONS

§ 935. Art. 135. Courts of inquiry

(a) Courts of inquiry to investigate any matter may be convened by any person authorized to convene a general court-martial or by any other person designated by the Secretary concerned for that purpose, whether or not the persons involved have requested such an inquiry.

(b) A court of inquiry consists of three or more commissioned officers. For each court of inquiry the convening authority shall also appoint counsel for the court.

(c) Any person subject to this chapter whose conduct is subject to inquiry shall be designated as a party. Any person subject to this chapter or employed by the Department of Defense who has a direct interest in the subject of inquiry has the right to be designated as a party upon request to the court. Any person designated as a party shall be given due notice and has the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence.

(d) Members of a court of inquiry may be challenged by a party, but only for cause stated to the court.

(e) The members, counsel, the reporter, and interpreters of courts of inquiry shall take an oath to faithfully perform their duties.

(f) Witnesses may be summoned to appear and testify and be examined before courts of inquiry, as provided for courts-martial.

(g) Courts of inquiry shall make findings of fact but may not express opinions or make recommendations unless required to do so by the convening authority.

(h) Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. If the record cannot be authenticated by the president, it shall be signed by a member in lieu of the president. If the record cannot be authenticated by the counsel for the court, it shall be signed by a member in lieu of the counsel.

§ 936. Art. 136. Authority to administer oaths and to act as notary

(a) The following persons on active duty or performing inactive-duty training may administer oaths for the purposes of military administration, including military justice:

(1) All judge advocates.

(2) All summary courts-martial.

(3) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants.

(4) All commanding officers of the Navy, Marine Corps, and Coast Guard.

(5) All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers.

(6) All other persons designated by regulations of the armed forces or by statute.

(b) The following persons on active duty or performing inactive-duty training may administer oaths necessary in the performance of their duties:

(1) The president, military judge, trial counsel, and assistant trial counsel for all general and special courts-martial.

(2) The president and the counsel for the court of any court of inquiry.

(3) All officers designated to take a deposition.

(4) All persons detailed to conduct an investigation.

(5) All recruiting officers.

(6) All other persons designated by regulations of the armed forces or by statute.

§ 937. Art. 137. Articles to be explained

(a)(1) The sections of this title (articles of the Uniform Code of Military Justice) specified in paragraph (3) shall be carefully explained to each enlisted member at the time of (or within fourteen days after)—

(A) the member's initial entrance on active duty; or

(B) the member's initial entrance into a duty status with a reserve component.

(2) Such sections (articles) shall be explained again—

(A) after the member has completed six months of active duty or, in the case of a member of a reserve component, after the member has completed basic or recruit training; and

(B) at the time when the member reenlists.

(3) This subsection applies with respect to sections 802, 803, 807–815, 825, 827, 831, 837, 838, 855,877–934, and 937–939 of this title(articles 2, 3, 7–15, 25, 27, 31, 37, 38, 55, 77–134, and 137–139).

(b) The text of the Uniform Code of Military Justice and of the regulations prescribed by the President under such Code shall be made available to a member on active duty or to a member of a reserve component, upon request by the member, for the member's personal examination.

§ 938. Art. 138. Complaints of wrongs

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

§ 939. Art. 139. Redress of injuries to property

(a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces, he may, under such regulations as the Secretary concerned may prescribe, convene a board to investigate the complaint. The board shall consist of from one to three commissioned officers and, for the purpose of that investigation, it has power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages as assessed and approved.

(b) If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be considered just upon the individual members thereof who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.

§ 940. Art. 140. Delegation by the President

The President may delegate any authority vested in him under this chapter, and provide for the subdelegation of any such authority.

SUBCHAPTER XII. UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

§ 941. Art. 141. Status

There is a court of record known as the United States Court of Appeals for the Armed Forces. The court is established under article I of the Constitution. The court is located for administrative purposes only in the Department of Defense.

§ 942. Art. 142. Judges

(a) *Number.* The United States Court of Appeals for the Armed Forces consists of five judges.

(b) *Appointment; qualification.*

(1) Each judge of the court shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, for a specified term determined under paragraph (2). A judge may serve as a senior judge as provided in subsection (e).

(2) The term of a judge shall expire as follows:

(A) In the case of a judge who is appointed after March 31 and before October 1 of any year, the term shall expire on September 30 of the year in which the fifteenth anniversary of the appointment occurs.

(B) In the case of a judge who is appointed after September 30 of any year and before April 1 of the following year, the term shall expire fifteen years after such September 30.

(3) Not more than three of the judges of the court may be appointed from the same political party, and no person may be appointed to be a judge of the court unless the person is a member of the bar of a Federal court or the highest court of a State.

(4) For purposes of appointment of judges to the court, a person retired from the armed forces after 20 or more years of active service (whether or not such person is on the retired list) shall not be considered to be in civilian life.

(c) *Removal.* Judges of the court may be removed from office by the President, upon notice and hearing, for—

(1) neglect of duty;

(2) misconduct; or

(3) mental or physical disability.

A judge may not be removed by the President for any other cause.

(d) *Pay and allowances.* Each judge of the court is entitled to the same salary and travel allowances as are, and from time to time may be, provided for judges of the United States Court of Appeals.

(e) *Senior judges.*

(1)(A) A former judge of the court who is receiving retired pay

or an annuity under section 945 of this title (article 145) or under subchapter III of chapter 83 or chapter 84 of title 5 shall be a senior judge. The chief judge of the court may call upon an individual who is a senior judge of the court under this subparagraph, with the consent of the senior judge, to perform judicial duties with the court—

(i) during a period a judge of the court is unable to perform his duties because of illness or other disability;

(ii) during a period in which a position of judge of the court is vacant; or

(iii) in any case in which a judge of the court recuses himself.

(B) If, at the time the term of a judge expires, no successor to that judge has been appointed, the chief judge of the court may call upon that judge (with the judge's consent) to continue to perform judicial duties with the court until the vacancy is filled. A judge who, upon the expiration of the judge's term, continues to perform judicial duties with the court without a break in service under this subparagraph shall be a senior judge while such service continues.

(2) A senior judge shall be paid for each day on which he performs judicial duties with the court an amount equal to the daily equivalent of the annual rate of pay provided for a judge of the court. Such pay shall be in lieu of retired pay and in lieu of an annuity under section 945 of this title (Article 145), subchapter III of chapter 83 or subchapter II of chapter 84 of title 5, or any other retirement system for employees of the Federal Government.

(3) A senior judge, while performing duties referred to in paragraph (2), shall be provided with such office space and staff assistance as the chief judge considers appropriate and shall be entitled to the per diem, travel allowances, and other allowances provided for judges of the court.

(4) A senior judge shall be considered to be an officer or employee of the United States with respect to his status as a senior judge, but only during periods the senior judge is performing duties referred to in paragraph (2). For the purposes of section 205 of title 18, a senior judge shall be considered to be a special Government employee during such periods. Any provision of law that prohibits or limits the political or business activities of an employee of the United States shall apply to a senior judge only during such periods.

(5) The court shall prescribe rules for the use and conduct of senior judges of the court. The chief judge of the court shall transmit such rules, and any amendments to such rules, to the Committees on Armed Services of the Senate and the House of Representatives not later than 15 days after the issuance of such rules or amendments, as the case may be.

(6) For purposes of subchapter III of chapter 83 of title 5 (relating to the Civil Service Retirement and Disability System) and chapter 84 of such title (relating to the Federal Employees' Retirement System) and for purposes of any other Federal Government retirement system for employees of the Federal Government—

(A) a period during which a senior judge performs duties referred to in paragraph (1) shall not be considered creditable service;

(B) no amount shall be withheld from the pay of a senior judge as a retirement contribution under section 8334, 8343, 8422, or 8432 of title 5 or under other such retirement system for any period during which the senior judge performs duties referred to in paragraph (1);

(C) no contribution shall be made by the Federal Government to any retirement system with respect to a senior judge for any period during which the senior judge performs duties referred to in paragraph (1); and

(D) a senior judge shall not be considered to be a reemployed annuitant for any period during which the senior judge performs duties referred to in paragraph (1).

(f) *Service of article III judges.*

(1) The Chief Justice of the United States, upon the request of the chief judge of the court, may designate a judge of a United States Court of Appeals or of a United States District Court to perform the duties of judge of the United States Court of Appeals for the Armed Forces—

(A) during a period a judge of the court is unable to perform his duties because of illness or other disability; or

(B) in any case in which a judge of the court recuses himself; or

(C) during a period when there is a vacancy on the court and in the opinion of the chief judge of the court such a designation is necessary for the proper dispatch of the business of the court.

(2) The chief judge of the court may not request that a designation be made under paragraph (1) unless the chief judge has determined that no person is available to perform judicial duties with the court as a senior judge under subsection (e).

(3) A designation under paragraph (1) may be made only with the consent of the designated judge and the concurrence of the chief judge of the court of appeals or district court concerned.

(4) Per diem, travel allowances, and other allowances paid to the designated judge in connection with the performance of duties for the court shall be paid from funds available for the payment of per diem and such allowances for judges of the court.

(g) *Effect of vacancy on court.* A vacancy on the court does not impair the right of the remaining judges to exercise the powers of the court.

§ 943. Art. 143. Organization and employees

(a) *Chief judge.*

(1) The chief judge of the United States Court of Appeals for the Armed Forces shall be the judge of the court in regular active service who is senior in commission among the judges of the court who—

(A) have served for one or more years as judges of the court; and

(B) have not previously served as chief judge.

(2) In any case in which there is no judge of the court in regular active service who has served as a judge of the court for at least one year, the judge of the court in regular active service who is senior in commission and has not served previously as chief judge shall act as the chief judge.

(3) Except as provided in paragraph (4), a judge of the court shall serve as the chief judge under paragraph (1) for a term of

five years. If no other judge is eligible under paragraph (1) to serve as chief judge upon the expiration of that term, the chief judge shall continue to serve as chief judge until another judge becomes eligible under that paragraph to serve as chief judge.

(4)(A) The term of a chief judge shall be terminated before the end of five years if—

(i) The chief judge leaves regular active service as a judge of the court; or

(ii) The chief judge notifies the other judges of the court in writing that such judge desires to be relieved of his duties as chief judge.

(B) The effective date of a termination of the term under subparagraph (A) shall be the date on which the chief judge leaves regular active service or the date of the notification under subparagraph (A)(ii), as the case may be.

(5) If a chief judge is temporarily unable to perform his duties as achief judge, the duties shall be performed by the judge of the court in active service who is present, able, and qualified to act, and is next in precedence.

(b) *Precedence of judges.* The chief judge of the court shall have precedence and preside at any session that he attends. The other judges shall have precedence and preside according to the seniority of their original commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

(c) *Status of Certain positions.*

(1) Attorney positions of employment under the Court of Appeals for the Armed Forces are excepted from the competitive service. A position of employment under the court that is provided primarily for the service of one judge of the court, reports directly to the judge, and is a position of a confidential character is excepted from the competitive service. Appointments to positions referred to in the preceding sentences shall be made by the court, without the concurrence of any other officer or employee of the executive branch, in the same manner as appointments are made to other executive branch positions of a confidential or policy-determining character for which it is not practicable to examine or to hold a competitive examination. Such positions shall not be counted as positions of that character for purposes of any limitation on the number of positions of that character provided in law.

(2) In making appointments to the positions described in paragraph (1), preference shall be given, among equally qualified persons, to persons who are preference eligibles (as defined in section 2108(3) of title 5).

§ 944. Art. 144. Procedure

The United States Court of Appeals for the Armed Forces may prescribe its rules of procedure and may determine the number of judges required to constitute a quorum.

§ 945. Art. 145. Annuities for judges and survivors

(a) *Retirement annuities for judges.*

(1) A person who has completed a term of service for which he was appointed as a judge of the United States Court of Appeals for the Armed Forces is eligible for an annuity under this section upon separation from civilian service in the Federal Government. A person who continues service with the court as a senior judge under section 943(e)(1)(B) of this title (art. 143(e)(1)(B)) upon the expiration of the judge's term shall be considered to have been separated from civilian service in the Federal Government only upon the termination of that continuous service.

(2) A person who is eligible for any annuity under this section shall be paid that annuity if, at the time he becomes eligible to receive that annuity, he elects to receive that annuity in lieu of any other annuity for which he may be eligible at the time of such election (whether an immediate or a deferred annuity) under subchapter III of chapter 83 or subchapter II of chapter 84 of title 5 or any other retirement system for civilian employees of the Federal Government. Such an election may not be revoked.

(3)(A) The Secretary of Defense shall notify the Director of the Office of Personnel Management whenever an election under paragraph (2) is made affecting any right or interest under subchapter III of chapter 83 or subchapter 11 of chapter 85 of title 5 based on service as a judge of the United States Court of Appeals for the Armed Forces.

(B) Upon receiving any notification under subparagraph (A) in the case of a person making an election under (2), the Director shall determine the amount of the person's lump-sum credit under subchapter 111 of chapter 83 or subchapter II of chapter 84 of title 5, as applicable, and shall request the Secretary of the Treasury to transfer such amount from the Civil Service Retirement and Disability Fund to the Department of Defense Military Retirement Fund. The Secretary of the Treasury shall make any transfer so requested.

(C) In determining the amount of a lump-sum credit under section 8331(8) of title 5 for purposes of this paragraph -

(i) interest shall be computed using the rates under section 8334(e)(3) of such title; and

(ii) the completion of 5 years of civilian service (or longer) shall not be a basis for excluding interest.

(b) *Amount of annuity.* The annuity payable under this section to a person who makes an election under subsection (a)(2) is 80 percent of the rate of pay for a judge in active service on the United States Court of Appeals for the Armed Forces as of the date on which the person is separated from civilian service.

(c) *Relation to thrift savings plan.* Nothing in this section affects any right of any person to participate in the thrift savings plan under section 8351 of title 5 of subchapter III of chapter 84 of such title.

(d) *Survivor annuities.* The Secretary of Defense shall prescribe by regulation a program to provide annuities for survivors and former spouses of persons receiving annuities under this section by reason of elections made by such persons under subsection (a)(2). That program shall, to the maximum extent practicable, provide benefits and establish terms and conditions that are similar to those provided under survivor and former spouse annuity programs under other retirement systems for civilian employees of the Federal Government. The program may include provisions for the reduction in the annuity paid the person as a condition for the survivor annuity. An election by a judge (including a senior judge) or former judge to receive an annuity under this section terminates any right or interest which any other individual may have to a survivor annuity under any other retirement system for civilian employees of the Federal Government based on the serv-

ice of that judge or former judge as a civilian officer or employee of the Federal Government (except with respect to an election under subsection (g)(1)(B)).

(e) *Cost-of-living increases.* The Secretary of Defense shall periodically increase annuities and survivor annuities paid under this section in order to take account of changes in the cost of living. The Secretary shall prescribe by regulation procedures for increases in annuities under this section. Such system shall, to the maximum extent appropriate, provide cost-of-living adjustments that are similar to those that are provided under other retirement systems for civilian employees of the Federal Government.

(f) *Dual compensation.* A person who is receiving an annuity under this section by reason of service as a judge of the court and who is appointed to a position in the Federal Government shall, during the period of such person's service in such position, be entitled to receive only the annuity under this section or the pay for that position, whichever is higher.

(g) *Election of judicial retirement benefits.*

(1) A person who is receiving an annuity under this section by reason of service as a judge of the court and who later is appointed as a justice or judge of the United States to hold office during good behavior and who retires from that office, or from regular active service in that office, shall be paid either—

(A) the annuity under this section, or

(B) the annuity or salary to which he is entitled by reason of his service as such a justice or judge of the United States, as determined by an election by that person at the time of his retirement from the office, or from regular active service in the office, of justice or judge of the United States. Such an election may not be revoked.

(2) An election by a person to be paid an annuity or salary pursuant to paragraph (1)(B) terminates (A) any election previously made by such person to provide a survivor annuity pursuant to subsection (d), and (B) any right of any other individual to receive a survivor annuity pursuant to subsection (d) on the basis of the service of that person.

(h) *Source of payment of annuities.* Annuities and survivor annuities paid under this section shall be paid out of the Department of Defense Military Retirement Fund.

(i) *Eligibility to elect between retirement systems.*

(1) This subsection applies with respect to any person who—

(A) prior to being appointed as a judge of the United States Court of Appeals for the Armed Forces, performed civilian service of a type making such person subject to the Civil Service Retirement System; and

(B) would be eligible to make an election under section 301(a)(2) of the Federal Employees' Retirement System Act of 1986, by virtue of being appointed as such a judge, but for the fact that such person has not had a break in service of a sufficient duration to be considered someone who is being reemployed by the Federal Government.

(2) Any person with respect to whom this subsection applies shall be eligible to make an election under section 301(a)(2) of the Federal Employees' Retirement System Act of 1986 to the same extent and in the same manner (including subject to the condition set forth in section 301(d) of such Act) as if such person's appointment constituted reemployment with the Federal Government.

(Added Pub.L. 101–189, Div. A, Title XIII, § 1301(c), Nov. 29, 1989, 103 Stat. 1572, and amended Pub.L. 102–190, Div. A, Title X, § 1061(b)(1)(C), Dec. 5, 1991, 105 Stat. 1474; Pub.L. 102–484, Div. A, Title X, §§ 1052(11), 1062(a)(1), Oct. 23, 1992, 106 Stat. 2499, 2504.)

§ 946. Art. 146. Code committee

(a) *Annual survey.* A committee shall meet at least annually and shall make an annual comprehensive survey of the operation of this chapter.

(b) *Composition of committee.* The committee shall consist of—

(1) the judges of the United States Court of Appeals for the Armed Forces;

(2) the Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel of the Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps; and

(3) two members of the public appointed by the Secretary of Defense.

(c) *Reports.*

(1) After each such survey, the committee shall submit a report—

(A) to the Committees on Armed Services of the Senate and House of Representatives; and

(B) to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Transportation.

(2) Each report under paragraph (1) shall include the following:

(A) Information on the number and status of pending cases.

(B) Any recommendation of the committee relating to—

(i) uniformity of policies as to sentences;

(ii) amendments to this chapter; and

(iii) any other matter the committee considers appropriate.

(d) *Qualifications and terms of appointed members.* Each member of the committee appointed by the Secretary of Defense under subsection (b)(3) shall be a recognized authority in military justice or criminal law. Each such member shall be appointed for a term of three years.

(e) *Applicability of Federal Advisory Committee Act.* The Federal Advisory Committee Act (5 U.S.C.App. 1) shall not apply to the committee.

APPENDIX 3
DoD Directive 5525.7

Department of Defense
DIRECTIVE

January 22, 1985
NUMBER 5525.7

GC/IG, DoD

SUBJECT:
Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes

References:

(a) DoD Directive 1355.1, "Relationships with the Department of Justice on Grants of Immunity and the Investigation and Prosecution of Certain Crimes," July 21, 1981 (hereby canceled)

(b) Memorandum of Understanding Between the Department Relating to the Investigation and Prosecution of Certain Crimes, August 1984

(c) Title 18, United State Code

(d) Title 10, United States Code, Sections 801-940 (Articles 1-140), "Uniform Code of Military Justice (UCMJ)"

(e) Manual for Courts-Martial, United States, 1984 (R.C.M. 704)

A. REISSUANCE AND PURPOSE

This Directive reissues reference (a), updates policy and procedures, assigns responsibilities, and implements the 1984 Memorandum of Understanding (MOU) between the Department of Justice (DoJ) and the Department of Defense (DoD).

B. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense, the Military Departments, the Office of Inspector General, DoD, the Organization of the Joint Chiefs of Staff, the Defense Agencies, and Unified and Specified Commands (hereafter referred to collectively as "DoD Components"). The term "DoD criminal investigative organizations," as used herein, refers collectively to the United States Army Criminal Investigation Command (USACIDC); Naval Investigative Service (NIS); U.S. Air Force Office of Special Investigations (AFOSI), and Defense Criminal Investigative Service (DCIS), Office of the Inspector General, DoD.

C. POLICY

It is DoD policy to maintain effective working relationships with the DoJ in the investigation and prosecution of crimes involving the programs, operations, or personnel of the Department of Defense.

D. PROCEDURES

With respect to inquiries for which the DoJ has assumed investigative responsibility based on the MOU, DoD investigative agencies should seek to participate jointly with DoJ investigative agencies whenever the inquiries relate to the programs, operations, or personnel of the Department of Defense. This applies to cases referred to the Federal Bureau of Investigation (FBI) under paragraph C.1.a. of the attached MOU (*see* enclosure 1) as well as to those cases for which a DoJ investigative agency is assigned primary investigative responsibility by a DoJ prosecutor. DoD components shall comply with the terms of the MOU and DoD Supplemental Guidance (*see* enclosure 1).

E. RESPONSIBILITIES

1. *The Inspector General, Department of Defense* (IG, DoD), shall:

a. Establish procedures to implement the investigative policies set forth in this Directive.

b. Monitor compliance by DoD criminal investigative organizations to the terms of the MOU.

c. Provide specific guidance regarding investigative matters, as appropriate.

2. *The General Counsel, Department of Defense*, shall:

a. Establish procedures to implement the prosecutive policies set forth in this Directive.

b. Monitor compliance by the DoD Components regarding the prosecutive aspects of the MOU.

c. Provide specific guidance, as appropriate.

d. Modify the DoD Supplemental Guidance at enclosure 1, with the concurrence of the IG, DoD, after requesting comments from affected DoD Components.

3. The *Secretaries of the Military Departments* shall establish procedures to implement the policies set forth in this Directive.

F. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. The Military Departments shall forward two copies of implementing documents to the Inspector General, Department of Defense, within 90 days. Other DoD Components shall disseminate this Directive to appropriate personnel.

Signed by William H. Taft, IV
Deputy Secretary of Defense

Enclosure—1

Memorandum of Understanding Between the Departments of Justice And Defense Relating to the Investigation and Prosecution of Certain Crimes

MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE

This enclosure contains the verbatim text of the 1984 Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes (reference (b)). Matter that is identified as "DoD Supplemental Guidance" has been added by the Department of Defense. DoD Components shall comply with the MOU and the DoD Supplemental Guidance.

MEMORANDUM OR UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES

A. PURPOSE, SCOPE AND AUTHORITY

This Memorandum of Understanding (MOU) establishes policy for the Department of Justice and the Department of Defense with regard to the investigation and prosecution of criminal matters over which the two Departments have jurisdiction. This memorandum is not intended to confer any rights, benefits, privileges or form of due process procedure upon individuals, associations, corporations or other persons or entities.

This Memorandum applies to all components and personnel of the Department of Justice and the Department of Defense. The statutory bases for the Department of Defense and the Department of Justice investigation and prosecution responsibilities include, but are not limited to:

1. Department of Justice: Titles 18, 21 and 28 of the United States Code; and

2. Department of Defense: The Uniform Code of Military Justice, Title 10, United States Code, Sections 801-940; the Inspector General Act of 1978, Title 5 United States Code, Appendix 3; and Title 5 United States Code, Section 301.

B. POLICY

The Department of Justice has primary responsibility for enforcement of federal laws in the United States District Courts. The Department of Defense has responsibility for the integrity of its programs, operations and installations and for the discipline of the Armed Forces. Prompt administrative actions and completion of investigations within the two (2) year statute of limitations under the Uniform Code of Military Justice require the Department of Defense to assume an important role in federal criminal investigations. To encourage joint and coordinated investigative efforts, in appropriate cases where the Department of Justice assumes investigative responsibility for a matter relating to the Department of Defense, it should share information and conduct the inquiry jointly with the interested Department of Defense investigative agency.

It is neither feasible nor desirable to establish inflexible rules regarding the responsibilities of the Department of Defense and the Department of Justice as to each matter over which they may have concurrent interest. Informal arrangements and agreements within the spirit of this MOU are permissible with respect to specific crimes or investigations.

C. INVESTIGATIVE AND PROSECUTIVE JURISDICTION

1. CRIMES ARISING FROM THE DEPARTMENT OF DEFENSE OPERATIONS

a. Corruption Involving the Department of Defense Personnel

The Department of Defense investigative agencies will refer to the FBI on receipt all significant allegations of bribery and conflict of interest involving military or civilian personnel of the Department of Defense. In all corruption matters the subject of a referral to the FBI, the Department of Defense shall obtain the concurrence of the Department of Justice prosecutor or the FBI before initiating any independent investigation preliminary to any action under the Uniform code of Military Justice. If the Department of Defense is not satisfied with the initial determination, the matter will be reviewed by the Criminal Division of the Department of Justice.

The FBI will notify the referring agency promptly regarding whether they accept the referred matters for investigation. The FBI will attempt to make such decision in one (1) working day of receipt in such matters.

DoD Supplemental Guidance

A. Certain bribery and conflict of interest allegations (also referred to as "corruption" offenses in the MOU) are to be referred immediately to the FBI.

B. For the purposes of this section, bribery and conflict of interest allegations are those which would, if proven, violate 18 U.S.C., Sections 201, 203, 205, 208, 209, or 219 (reference (c)).

C. Under paragraph C.1.a., DoD criminal investigative organizations shall refer to the FBI those "significant" allegations of bribery and conflict of interest that implicate directly military or civilian personnel of the Department of Defense, including allegations of bribery or conflict of interest that arise during the course of an ongoing investigation.

1. All bribery and conflict of interest allegations against present, retired, or former General or Flag officers and civilians in grade GS-16 and above, the Senior Executive Service and the Executive Level will be considered "significant" for purposes of referral to the FBI.

2. In cases not covered by subsection C.1., above, the determination of whether the matter is "significant" for purposes of referral to the FBI should be made in light of the following factors: sensitivity of the DoD program, involved, amount of money in the alleged bribe, number of DoD personnel implicated, impact on the affected DoD program, and with respect to military personnel, whether the matter normally would be handled under the Uniform Code of Military Justice (reference (d)). Bribery and conflicts of interest allegations warranting consideration of Federal prosecution, which were not referred to the FBI based on the application of these guidelines and not otherwise disposed of under reference (d), will be developed and brought to the attention of the Department of Justice through the "conference" mechanism described in paragraph C.1.b. of the MOU(reference (b)).

D. Bribery and conflict of interest allegations when military or DoD civilian personnel are not subjects of the investigation are not covered by the referral requirement of paragraph C.1.a of reference (b). Matters in which the suspects are solely DoD contractors and their subcontractors, such as commercial bribery between a DoD subcontractor and a DoD prime contractor, do not require referral upon receipt to the FBI. The "conference" procedure described in paragraph C.1.b. of reference (b) shall be used in these types of cases.

E. Bribery and conflict of interest allegations that arise from events occurring outside the United States, its territories, and possessions, and requiring investigation outside the United States, its territories, and possessions need not be referred to the FBI.

b. Frauds Against the Department of Defense and Theft and Embezzlement of Government Property

The Department of Justice and the Department of Defense have investigative responsibility for frauds against the Department of Defense and theft and embezzlement of Government property from the Department of Defense. The Department of Defense will investigate frauds against the Department of Defense and theft of government property from the Department of Defense. Whenever a Department of Defense investigative agency identifies a matter which, if developed by investigation, would warrant federal prosecution, it will confer with the United States Attorney or the Criminal Division, the Department of Justice, and the FBI field office. At the time of this initial conference, criminal investigative responsibility will be determined by the Department of Justice in consultation with the Department of Defense.

DoD Supplemental Guidance

A. Unlike paragraph C.1.a. of the MOU (reference (b)), paragraph C.1.b. does not have an automatic referral requirement. Under paragraph C.1.b., DoD criminal investigative organizations shall confer with the appropriate federal prosecutor and the FBI on matters which, if developed by investigation, would warrant Federal prosecution. This "conference" serves to define the respective roles of DoD criminal investigative organizations and the FBI on a case-by-case basis. Generally, when a conference is warranted, the DoD criminal investigative organization shall arrange to meet with the prosecutor and shall provide notice to the FBI that such meeting is being held. Separate conferences with both the prosecutor and the FBI normally are not necessary.

B. When investigations are brought to the attention of the Defense Procurement Fraud Unit (DPFU), such contact will satisfy the "conference" requirements of paragraph C.1.b. (reference (b)) as to both the prosecutor and the FBI.

C. Mere receipt by DoD criminal investigative organizations of raw allegations of fraud or theft does not require conferences with the DoJ and the FBI. Sufficient evidence should be developed before the conference to allow the prosecutor to make an informed judgment as to the merits of a case dependent upon further investigation. However, DoD criminal investigative organizations should avoid delay in scheduling such conferences, particularly in complex fraud cases, because an early judgment by a prosecutor can be of assistance in focusing the investigation on those matters that most likely will result in criminal prosecution.

2. **CRIMES COMMITTED ON MILITARY INSTALLATIONS**

a. Subject(s) can be Tried by Court-Martial or are Unknown

Crimes (other than those covered by paragraph C.1.) committed on a military installation will be investigated by the Department of Defense investigative agency concerned and, when committed by a person subject to the Uniform Code of Military Justice, prosecuted by the Military Department concerned. The Department of Defense will provide immediate notice to the Department of Justice of significant cases in which an individual subject/victim is other than a military member or dependent thereof.

b. One or More Subjects cannot be Tried by Court-Martial

When a crime (other than those covered by paragraph C.1.) has occurred on a military installation and there is reasonable basis to believe that it has been committed by a person or persons, some or all of whom are not subject to the Uniform Code of Military Justice, the Department of Defense investigative agency will provide immediate notice of the matter to the appropriate Department of Justice investigative agency unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

DoD Supplemental Guidance

A. Subsection C.2. of the MOU (reference (b)) addresses crimes committed on a military installation other than those listed in paragraphs C.1.a. (bribery and conflict of interest) and C.1.b. (fraud, theft, and embezzlement against the Government).

B. Unlike paragraph C.1.a. of reference (b), which requires "referral" to the FBI of certain cases, and paragraph C.1.b., which requires "conferences" with respect to certain cases, subsection C.2. requires only that "notice" be given to DoJ of certain cases. Relief from the reporting requirement of subsection C.2. may be granted by the local U.S. attorney as to types or classes of cases.

C. For purposes of paragraph C.2.a. (when the subjects can be tried by court-martial or are unknown), an allegation is "significant" for purposes of required notice to the DoJ only if the offense falls within the prosecutorial guidelines of the local U.S. attorney. Notice should be given in other cases when the DoD Component believes that Federal prosecution is warranted or otherwise determines that the case may attract significant public attention.

3. **CRIMES COMMITTED OUTSIDE MILITARY INSTALLATIONS BY PERSONS WHO CAN BE TRIED BY COURT-MARTIAL**

a. Offense is Normally Tried by Court-Martial

Crimes (other than those covered by paragraph C.1.) committed outside a military installation by persons subject to the Uniform Code of Military Justice which, normally, are tried by court-martial will be investigated and prosecuted by the Department of Defense. The Department of Defense will

provide immediate notice of significant cases to the appropriate Department of Justice investigative agency. The Department of Defense will provide immediate notice in all cases where one or more subjects is not under military jurisdiction unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

DoD Supplemental Guidance

For purposes of this paragraph, an allegation is "significant" for purposes of required notice to the DoJ only if the offense falls within prosecutorial guidelines of the local U.S. attorney. Notice should be given in other cases when the DoD Component believes that Federal prosecution is warranted, or otherwise determines that the case may attract significant public attention.

b. Crimes Related to Scheduled Military Activities

Crimes related to scheduled Military activities outside of a military installation, such as organized maneuvers in which persons subject to the Uniform Code of Military Justice are suspects, shall be treated as if committed on a military installation for purposes of this Memorandum. The FBI or other Department of Justice investigative agency may assume jurisdiction with the concurrence of the United States Attorney or the Criminal Division, Department of Justice.

c. Offense is not Normally Tried by Court-Martial

When there are reasonable grounds to believe that a Federal crime (other than those covered by paragraph C.1.) normally not tried by court-martial, has been committed outside a military installation by a person subject to the Uniform Code of Military Justice, the Department of Defense investigative agency will immediately refer the case to the appropriate Department of Justice investigative agency unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

D. REFERRALS AND INVESTIGATIVE ASSISTANCE

1. **REFERRALS**

Referrals, notices, reports, requests and the general transfer of information under this Memorandum normally should be between the FBI or other Department of Justice investigative agency and the appropriate Department of Defense investigative agency at the field level.

If a Department of Justice investigative agency does not accept a referred matter and the referring Department of Defense investigative agency then, or subsequently, believes that evidence exists supporting prosecution before civilian courts, the Department of Defense agency may present the case to the United States Attorney or the Criminal Division, Department of Justice, for review.

2. **INVESTIGATIVE ASSISTANCE**

In cases where a Department of Defense or Department of Justice investigative agency has primary responsibility and it requires limited assistance to pursue outstanding leads, the investigative agency requiring assistance will promptly advise the appropriate investigative agency in the other Department and, to the extent authorized by law and regulations, the requested assistance should be provided without assuming responsibility for the investigation.

E. PROSECUTION OF CASES

1. With the concurrence of the Department of Defense, the Department of Justice will designate such Department of Defense attorneys as it deems desirable to be Special Assistant United States Attorneys for use where the effective prosecution of cases may be facilitated by the Department of Defense attorneys.

2. The Department of Justice will institute civil actions expeditiously in United States District Courts whenever appropriate to recover monies lost as a result of crimes against the Department of Defense; the Department of Defense will provide appropriate assistance to facilitate such actions.

3. The Department of Justice prosecutors will solicit the views of the Department of Defense prior to initiating action against an individual subject to the Uniform Code of Military Justice.

4. The Department of Justice will solicit the views of the Department of Defense with regard to its Department of Defense-related cases and investigations in order to effectively coordinate the use of civil, criminal and administrative remedies.

DoD Supplemental Guidance

Prosecution of Cases and Grants of Immunity

A. The authority of court-martial convening authorities to refer cases to trial, approve pretrial agreements, and issue grants of immunity under the UCMJ (reference (d)) extends only to trials by court-martial. In order to ensure that such actions do not preclude appropriate action by Federal civilian authorities in cases likely to be prosecuted in the U.S. district courts, court-martial convening authorities shall ensure that appropriate consultation as required by this enclosure has taken place before trial by court-martial, approval of a pretrial agreement, or issuance of a grant of immunity in cases when such consultation is required.

B. Only a general court-martial convening authority may grant immunity under the UCMJ (reference (d)), and may do so only in accordance with R.C.M. 704 (reference (e)).

1. Under reference (d), there are two types of immunity in the military justice system:

a. A person may be granted transactional immunity from trial by court-martial for one or more offenses under reference (d).

b. A person may be granted testimonial immunity, which is immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial.

2. Before a grant of immunity under reference (d), the general court-martial convening authority shall ensure that there has been appropriate consultation with the DoJ with respect to offenses in which consultation is required by this enclosure.

3. A proposed grant of immunity in a case involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of rules or statutes concerning classified information or the foreign relations of the United States shall be forwarded to the General Counsel of the Department of Defense for the purpose of consultation with the DoJ. The General Counsel shall obtain the views of other appropriate elements of the Department of Defense in furtherance of such consultation.

C. The authority of court-martial convening authorities extends only to grants of immunity from action under reference (d). Only the Attorney General or other authority designated under 18 U.S.C. Secs. 6001-6005 (reference (c)) may authorize action to obtain a grant of immunity with respect to trials in the U.S. district courts.

F. MISCELLANEOUS MATTERS

1. THE DEPARTMENT OF DEFENSE ADMINISTRATIVE ACTIONS

Nothing in this Memorandum limits the Department of Defense investigations conducted in support of administrative actions to be taken by the Department of Defense. However, the Department of Defense investigative agencies will coordinate all such investigations with the appropriate Department of Justice prosecutive agency and obtain the concurrence of the Department of Justice prosecutor or the Department of Justice investigative agency prior to conducting any administrative investigation during the pendency of the criminal investigation or prosecution.

2. SPECIAL UNIFORM CODE OF MILITARY JUSTICE FACTORS

In situations where an individual subject to the Uniform Code of Military Justice is a suspect in any crime for which a Department of Justice investigative agency has assumed jurisdiction, if a Department of Defense investigative agency believes that the crime involves special factors relating to the administration and discipline of the Armed Forces that would justify its investigation, the Department of Defense investigative agency will advise the appropriate Department of Justice investigative agency or the Department of Justice prosecuting authorities of these factors. Investigation of such a crime may be undertaken by the appropriate Department of Defense investigative agency with the concurrence of the Department of Justice.

3. ORGANIZED CRIME

The Department of Defense investigative agencies will provide to the FBI all information collected during the normal course of agency operations pertaining to the element generally known as "organized crime" including both traditional (La Cosa Nostra) and nontraditional organizations whether or not the matter is considered prosecutable. The FBI should be notified of any investigation involving any element of organized crime and may assume jurisdiction of the same.

4. DEPARTMENT OF JUSTICE NOTIFICA-

TIONS TO DEPARTMENT OF DEFENSE INVESTIGATIVE AGENCIES

a. The Department of Justice investigative agencies will promptly notify the appropriate Department of Defense investigative agency of the initiation of the Department of Defense related investigations which are predicated on other than a Department of Defense referral except in those rare instances where notification might endanger agents or adversely affect the investigation. The Department of Justice investigative agencies will also notify the Department of Defense of all allegations of the Department of Defense related crime where investigation is not initiated by the Department of Justice.

b. Upon request, the Department of Justice investigative agencies will provide timely status reports on all investigations relating to the Department of Defense unless the circumstances indicate such reporting would be inappropriate.

c. The Department of Justice investigative agencies will promptly furnish investigative results at the conclusion of an investigation and advise as to the nature of judicial action, if any, taken or contemplated.

d. If judicial or administrative action is being considered by the Department of Defense, the Department of Justice will, upon written request, provide existing detailed investigative data and documents (less any federal grand jury material, disclosure of which would be prohibited by Rule 6(e), Federal Rules of Criminal Procedure), as well as agent testimony for use in judicial or administrative proceedings, consistent with Department of Justice and other federal regulations. The ultimate use of the information shall be subject to the concurrence of the federal prosecutor during the pendency of any related investigation or prosecution.

5. **TECHNICAL ASSISTANCE**

a. The Department of Justice will provide to the Department of Defense all technical services normally available to federal investigative agencies.

b. The Department of Defense will provide assistance to the Department of Justice in matters not relating to the Department of Defense as permitted by law and implementing regulations.

6. **JOINT INVESTIGATIONS**

a. To the extent authorized by law, the Department of Justice investigative agencies and the Department of Defense investigative agencies may agree to enter into joint investigative endeavors, including undercover operations, in appropriate circumstances. However, all such investigations will be subject to Department of Justice guidelines.

b. The Department of Defense, in the conduct of any investigation that might lead to prosecution in Federal District Court, will conduct the investigation consistent with any Department of Justice guidelines. The Department of Justice shall provide copies of all relevant guidelines and their revisions.

DoD Supplemental Guidance

When DoD procedures concerning apprehension, search and seizure, interrogation, eyewitnesses, or identification differ from those of DoJ, DoD procedures will be used, unless the DoJ prosecutor has directed that DoJ procedures be used instead. DoD criminal investigators should bring to the attention of the DoJ prosecutor, as appropriate, situations when use of DoJ procedures might impede or preclude prosecution under the UCMJ (reference (d)).

7. **APPREHENSION OF SUSPECTS**

To the extent authorized by law, the Department of Justice and the Department of Defense will each promptly deliver or make available to the other suspects, accused individuals and witnesses where authority to investigate the crimes involved is lodged in the other Department. This MOU neither expands nor limits the authority of either Department to perform apprehensions, searches, seizures, or custodial interrogations.

G. EXCEPTION

This Memorandum shall not affect the investigative authority now fixed by the 1979 “Agreement Governing the Conduct of the Defense Department Counter intelligence Activities in Conjunction with the Federal Bureau of Investigation” and the 1983 Memorandum of Understanding between the Department of Defense, the Department of Justice and the FBI concerning “Use of Federal Military Force in Domestic Terrorist Incidents.”

APPENDIX 3.1

MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND TRANSPORTATION (COAST GUARD) RELATING TO THE INVESTIGATIONS AND PROSECUTION OF CRIMES OVER WHICH THE TWO DEPARTMENTS HAVE CONCURRENT JURISDICTION.

Whereas, certain crimes committed by Coast Guard personnel subject to the Uniform Code of Military Justice may be prosecuted by Coast Guard tribunals under the Code or by civilian authorities in the Federal Courts; and

Whereas, it is recognized that although the administration and discipline of the Coast Guard requires that certain types of crimes committed by its personnel be investigated by that service and prosecuted before Coast Guard military tribunals other types of crimes committed by such military personnel should be investigated by civil authorities and prosecuted before civil tribunals; and

Whereas, it is recognized that it is not feasible to impose inflexible rules to determine the respective responsibility of the civilian and Coast Guard military authorities as to each crime over which they may have concurrent jurisdiction and that informal arrangements and agreements may be necessary with respect to specific crimes or investigations; and

Whereas, agreement between the Department of Justice and the Department of Transportation (Coast Guard) as to the general areas in which they will investigate and prosecute crimes to which both civil and military jurisdiction attach will, nevertheless, tend to make the investigation and prosecution of crimes more expeditious and efficient and give appropriate effect to the policies of civil government and the requirements of the United States Coast Guard;

It is hereby agreed and understood between the Department of Justice and the Department of Transportation (Coast Guard) as follows:

1. *Crimes committed on military installations (including aircraft and vessels).* Except as hereinafter indicated, all crimes committed on a military installation by Coast Guard personnel subject to the Uniform Code of Military Justice shall be investigated and prosecuted by the Coast Guard if the Coast Guard makes a determination that there is a reasonable likelihood that only Coast Guard personnel subject to the Uniform Code of Military justice are involved in such crimes as principles or accessories, and except in extraordinary cases, that there is no victim other than persons who are subject to the Uniform Code of Military Justice or who are bona fide dependents or members of a household of military or civilian personnel residing on the installation. Unless such a determination is made, the Coast Guard shall promptly advise the Federal Bureau of Investigation of any crime committed on a military installation if such crime is within the investigative authority of the Federal Bureau of Investigation. The Federal Bureau of Investigation shall investigate any serious crime of which it has been so advised for the purpose of prosecution in the civil courts unless the Department of Justice determines that investigation and prosecution may be conducted more efficiently and expeditiously by the Coast Guard. Even if the determination provided for in the first sentence of this paragraph is made by the Coast Guard, it shall promptly advise the Federal Bureau of Investigation of any crime committed on a military installation in which there is a victim who is not subject to the Uniform Code of Military Justice or a bona fide dependent or member of the household of military or civilian personnel residing on the installation and that the Coast Guard is investigating the crime because it has been determined to be extraordinary. The Coast Guard shall promptly advise the Federal Bureau of Investigation whenever the crime, except in minor offenses, involves fraud against the government, misappropriation, robbery, or theft of government property of funds, or is of a similar nature. All such crimes shall be investigated by the Coast Guard unless it receives prompt advise that the Department of Justice has determined that the crime should be investigated by the Federal Bureau of Investigation and that the Federal Bureau of Investigation will undertake the investigation for the purpose of prosecution in the civil courts.

2. *Crimes committed outside of military installations.* Except as hereinafter indicated, all crimes committed outside of military installations, which fall within the investigative jurisdiction of the Federal Bureau of Investigation and in which there is involved as a suspect an individual subject to the Uniform Code of Military Justice, shall be investigated by the Federal Bureau of Investigation for the purpose of prosecution in civil courts, unless the

Department of Justice determines that investigation and prosecution may be conducted more efficiently and expeditiously by other authorities. All such crimes which come first to the attention of Coast Guard authorities shall be referred promptly by them to the Federal Bureau of Investigation, unless relieved of this requirement by the Federal Bureau of Investigation as to particular types or classes of crime. However, whenever Coast Guard military personnel are engaged in scheduled military activities outside of military installations such as organized maneuvers or organized movement, the provisions of paragraph 1 above shall apply, unless persons not subject to the Uniform Code of Military Justice are involved as principals, accessories or victims.

If, however, there is involved as a suspect or as an accused in any crime committed outside of a military installation and falling within the investigative authority of the Federal Bureau of Investigation, an individual who is subject to the Uniform Code of Military Justice and if the Coast Guard authorities believe that the crime involves special factors relating to the administration and discipline of the Coast Guard which would justify investigation by them for the purpose of prosecution before a Coast Guard military tribunal, they shall promptly advise the Federal Bureau of Investigation of the crime and indicate their views on the matter. Investigation of such a crime may be undertaken by the Coast Guard military authorities if the Department of Justice agrees.

3. *Transfer of investigative authority.* An investigative body of the Coast Guard which has initiated an investigation pursuant to paragraphs 1 and 2 hereof, shall have exclusive investigative authority and may proceed therewith to prosecution. If, however, any Coast Guard investigative body comes to the view that effectuation of those paragraphs requires the transfer of investigative authority over a crime, investigation of which has already been initiated by that or by any other investigative body, it shall promptly advise the other interested investigative body of its views. By agreement between the Departments of Justice and Transportation (Coast Guard), investigative authority may then be transferred.

4. *Administrative action.* Exercise of exclusive investigative authority by the Federal Bureau of Investigation pursuant to this agreement shall not preclude Coast Guard military authorities from making inquiries for the purpose of administrative action related to the crime being investigated. The Federal Bureau of Investigation will make the results of its investigations available to Coast Guard military authorities for use in connection with such action.

Whenever possible, decisions with respect to the application in particular cases of the provisions of this Memorandum of Understanding will be made at the local level, that is, between the Special Agent in Charge of the local office of the Federal Bureau of Investigation and the local Coast Guard military commander.

5. *Surrender of suspects.* To the extent of the legal authority conferred upon them, the Department of Justice and Coast Guard military authorities will each deliver to the other promptly suspects and accused individuals if authority to investigate the crimes in which such accused individuals and suspects are involved is lodged in the other by paragraphs 1 and 2 hereof.

Nothing in this memorandum shall prevent the Coast Guard from prompt arrest and detention of any person subject to the Uniform Code of Military Justice whenever there is knowledge or reasonable basis to believe that such a person has committed an offense in violation of such code and detaining such person until he is delivered to the Federal Bureau of Investigation if such action is required pursuant to this memorandum.

APPROVED:

/s/ Ramsey Clark	/s/ Alan S. Boyd
Ramsey Clark	Alan S. Boyd
Attorney General	Secretary of Transportation
Date: 9 October 1967	Date: 24 October 1967

APPENDIX 4
Charge Sheet (DD FORM 458)

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
James, Reiben J.	111-11-1111	PFC	E-3

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Co A, 1st Battalion, 61st Inf Bde, Fort Blank, MO	1 April 1983	3 years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$500	None	$500	Restriction	1 August 1984

II. CHARGES AND SPECIFICATIONS

10. CHARGE: I VIOLATION OF THE UCMJ, ARTICLE 86

SPECIFICATION: In that Private Firt Class Reuben J. James, U.S. Army, Company A, 61st Battalion, 1st Infantry Brigade, Fort Blank, Missouri, on active duty, did, on or about 15 July 1984, without authority, absent himself from his unit, to wit: Company A, 1st Battalion, 61st Infantry Brigade, located at Fort Blank, Missouri, and did remain so absent until on or about 30 July 1984.

Charge II: Violation of the UCMJ, Article 112a

Specification: In that Private First Class Reuben J. James, U.S. Army, Company A, 1st Battalion, 1st Infantry Brigade, Fort Blank, Missouri, on active duty, did at Fort Blank, Missouri, on or about 12 July 1984, wrongfully possess 10 grams of marijuana.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
Richards, Jonathan E.	Captain	Co A, 1st Bn, 61st Inf Bde

d. SIGNATURE OF ACCUSER: Jonathan E. Richards — e. DATE: 1 August 1984

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 1st day of August, 19 84, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Will M. Wilson
Typed Name of Officer

61st Bn, 1st Inf Bde
Organization of Officer

Captain
Grade

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

Will M. Wilson
Signature

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12.
On 2 August, 19 84, the accused was informed of the charges against him/~~her~~ and of the name(s) of the accuser(s) ~~(s)~~ known to me *(See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)*

Jonathan E. Richards
Typed Name of Immediate Commander

Co A, 1st Bn, 61st Inf Bde
Organization of Immediate Commander

Captain
Grade

Jonathan E. Richards
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.
The sworn charges were received at 1100 hours, 2 August 19 84 at 1st Battalion, 1st Inf Brigade
Designation of Command or

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

FOR THE[1] COMMANDER

Will M. Wilson
Typed Name of Officer

Adjutant
Official Capacity of Officer Signing

Captain
Grade

Will M. Wilson
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
1st Infantry Brigade	Fort Blank, Missouri	7 August 1984

Referred for trial to the special court-martial convened by CMCO number 12 dated

, 1 August 19 84, subject to the following instructions:[2] None

~~By~~ _____ ~~of~~
Command or Order

Carl E. Nevins
Typed Name of Officer

Commander, 1st Inf Brigade
Official Capacity of Officer Signing

Colonel
Grade

Carl E. Nevins
Signature

15.
On 8 August, 19 84, I ~~/~~caused to be ~~/~~served a copy hereof on ~~(each of)~~ the above named accused.

Hamilton Burger
Typed Name of Trial Counsel

Captain, JAGC
Grade or Rank of Trial Counsel

Hamilton Burger
Signature

FOOTNOTES: 1 — When an appropriate commander signs personally, inapplicable words are stricken.
2 — See R.C.M. 601(e) concerning instructions. If none, so state.

APPENDIX 5
Investigating Officer Report (DD FORM 457)

INVESTIGATING OFFICER'S REPORT

(Of Charges Under Article 32, UCMJ and R.C.M. 405, Manual for Courts-Martial)

1a. FROM: *(Name of Investigating Officer — Last, First, MI)*	b. GRADE	c. ORGANIZATION	d. DATE OF REPORT
Adamson, Adam A.	Major	1st Bn, 61st Inf Bde	1 Sep 1993

2a. TO: *(Name of Officer who directed the investigation — Last, First, MI)*	b. TITLE	c. ORGANIZATION
Harrison, Harry A.	Commanding Officer	1st Bn, 61st Inf, Fort Cutts, Texas

3a. NAME OF ACCUSED *(Last, First, MI)*	b. GRADE	c. SSN	d. ORGANIZATION	e. DATE OF CHARGES
Benson, Ben B.	PVT	111-11-1111	Co A, 1st Bn, 61st Inf	24 Aug 1993

(Check appropriate answer)	YES	NO
4. IN ACCORDANCE WITH ARTICLE 32, UCMJ, AND R.C.M. 405, MANUAL FOR COURTS-MARTIAL, I HAVE INVESTIGATED THE CHARGES APPENDED HERETO (Exhibit 1)	X	
5. THE ACCUSED WAS REPRESENTED BY COUNSEL (If not, see 9 below)	X	
6. COUNSEL WHO REPRESENTED THE ACCUSED WAS QUALIFIED UNDER R.C.M. 405(d)(2), 502(d)	X	

7a. NAME OF DEFENSE COUNSEL *(Last, First, MI)*	b. GRADE	8a. NAME OF ASSISTANT DEFENSE COUNSEL *(If any)*	b. GRADE
Carlson, Carl C.	CPT		
c. ORGANIZATION *(If appropriate)* TDS w/Duty Fort Cutts, Texas		c. ORGANIZATION *(If appropriate)*	
d. ADDRESS *(If appropriate)*		d. ADDRESS *(If appropriate)*	

9. *(To be signed by accused if accused waives counsel. If accused does not sign, investigating officer will explain in detail in Item 21.)*

a. PLACE	b. DATE

I HAVE BEEN INFORMED OF MY RIGHT TO BE REPRESENTED IN THIS INVESTIGATION BY COUNSEL, INCLUDING MY RIGHT TO CIVILIAN OR MILITARY COUNSEL OF MY CHOICE IF REASONABLY AVAILABLE. I WAIVE MY RIGHT TO COUNSEL IN THIS INVESTIGATION.

c. SIGNATURE OF ACCUSED

10. AT THE BEGINNING OF THE INVESTIGATION I INFORMED THE ACCUSED OF: *(Check appropriate answer)*	YES	NO
a. THE CHARGE(S) UNDER INVESTIGATION	X	
b. THE IDENTITY OF THE ACCUSER	X	
c. THE RIGHT AGAINST SELF-INCRIMINATION UNDER ARTICLE 31	X	
d. THE PURPOSE OF THE INVESTIGATION	X	
e. THE RIGHT TO BE PRESENT THROUGHOUT THE TAKING OF EVIDENCE	X	
f. THE WITNESSES AND OTHER EVIDENCE KNOWN TO ME WHICH I EXPECTED TO PRESENT	X	
g. THE RIGHT TO CROSS-EXAMINE WITNESSES	X	
h. THE RIGHT TO HAVE AVAILABLE WITNESSES AND EVIDENCE PRESENTED	X	
i. THE RIGHT TO PRESENT ANYTHING IN DEFENSE, EXTENUATION, OR MITIGATION	X	
j. THE RIGHT TO MAKE A SWORN OR UNSWORN STATEMENT, ORALLY OR IN WRITING	X	
11a. THE ACCUSED AND ACCUSED'S COUNSEL WERE PRESENT THROUGHOUT THE PRESENTATION OF EVIDENCE *(If the accused or counsel were absent during any part of the presentation of evidence, complete b below.)*	X	

b. STATE THE CIRCUMSTANCES AND DESCRIBE THE PROCEEDINGS CONDUCTED IN THE ABSENCE OF ACCUSED OR COUNSEL

NOTE: If additional space is required for any item, enter the additional material in Item 21 or on a separate sheet. Identify such material with the proper numerical and, if appropriate, lettered heading *(Example: "7c".)* Securely attach any additional sheets to the form and add a note in the appropriate item of the form: "See additional sheet."

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12a. THE FOLLOWING WITNESSES TESTIFIED UNDER OATH: *(Check appropriate answer)*

NAME *(Last, First, MI)*	GRADE *(If any)*	ORGANIZATION/ADDRESS *(Whichever is appropriate)*	YES	NO
Dodson, Dodd D.	Captain	Co A, 1st Bn, 61st Inf	X	
Evanson, Evan E.	Sergeant	Co A, 1st Bn, 61st Inf	X	
Fordson, Ford F.	Sergeant	400th MP Co.	X	

b. THE SUBSTANCE OF THE TESTIMONY OF THESE WITNESSES HAS BEEN REDUCED TO WRITING AND IS ATTACHED. X

13a. THE FOLLOWING STATEMENTS, DOCUMENTS, OR MATTERS WERE CONSIDERED; THE ACCUSED WAS PERMITTED TO EXAMINE EACH

DESCRIPTION OF ITEM	LOCATION OF ORIGINAL *(If not attached)*	YES	NO
Statement of Gregg Greggson	CID, Bldg 10, Fort Cutts, Texas	X	
CID Lab Report (fingerprint analysis)	CID, Bldg 10, Fort Cutts, Texas	X	

b. EACH ITEM CONSIDERED, OR A COPY OR RECITAL OF THE SUBSTANCE OR NATURE THEREOF, IS ATTACHED X

14. THERE ARE GROUNDS TO BELIEVE THAT THE ACCUSED WAS NOT MENTALLY RESPONSIBLE FOR THE OFFENSE(S) OR NOT COMPETENT TO PARTICIPATE IN THE DEFENSE. *(See R.C.M. 909, 916(k).)* X

15. THE DEFENSE DID REQUEST OBJECTIONS TO BE NOTED IN THIS REPORT *(If Yes, specify in Item 21 below.)* X

16. ALL ESSENTIAL WITNESSES WILL BE AVAILABLE IN THE EVENT OF TRIAL X

17. THE CHARGES AND SPECIFICATIONS ARE IN PROPER FORM X

18. REASONABLE GROUNDS EXIST TO BELIEVE THAT THE ACCUSED COMMITTED THE OFFENSE(S) ALLEGED X

19. I AM NOT AWARE OF ANY GROUNDS WHICH WOULD DISQUALIFY ME FROM ACTING AS INVESTIGATING OFFICER. *(See R.C.M. 405(d)(1).* X

20. I RECOMMEND:

a. TRIAL BY ☐ SUMMARY ☐ SPECIAL ☒ GENERAL COURT-MARTIAL

b. ☐ OTHER *(Specify in Item 21 below)*

21. REMARKS *(Include, as necessary, explanation for any delays in the investigation, and explanation for any "no" answers above.)*

Examples of other matters which may be discussed here are:

1. Discussion of evidence, credibility of witnesses, and sufficiency of proof.
2. Recommendations to dismiss or change any specifications.
3. Statement of any anticipated offenses or of any anticipated difficulties in proving any specification on which trial is recommended.
4. Any other matter which should be known to the convening authority or subsequent reviewing authorities.

22a. TYPED NAME OF INVESTIGATING OFFICER	b. GRADE	c. ORGANIZATION
Adam A. Adamson	Major	1st Bn, 61st Inf Bde

d. SIGNATURE OF INVESTIGATING OFFICER Adam A. Adamson e. DATE 1 September 1993

☆U.S. G.P.O. 1984-421-646/17045

APPENDIX 6
FORMS FOR ORDERS CONVENING COURTS-MARTIAL

a. General and special court-martial convening orders

(1) *Convening orders.*

[Note 1. *See* R.C.M. 504(d)]

(Date)_____

(Designation of command of officer convening court-martial)

[Pursuant to (para. _____ General Order No. _____, Department of the_____,_____) (SECNAV ltr ser _____ of_____) a] (A) (general) (special) court-martial is convened with the following members (and shall meet at_____, unless otherwise directed):

(Captain) (Colonel)

_____

(Commander) (Lieutenant Colonel)

_____

(Lieutenant Commander) (Major)

_____

(Lieutenant) (Captain)

_____

(Lieutenant, j.g.) (First Lieutenant)

_____

[Note 2. The name, rank, and position of the convening authority should be shown. The order may be authenticated by the signature of the convening authority or a person acting under the direction of the convening authority.]

[Note 3. The language in brackets or parentheses in the foregoing samples should be used when appropriate. The Secretary concerned may prescribe additional requirements for convening orders. *See* R.C.M. 504(d)(3). Service regulations should be consulted when preparing convening orders.]

[Note 4. When a new court-martial is convened to replace one in existence, the following should be added below the names of the personnel of the court-martial and before the authentication line:]

All cases referred to the (general) (special) court-martial convened by order no._____ this (headquarters) (ship) (_____), dated _____ ____, in which the proceedings have not begun, will be brought to trial before the court-martial hereby convened.

(2) *Order amending convening orders.*

[Note 5. The same heading and authentication used on convening order should be used on amending orders.]

[Note 6. A succession of amending orders may result in error. Care should be used in amending convening orders.]

(a) Adding members.

[Note 7. Members may be added in specific cases or for all cases.]

The following members are detailed to the (general) (special) court-martial convened by order no._____, this (headquarters) (ship) (_____), dated _____ ____ (for the trial of_____ only).

(b) Replacing members.

[Note 8. Members may be replaced in specific cases or for all cases.]

(Captain) (Colonel) _____, is detailed as a member of the (general) (special) court-martial convened by order no._____, this (headquarters) (ship) (_____), dated _____, relieved (for the case of_____ only).

b. Summary court-martial convening orders

(Date)_____

(Designation of command of officer convening court-martial)

[Pursuant to (para._____, General Order No._____, Department of the _____, _____,) (SECNAV ltr ser_____ of _____,)] (Lieutenant Commander) (Major)_____ is detailed a summary court-martial (and shall sit at_____, unless otherwise directed).

[Note 9. The name, rank, and position of the convening authority should be shown. The order may be authenticated by the signature of the convening authority or a person acting under the direction of the convening authority.]

[Note 10. The summary court-martial convening order may be a separate page or a notation on the charge sheet. *See* R.C.M. 504(d)(2) and 1302(c).]

APPENDIX 7
Subpoena (DD FORM 453)

SUBPOENA

The President of the United States, to Mr. James E. Pinelli .
(Name and Title of Person being Subpoenaed)

You are hereby summoned and required to appear on the 1st day of October , 19 93 , at 9 o'clock A .M., at Bldg 13, Rm 4, US Naval Station, Oakton, FL , ~~before~~ XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
(Place of Proceeding) *(Name and Title of Deposition Officer)*

~~designated to take your deposition~~ (a general court-martial of the United States ~~XXXXXXXXXXXXX~~), appointed by General Court-Martial Convening Order No. 10 , dated 1 September
(Identification of Convening Order or Convening Authority)

19 93 , to testify as a witness in the matter of United States v. Roberts
(Name of Case)

~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~).
(Specific Identification of Documents or Other Evidence)

Failure to appear and testify is punishable by a fine of not more than $500 or imprisonment for a period not more than six months, or both. 10 U.S.C. § 847. Failure to appear may also result in your being taken into custody and brought before the court-martial ~~XXXXXXXXXXXXXXXXXXXXXXXX~~ under a Warrant of Attachment (DD Form 454). Manual for Courts-Martial R.C.M. 703(e)(2)(G).

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

Subscribed at Naval Station, Oakton, FL this 1st day of September 19 93 .

Roberta Mueller, Lt., JAGC, USN
(Signature (See R.C.M. 703(e)(2)(C))

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

I hereby accept service of the above subpoena.

____
Signature of Witness

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

Personally appeared before me, the undersigned authority, ____________________ ,

who, being first duly sworn according to law, deposes and says that at __________ , on __________

19 ____ , he personally delivered to ____________________ in person a duplicate of this subpoena.

Grade	*Signature*

Subscribed and sworn to before me at ____________________ , this ____ day of

____________ 19 ____ .

Grade

Official Status	*Signature*

DD FORM 453, 84 AUG — EDITION OF OCT 69 IS OBSOLETE. ☆ GPO : 1984 O - 421-646 (17036)

TRAVEL ORDER

Payment of travel allowances is authorized pursuant to 10 U.S.C. § 847 and 28 U.S.C. § 1821. You should travel from Smithburg, Georgia in sufficient time to arrive at US Naval Station, Oakton, FL on the date and at the time specified. You will be paid fees and expenses for attendance at the specified hearing and travel directly to and from that place. You may travel by ☐ rail, ☐ commercial or military aircraft, ☐ bus, or ☒ privately owned automobile.

You ☐ have ☒ have not been given a "Government Transportation Request" to exchange for commercial tickets. No mileage will be paid for any transportation provided by the Government in kind or by Government Transportation Request. If a Government Transportation Request is not given to you and you travel by commercial carrier at personal expense, reimbursement for your cost of transportation will be limited to:

a. The least costly regularly scheduled air service between the points involved; or

b. The cost of the rail fare and a lower berth, or the lowest first-class rail accommodation available at the time reservations were made; or

c. Actual cost of commercial bus fare.

If you travel by private automobile, you will be reimbursed at the rate of *twenty cents $.20* /// a mile, plus the cost of necessary parking fees, bridge, ferry, and other highway tolls incurred while traveling under this travel order. The total reimbursement will be limited to the cost of travel by the usual mode of common carrier, including per diem. Receipts and ticket stubs will be required to support your claim for cost of transportation and subsistence for each item in excess of *$15.00* ///.

☐ You will be traveling to a high-cost area.

The travel regulations designate certain cities as high cost areas. Because your attendance requires travel to one of these cities, you will be authorized an actual expense allowance instead of a per diem allowance. You will be reimbursed for the actual expenses incurred, not to exceed the maximum amount prescribed for the city involved. The expenses may include lodgings; meals, tips to waiters, bellboys, maids, porters; personal laundry, pressing and dry-cleaning; local transportation *(including usual tips)* between places of lodging and duty; and other necessary expenses. You must itemize your daily actual expenses on your claim and receipts for lodging and any items over *$15.00* /// are required.

☒ You will not be traveling to a high-cost area.

Because you are not traveling to a high-cost area, you will be entitled to a per diem allowance to cover your expenses for lodging, meals, and incidentals. While traveling and attending the specified hearing within the continental United States, you will be authorized a per diem equal to the daily average you pay for lodging, plus *$23.00* /// per day for meals and incidentals, rounded off to the next dollar. If the resulting amount is more than the maximum per diem allowable, which is *$50.00* ///, then you will be reimbursed only the maximum per diem authorized. You are required to state on your reimbursement claim that the per diem claimed is based on the average cost to you for lodging while on required travel within the continental United States during the period covered by the claim. Receipts are required for lodging. The per diem allowance for travel overseas is based on rates set by the Department of State or by the Department of Defense, and you will be reimbursed the amount specified for the particular overseas area involved.

You are entitled to an attendance fee of *$30.00* /// per day under 28 U.S.C. § 1821.

Address any inquiries regarding the matter to: Lieutenant R. Mueller, Naval Legal Service Office, Building 13, Naval Station, Oakton, FL Tel Nr. (111) 111-1111

This is travel order number 93-7, dated 20 September 1993,
issued by *(headquarters)* US Naval Station, Oakton, FL.
TDN. Accounting Citation XX1111122211-XX-0

FOR THE COMMANDER

R. Mueller, Lt, JAGC, USN, Trial Counsel	Lem J. Berger, LCDR, SC, USN, Disbursing Officer
Typed Name of Approving Official	*Typed Name of Authenticating Official*
R. Mueller	Lem J. Berger
Signature of Approving Official	*Signature of Authenticating Official*

DD FORM 84 AUG 453-1

☆ GPO : 1984 O - 421-646 (17042)

APPENDIX 8
GUIDE FOR GENERAL AND SPECIAL COURTS-MARTIAL

[Note 1. This guide outlines the sequence of events ordinarily followed in general and special courts-martial, and suggests ways to conduct various procedures prescribed in the Rules for Courts-Martial. The guide is not mandatory; it is intended solely as an aid to users of the Manual for Courts-Martial.]

Section I. Opening Session Through Pleas

[Note 2. *See* R.C.M. 901–911.]

[Note 3. When a military judge has been detailed, the proceedings outlined in this section will be conducted at an Article 39(a) session. *See* R.C.M. 901(e). In special courts-martial without a military judge, these procedures should be followed in general; the president of a special court-martial without a military judge should also carefully examine pertinent Rules for Courts-Martial.]

Sessions called to order

MJ: This Article 39(a) session is called to order. (Be seated.)

Convening orders and referral of charges

TC: The court-martial is convened by (general) (special) court-martial convening order(s) number_____ , (HQ_____) (USS_____) (_____), (as amended by_____) copies of which have been furnished to the military judge, counsel, and the accused, (and to the reporter for insertion at this point in the record) (and which will be inserted at this point in the record). (Copies of any written orders detailing the military judge and counsel will be inserted at this point in the record.)

[Note 4. When detailed, the reporter records all proceedings verbatim. *See* R.C.M. 502(e)(3)(B), 808, and 1103. The reporter should account for the parties to the trial and keep a record of the hour and date of each opening and closing of the session, whether a recess, adjournment, or otherwise, for insertion in the record. *See* R.C.M. 813(b) ad 1103. *See also* Appendices 13 and 14.]

[Note 5. The military judge should examine the convening order and any amending orders.]

TC: The charges have been properly referred to this court-martial for trial and were served on the accused on_____.

[Note 6. In time of peace, if less than 5 days have elapsed since service of the charges in a general court-martial (3 days in case of a special court-martial), the military judge should inquire whether the accused objects to proceeding. If the accused objects, the military judge must grant a continuance. *See* R.C.M. 901(a).]

TC: (The following corrections are noted on the convening orders:_____).

[Note 7. Only minor changes, such as typographical errors or changes of grade due to promotion, may be made. Any correction which affects the identity of the individual concerned must be made by an amending or correcting order.]

Accounting for parties

[Note 8. *See* R.C.M. 813.]

TC: The accused and the following persons detailed to this court-martial are present:_____. The members and the following persons detailed to this court-martial are absent:_____.

Reporter detailed

[Note 9. When a reporter is detailed, the following announcement will be made. *See* R.C.M. 813(a)(8).]

TC: _____has been detailed reporter for this court-martial and (has previously been sworn) (will now be sworn).

[Note 10. *See* R.C.M. 807(b)(2) Discussion (D) concerning the oath to be administered the reporter.]

Detail of trial counsel

TC: ((I) (All members of the prosecution) have been detailed to this court-martial by_____.)

Qualifications of

TC: (I am) (All members of the prosecution are) Prosecution qualified and certified under Article 27(b) and sworn under Article 42(a). (_____.)

TC: (I have not) (No member of the prosecution has) acted in any manner which might tend to disqualify (me) (him) (or) (her) in this court-martial (_____.)

Detail of defense counsel

DC: ((I) (All detailed members of the defense) have been detailed to this court-martial by_____.)

Qualifications of defense

DC: (All detailed members of the defense are) (I Counsel am) qualified and certified under Article 27(b) and sworn under Article 42(a). (_____.)

DC: (I have not) (No member of the defense has) acted in any manner which might tend to disqualify (me) (him) (or) (her) in this court-martial. (_____.)

Qualifications of individual counsel when present

IDC: My qualifications are_____ . I have not acted in any manner which might tend to disqualify me in this court-martial.

[Note 11. If it appears that any counsel may be disqualified, the military judge must decide the matter and take appropriate action. *See* R.C.M. 901(d)(3).]

Rights to counsel

[Note 12. *See* R.C.M. 506.]

MJ: _____, you have the right to be represented in this court-martial by_____ (and _____), your detailed defense counsel, or you may be represented by military counsel of your own selection, if the counsel you request is reasonably available. If you are represented by military counsel of your own selection, you would lose the right to have_____ (and_____), your detailed counsel, to continue to help in your defense. However, you may request that_____ (and _____ , or one of them), your detailed counsel, continue to act as associate counsel with the military counsel you select, and_____ , the detailing authority, may approve such a request. Do you understand?

ACC: _____.

MJ: In addition, you have the right to be represented by civilian counsel, at no expense to the United States. Civilian counsel may represent you alone or along with your military counsel. Do you understand?

[Note 13. If two or more accused in a joint or common trial are represented by the same counsel, or by civilian counsel who are associated in the practice of law, the military judge must inquire into the matter. *See* R.C.M. 901(d)(4)(D).]

MJ: Do you have any questions about your rights to counsel?

ACC: _____.

MJ: Who do you want to represent you?

ACC: _____.

[Note 14. If appropriate, the court-martial should be continued to permit the accused to obtain individual military or civilian counsel.]

MJ: Counsel for the parties have the necessary qualifications, and have been sworn (except_____, who will now be sworn.)

MJ: I have been detailed to this court-martial by_____.

[Note 15. *See* R.C.M. 807(b)(2) Discussion (C) concerning the oath to be administered to counsel.]

General nature of charges

TC: The general nature of the charge(s) in this case is_____. The charge(s) were preferred by_____, forwarded with recommendations as to disposition by_____ (, and investigated by_____). (_____is also an accuser in this case.)

Challenge of military judge

[Note 16. *See* R.C.M. 902.]

TC: Your honor, are you aware of any matter which may be a ground for challenge against you?

MJ: (I am aware of none.) (_____.)

TC: (The Government has no challenge for cause against the military judge.) (_____.)

DC: (The defense has no challenge for cause against the military judge.) (_____.)

Accused's elections on composition of court-martial

[Note 17. *See* R.C.M. 903. *See also* R.C.M. 501(a) and 503(b).]

MJ: _____, do you understand that you have the right to be tried by a court-martial composed of members (including, if you request in writing, at least one-third enlisted persons) and that, if you are found guilty of any offense, those members would determine a sentence?

ACC: _____.

MJ: Do you also understand that you may request in writing or orally here in the court-martial trial before me alone, and that if I approve such a request, there will be no members and I alone will decide whether you are guilty and, if I find you guilty, determine a sentence?

ACC: _____.

MJ: Have you discussed these choices with your counsel?

ACC: _____.

MJ: By which type of court-martial do you choose to be tried?

ACC: _____.

[Note 18. *See* R.C.M. 903(a) concerning whether the accused may defer a decision on composition of court-martial.]

[Note 19. If the accused chooses trial by court-martial composed of members proceed to arraignment below. Any request for enlisted members will be marked as an Appellate Exhibit and inserted in the record of trial. *See* R.C.M. 1103(b)(2)(D)(iii). In a special court-martial without a military judge, the members should be sworn, and the challenge procedure conducted at this point. *See* Notes 38–17 below.]

Election to be tried by military judge alone

[Note 20. A request for trial by military judge alone must be written and signed by the accused and should identify the military judge by name or it may be made orally on the record. A written request will he marked as an Appellate Exhibit and inserted in the record of trial. *See* R.C.M. 1103(b)(2)(D)(iii).]

MJ: (I have Appellate Exhibit_____, a request for trial before me alone.) (I am (Colonel) (Captain) (_____) _____.) _____. Have you discussed this request and the rights I just described with your counsel?

ACC: _____.

MJ: If I approve your request for trial by me alone you give up your right to trial by a court-martial composed of members (including, if you requested, enlisted members). Do you wish to request trial before me alone?

ACC: _____.

MJ: (Your request is approved. The court-martial is assembled.) (Your request is disapproved because_____.)

[Note 21. *See* R.C.M. 903(c)(2)(B) concerning approval or disapproval. *See* R.C.M. 911 concerning assembly of the court-martial.]

Arraignment

[Note 22. *See* R.C.M. 904.]

MJ: The accused will now be arraigned.

TC: All parties and the military judge have been furnished a copy of the charges and specifications. Does the accused want them read?

DC: The accused (waives reading of the charges) (wants the charges read).

MJ: (The reading may be omitted.)

TC: (_____.)

TC: The charges are signed by_____, a person subject to the code, as accuser; are properly sworn to before a commissioned officer of the armed forces authorized to administer oaths, and are properly referred to this court-martial for trial by_____, the convening authority.

MJ: _____, how do you plead? Before receiving your pleas, I advise you that any motions to dismiss any charge or to grant other relief should be made at this time.

[Note 23. *See* R.C.M. 801(e), 905–907 concerning motions. *See* R.C.M. 908 if the Government elects to appeal a ruling adverse to it.]

DC: The defense has (no) (the following) motion(s). (_____.)

[Note 24. After any motions are disposed of pleas are ordinarily entered. *See* R.C.M. 910.]

DC: _____pleads_____.

[Note 25. If the accused enters any pleas of guilty proceed with the remainder of section I. If no pleas of guilty are entered, proceed to section II if trial is before members, or section III if trial is before military judge alone.]

[Note 26. If trial is before members in a contested case, the military judge should examine the copy of the charge(s) to be provided the members, discuss any preliminary instructions with the parties, and determine whether other matters should be addressed before the Article 39(a) session is ended.]

Guilty plea inquiry

[Note 27. *See* R.C.M. 910(c), (d), (e), and (f). If a conditional guilty plea is entered, *see* R.C.M. 9l0(a)(2).]

Introduction

MJ: _____, your plea of guilty will not be accepted unless you understand its meaning and effect. I am going to discuss your plea of guilty with you now. If you have any questions, please say so. Do you understand?

ACC: _____.

MJ: A plea of guilty is the strongest form of proof known to the law. On your plea alone, without receiving any evidence, this court-martial could find you guilty of the offense(s) to which you are pleading guilty. Your plea will not be accepted unless you understand that by pleading guilty you admit every element of each offense and you are pleading guilty because you really are guilty. If you do not believe that you are guilty, you should not plead guilty for any reason. You have the right to plead not guilty and place the burden upon the prosecution to prove your guilt. Do you understand that?

ACC: _____.

Waiver of rights

MJ: By your plea of guilty you waive, or in other words, you give up certain important rights. (You give up these rights only as to the offense(s) to which you have pleaded guilty. You keep them as to the offense(s) to which you have pleaded not guilty). The rights you give up are: First, the right against self-incrimination, that is the right to say nothing at all about (this) (these) offense(s). Second, the right to a trial of the facts by the court-martial, that is, the right to have this court-martial decide whether or not you are guilty based on evidence presented by the prosecution and, if you chose to do so, by the defense. Third, the right to be confronted by the witnesses against you, that is to see and hear the witnesses against you here in the court-martial and to have them cross-examined, and to call witnesses in your behalf. Do you understand these rights?

ACC: _____.

MJ: If you plead guilty, there will not be a trial of any kind as to the offense(s) to which you are pleading guilty, so by pleading guilty you give up the rights I have just described. Do you understand that?

ACC: _____.

Maximum penalty

MJ: Defense counsel, what advice have you given_____ as to the maximum punishment for the offense(s) to which the accused pleaded guilty?

DC: _____.

MJ: Trial counsel, do you agree with that?

TC: _____.

[Note 28. If there is a question as to the maximum punishment, the military judge must resolve it. If the maximum punishment may be subject to further dispute, the military judge should advise the accused of the alternative possibilities and determine whether this affects the accused's decision to plead guilty.]

MJ: _____, by your plea of guilty this court-martial could sentence you to the maximum authorized punishment, which is_____. Do you understand that?

ACC: _____.

MJ: Do you feel you have had enough time to discuss your case with your counsel,_____?

ACC: _____.

MJ: _____, do you feel that you have had enough time to discuss the case with your client?

DC: _____.

MJ: _____, are you satisfied with_____ (and_____), your defense counsel, and do you believe (his) (her) (their) advice has been in your best interest?

ACC: _____.

MJ: Are you pleading guilty voluntarily?

ACC: _____.

MJ: Has anyone tried to force you to plead guilty?

ACC: _____.

Factual basis for plea

[Note 29. The accused will be placed under oath at this point. *See* R.C.M. 910(e). The military judge may inquire whether there is a stipulation in connection with the plea, and may inquire into the stipulation at this point. *See* R.C.M. 811.]

MJ: In a moment, you will be placed under oath and we will discuss the facts of your case. If what you say is not true, your statements may be used against you in a prosecution for perjury or false statement. Do you understand?

ACC: _____.

TC: Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

ACC: _____.

MJ: I am going to explain the elements of the offense(s) to which you have entered pleas of guilty. By "elements" I mean the facts which the Government would have to prove by evidence beyond a reasonable doubt before you could be found guilty if you pleaded not guilty. When I state each of these elements ask yourself if it is true, and whether you want to admit that its true. Then be ready to talk about these facts with me.

MJ: Please look at your copy of the charges and specifications. You have pleaded guilty to Charge_____, Specification _____, a violation of Article _____ of the Uniform Code of Military Justice. The elements of that offense are_____.

[Note 30. *See* subparagraph b of the appropriate paragraph in Part IV. The description of the elements should be tailored to the allegations in the specification. Legal terms should be explained.]

MJ: Do you understand those elements?

ACC: _____.

MJ: Do the elements correctly describe what you did?

ACC: _____.

Accused's description of offense(s)

[Note 3l. The military judge should elicit from the accused facts supporting the guilty plea by questioning the accused about the offense(s). The questioning should develop the accused's description of the offense(s) and establish the existence of each element of the offense(s). The military judge should be alert to discrepancies in the accused's description or between the accused's description and any stipulation. If the accused's discussion or other information discloses a possible defense, the military judge must inquire into the matter, and may not accept the plea if a possible defense exists. The military judge should explain to the accused the elements of a defense when the accused's description raises the possibility of one. The foregoing inquiry should be repeated as to each offense to which the accused has pleaded guilty.]

Identification of accused

MJ: Do you admit that you are_____, the accused in this case?

ACC: _____.

Jurisdiction

MJ: On (date of earliest offense)_____, were you a member of the United States (Army) (Navy) (Air Force) (Marine Corps) (Coast Guard) on active duty, and have you remained on active duty since then?

ACC: _____.

[Note 32. The military judge should determine whether jurisdiction might be affected by a post-offense reenlistment.]

Pretrial agreement

MJ: Is there a pretrial agreement in this case?

TC or DC:_____.

[Note 33. If the answer is yes proceed to note 35; if the answer is no, proceed as follows.]

MJ: _____are you pleading guilty because of any promise by the Government that you will receive a sentence reduction or other benefit from the Government if you plead guilty?

ACC: _____.

[Note 34. If the answer is no, proceed to acceptance of the plea. If the answer is yes, the military judge should determine from the accused and counsel whether any agreement exists. If so, the plea agreement inquiry should continue. If not, then the military judge should clarify any misunderstanding the accused may have, and ascertain whether the accused still wants to plead guilty. Once any issue is resolved, if the accused maintains the plea of guilty, proceed to acceptance of the plea.]

[Note 35. If there is a pretrial agreement, the military judge must: (l) ensure that the entire agreement is presented, provided that in trial by military judge alone the military judge ordinarily will not examine any sentence limitation at this point; (2) ensure that the agreement complies with R.C.M. 705; and (3) inquire to ensure that the accused understands the agreement and that the parties agree to it. *See* R.C.M. 910(f). If the agreement contains any ambiguous or unclear terms, the military judge should obtain clarification from the parties.]

[Note 36. The agreement should be marked as an Appellate Exhibit. If the agreement contains a sentence limitation and trial is before military judge alone, the sentence limitation should be marked as a separate Appellate Exhibit, if possible.]

[Note 37. The language below is generally appropriate when trial is before military judge alone. It should be modified when trial is before members.]

MJ: _____, I have here Appellate Exhibit_____, which is part of a pretrial agreement between you and_____, the convening authority. Is this your signature which appears (on the bottom of page_____), (_____) and did you read this part of the agreement?

ACC: _____.

MJ: Did you also read and sign Appellate Exhibit_____, which is the second part of the agreement?

ACC: _____.

MJ: Do you believe that you fully understand the agreement?

ACC: _____.

MJ: I don't know, and I don't want to know at this time the sentence limitation you have agreed to. However, I want you to read that part of the agreement over to yourself once again.

MJ: [After accused has done so.] Without saying what it is, do you understand the maximum punishment the convening authority may approve?

ACC: _____.

MJ: In a pretrial agreement, you agree to enter a plea of guilty to (some of) the charge(s) and specification(s), and, in return, the convening authority agrees to (approve no sentence greater than that listed in Appellate Exhibit_____, which you have just read) (_____). [In addition, (you have agreed to testify against_____) (_____) (the convening authority has agreed to withdraw Charge_____ and its specification) (_____). Do you understand that?

ACC: _____.

MJ: If the sentence adjudged by this court-martial is greater than the one provided in the agreement, the convening authority would have to reduce the sentence to one no more severe than the one in your agreement. On the other hand, if the sentence adjudged by this court-martial is less than the one in your agreement, the convening authority cannot increase the sentence adjudged. Do you understand that?

ACC: _____.

[Note 38. The military judge should discuss the agreement with the accused, and explain any terms which the accused may not understand. If the accused does not understand a term, or if the parties disagree as to a term, the agreement should not be accepted unless the matter is clarified to the satisfaction of the parties. If there are any illegal terms, the agreement must be modified in accordance with R.C.M. 705. The trial counsel should be granted a recess on request to secure the assent of the convening authority to any material modification in the agreement.]

MJ: _____is this agreement, Appellate Exhibit(s) _____(and_____) the entire agreement between you and the convening authority? In other words, is it correct that there are no other agreements or promises in this case?

ACC: _____.

MJ: Do counsel agree?

TC: _____.

DC: _____.

MJ: _____, do you understand your pretrial agreement?

ACC: _____.

MJ: Do counsel disagree with my explanation or interpretation of the agreement in any respect?

TC: _____.

DC: _____.

MJ: (To DC), did the offer to make a pretrial agreement originate with the defense?

DC: _____.

MJ: _____are you entering this agreement freely and voluntarily?

AC: _____.

MJ: Has anyone tried to force you to enter this agreement?

ACC: _____.

MJ: Have you fully discussed this agreement with your counsel, and are you satisfied that (his) (her) advice is in your best interest?

ACC: _____.

MJ: _____, although you believe you are guilty, you have a legal and a moral right to plead not guilty and to require the Government to prove its case against you, if it can, by legal and competent evidence beyond a reasonable doubt. If you were to plead not guilty, then you would be presumed under the law to be not guilty, and only by introducing evidence and proving your guilt beyond a reasonable doubt can the Government overcome that presumption. Do you understand?

ACC: _____.

MJ: Do you have any questions about your plea of guilty, your pretrial agreement, or anything we have discussed?

ACC: _____.

Acceptance of guilty plea

MJ: Do you still want to plead guilty?

ACC: _____.

MJ: I find that the accused has knowingly, intelligently, and consciously waived (his) (her) rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against (him) (her); that the accused is, in fact guilty; and (his) (her) plea of guilty is accepted.

MJ: _____, you may request to withdraw your plea of guilty any time before the sentence is announced in your case and if you have a good reason for your request, I will grant it. Do you understand?

ACC: _____.

Announcement of findings based on a guilty plea

[Note 39. Findings of guilty may, and ordinarily should, be entered at this point *except* when: (l) not permitted by regulations of the Secretary concerned; or (2) the plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged. *See* R.C.M. 9l0(g)(l) and (2). *See also* R.C.M. 9l0(g)(3) in special courts-martial without a military judge. In trials before military judge alone, when some offenses are to be contested, the military judge may elect to defer entry of any findings until the end of trial on the merits.]

[Note 40. *See* R.C.M. 922 and Appendix 10 concerning forms of findings.]

MJ: _____, in accordance with your plea(s) of guilty, this court-martial finds you (of all charges and specifications) (of Specification_____ of Charge_____ and Charge_____): Guilty.

[Note 41. If trial is before members, and no offenses remain to be contested on the merits, this may be an appropriate point for the military judge to inform the accused of the rights to allocution under R.C.M. 100l(a)(3). *See* Note 88 below. In addition, other issues relating to the information or evidence to be introduced on sentencing should ordinarily be resolved at this point. If other offenses remain to be contested, the military judge should consider, and solicit the views of the parties, whether to inform the members only of the offenses to which the accused pleaded not guilty. The copy of the charges presented to the members should reflect this decision. *See also* Note 26.]

Section II. Trial With Members; Preliminary Session

[Note 42. The following procedure is suggested for a trial with members after completion of the Article 39(a) session.

Before calling the court-martial to order, the military judge should examine the convening order and any amending orders and ensure that all members required to be present are present. Witnesses should be excluded from the courtroom except when they testify.

When the court-martial is ready to proceed the military judge should direct the bailiff, if any, or the trial counsel to call the members. Whenever the members enter the courtroom, all persons present except the military judge and reporter should rise.

The members are seated alternatively to the right and left of the president according to rank.]

MJ: The court-martial will come to order. You may be seated.

TC: This court-martial is convened by (general) (special) court-martial convening order number_____ (HQ_____) (USS _____) (_____), as amended by_____), a copy of which has been furnished to each member.

TC: The accused and the following persons named in the convening orders are present:_____.

TC: The following persons named in the convening orders are absent: _____.

[Note 43. Persons who have been relieved (viced) by written orders need not he mentioned. The reason for any other absences should be stated.]

TC: The prosecution is ready to proceed with the trial in the case of United States v._____ (who is present).

Oath of members

MJ: The members will now be sworn.

TC: All persons please rise.

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

Each member: I do.

Assembly/preliminary instructions

MJ: Be seated please. The court-martial is assembled.

[Note 44. *See* R.C.M. 911 concerning assembly.]

[Note 45. At this point, the military judge may give the members preliminary instructions. These may include instructions on the general nature of the member's duties (*see* R.C.M. 502(a)(2) and Discussion, 922, l006), the duties of the military judge (*see* R.C.M. 801, 920, 1005; Mil. R. Evid. 103). and the duties of counsel (*see* R.C.M. 502(d)(5) and (6)); on voir dire and possible grounds for challenge (*see* R.C.M. 912); on the procedures for questioning witnesses (*see* Mil. R. Evid. 611, 614); on taking notes; and such other matters as may be appropriate. The military judge may elect to defer giving instructions on some of these matters until after voir dire, or until another appropriate point in the proceedings.]

General nature of charges

[Note 46. Trial counsel should distribute copies of the charges and specifications to the members.]

TC: The general nature of the charge(s) in this case (is) (are)_____. The charge(s) were preferred by_____; forwarded with recommendations as to disposition by_____; (and investigated by_____.)

Challenges

TC: The records of this case disclose (no grounds for challenge) (grounds for challenge of_____, on the following grounds _____.)

TC: If any member is aware of any matter which may be a ground for challenge by any party, the member should so state.

[Note 47. In case of a negative response, trial counsel should announce "Apparently not."]

[Note 48. The military judge and, if permitted by the military judge, counsel may examine the members on voir dire. *See* R.C.M. 912(d) and Discussion. The parties may present evidence relating to challenges for cause. *See* R.C.M. 912(e). Upon completion of voir dire and taking evidence, if any, the parties will be called upon to enter challenges for cause. Ordinarily trial counsel enters challenges for cause before defense counsel. After any challenges for cause, the parties may be called upon to enter peremptory challenges. Ordinarily trial counsel enters a peremptory challenge before the defense. The parties must be permitted to enter challenges outside the presence of members. *See* R.C.M. 912(f) and (g). In special courts-martial without a military judge, *see* R.C.M. 912(h).]

[Note 49. If any members are successfully challenged, they should be excused in open session in the presence of the parties. The record should indicate that they withdrew from the courtroom. The members who remain after challenges should be reseated according to rank, as necessary.]

[Note 50. The military judge should ensure that a quorum remains, and, if the court-martial is composed with enlisted persons, that at least one-third of the remaining members are enlisted persons. *See* R.C.M. 912(g)(2) Discussion.]

[Note 51. If the members have not yet been informed of the plea(s), this should now be done.]

MJ: Members of the court-martial, at an earlier session the accused was arraigned and entered the following pleas:_____.

[Note 52. In a special court-martial without a military judge, the accused should now be arraigned. *See* Notes 22–39.]

[Note 53. If the military judge entered findings based on pleas of guilty and no offenses remain to be contested, the military judge should give the following instruction and proceed to SECTION IV, below.]

MJ: I accepted the accused's pleas of guilty and entered findings of guilty as to (the) (all) Charge(s) (_____) and Specification(s) (_____) and _____). Therefore, we will now proceed to determine a sentence in the case.

[Note 54. If the accused pleaded guilty to some offenses, but others remain to be contested, and the members have been informed of the offenses to which the accused pleaded guilty, the military judge should instruct as follows.]

MJ: Members, you will not be required to reach findings regarding Charge (_____) and Specification(s) (_____) (and_____) (and_____). Findings will be required, however, as to Charge (_____) and Specification(s) (_____) (and_____) (and _____), to which the accused has pleaded not guilty. You may not consider the fact that the accused pleaded guilty to (one) (some) offense(s) in any way in deciding whether the accused is guilty of the offense(s) to which (he) (she) has pleaded not guilty.

[Note 55. If the accused has pleaded guilty to a lesser included offense and the prosecution intends to prove the greater offense, the military judge should instruct as follows.]

MJ: The accused's plea of guilty to the lesser included offense of_____ admits some of the elements of the offense charged in (the) Specification (_____) of (the) Charge (_____). These elements are, therefore, established by the accused's plea without need of further proof. However, the accused's plea of guilty to this lesser included offense provides no basis for a finding of guilty as charged, because there still remains in issue the elements of_____. No inference of guilt of such remaining elements may be drawn from the accused's plea. Before the accused may be found guilty of the offense charged, the prosecution must prove the remaining element(s) beyond a reasonable doubt.

[Note 56. The military judge may give such additional preliminary instructions as may be appropriate at this point.]

SECTION III. TRIAL

[Note 57. *See* R.C.M. 913.]

MJ: Will the prosecution make an opening statement?

TC: (No) (Yes._____.)

MJ: Will the defense make an opening statement?

DC: (No) (The defense will make its statement after the prosecution has rested.) (Yes._____.)

TC: The prosecution calls as its first witness_____.

Oath of witness

[Note 58. *See* R.C.M. 807.]

TC: Do you (swear) (affirm) that the evidence you give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth, (so help you God)?

WIT: _____.

Preliminary questions

TC: (Are you (*state name, grade, organization, station, and armed force) (state name and address, if civilian*)?) (Please state your name (grade, organization, station, and armed force) (and address).

WIT: _____.

[Note 59. The address of witnesses should be omitted in appropriate cases, as where it might endanger the witness.]

[Note 60. Except when an identification is inappropriate (e.g., when the witness is a laboratory technician) or where a foundation must be laid, Trial Counsel ordinarily should ask the witness to identify the accused.]

TC: Do you know the accused?

WIT: _____.

[Note 61. If the witness answers affirmatively:]

TC: Please point to the accused and state (his) (her) name.

WIT: _____.

TC: Let the record show that the witness pointed to the accused when stating (his) (her) name.

Testimony

[Note 62. Trial counsel should now conduct direct examination of the witness. *See* Mil. R. Evid. 611.]

TC: No further questions.

MJ: _____, you may cross-examine.

[Note 63. Defense counsel may cross-examine the witness.]

DC: No (further) questions.

[Note 64. The parties should be permitted to conduct such redirect and recross-examination as may reasonably be necessary. *See* Mil. R. Evid. 611. After the parties have completed their questioning, the military judge and members may ask additional questions. *See* Mil. R. Evid. 614. The members should be instructed on the procedures for questioning. Each member's questions will be collected by the bailiff, if any, or trial counsel, marked as an Appellate Exhibit, examined by counsel for each side, and given to the military judge. If there are any objections, they should be raised at an Article 39(a) session or at a side-bar conference.]

[Note 65. After questioning of a witness is completed, the military judge should determine whether the witness will be excused temporarily or permanently. The military judge should advise the witness as follows.]

MJ: _____thank you. You are (temporarily) excused. (Please wait (in the waiting room) (_____)). (You are free to go.) As long as this trial continues, do not discuss your testimony or knowledge of the case with anyone except counsel. If anyone else tries to talk to you about the case, stop them and report the matter to one of the counsel.

[Note 66. The witness will withdraw from the courtroom. *See* Mil. R. Evid. 615.]

TC: The prosecution calls as its next witness_____.

[Note 67. Trial counsel continues to present the prosecution case. If exhibits were admitted at an Article 39(a) session, trial counsel may, with the permission of the military judge, read or present the evidence to the court-martial.]

Recess, adjournment, or Article 39(a) session

[Note 68. In the event of a recess, continuance, adjournment, or Article 39(a) session the military judge should announce when the court-martial will reconvene, and should instruct or remind the members not to discuss the case with anyone, not to consult legal references, and to avoid exposure to matters relating to the case.]

Reopening

[Note 69. When the court-martial is reopened, the following announcement is appropriate.]

MJ: The court-martial will come to order.

TC: The members, the parties, and the military judge are all present.

Prosecution rests

TC: The prosecution rests.

[Note 70. A motion for a finding of not guilty may be raised at this point. *See* R.C.M. 917. Any such motion should be made outside the presence of the members. If a motion is made in the presence of members, and is denied, the military judge should instruct the members that the military judge applies a different standard in ruling on the motion than they must apply in reaching their findings, and that the denial must have no effect on their deliberations and findings.]

Presentation of evidence by defense

[Note 71. Defense counsel may make an opening statement if one was not made previously.]

DC: The defense calls as its first witness_____.

[Note 72. Trial counsel administers the oath to each witness. Defense counsel conducts direct examination, and trial counsel cross-examination of each witness. Redirect and recross-examination may be conducted as appropriate. The military judge and members may question each witness. *See note* 64.]

[Note 73. Defense counsel continues to present the defense case. If exhibits were admitted at an Article 39(a) session, defense counsel may, with the permission of the military judge, read or present the evidence to the court-martial.]

DC: The defense rests.

Rebuttal and surrebuttal

[Note 74. The parties may present evidence in rebuttal and surrebuttal. *See* R.C.M. 9l3(c)(l). After the parties complete their presentations, additional evidence may be presented when the military judge so directs. *See* R.C.M. 801(c), 9l3(c)(l)(F).]

[Note 75. When a witness is recalled, the following is appropriate.]

TC: Are you the same_____ who testified earlier in this court-martial?

WIT: I am.

TC: You are reminded that you are still under oath.

[Note 76. If trial is by military judge alone, counsel should be permitted to make closing arguments. *See* R.C.M. 919. After arguments, proceed to announcement of findings.]

Out of court hearing on findings instructions

[Note 77. Ordinarily the military judge will conducts Article 39(a) session to discuss findings instructions and examine the findings worksheet. *See* R.C.M. 920,921(d). If such instructions are discussed at a conference, *see* R.C.M. 802.]

Closing arguments

[Note 78. *See* R.C.M. 919.]

TC: _____.

DC: _____.

TC: _____.

Instructions

[Note 79. *See* R.C.M. 920.]

MJ: _____.

MJ: Does any member have any questions concerning these instructions?

MEMBERS:_____

MJ: Do counsel have any objections to these instructions not previously raised?

TC: _____.

DC: _____.

[Note 80. *See* R.C.M. 920(f).]

[Note 81. Any exhibits which the members are to consider should be given to the president before the court-martial closes.]

Closing

MJ: The court-martial is closed.

[Note 82. While the members are deliberating, the military judge may take up certain matters which may arise if the accused is found guilty of any offense. The admissibility of evidence during sentencing proceedings and advice to the accused about allocution rights may be considered at an Article 39(a) session at this point. *See* R.C.M. 1001. *See* Note 88 below concerning allocution advice.]

After findings reached

MJ: The court-martial will come to order.

TC: All parties and members and the military judge are present.

MJ: (To president) _____ have the members reached findings?

PRES: _____

MJ: Are the findings on Appellate Exhibit_____?

PRES: Yes.

MJ: Would (the bailiff) (trial counsel), without examining it please bring me Appellate Exhibit_____?

MJ: I have examined Appellate Exhibit_____. It appears to be in proper form. Please return it to the president.

[Note 83. *See* R.C.M. 921(d) concerning a findings worksheet, and the procedure to be followed if any problems are indicated. *See* R.C.M. 924 if reconsideration of a finding may be necessary.]

Announcement of findings

MJ: _____, would you and your counsel stand up please (and approach the president).

MJ: _____, announce the findings please.

PRES: _____, this court-martial finds you_____.

MJ: Please be seated.

[Note 84. If the accused is found not guilty of all charges and specifications, the court-martial is ordinarily adjourned at this point.]

SECTION IV. PRESENTENCING PROCEDURE

[Note 85. If the accused pleaded guilty to some specifications and the members have not yet been informed of these, the members should now be given copies of these specifications and be informed of the accused's plea to them. *See* text following Note 51.]

Data from charge sheet

[Note 86. *See* R.C.M. 1001(b)(1).]

MJ: The court-martial will now hear the data concerning the accused shown on the charge sheet.

TC: _____.

Matters presented by prosecution

MJ: Does the prosecution have other matters to present?

[Note 87. The prosecution may present certain matters from the accused's personnel records, evidence of previous convictions, evidence in aggravation, and evidence of rehabilitative potential. *See* R.C.M. 1001(b)(2) through (5).]

TC: The prosecution has nothing further.

Matters presented by defense

[Note 88. If the accused has not previously been advised in accordance with R.C.M. 1001(a)(3), such advice should now be given. In trial before members, this advice should be given at an Article 39(a) session.]

MJ: _____, you have the right to present matters in extenuation and mitigation, that is, matters about the offense(s) or yourself which you want the court-martial to consider in deciding a sentence. Included in your right to present evidence are the rights you have to testify under oath, to make an unsworn statement, or to remain silent. If you testify, you may be cross-examined by the trial counsel and questioned by me (and the members). If you decide to make an unsworn statement you may not be cross-examined by trial counsel or questioned by me (or the members). You may make an unsworn statement orally or in writing, personally, or through your counsel, or you may use a combination of these ways. If you decide to exercise your right to remain silent, that cannot be held against you in any way. Do you understand your rights?

ACC: _____.

MJ: Which of these rights do you want to exercise?

ACC: _____.

[Note 89. The defense may present matters in rebuttal and extenuation and mitigation. *See* R.C.M. 1001(c).]

DC: The defense has nothing further.

Rebuttal

[Note 90. The parties may present additional matters in rebuttal, as appropriate. *See* R.C.M. 1001(a)(l)(C).]

Out of court hearing on sentencing instructions

[Note 91. If trial is by military judge alone, counsel should be permitted to make arguments on sentencing. After arguments proceed to announcement of the sentence.]

[Note 92. Ordinarily the military judge will conduct an Article 39(a) session to discuss sentencing instructions and examine the sentence worksheet. *See* R.C.M. 1005. If such instructions are discussed at a conference, *see* R.C.M. 802.]

Closing arguments

[Note 93. *See* R.C.M. 1001(g).]

TC: _____.

DC: _____.

Instructions

[Note 94. *See* R.C.M. 1005.]

MJ: _____.

MJ: Does any member have any questions concerning these instructions?

MEMBERS:_____.

MJ: Do counsel have any objections concerning these instructions not previously raised?

TC: _____.

DC: _____.

[Note 95. *See* R.C.M. 1005(f).]

[Note 96. Any exhibits which the members are to consider should be given to the president before the court-martial closes.]

Closing

MJ: The court-martial is closed.

After sentence reached

MJ: The court-martial will come to order.

TC: All parties and members and the military judge are present.

MJ: (To president)_____, have the members reached a sentence?

PRES: _____.

MJ: Is the sentence on Appellate Exhibit_____?

PRES: Yes.

MJ: Would (the bailiff) (trial counsel), without examining it, please bring me Appellate Exhibit_____.

MJ: I have examined Appellate Exhibit_____. It appears to be in proper form. Please return it to the president.

[Note 97. *See* R.C.M. 1006(e) concerning a sentence worksheet, and the procedure to be followed if any problems are indicated. *See* R.C.M. 1009 if reconsideration of the sentence may be necessary.]

Announcement of sentence

MJ: _____, would you and your counsel stand up please (and approach the president).

MJ: _____, would you announce the sentence please.

PRES: _____, this court-martial sentences you to:_____.

MJ: Please be seated.

[Note 98. In trial before members, ordinarily the members should be excused at this point. If no other matters remain to be considered, the court-martial should be adjourned. If there are additional matters to be considered (e.g., punishment limitation in a pretrial agreement in a trial by military judge alone, *see* R.C.M. 9l0(f)(3) or, if the accused was represented by more than one counsel, which counsel will prepare any response to the post-trial review) these matters should be addressed before the court-martial is adjourned.]

Advice of post-trial and appellate rights

[Note 99. The military judge must advise the accused of the accused's post-trial and appellate rights. *See* R.C.M. 1010.]

MJ: _____, I will explain to you your post-trial and appellate rights.

MJ: After the record of trial is prepared in your case,_____ the convening authority will act on your case. The convening authority can approve the sentence (adjudged) (provided in your pretrial agreement), or (he) (she) can approve a lesser sentence or disapprove the sentence entirely. The convening authority cannot increase the sentence. The convening authority can also disapprove (some or all of) the findings of guilty. The convening authority is not required to review the case for legal errors, but may take action to correct legal errors. Do you understand?

ACC: _____.

Advice in GCMs and SPCMs in which BCD adjudged

[Note 100. In cases subject to review by a Court of Criminal Appeals, the following advice should be given. In other cases proceed to Note 101 or 102 as appropriate.]

MJ: _____, I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights you have the right to the advice and assistance of military counsel provided free of charge or civilian counsel provided at your own expense.

You have the right to submit any matters you wish the convening authority to consider in deciding whether to approve all, part, or any of the findings and sentence in your case. Such matters must be submitted within 10 days after you or your counsel receive a copy of the record of trial and the recommendation of the (staff judge advocate) (legal officer).

If the convening authority approves the discharge or confinement at hard labor for a year or more, your case will be reviewed by a Court of Criminal Appeals.

After the Court of Criminal Appeals completes its review, you may request that your case be reviewed by the Court of Appeals for the Armed Forces; if your case is reviewed by that Court, you may request review by the United States Supreme Court.

You also have the right to give up review by the Court of Criminal Appeals, or to withdraw your case from appellate review at any time before such review is completed.

If you give up your right to review by the Court of Criminal Appeals or later withdraw your case from appellate review.

(a) That decision is final and you cannot change your mind later.

(b) Your case will be reviewed by a military lawyer for legal error. It will also be sent to the (general court-martial*) convening authority for final action.

(*Use only for special court-martial.)

(c) Within 2 years after final action is taken on your case, you may request The Judge Advocate General to take corrective action.

Do you have any questions?

ACC: _____.

MJ: The court-martial is adjourned.

GCM subject to review under Article 69

[Note 101. In general courts-martial subject to review under Article 69, the following advice should be given. In other cases, proceed to Note 102.]

MJ: _____, I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights you have the right to the advice and assistance of military counsel provided free of charge or civilian counsel provided at your own expense.

You have the right to submit any matters you wish the convening authority to consider in deciding whether to approve all, part, or any of the findings and sentence in your case. Such matters must be submitted within 10 days after you or your counsel receive a copy of the record of trial and the recommendation of the (staff judge advocate) (legal officer). If the convening authority approves any part of your sentence, your case will be examined in the Office of The Judge Advocate General for any legal errors and to determine whether your sentence is fair. The Judge Advocate General may take corrective action, if appropriate. You also have the right to give up examination by The Judge Advocate General or to withdraw your case from such examination at any time before such examination is completed. If you give up your right to examination by The Judge Advocate General or later withdraw your case from such examination:

(a) That decision is final and you cannot change your mind later.

(b) Your case will be reviewed by a military lawyer for legal error. It will also be sent to the convening authority for final action.

(c) Within 2 years after action is taken on your case, you may request The Judge Advocate General to take corrective action.

Do you have any questions?

ACC: _____.

MJ: The court-martial is adjourned.

SPCM not involving a BCD

[Note 102. In special courts-martial not involving BCD, the following advice should be given.]

MJ: _____, I will now advise you of your post-trial and appellate rights. Remember that in exercising these rights, you have the right to the advice and assistance of military counsel provided free of charge or civilian counsel provided at your own expense. You have the right to submit any matters you wish the convening authority to consider in deciding whether to approve all, part, or any of the findings and sentence in your case. Such matters must be submitted within l0 days after you or your counsel receive a copy of the record of trial. If the convening authority approves any part of the findings or sentence, your case will be reviewed by a military lawyer for legal error. It may be sent to the general court-martial convening authority for final action on any recommendation by the lawyer for corrective action. Within 2 years after final action is taken on your case, you may request The Judge Advocate General to take corrective action. Do you have any questions?

ACC: _____.

MJ: The court-martial is adjourned.

APPENDIX 9
GUIDE FOR SUMMARY COURTS-MARTIAL

[General Note to SCM: It is not the purpose of this guide to answer all questions which may arise during a trial. When this guide, chapter 13 of the Rules for Courts-Martial, and other legal materials available fail to provide sufficient information concerning law or procedure, the summary court-martial should seek advice on these matters from a judge advocate. *See* R.C.M. 1301(b). If the accused has obtained, or wishes to obtain, defense counsel, *see* R.C.M. 1301(e). The SCM should examine the format for record of trial at appendix 15. It may be useful as a checklist during the proceedings to ensure proper preparation after trial. The SCM should become familiar with this guide before using it. Instructions for the SCM are contained in brackets, and should not be read aloud. Language in parentheses reflects optional or alternative language. The SCM should read the appropriate language aloud.]

Preliminary Proceeding

Identity of SCM

SCM: I am_____.I have been detailed to conduct a summary court-martial (by Summary Court-Martial Convening Order (Number_____), Headquarters,_____, dated [*see*convening order]).

Referral of charges to trial

Charges against you have been referred to me for trial by summary court-martial by ([*name and title of convening authority*]) on ([*date of referral*]) [*see* block IV on page 2 of charge sheet].

[Note 1. Hand copy of charge sheet to the accused.]

Providing the accused with charge sheet

I suggest that you keep this copy of the charge sheet and refer to it during the trial. The charges are signed by [*see* first name at top of page 2 of charge sheet], a person subject to the Uniform Code of Military Justice, as accuser, and are properly sworn to before a commissioned officer of the armed forces authorized to administer oaths. (_____ ordered the charges to be preferred.) The charges allege, in general, violation of Article_____, in that you_____ (and Article_____, in that you_____). I am now going to tell you about certain rights you have in this trial. You should carefully consider each explanation because you will soon have to decide whether to object to trial by summary court-martial. Until I have completed my explanation, do not say anything except to answer the specific questions which I ask you. Do you understand that?

ACC: _____.

Duties of SCM

SCM: As summary court-martial it is my duty to obtain and examine all the evidence concerning any offense(s) to which you plead not guilty, and to thoroughly and impartially inquire into both sides of the matter. I will call witnesses for the prosecution and question them, and I will help you in cross-examining those witnesses. I will help you obtain evidence and present the defense. This means that one of my duties is to help you present your side of the case. You may also represent yourself, and if you do, it is my duty to help you. You are presumed to be innocent until your guilt has been proved by legal and competent evidence beyond a reasonable doubt. If you are found guilty of an offense, it is also my duty to consider matters which might affect the sentence, and then to adjudge an appropriate sentence. Do you understand that?

ACC: _____.

Right to object to SCM

SCM: You have the absolute right to object to trial by summary court-martial. If you object the appropriate authority will decide how to dispose of the case. The charges may be referred to a special or general court-martial, or they may be dismissed, or the offenses charged may be disposed of by (nonjudicial punishment [if not previously offered and refused] or) administrative measures. [*See* R.C.M. 306.] Do you understand that?

ACC: _____.

Right to inspect allied papers and personnel records.

SCM: You may inspect the allied papers and personnel records [Hand those documents which are available to the accused for examination in your presence.] (You may also inspect [*identify personnel records or other documents which are not present*] which are located at_____. You may have time to examine these if you wish.)

Witnesses/other evidence for the government

SCM: The following witnesses will probably appear and testify against you:_____. The following documents and physical evidence will probably be introduced:_____.

Right to cross-examine

After these witnesses have testified in response to my questions, you may cross-examine them. If you prefer, I will do this for you after you inform me of the matters about which you want the witness to be questioned. Do you understand that?

ACC: _____.

Right to present evidence

SCM: You also have the right to call witnesses and present other evidence. This evidence may concern any or all of the charges. (I have arranged to have the following witnesses for you present at the trial.) I will arrange for the attendance of other witnesses and the production of other evidence requested by you. I will help you in any way possible. Do you understand that?

ACC: _____.

Evidence to be considered

SCM: In deciding this case, I will consider only evidence introduced during the trial. I will not consider any other information, including any statements you have made to me, which is not introduced in accordance with the Military Rules of Evidence during the court-martial. Do you understand that?

ACC: _____.

Right to remain silent

SCM: You have the absolute right during this trial to choose not to testify and to say nothing at all about the offense(s) with which you are charged. If you do not testify, I will not hold it against you in any way. I will not consider it as an admission that you are guilty. If you remain silent, I am not permitted to question you about the offense(s).

Right to testify concerning the offense(s)

However, if you choose, you may be sworn and testify as a witness concerning the offense(s) charged against you. If you do that, I will consider your testimony just like the testimony of any other witness.

[Note 2. Use the following if there is only one specification.]

If one specification

If you decide to testify concerning the offense, you can be questioned by me about the whole subject of the offense. Do you understand that?

ACC: _____.

[Note 3. Use the following if there is more than one specification.]

If more than one specification

SCM: If you decide to testify, you may limit your testimony to any particular offense charged against you and not testify concerning any other offense(s) charged against you. If you do this, I may question you about the whole subject of the offense about which you testify, but I may not question you about any offense(s) concerning which you do not testify. Do you understand that?

ACC: _____.

Right to testify, remain silent or make an unsworn statement in extenuation and mitigation

SCM: In addition, if you are found guilty of an offense, you will have the right to testify under oath concerning matters regarding an appropriate sentence. You may, however, remain silent, and I will not hold your silence against you in any way. You may, if you wish, make an unsworn statement about such matters. This statement may be oral, in writing, or both. If you testify, I may cross-examine you. If you make an unsworn statement, however, I am not permitted to question you about it, but I may receive evidence to contradict anything contained in the statement. Do you understand that?

ACC: _____.

Maximum punishment

SCM: If I find you guilty (of the offense) (of any of the offenses charged), the maximum sentence which I am authorized to impose is:

[Note 4. For an accused of a pay grade of E–4 or below, proceed as follows.]

E-4 and below

(l) reduction to lowest enlisted pay grade; and
(2) forfeiture of two-thirds of 1 month's pay; and
(3) confinement for l month (or, [if the accused is attached to or embarked in a vessel] to confinement on bread and water or diminished rations for 3 days and confinement for 24 days).

[Note 5. For an accused of a pay grade above E–4, proceed as follows.]

E-5 and above

(1) reduction to the next inferior pay grade; and
(2) forfeiture of two-thirds of 1 month's pay; and
(3) restriction to specified limits for 2 months.

SCM: Do you understand the maximum punishment which this court-martial is authorized to adjudge?

ACC: _____.

Plea options

SCM: You may plead not guilty or guilty to each offense with which you are charged. You have an absolute right to plead not guilty and to require that your guilt be proved beyond a reasonable doubt before you can be found guilty. You have the right to plead not guilty even if you believe you are guilty. Do you understand that?

ACC: _____.

SCM: If you believe you are guilty of an offense, you may, but are not required to, plead guilty to that offense. If you plead guilty to an offense, you are admitting that you committed that offense, and this court-martial could find you guilty of that offense without hearing any evidence, and could sentence you to the maximum penalty I explained to you before. Do you understand that?

ACC: _____.

Lesser included offenses

SCM: [Examine the list of lesser included offenses under each punitive article alleged to have been violated. *See* Part IV. If a lesser included offense may be in issue, give the following advice.] You may plead not guilty to Charge_____, Specification_____, as it now reads, but plead guilty to the offense of_____, which is included in the offense charged. Of course, you are not required to do this. If you do, then I can find you guilty of this lesser offense without hearing evidence on it. Furthermore, I could still hear evidence on the greater offense for purposes of deciding whether you are guilty of it. Do you understand that?

ACC: _____.

SCM: Do you need more time to consider whether to object to trial by summary court-martial or to prepare for trial?

ACC: _____.

SCM: [If time is requested or otherwise appropriate.] We will convene the court-martial at_____. When we convene, I will ask you whether you object to trial by summary court-martial. If you do not object, I will then ask for your pleas to the charge(s) and specification(s), and for you to make any motions you may have.

Trial Proceedings

Convene

SCM: This summary court-martial is now in session.

Objection/consent to trial by SCM

SCM: Do you object to trial by summary court-martial?

ACC: _____.

Entries on record of trial

[Note 6. If there is an objection, adjourn the court-martial and return the file to the convening authority. If the accused does not object, proceed as follows. The accused may be asked to initial the notation on the record of trial that the accused did or did not object to trial by summary court-martial. This is not required, however.]

Readings of the charges

SCM: Look at the charge sheet.Have you read the charge(s) and specification(s)?

ACC: _____.

SCM: Do you want me to read them to you?

ACC: [If accused requests, read the charge(s) and specification(s).]

Arraignment

SCM: How do you plead? Before you answer that question, if you have any motion to dismiss (the) (any) charge or specification, or for other relief, you should make it now.

ACC: _____.

Motions

[Note 7. If the accused makes a motion to dismiss or to grant other relief, or such a motion is raised by the summary court-martial, do not proceed with the trial until the motions have been decided. *See* R.C.M. 905–907, and R.C.M. l304(b)(2)(c). After any motions have been disposed of and if termination of the trial has not resulted, have the accused enter pleas and proceed as indicated below.]

Pleas

ACC: I plead:_____.

[Note 8. If the accused refuses to plead to any offense charged, enter pleas of not guilty. If the accused refuses to enter any plea, evidence must be presented to establish that the accused is the person named in the specification(s) and is subject to court-martial jurisdiction. *See* R.C.M. 202, 1301(c)]

[Note 9. If the accused pleads not guilty to all offenses charged, proceed to the section entitled "Procedures-Not Guilty Pleas."]

[Note 10. If the accused pleads guilty to one or more offenses, proceed as follows.]

Procedures-guilty pleas

SCM: I will now explain the meaning and effect of your pleas, and question you so that I can be sure you understand. Refer to the charge(s) and specification(s). I will not accept your pleas of guilty unless you understand their meaning and effect. You are legally and morally entitled to plead not guilty even though you believe you are guilty, and to require that your guilt be proved beyond a reasonable doubt. A plea of guilty is the strongest form of proof known to the law. On your pleas of guilty alone, without receiving any evidence, I can find you guilty of the offense(s) to which you have pleaded guilty. I will not accept your pleas unless you realize that by your pleas you admit every element of the offense(s) to which you have pleaded guilty, and that you are pleading guilty because you really are guilty. If you are not convinced that you are in fact guilty, you should not allow anything to influence you to plead guilty. Do you understand that?

ACC: _____.

SCM: Do you have any questions?

ACC: _____.

SCM: By your pleas of guilty you give up three very important rights. (You keep these rights with respect to any offense(s) to which you have pleaded not guilty.) The rights which you give up when you plead guilty are:

First, the right against self-incrimination. This means you give up the right to say nothing at all about (this) (these) offense(s) to which you have pleaded guilty. In a few minutes I will ask you questions about (this) (these) offense(s), and you will have to answer my questions for me to accept your pleas of guilty.

Second, the right to a trial of the facts by this court-martial. This means you give up the right to have me decide whether you are guilty based upon the evidence which would be presented.

Third, the right to be confronted by and to cross-examine any witnesses against you. This means you give up the right to have any witnesses against you appear, be sworn and testify, and to cross-examine them under oath.

Do you understand these rights?

ACC: _____.

SCM: Do you understand that by pleading guilty you give up these rights?

ACC: _____.

SCM: On your pleas of guilty alone you could be sentenced to_____.

[Note 11. Re-read the appropriate sentencing section at notes 4 or 5 above unless the summary court-martial is a rehearing or new or other trial, in which case *see* R.C.M. 810(d).]

Do you have any questions about the sentence which could be imposed as a result of your pleas of guilty?

ACC: _____.

SCM: Has anyone made any threat or tried in any other way to force you to plead guilty?

ACC: _____.

Pretrial agreement

SCM: Are you pleading guilty because of any promises or understandings between you and the convening authority or anyone else?

ACC: _____.

[Note 12. If the accused answers yes, the summary court-martial must inquire into the terms of such promises or understandings in accordance with R.C.M. 910. *See* Appendix 8, Note 35 through acceptance of plea.]

[Note 13. If the accused has pleaded guilty to a lesser included offense, also ask the following question.]

Effect of guilty pleas to lesser included offenses

SCM: Do you understand that your pleas of guilty to the lesser included offense of_____ confess all the elements of the offense charged except_____, and that no proof is necessary to establish those elements admitted by your pleas?

ACC: _____.

SCM: The following elements state what would have to be proved beyond a reasonable doubt before the court-martial could find you guilty if you had pleaded not guilty. As I read each of these elements to you, ask yourself whether each is true and whether you want to admit that each is true, and then be prepared to discuss each of these elements with me when I have finished.

The elements of the offense(s) which your pleas of guilty admit are_____.

[Note 14. Read the elements of the offense(s) from the appropriate punitive article in Part IV. This advice should be specific as to names, dates, places, amounts, and acts.]

Do you understand each of the elements of the offense(s)?

ACC: _____.

SCM: Do you believe, and admit, that taken together these elements correctly describe what you did?

ACC: _____.

[Note 15. The summary court-martial should now question the accused about the circumstances of the offense(s) to which the accused has pleaded guilty. The accused will he placed under oath for this purpose. *See* oath below. The purpose of these questions is to develop the circumstances in the accused's own words, so that the summary court-martial may determine whether each element of the offense(s) is established.]

Oath to accused for guilty plea inquiry

SCM: Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

ACC: _____.

SCM: Do you have any questions about the meaning and effect of your pleas of guilty?

ACC: _____.

SCM: Do you believe that you understand the meaning and effect of your pleas of guilty?

ACC: _____.

Determination of providence of pleas of guilty

[Note 16. Pleas of guilty may not be accepted unless the summary court-martial finds that they are made voluntarily and with understanding of their meaning and effect, and that the accused has knowingly, intelligently, and consciously waived the rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses. Pleas of guilty may be improvident when the accused makes statements at any time during the trial which indicate that there may be a defense to the offense(s), or which are otherwise inconsistent with an admission of guilt. If the accused makes such statements and persists in them after questioning, then the summary court-martial must reject the accused's guilty pleas and enter pleas of not guilty for the accused. Turn to the section entitled "Procedures-Not Guilty Pleas" and continue as indicated. If (the) (any of the) accused's pleas of guilty are found provident, the summary court-martial should announce findings as follows.]

Acceptance of guilty pleas

SCM: I find that the pleas of guilty are made voluntarily and with understanding of their meaning and effect. I further specifically find that you have knowingly, intelligently, and consciously waived your rights against self-incrimination, to a trial of the facts by a court-martial, and to be confronted by the witnesses against you. Accordingly, I find the pleas are provident, and I accept them. However, you may ask to take back your guilty pleas at any time before the sentence is announced. If you have a sound reason for your request, I will grant it. Do you understand that?

ACC: _____.

If any not guilty pleas remain

[Note 17. If no pleas of not guilty remain, go to note 26. If the accused has changed pleas of guilty to not guilty, if the summary court-martial has entered pleas of not guilty to any charge(s) and specification(s), or if the accused has pleaded not guilty to any of the offenses or pleaded guilty to a lesser included offense, proceed as follows.]

Witnesses for the accused

SCM: If there are witnesses you would like to call to testify for you, give me the name, rank, and organization or address of each, and the reason you think they should be here, and I will arrange to have them present if their testimony would be material. Do you want to call witnesses?

ACC: _____.

[Note 18. The summary court-martial should estimate the length of the case and arrange for the attendance of witnesses. The prosecution evidence should be presented before evidence for the defense.]

Calling witnesses

SCM: I call as a witness_____.

Witness oath

SCM: [To the witness, both standing] Raise your right hand.

Do you swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth (, so help you God)? [Do not use the phrase, "so help you God," if the witness prefers to affirm.]

WIT: _____.

SCM: Be seated. State your full name, rank, organization, and armed force ([or if a civilian witness] full name, address, and occupation).

WIT: _____.

[Note 19. The summary court-martial should question each witness concerning the alleged offense(s). After direct examination of each witness, the accused must be given an opportunity to cross-examine. If the accused declines to cross-examine the witness, the summary court-martial should ask any questions that it feels the accused should have asked. If cross-examination occurs, the summary court-martial may ask questions on redirect examination and the accused may ask further questions in recross-examination.]

[Note 20. After each witness has testified, instruct the witness as follows.]

SCM: Do not discuss this case with anyone except the accused, counsel, or myself until after the trial is over. Should anyone else attempt to discuss this case with you, refuse to do so and report the attempt to me immediately. Do you understand that?

WIT: _____.

SCM: [To the witness]You are excused.

Recalling witnesses

[Note 2l. Witnesses may be recalled if necessary. A witness who is recalled is still under oath and should be so reminded.]

[Note 22. After all witnesses against the accused have been called and any other evidence has been presented, the summary court-martial will announce the following.]

SCM: That completes the evidence against you. I will now consider the evidence in your favor.

Presentation of defense case

[Note 23. Witnesses for the accused should now be called to testify and other evidence should be presented. Before the defense case is terminated the summary court-martial should ask the accused if there are other matters the accused wants presented. If the accused has not testified, the summary court-martial should remind the accused of the right to testify or to remain silent.]

Closing argument

SCM: I have now heard all of the evidence. You may make an argument on this evidence before I decide whether you are guilty or not guilty.

Deliberations on findings

[Note 24. The court-martial should normally close for deliberations. If the summary court-martial decides to close, proceed as follows.]

SCM: The court-martial is closed so that I may review the evidence. Wait outside the courtroom until I recall you.

[Note 25. The summary court-martial should review the evidence and applicable law. It must acquit the accused unless it is convinced beyond a reasonable doubt by the evidence it has received in court in the presence of the accused that each element of the alleged offense(s) has been proved beyond a reasonable doubt. *See* R.C.M. 918. It may not consider any facts which were not admitted into evidence, such as a confession or admission of the accused which was excluded because it was taken in violation of Mil. R. Evid. 304. The summary court-martial may find the accused guilty of only the offense(s) charged, a lesser included offense, or of an offense which does not change the identity of an offense charged or a lesser included offense thereof.]

Announcing the findings

[Note 26. The summary court-martial should recall the accused, who will stand before the court-martial when findings are announced. All findings including any findings of guilty resulting from guilty pleas, should be announced at this time. The following forms should be used in announcing findings.]

Not guilty of all offenses

SCM: I find you of (the) (all) Charge(s) and Specification(s): Not Guilty.

Guilty of all offenses

I find you of (the) (all) Charge(s) and Specification(s): Guilty.

Guilty of some but not all offenses

I find you of (the) Specification (_____) of (the) Charge (_____): Not Guilty; of (the) Specification (_____) of (the) Charge (_____): Guilty; of (the) Charge (_____): Guilty.

Guilty of lesser included offense or with exceptions and substitutions

I find you of (the Specification (_____) of (the) Charge (_____): Guilty, except the words_____ and_____; (substituting therefor, respectively, the words_____ and_____;) of the excepted words: Not Guilty; (of the substituted words: Guilty;) of the Charge: (Guilty) (Not Guilty, but Guilty of a violation of Article_____, UCMJ, a lesser included offense).

Entry of findings

[Note 27. The summary court-martial shall note all findings on the record of trial.]

Procedure if total acquittal

[Note 28. If the accused has been found not guilty of all charges and specifications, adjourn the court-martial, excuse the accused, complete the record of trial, and return the charge sheet, personnel records, allied papers, and record of trial to the convening authority.]

Procedure if any findings of guilty

[Note 29. If the accused has been found guilty of any offense, proceed as follows.]

Presentence procedure

SCM: I will now receive information in order to decide on an appropriate sentence. Look at the information concerning you on the front page of the charge sheet. Is it correct?

[Note 30. If the accused alleges that any of the information is incorrect, the summary court-martial must determine whether it is correct and correct the charge sheet, if necessary.]

[Note 31. Evidence from the accused's personnel records, including evidence favorable to the accused, should now be received in accordance with R.C.M. 1001(b)(2). These records should be shown to the accused.]

SCM: Do you know any reason why I should not consider these?

ACC: _____.

[Note 32. The summary court-martial shall resolve objections under R.C.M. 1002(b)(2) and the Military Rules of Evidence and then proceed as follows. *See also* R.C.M. 1001(b)(3), (4), and (5) concerning other evidence which may be introduced.]

Extenuation and mitigation

SCM: In addition to the information already admitted which is favorable to you, and which I will consider, you may call witnesses who are reasonably available, you may present evidence, and you may make a statement. This information may be to explain the circumstances of the offense(s), including any reasons for committing the offense(s), and to lessen the punishment for the offense(s) regardless of the circumstances. You may show particular acts of good conduct or bravery, and evidence of your reputation in the service for efficiency, fidelity, obedience, temperance, courage, or any other trait desirable in a good servicemember. You may call available witnesses or you may use letters, affidavits, certificates of military and civil officers, or other similar writings. If you introduce such matters, I may receive written evidence for the purpose of contradicting the matters you presented. If you want me to get some military records that you would otherwise be unable to obtain, give me a list of these documents. If you intend to introduce letters, affidavits, or other documents, but you do not have them, tell me so that I can help you get them. Do you understand that?

ACC: _____.

Rights of accused to testify, remain silent, and make an unsworn statement

SCM: I informed you earlier of your right to testify under oath, to remain silent, and to make an unsworn statement about these matters.

SCM: Do you understand these rights?

ACC: _____.

SCM: Do you wish to call witnesses or introduce anything in writing?

ACC: _____.

[Note 33. If the accused wants the summary court-martial to obtain evidence, arrange to have the evidence produced as soon as practicable.]

[Note 34. The summary court-martial should now receive evidence favorable to the accused. If the accused does not produce evidence, the summary court-martial may do so if there are matters favorable to the accused which should be presented.]

SCM: Do you wish to testify or make an unsworn statement?

ACC: _____.

Questions concerning pleas of guilty

[Note 35. If as a result of matters received on sentencing, including the accused's testimony or an unsworn statement, any matter is disclosed which is inconsistent with the pleas of guilty, the summary court-martial must immediately inform the accused and resolve the matter. *See* Note 16.]

Argument on sentence

SCM: You may make an argument on an appropriate sentence.

ACC: _____.

Deliberations prior to announcing sentence

[Note 36. After receiving all matters relevant to sentencing, the summary court-martial should normally close for deliberations. If the summary court-martial decides to close, proceed as follows.]

Closing the court-martial

SCM: This court-martial is closed for determination of the sentence. Wait outside the courtroom until I recall you.

[Note 37. *See* Appendix 11 concerning proper form of sentence. Once the summary court-martial has determined the sentence, it should reconvene the court-martial and announce the sentence as follows.]

Announcement of sentence

SCM: Please rise. I sentence you to_____.

[Note 38. If the sentence includes confinement, advise the accused as follows.]

SCM: You have the right to request in writing that [name of convening authority] defer your sentence to confinement. Deferment is not a form of clemency and is not the same as suspension of a sentence. It merely postpones the running of a sentence to confinement.

[Note 39. Whether or not the sentence includes confinement, advise the accused as follows.]

SCM: You have the right to submit in writing a petition or statement to the convening authority. This statement may include any matters you feel the convening authority should consider, a request for clemency, or both. This statement must be submitted within 7 days, unless you request and convening authority approves an extension of up to 20 days. After the convening authority takes action, your case will be reviewed by a judge advocate for legal error. You may suggest, in writing, legal errors for the judge advocate to consider. If, after final action has been taken in your case, you believe that there has been a legal error, you may request review of your case by The Judge Advocate General of_____. Do you understand these rights?

ACC: _____.

Adjourning the court-martial

SCM: This court-martial is adjourned.

Entry on charge sheet

[Note 40. Record the sentence in the record of trial, inform the convening authority of the findings, recommendations for suspension, if any, and any deferment request. If the sentence includes confinement, arrange for the delivery of the accused to the accused's commander, or someone designated by the commander, for appropriate action. Ensure that the commander is informed of the sentence. Complete the record of trial and forward to the convening authority.]

APPENDIX 10
FORMS OF FINDINGS

a. Announcement of findings

*See*R.C.M. 922.

In announcing the findings the president or, in cases tried by military judge alone, the military judge should announce:

"(Name of accused), this court-martial finds you_____."

The findings should now be announced following one of the forms in b below, or any necessary modification or combination thereof.

b. Forms

[Note: The following may, in combination with the format for announcing the findings in a above, be used as a format for a findings worksheet, appropriately tailored for the specific case.]

Forms of Findings

I. Acquittal of all Charges

Of all Specifications and Charges: Not Guilty

II. Findings of Not Guilty only by Reason of Lack of Mental Responsibility

Of (the) Specification (_____) of (the) Charge (_____) and of (the) Charge (_____): Not Guilty only by Reason of Lack of Mental Responsibility

III. Conviction of all Charges

Of all Specifications and Charges: Guilty

IV. Conviction of all Specifications of some Charges

Of all Specification(s) of Charge I: Guilty

Of Charge I: Guilty

Of all Specification(s) of Charge II: Not Guilty

Of Charge II: Not Guilty

V. Conviction of some Specifications of a Charge

Of Specification(s)_____ of Charge I: Guilty

Of Specification(s)_____ of Charge I: Not Guilty

Of Charge I: Guilty

VI. Conviction by exceptions

Of (the) Specification (_____) of Charge I: Guilty except the words "_____";

Of the excepted words: Not Guilty

Of Charge I: (Guilty) (Not Guilty, but Guilty of a violation of Article_____)

VII. Conviction by exceptions and substitutions

Of (the) Specification (_____) of Charge I: Guilty except the words "_____," substituting therefor the words "_____";

Of the excepted words: Not Guilty
Of the substituted words: Guilty

Of Charge I: (Guilty) (Not Guilty, but Guilty of a violation of Article_____)

VIII. Conviction under one Charge of offenses under different Articles

Of Specification 1 of (the) Charge (_____): Guilty, of Specification 2 of (the) Charge (_____): Guilty, except the words "_____."

Of (the) Charge (_____), as to Specification 1: Guilty, as to Specification 2: Not Guilty, but Guilty of a violation of Article_____.

APPENDIX 11
FORMS OF SENTENCES

a. Announcement of sentence

See R.C.M. 1007.

In announcing the sentence, the president or, in cases tried by military judge alone, the military judge should announce:

"(Name of accused), this court-martial sentences you_____."

The sentence should now be announced following one of the forms contained in *b* below, or any necessary modification or combination thereof. Each of the forms of punishment prescribed in *b* are separate, that is, the adjudging of one form of punishment is not contingent upon any other punishment also being adjudged. The forms in *c*, however, may be combined and modified so long as the punishments adjudged is not forbidden by the code and does not exceed the maximum authorized by this Manual (*see* R.C.M. 1003 and Part IV) in the particular case being tried. In announcing a sentence consisting of combined punishments, the president or military judge may, for example, state:

> "To be dishonorably discharged from the service, to be confined for one year, to forfeit all pay and allowances, and to be reduced to Private, E–1;" or
>
> "To be discharged from the service with a bad-conduct discharge, to be confined for six months, and to forfeit $35.00 pay per month for six months;" or
>
> "To be dismissed from the service, to be confined for one year, and to forfeit all pay and allowances;" or
>
> "To perform hard labor without confinement for one month and to forfeit $25.00 pay per month for one month."

b. Single punishment forms

[Note: The following may, in combination with the format for announcing the sentence in *a* above, be used as a format for a sentence worksheet, appropriately tailored for the specific case.]

1. To no punishment

Reprimand

2. To be reprimanded.

Forfeitures, Etc.

3. To forfeit $_____ pay per month for_____ (months) (years).

4. To forfeit all pay and allowances.

5. To pay the United States a fine of $_____ (and to serve (additional) confinement of_____ (days) (months) (years) if the fine is not paid).

Reduction of Enlisted Personnel

6. To be reduced to_____.

Restraint and Hard Labor

7. To be restricted to the limits of_____ for (days) (months).

8. To perform hard labor without confinement for_____ (days) (months).

9. To be confined for_____ (days) (months) (years) (the length of your natural life with eligibility) (the length of your natural life without eligibility for parole).

10. To be confined on (bread and water) (diminished rations) for_____days.

Punitive Discharge

11. To be discharged from the service with a bad-conduct discharge (Enlisted Personnel only).

12. To be dishonorably discharged from the service (Enlisted Personnel and Noncommissioned Warrant Officers only).

13. To be dismissed from the service (Commissioned Officers, Commissioned Warrant Officers, Cadets, and Midshipmen only).

Death

14. To be put to death.

[Note: A court-martial has no authority to suspend a sentence or any part of a sentence.]

APPENDIX 12
MAXIMUM PUNISHMENT CHART

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
77	Principals (*see* Part IV, Para. 1 and pertinent offenses)			
78	Accessory after the fact (*see* Part IV, Para. 3.e.)			
79	Lesser included offenses (*see* Part IV, Para. 2 and pertinent offenses)			
80	Attempts (*see* Part IV, Para. 4.e.)			
81	Conspiracy (*see* Part IV, Para. 5.e.)			
82	Solicitation			
	If solicited offense committed, or attempted, *see* Part IV, Para. 6.e.			
	If solicited offense not committed:			
	Solicitation to desert[1]	DD, BCD	3 yrs.[1]	Total
	Solicitation to mutiny[1]	DD, BCD	10 yrs.[1]	Total
	Solicitation to commit act of misbehavior before enemy[1]	DD, BCD	10 yrs.[1]	Total
	Solicitation to commit act of sedition[1]	DD, BCD	10 yrs.[1]	Total
83	Fraudulent enlistment, appointment	DD, BCD	2 yrs.	Total
	Fraudulent separation	DD, BCD	5 yrs.	Total
84	Effecting unlawful enlistment, appointment, separation	DD, BCD	5 yrs.	Total
85	Desertion			
	In time of war	Death, DD, BCD	Life[4]	Total
	Intent to avoid hazardous duty, shirk important service[1]	DD, BCD	5 yrs.[1]	Total
	Other cases			
	Terminated by apprehension	DD, BCD	3 yrs.[1]	Total
	Otherwise terminated	DD, BCD	2 yrs.[1]	Total
86	Absence without leave, etc.			
	Failure to go, going from place of duty	None	1 mo.	2/3 1 mo.
	Absence from unit, organization, etc.			
	Not more than 3 days	None	1 mo.	2/3 1 mo.
	More than 3, not more than 30 days	None	6 mos.	2/3 6 mos.
	More than 30 days	DD, BCD	1 yr.	Total
	More than 30 days and terminated by apprehension	DD, BCD	1 yr., 6 mos.	Total
	Absence from guard or watch	None	3 mos.	2/3 3 mos.
	Absence from guard or watch with intent to abandon	BCD	6 mos.	Total
	Absence with intent to avoid maneuvers, field exercises	BCD	6 mos.	Total
87	Missing movement			
	Through design	DD, BCD	2 yrs.	Total
	Through neglect	BCD	1 yr.	Total
88	Contempt toward officials	Dismissal	1 yr.	Total
89	Disrespect toward superior commissioned officer	BCD	1 yr.	Total
90	Assaulting, willfully disobeying superior commissioned officer			
	In time of war	Death, DD, BCD	Life[4]	Total
	Striking, drawing or lifting up any weapon or offering any violence toward superior commissioned officer execution of duty[1]	DD, BCD	10 yrs.[1]	Total
	Willfully disobeying lawful order of superior commissioned officer[1]	DD, BCD	5 yrs.[1]	Total
91	Insubordinate conduct toward warrant, noncommissioned, petty officer			
	Striking or assaulting:			
	Warrant officer	DD, BCD	5 yrs.	Total
	Superior noncommissioned officer	DD, BCD	3 yrs.	Total
	Other noncommissioned or petty officer	DD, BCD	l yr.	Total
	Willfully disobeying:			
	Warrant officer	DD, BCD	2 yrs.	Total
	Noncommissioned or petty officer	BCD	l yr.	Total
	Contempt, disrespect toward:			
	Warrant Officer	BCD	9 mos.	Total
	Superior noncommissioned or petty officer	BCD	6 mos.	Total
	Other noncommissioned or petty officer	None	3 mos.	2/3 3 mos.

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
92	Failure to obey order, regulation			
	Violation, failure to obey general order or regulation[2]	DD, BCD	2 yrs.	Total
	Violation, failure to obey other order[2]	BCD	6 mos.	Total
	Dereliction in performance of duties			
	Through neglect, culpable inefficiency	None	3 mos.	2/3 3 mos.
	Willful	BCD	6 mos.	Total
93	Cruelty, maltreatment of subordinates	DD, BCD	1 yr.	Total
94	Mutiny & sedition	Death, DD, BCD	Life[4]	Total
95	Resisting apprehension, flight, breach of arrest, escape			
	Resisting apprehension	BCD	1 yr.	Total
	Flight from apprehension	BCD	1 yr.	Total
	Breaking arrest	BCD	6 mos.	Total
	Escape from custody, pretrial confinement, or confinement on bread and water or diminished rations	DD, BCD	1 yr.	Total
	Escape from post-trial confinement	DD, BCD	5 yrs.	Total
96	Releasing prisoner without proper authority	DD, BCD	2 yrs.	Total
	Suffering prisoner to escape through neglect	BCD	1 yr.	Total
	Suffering prisoner to escape through design	DD, BCD	2 yrs.	Total
97	Unlawful detention	DD, BCD	3 yrs.	Total
98	Noncompliance with procedural rules, etc.			
	Unnecessary delay in disposition of case	BCD	6 mos.	Total
	Knowingly, intentionally failing to comply, enforce code	DD, BCD	5 yrs.	Total
99	Misbehavior before enemy	Death, DD, BCD	Life[4]	Total
100	Subordinate compelling surrender	Death, DD, BCD	Life[4]	Total
101	Improper use of countersign	Death, DD, BCD	Life[4]	Total
102	Forcing safeguard	Death, DD, BCD	Life[4]	Total
103	Captured, abandoned property; failure to secure, etc.			
	Of value of $100.00 or less	BCD	6 mos.	Total
	Of value of more than $100.00	DD, BCD	5 yrs.	Total
	Looting, pillaging	DD, BCD	Life[4]	Total
104	Aiding the enemy	Death, DD, BCD	Life[4]	Total
105	Misconduct as prisoner	DD, BCD	Life[4]	Total
106	Spying	Mandatory Death, DD, BCD	Not applicable	Total
106a	Espionage			
	Cases listed in Art. 106a(a)(l)(A)–(D)	Death, DD, BCD	Life[4]	Total
	Other cases	DD, BCD	Life[4]	Total
107	False official statements	DD, BCD	5 yrs.	Total
108	Selling, otherwise disposing			
	Of value of $100.00 or less	BCD	1 yr.	Total
	Of value of more than $100.00	DD, BCD	10 yrs.	Total
	Any firearm, explosive or incendiary device	DD, BCD	10 yrs.	Total
	Damaging, destroying, losing or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed:			
	Through neglect, of a value of:			
	$100.00 or less	None	6 mos.	2/3 6 mos.
	More than $100.00	BCD	1 yr.	Total
	Willfully, of a value of			
	$100.00 or less	BCD	1 yr.	Total
	More than $100.00	DD, BCD	10 yrs.	Total
	Any firearm, explosive, or incendiary device	DD, BCD	10 yrs.	Total
109	Property other than military property of U.S.: loss, damage, destruction, disposition:			

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
	Wasting, spoiling, destroying, or damaging property of a value of:			
	$100.00 or less	BCD	1 yr.	Total
	More than $100.00	DD, BCD	5 yrs.	Total
110	Hazarding a vessel			
	Willfully and wrongfully	Death, DD, BCD	Life[4]	Total
	Negligently	DD, BCD	2 yrs.	Total
111	Drunken driving			
	Resulting in personal injury	DD, BCD	1 yr., 6 mos.	Total
	Other cases	BCD	6 mos.	Total
112	Drunk on duty	BCD	9 mos.	Total
112a	Wrongful use, possession, etc. of controlled substances[3]			
	Wrongful use, possession, manufacture, or introduction of:			
	Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances	DD, BCD	5 yrs.	Total
	Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances	DD, BCD	2 yrs.	Total
	Wrongful distribution of, or, with intent to distribute, wrongful possession, manufacture, introduction, or wrongful importation of or exportation of:			
	Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances	DD, BCD	15 yrs.	Total
	Phenobarbital and Schedule IV and V controlled substances	DD, BCD	10 yrs.	Total
113	Misbehavior of sentinel or lookout			
	In time of war	Death, DD, BCD	Life[4]	Total
	In other time:			
	While receiving special pay under 37 U.S.C. 310	DD, BCD	10 yrs.	Total
	Other places	DD, BCD	1 yr.	Total
114	Dueling	DD, BCD	1 yr.	Total
115	Malingering			
	Feigning illness, etc.			
	In time of war, or while receiving special pay under 37 U.S.C. 310	DD, BCD	3 yrs.	Total
	Other	DD, BCD	1 yr.	Total
	Intentional self-inflicted injury			
	In time of war, or while receiving special pay under 37 U.S.C. 310	DD, BCD	10 yrs.	Total
	Other	DD, BCD	5 yrs.	Total
116	Riot	DD, BCD	10 yrs.	Total
	Breach of peace	None	6 mos.	2/3 6 mos.
117	Provoking speech, gestures	None	6 mos.	2/3 6 mos.
118	Murder			
	Article 118(1) or (4)	Death, mandatory minimum life with parole, DD, BCD	Life[4]	Total
	Article 118(2) or (3)	DD, BCD	Life[4]	Total
119	Manslaughter			
	Voluntary	DD, BCD	15 yrs.	Total
	Involuntary	DD, BCD	10 yrs.	Total
120	Rape	Death, DD, BCD	Life[4]	Total
	Carnal knowledge			
	With child at least 12	DD, BCD	20 yrs.	Total
	With child under the age of 12	DD, BCD	Life[4]	Total
121	Larceny			
	Of military property of a value of $100.00 or less	BCD	1 yr.	Total
	Of property other than military property of a value of $100.00 or less	BCD	6 mos.	Total
	Of military property of a value of more than $100.00 or of any military motor vehicle, aircraft, vessel, firearm, or explosive	DD, BCD	10 yrs.	Total

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
	Of property other than military property of a value of more than $100.00 or any motor vehicle, aircraft, vessel, firearm, or explosive	DD, BCD	5 yrs.	Total
	Wrongful appropriation			
	Of value of $100.00 or less	None	3 mos.	2/3 3 mos.
	Of value of more than $100.00	BCD	6 mos.	Total
	Of any motor vehicle, aircraft, vessel, firearm, or explosive	DD, BCD	2 yrs.	Total
122	Robbery			
	Committed with a firearm	DD, BCD	15 yrs.	Total
	Other cases	DD, BCD	10 yrs.	Total
123	Forgery	DD, BCD	5 yrs.	Total
123a	Checks, etc., insufficient funds, intent to deceive			
	To procure anything of value of:			
	$100.00 or less	BCD	6 mos.	Total
	More than $100.00	DD, BCD	5 yrs.	Total
	For payment of past due obligation, and other cases	BCD	6 mos.	Total
124	Maiming	DD, BCD	7 yrs.	Total
125	Sodomy			
	By force and without consent	DD, BCD	Life[4]	Total
	With child under age of 16 years and at least 12	DD, BCD	20 yrs.	Total
	With child under the age of 12	DD, BCD	Life[4]	Total
	Other cases	DD, BCD	5 yrs.	Total
126	Arson			
	Aggravated	DD, BCD	20 yrs.	Total
	Other cases, where property value is:			
	$100.00 or less	DD, BCD	1 yr.	Total
	More than $100.00	DD, BCD	5 yrs.	Total
127	Extortion	DD, BCD	3 yrs.	Total
128	Assaults			
	Simple Assault:			
	Generally	None	3 mos.	2/3 3 mos.
	With an unloaded firearm	DD, BCD	3 yrs.	Total
	Assault consummated by battery	BCD	6 mos.	Total
	Assault upon commissioned officer of U.S. or friendly power not in execution of office	DD, BCD	3 yrs.	Total
	Assault upon warrant officer, not in execution of office	DD, BCD	1 yr., 6 mos.	Total
	Assault upon noncommissioned or petty officer not in execution of office	BCD	6 mos.	Total
	Assault upon, in execution of office, person serving as sentinel, lookout, security policeman, military policeman, shore patrol, master at arms, or civil law enforcement	DD, BCD	3 yrs.	Total
	Assault consummated by battery upon child under age of l6 years	DD, BCD	2 yrs.	Total
	Assault with dangerous weapon or means likely to produce grievous bodily harm or death:			
	Committed with loaded firearm	DD, BCD	8 yrs.	Total
	Other cases	DD, BCD	3 yrs.	Total
	Assault in which grievous bodily harm is intentionally inflicted:			
	With a loaded firearm	DD, BCD	10 yrs.	Total
	Other cases	DD, BCD	5 yrs.	Total
129	Burglary	DD, BCD	10 yrs.	Total
130	Housebreaking	DD, BCD	5 yrs.	Total
131	Perjury	DD, BCD	5 yrs.	Total
132	Frauds against the United States			
	Offenses under article 132(1) or (2)	DD, BCD	5 yrs.	Total
	Offenses under article 132(3) or (4)			
	$100.00 or less	BCD	6 mos.	Total
	More than $100.00	DD, BCD	5 yrs.	Total

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
133	Conduct unbecoming officer (*see* Part IV, para. 59e)	Dismissal	1 yr. or as prescribed	Total
134	Abusing public animal	None	3 mos.	2/3 3 mos.
	Adultery	DD, BCD	1 yr.	Total
	Assault, indecent	DD, BCD	5 yrs.	Total
	Assault			
	With intent to commit murder or rape	DD, BCD	20 yrs.	Total
	With intent to commit voluntary manslaughter, robbery, sodomy, arson, or burglary	DD, BCD	10 yrs.	Total
	With intent to commit housebreaking	DD, BCD	5 yrs.	Total
	Bigamy	DD, BCD	2 yrs.	Total
	Bribery	DD, BCD	5 yrs.	Total
	Graft	DD, BCD	3 yrs.	Total
	Burning with intent to defraud	DD, BCD	10 yrs.	Total
	Check, worthless, making and uttering—by dishonorably failing to maintain funds	BCD	6 mos.	Total
	Cohabitation, wrongful	None	4 mos.	2/3 4 mos.
	Correctional custody, escape from	DD, BCD	1 yr.	Total
	Correctional custody, breach of	BCD	6 mos.	Total
	Debt, dishonorably failing to pay	BCD	6 mos.	Total
	Disloyal statements	DD, BCD	3 yrs.	Total
	Disorderly conduct			
	Under such circumstances as to bring discredit	None	4 mos.	2/3 4 mos.
	Other cases	None	1 mo.	2/3 1 mo.
	Drunkenness			
	Aboard ship or under such circumstances as to bring discredit	None	3 mos.	2/3 3 mos.
	Other cases	None	1 mo.	2/3 1 mo.
	Drunk and disorderly			
	Aboard ship	BCD	6 mos.	Total
	Under such circumstances as to bring discredit	None	6 mos.	2/3 6 mos.
	Other cases	None	3 mos.	2/3 3 mos.
	Drinking liquor with prisoner	None	3 mos.	2/3 3 mos.
	Drunk prisoner	None	3 mos.	2/3 3 mos.
	Drunkenness—incapacitating oneself for performance of duties through prior indulgence in intoxicating liquor or drugs	None	3 mos.	2/3 3 mos.
	Endangerment, reckless	BCD	1 yr.	Total
	False or unauthorized pass offenses			
	Possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling	DD, BCD	3 yrs.	Total
	All other cases	BCD	6 mos.	Total
	False pretenses, obtaining services under			
	Of a value of $100.00 or less	BCD	6 mos.	Total
	Of a value of more than $100.00	DD, BCD	5 yrs.	Total
	False swearing	DD, BCD	3 yrs.	Total
	Firearm, discharging—through negligence	None	3 mos.	2/3 3 mos.
	Firearm, discharging—willfully, under such circumstances as to endanger human life	DD, BCD	1 yr.	Total
	Fleeing scene of accident	BCD	6 mos.	Total
	Fraternization	Dismissal	2 yrs.	Total
	Gambling with subordinates	None	3 mos.	2/3 3 mos.
	Homicide, negligent	DD, BCD	3 yrs.	Total
	Impersonation			
	With intent to defraud	DD, BCD	3 yrs.	Total
	All other cases	BCD	6 mos.	Total
	Indecent act, liberties with child	DD, BCD	7 yrs.	Total
	Indecent exposure	BCD	6 mos.	Total
	Indecent language			
	Communicated to child under 16 yrs	DD, BCD	2 yrs.	Total
	Other cases	BCD	6 mos.	Total
	Indecent acts with another	DD, BCD	5 yrs.	Total
	Jumping from vessel into the water	BCD	6 mos.	Total

This chart was compiled for convenience purposes only and is not the authority for specific punishments. *See* Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	*Offense*	*Discharge*	*Confinement*	*Forfeitures*
	Kidnapping	DD, BCD	Life[4]	Total
	Mail, taking, opening, secreting, destroying, or stealing	DD, BCD	5 yrs.	Total
	Mails, depositing or causing to be deposited obscene matters in	DD, BCD	5 yrs.	Total
	Misprision of serious offense	DD, BCD	3 yrs.	Total
	Obstructing justice	DD, BCD	5 yrs.	Total
	Wrongful interference with an adverse administrative proceeding	DD, BCD	5 yrs.	Total
	Pandering	DD, BCD	5 yrs.	Total
	Prostitution	DD, BCD	1 yr.	Total
	Parole, violation of	BCD	6 mos.	2/3 6 mos.
	Perjury, subornation of	DD, BCD	5 yrs.	Total
	Public record, altering, concealing, removing, mutilating, obliterating, or destroying	DD, BCD	3 yrs.	Total
	Quarantine, breaking	None	6 mos.	2/3 6 mos.
	Reckless endangerment	BCD	1 yr.	Total
	Restriction, breaking	None	1 mo.	2/3 1 mo.
	Seizure, destruction, removal, or disposal of property to prevent	DD, BCD	1 yr.	Total
	Self-injury without intent to avoid service			
	In time of war, or in a hostile fire pay zone	DD	5 yrs.	Total
	Other	DD	2 yrs.	Total
	Sentinel, lookout			
	Disrespect to	None	3 mos.	2/3 3 mos.
	Loitering or wrongfully sitting on post by			
	In time of war or while receiving special pay	DD, BCD	2 yrs.	Total
	Other cases	BCD	6 mos.	Total
	Soliciting another to commit an offense (*see* Part IV, para. 105e)			
134	Stolen property, knowingly receiving, buying, concealing			
	Of a value of $100.00 or less	BCD	6 mos.	Total
	Of a value of more than $100.00	DD, BCD	3 yrs.	Total
	Straggling	None	3 mos.	2/3 3 mos.
	Testify, wrongfully refusing to	DD, BCD	5 yrs.	Total
	Threat, bomb, or hoax	DD, BCD	5 yrs.	Total
	Threat, communicating	DD, BCD	3 yrs.	Total
	Unlawful entry	BCD	6 mos.	Total
	Weapon, concealed, carrying	BCD	1 yr.	Total
	Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button	BCD	6 mos.	Total

Notes:

1. Suspended in time of war.

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

3. When any offense under paragraph 37, Part IV, is committed: while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under the control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; while receiving special pay under 37 U.S.C. sec. 310; in time of war; or in a confinement facility used by or under the control of the armed forces, the maximum period of confinement authorized for such offense shall be increased by 5 years.

4. With or without eligibility for parole.

APPENDIX 13
GUIDE FOR PREPARATION OF RECORD OF TRIAL BY GENERAL COURT-MARTIAL AND BY SPECIAL COURT-MARTIAL WHEN A VERBATIM RECORD IS NOT REQUIRED

a. *Record of trial*

If a verbatim record is not required (*see* R.C.M. 1103(h)(2)(C) and (c)(2)), a summarized report of testimony, objections, and other proceedings is permitted. In the event of an acquittal of all charges and specifications, or termination of the proceedings prior to findings by withdrawal, mistrial, or dismissal, the record may be further summarized and need only contain sufficient information to establish lawful jurisdiction over the accused and the offenses. *See* R.C.M. 1103(e).

This appendix is to be used as a general guide; the actual record may depart from it as appropriate. The manner of summarizing several items of procedure is shown in Appendix 14 *a*.

Note. All pen and ink changes to the transcribed record of trial shall be initialed. 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. A margin of 1 1/2 inches, or more as necessary, will be left at the top to permit binding. A 1 inch margin will be left on the bottom of the page and on the left side of each page. The left margin will be increased as necessary in the event that left hand binding is used rather than top binding. If left-hand binding is used, the top margin should be decreased to 1 inch. Words on the margins of this appendix are not part of the form of record. All records of trial should begin as follows:

Title

RECORD OF TRIAL
of

_____

(Name-last, first, middle initial) (SSN) (Grade)

_____

(Organization and armed force) (Station or ship)

by

_____ COURT-MARTIAL

Convened by _____

(Title of convening authority)

_____

(Command of convening authority)

Tried at

_____ on _____

(Place or places of trial) (Date or dates of trial)

COPIES OF RECORD

Copies of record

_____copy of record furnished the accused as per attached certificate or receipt._____ copy(ies) of record forwarded herewith.

RECEIPT FOR COPY OF RECORD

Receipt for record

I hereby acknowledge receipt of a copy of the above-described record of trial, delivered to me at_____ this_____ day of_____.

(Signature of accused or defense counsel)
(Name of accused or defense counsel)

Note. *See* R.C.M. 1104(b)(1) concerning service of record on the accused or defense Counsel.

CERTIFICATE

_____.
(Place) (Date)

Certificate in lieu of receipt

I certify that on this day delivery of a copy of the above-described record of trial was made to the accused,
_____at_____, by
(Name of accused) (Place of delivery)

_____
(Means of effecting delivery, i.e., 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)
(Name of trial counsel)

Note. If accused's defense counsel receives the record, the trial counsel must attach an explanation to the record. *See* R.C.M. 1104(b)(1)(C). The following format may be used:

The accused's defense counsel was served the accused's copy of the record because (the accused so requested in a written request, which is attached) (the accused so requested on the record at the court-martial) (the accused was transferred to_____) (the accused is absent without authority) (_____).

(Signature of trial counsel)
(Name of trial counsel)

Note. If the accused cannot be served and has no counsel to receive the record, an explanation for failure to serve the record will be attached to the record. *See* R.C.M. 1104(b)(l)(C). The following format may be used:

The accused was not served a copy of this record because the accused (is absent without authority) (_____) Accused has no defense counsel to receive the record because (defense counsel has been excused under R.C.M.505(d)(2)(B)) (_____.)

(Signature of trial counsel)
(Name of trial counsel)

Article 39(a) session

PROCEEDINGS OF A_____ COURT-MARTIAL ARTICLE 39(a) SESSION. The summarized record of an Article 39(a) session should proceed as follows:

Note. If trial was before a special court-martial without a military judge, there will have been no Article 39(a) session. However, generally the same sequence will be followed except as noted below. In special courts-martial without a military judge, substitute "president" for "military judge" when it appears, and "court-martial" for "Article 39(a) session."

Convening orders

The military judge called the Article 39(a) session to order (at) (on board) _____, at_____ hours,_____, pursuant to the following orders:

Note. Here insert a copy of the convening orders and copies of any amending orders. Any written orders detailing the military judge and counsel will be attached.Any request of an enlisted accused for enlisted members will be inserted immediately following the convening orders, together with any declaration of the nonavailability of such enlisted persons. Any written request for trial by the military judge alone will also be inserted at this point. *See* R.C.M. 503(a)(2), 903.

Time of session

Note. The reporter should note and record the time and date of the beginning and ending of each session of the court-martial. For example:

The session was called to order at_____ hours, _____.
The session (adjourned) (recessed) at_____ hours, _____.

PERSONS PRESENT

Military judge, counsel members present and absent

Note. Here list the names of the military judge, counsel, accused, and members if present.

PERSONS ABSENT

Note. The names of the members need not be listed if members are not present. The absence of other detailed persons should be noted. The record should include any reasons given for the absence of detailed persons. If the accused was questioned about the absence of any detailed defense counsel, this inquiry should be summarized at the point in the record at which such inquiry occurred.

Accused and defense counsel present

The accused and the following (detailed defense counsel and associate or assistant defense counsel) (civilian or individual military counsel) were present:

Swearing reporter; interpreter

The following detailed (reporter) (and) (interpreter) (was) (were) (had previously been) sworn:

Note. Applicable only when a reporter or interpreter is used.

Qualification of trial counsel

The trial counsel announced the legal qualifications and status as to oaths of all members of the prosecution (and that (he) (she) (they) had been detailed by_____).

Prior participation of trial counsel

The trial counsel further stated that no member of the prosecution had acted in a manner which might tend to disqualify (him) (her) except as indicated below.

Note. If a member of the prosecution is unqualified or disqualified under R.C.M. 502(d) that will be shown, together with the action taken under R.C.M. 901(d). Any inquiry or hearing into the matter should be summarized.

Qualification of defense counsel

The detailed defense counsel announced the legal qualifications and status as to oaths of all members of the defense (and) that he (and_____) had been detailed by_____.)

Note. Legal qualifications of any civilian or individual military counsel will be shown.

Prior participation of defense counsel

The defense counsel stated that no member of the defense had acted in a manner which might tend to disqualify (him) (her) except as indicated below.

Note. If a member of the defense is unqualified or disqualified under R.C.M. 502(d), the record will show that fact and the action taken under R.C.M. 901(d). Any inquiry or hearing into the matter should be summarized.

Inquiry concerning Article 38(b)

The military judge informed the accused of the rights concerning counsel as set forth in Article 38(b) and R.C.M. 901(d).

The accused responded that he/she understood the rights with respect to counsel, and that he/she chose to be defended by_____.

Personnel sworn

The military judge and the personnel of the prosecution and defense who were not previously sworn in accordance with Article 42(a) were sworn. The prosecution and each accused were extended the right to challenge the military judge for cause.

Challenge: military judge

The military judge was (not) challenged for cause (by_____) (on the ground that_____).

Note. The record should show the grounds for the challenge, a summary of evidence presented, if any, and the action taken.

Request for trial by military judge alone

The military judge ascertained that the accused had been advised of his right to request trial by the military judge alone and that the accused did (not) desire to submit such a request.

Note. If the accused requests trial by the military judge alone, any written request will be included in the record. The action on the request, whether oral or written, should be indicated as follows:

After ascertaining that the accused had consulted with defense counsel and had been informed of the identity of the military judge and of the right to trial by members, the military judge (approved) (disapproved) the accused's request for trial by military judge alone.

Note. If the military judge announced at this point that the court-martial was assembled, the record should so reflect. If assembly was announced at a different point it should be so shown in the record.

Note. If the military judge disapproved the accused's request, this fact and any reasons given for the disapproval should be summarized.

Note. If the accused did not submit, or the military judge disapproved, a request for trial by military judge alone, and if the accused is an enlisted person, the following should be included:

Request for enlisted members

The trial counsel announced that the accused had (not) made a request in writing that the membership of the court-martial include enlisted persons. The defense counsel announced that the accused had been advised of the right to request enlisted members and that the accused did (not) want to request enlisted members.

Note. If the accused did request enlisted members, the written request will be included in the record.

Convening authority identified

(*Name, rank, and organization of convening authority*) convened the court-martial and referred the charges and specifications to it.

Note. In a special court-martial without a military judge, ordinarily the examination and challenges of members would occur at this point. The format used below for examination and challenges may be inserted here as appropriate.

Arraignment

The accused was arraigned on the following charges and specifications:

Note. Here insert the original charge sheet. If there are not enough copies of the charge sheet to insert in each copy of the record, copy verbatim from the charge sheet the charges and specifications, and the name of the accuser, the affidavit, and the reference to the court-martial for trial.

Motions

Note. If any motions were made at arraignment, the substance of the motion, a summary of any evidence presented concerning it, and the military judge's ruling will be included in the record. Motions or objections made at other times in the court-martial should be similarly treated at a point in the record corresponding to when they were raised.

Pleas

The accused pleaded as follows:
To all the Specifications and Charges: (Not Guilty) (Guilty)
To Specification 1 of Charge I: (Not Guilty) (Guilty)
To Specification 2 of Charge I: (Not Guilty) (Guilty)
To Charge I: (Not Guilty) (Guilty)

etc.

Note. If the accused pleads guilty the plea inquiry should be summarized. The following may be used as a guide.

Guilty plea inquiry

The military judge inquired into the providence of the accused's pleas of guilty. The military judge informed the accused of: the right to counsel [if the accused had no counsel]; of the right to plead not guilty and to be tried by court-martial and that at such court-martial the accused would have the right to confront and cross-examine witnesses against the accused and the right against self-incrimination; that by pleading guilty the accused waived the rights to trial of the offense(s), to confront and cross-examine witnesses, and against self-incrimination; and that the military judge would question the accused, under oath, about the offense(s) to which the accused pleaded guilty and that if the accused answered those questions under oath, on the record, and in the presence of counsel, the accused's answers could be used against the accused in a prosecution for perjury or false statement. The accused stated that he/she understood these rights.The military judge questioned the accused and determined that the plea(s) of guilty (was) (were) voluntary and not the result of force or threats or of promises (other than those in the pretrial agreement). The military judge informed the accused of the elements of the offense(s) and the maximum punishment which could be imposed for (this) (these) offense(s). The accused stated that he/she understood.
The military judge asked the accused about the offense(s) to which the accused pleaded guilty. Under oath the accused stated as follows:

Note. Here summarize the accused's description of the offense(s).

The military judge ascertained that there was (not) a pretrial agreement in the case.

Note. If there was a pretrial agreement, the military judges's inquiry into it should be summarized. The following may be used as a guide:

The pretrial agreement was marked as Appellate Exhibit(s)_____. (The military judge did not examine Appellate Exhibit_____ at this time.) The military judge inquired and ensured that the accused understood the agreement and that the parties agreed to its terms.

Note. If there was a question or dispute as to the meaning of any term in the agreement, the resolution of that matter should be described.

Note. If the accused entered a conditional guilty plea (*see* R.C.M. 910(a)(2)), this will be included in the record.

The military judge found the accused's pleas of guilty provident and accepted them.

Note. If findings were entered (*see* R.C.M. 910(g)) on any charges and specifications at this point, the record should so reflect. *See* FINDINGS below for format.

Note. If the accused pleaded not guilty to any charge(s) and specification(s) which were not dismissed or withdrawn, in trial before military judge alone, proceed with PRESENTATION OF PROSECUTION CASE. If the accused pleaded guilty to all charge(s) and specification(s) in trial before military judge alone, proceed with SENTENCING PROCEEDINGS below. If trial was before members proceed with INITIAL SESSION WITH MEMBERS below.

Note. If the court-martial recessed, closed, or adjourned, or if an Article 39(a) session terminated and a session of the court-martial begins, the record should indicate the time of the recess, closing, or adjournment, and the time of reopening, using the following formats:

For example:

The Article 39(a) session terminated at_____ hours, _____. The court-martial (recessed) (adjourned) (closed) at_____ hours,_____.

Note. Whenever the court-martial reopens after a recess or adjournment, or after being closed, the record should indicate whether any party, member, or the military judge previously present was absent, or, if not previously present, was now present. Persons present for the first time should be identified by name. For example:

The military judge and all parties previously present were again present. (The following members were also present_____.) The members were (not) present.

The military judge and all parties previously present were again present, except_____, detailed defense counsel who had been excused by_____. _____, certified in accordance with Article 27(b) was present as individual military counsel, and was previously sworn.

INITIAL SESSION WITH MEMBERS

Note. Except in a special court-martial without a military judge, ordinarily members will be first present at this point. In a special court-martial without a military judge, ordinarily the members will he sworn and examined immediately after the accused has been afforded the opportunity to request enlisted members. In such cases, the following matters should be inserted at the appropriate point in the record.

Members sworn

The members of the court-martial were sworn in accordance with R.C.M. 807.

Note. If the military judge announced at this point that the court-martial was assembled, the record should so reflect. If assembly was announced at a different point, it should be so shown in the record.

Note. If the military judge gave preliminary instructions to members, this should be stated at the point at which they were given.

Preliminary instructions

The military judge instructed the members concerning their duties, the conduct of the proceedings, (_____).

Note. If counsel examined the members concerning their qualifications, the record should so state. If any member was challenged for cause, the grounds for challenge should he summarized. In addition, when a challenge is denied, the challenged member's statements concerning the matter in question should be summarized in the record. For example:

Trial and defense counsel examined the members concerning their qualifications._____, member was questioned concerning_____, and stated, under oath as follows:

The offense charged is, in my opinion, very serious, and worthy of a punitive discharge. My mind is not made up. I would consider all the evidence and the instructions of the military judge before deciding on an appropriate sentence.

The defense challenged_____ for cause. The challenge was denied. Neither side had any further challenges for cause. The trial counsel challenged_____ peremptorily. _____and_____ were excused and withdrew from the courtroom.

Note. If any part of the examination of members is done outside the presence of other members, this should be stated in the record. If challenges are made at an Article 39(a) session this should be stated in the record.

Note. If the accused was arraigned at an Article 39(a) session, ordinarily the military judge will have announced at this point to the members how the accused pleaded to the charges and specifications, and the record should so state. If the pleas were mixed and the members were not made aware at this point of the offense(s) to which the accused pleaded guilty the record should so state.

Announcement of pleas

The military judge informed the members that the accused had entered pleas of (Not Guilty) (Guilty) to (the) (all) Charge(s) and Specification(s) (_____).

PRESENTATION OF PROSECUTION CASE

Opening statement

The trial counsel made (an) (no) opening statement. The defense counsel made (an) (no) opening statement at this time.

Note. The record will contain a summary of the testimony presented. An example of the manner in which testimony may be summarized follows:

Testimony

The following witnesses for the prosecution were sworn and testified in substance as follows:

(name of witness, rank, and organization)

DIRECT EXAMINATION

I know the accused,_____, who is in the military service and a member of my company. We both sleep in the same barracks. When I went to bed on the night of October 7, 1984, I put my wallet under my pillow. The wallet had $7.00 in it; a $5.00 bill and two $1.00 bills. Sometime during the night something woke me up but I turned over and went to sleep again. When I woke up the next morning, my wallet was gone.

CROSS-EXAMINATION

I don't know the serial numbers on any of the bills. One of the $1.00 bills was patched together with scotch tape and one of the fellows told me that the accused had used a $1.00 bill just like that in a poker game the day after my wallet was missing.

Objection and ruling — Upon objection by the defense, so much of the answer of the witness as pertained to what he had been told was stricken.

Stipulation — The trial counsel offered in evidence a stipulation of fact entered into between the trial counsel, defense counsel, and the accused. The military judge ascertained that the accused understood and consented to the stipulation. It was admitted as Prosecution Exhibit 1.

PRESENTATION OF DEFENSE CASE

Opening statement — The defense counsel made (an) (no) opening statement. The following witnesses for the defense were sworn and testified in substance as follows:

EVIDENCE IN REBUTTAL, SURREBUTTAL

WITNESSES CALLED BY THE COURT-MARTIAL

Closing argument — The trial counsel made (an) (no) argument.
The defense counsel made (an) (no) argument.
The trial counsel made (an) (no) argument in rebuttal.

Instructions — The military judge instructed the members in accordance with R.C.M. 920, including the elements of each offense, (and of the lesser included offense(s) of_____) (the defense(s) of_____,) (the following evidentiary matters,) the presumption of innocence, reasonable doubt, and burden of proof as required by Article 51(c), and on the procedures for voting on the findings worksheet. (The members were given Appellate Exhibit_____, findings worksheet.) (The members were given Appellate Exhibit_____, a copy of the military judge's instructions.) (There were no objections to the instructions or requests for additional instructions.)

Note. If any party requested instructions which were not given, or objected to the instructions given, these matters should be summarized in the record.

Closing — The court-martial closed at_____ hours, _____.

The court-martial reopened at_____ hours,
_____.

Note. If the military judge examined a findings worksheet and gave additional instructions, these should be summarized.

FINDINGS

Findings by members

The president announced that the accused was found:

Of all Charges and Specifications: (Not Guilty) (Guilty)
Of Specification 1 of Charge I: (Not Guilty) (Guilty)
Of Specification 2 of Charge I: (Not Guilty) (Guilty)
Of Charge I: (Not Guilty) (Guilty)
Of the Specification of Charge II: Not Guilty
Of Charge II: Not Guilty

etc.

Findings by military judge alone

Note. In trial by the military judge alone, there would be no instructions given, but the military judge may make general and special findings. Any request for special findings should be summarized, and if submitted in writing, the request should be attached as an Appellate Exhibit. The general findings must be announced in open session with all parties present and may be recorded in the record in the following form, together with any special findings announced at that time:

Announcement

The military judge announced the following general (and special) findings (and directed that_____ be appended to the record as Appellate Exhibit _____) (and stated that the special findings would be furnished to the reporter prior to authentication for insertion in the record as Appellate Exhibit _____):
Of all the Specifications and Charges: Guilty

or

Of the Specification of Charge I: Guilty.
Of Charge I: Guilty
Of the Specification of Charge II: Not Guilty.
Of Charge II: Not Guilty

Note. All general findings should be recorded as indicated above. Special findings delivered orally should be summarized. Any written findings, opinion or memorandum of decision should be appended to the record as an appellate exhibit and copies furnished to counsel for both sides.

Note. If the accused was acquitted of all charges and specifications, proceed to adjournment.

SENTENCING PROCEEDINGS

Data as to service

The trial counsel presented the data as to pay, service, and restraint of the accused as shown on the charge sheet. There were no objections to the data.

Introduction of exhibits

The trial counsel offered Prosecution Exhibits_____, _____, and_____ for identification, matters from the accused's personnel records. (The defense did not object.) (The defense objected to Prosecution Exhibit_____ for identification on grounds that it was not properly authenticated.) (The objection was (overruled) (sustained).)
(Prosecution Exhibits_____, _____, and_____ were (not) received in evidence.)

Note. If the prosecution presented evidence in aggravation or of the accused's rehabilitative potential, this evidence should be summarized here, in the same way as evidence on the merits, above.

Inquiry of accused

The military judge informed the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or an unsworn statement or to remain silent. In response to the military judge the accused stated that he/she chose to (testify) (make an unsworn statement) (remain silent).

Note. If the defense calls witnesses in extenuation and mitigation, the testimony should be summarized in the record. If the accused makes an oral unsworn statement, personally or through counsel, this should be shown and the matters contained in the statement summarized.

Argument

The prosecution made (an) (no) argument on sentence. The defense made (an) (no) argument on sentence.

Instructions

The military judge instructed the members that the maximum punishment which could be adjudged for the offense(s) of which the accused had been found guilty was:_____ The military judge also instructed the members concerning the procedures for voting, the responsibility of the members, and the matters the members should consider in accordance with R.C.M. 1005(e). (The members were given Appellate Exhibit_____, a sentence worksheet.) (The members were given Appellate Exhibit_____, a copy of the military judge's instructions.) (There were no objections to the instructions or requests for additional instructions.)

Note. If any party requested instructions which were not given, or objected to the instructions given, these matters should be summarized in the record.

Note. If, in trial before military judge alone, the military judge announces what the military judge considers to be the maximum punishment, the stated maximum should be recorded.

Closing

The court-martial closed at_____ hours, _____.

Reopening

The court-martial reopened at_____ hours, _____.

Note. If the military judge examined a sentencing worksheet and gave additional instructions, these should be summarized.

Announcement

The (military judge) (president) announced the following sentence:_____.

Note. If trial was by military judge alone and there was a pretrial agreement, ordinarily the military judge will examine any sentence limitation after announcing the sentence. Any inquiry conducted at this point should be summarized.

Pretrial agreement

The military judge examined Appellate Exhibit_____. The military judge stated that, based on the sentence adjudged, the convening authority (was obligated, under the agreement to approve no sentence in excess of_____) (could approve the sentence adjudged if the convening authority so elected) (_____).

Note. The military judge must inform the accused of the accused's post-trial and appellate rights. *See* R.C.M. 1010. The following is an example:

Advice concerning post-trial and appellate rights

The military judge informed the accused of: the right to submit matters to the convening authority to consider before taking action; (the right to have the case examined in the Office of The Judge Advocate General and the effect of waiver or withdrawal of such right;) the right to apply for relief from The Judge Advocate General; and the right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

Adjournment

The court-martial adjourned at_____ hours,_____ _____.

b. Examination of record by defense counsel

Note. When the defense counsel has examined the record of trial before authentication the following form is appropriate:

_____ _____

Form

"I have examined the record of trial in the foregoing case.

(Grade) (Name), Defense Counsel"

Note. If the defense counsel was not given the opportunity to examine the record before authentication, the reasons should be attached to the record. *See* R.C.M. 1103(i)(1)(B).

c. Authentication of record of trial

_____ _____

Military judge

(1) By general or special court-martial with members and a military judge

(Captain) (Colonel)_____, Military Judge [or (LTJG) (1LT)_____, Trial Counsel, because of (death) (disability) (absence) of the military judge.] [(LCDR) (Major) or_____, a member in lieu of the military judge and the trial counsel because of (death) (disability) (absence) of the military judge and of (death) (disability) (absence) of the trial counsel.]

(2) By general or special court-martial consisting of only a military judge

(Captain) (Colonel)_____, Military Judge [or (LTJG) (1LT)_____, Trial Counsel, because of (death) (disability) (absence) of the military judge.] [or the court reporter in lieu of the military judge and trial counsel because of (death) (disability) (absence) of the trial counsel.]

President

(3) By special court-martial without a military judge

[(CDR) (LTC)_____, President [or (LTJG) (1LT)_____. Trial Counsel, because of (death) (disability) (absence) of the president.] [or (LT) (CPT)_____ a member in lieu of the president and the trial counsel because of (death) (disability) (absence) of the trial counsel.]

Note. If the rank of any person authenticating the record has changed since the court-martial, the current rank should be indicated, followed by "formerly_____."

d. Exhibits. See R.C.M. 1 103(b)(2)(D)

Note. Following the end of the transcript of the proceedings, insert any exhibits which were received in evidence, or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence and any appellate exhibits.

e. Attachments

Note. Attach to the record the matters listed in R.C.M. 1103(b)(3).

f. Certificate of correction

Note. *See* Appendix 14*f*

APPENDIX 14
GUIDE FOR PREPARATION OF RECORD OF TRIAL BY GENERAL COURT-MARTIAL AND BY SPECIAL COURT-MARTIAL WHEN A VERBATIM RECORD IS REQUIRED

a. *Record of trial.* The following guidelines apply to the preparation of all records of trial by general and special courts-martial when a verbatim record of trial is required by Rule for Courts-Martial 1103(b)(2)(B) and (c)(1).

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. The left margin will be increased as necessary in the event that left hand binding is used rather than top binding. If left-hand binding is used, the top margin should be decreased to 1 inch.

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 under UCMJ Articles 66 and 69(a) 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.C.M. 1103(b)(2)(B), (2)(D), and (3). 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 DD Form 490, with heavy stock dividers used to separate major components of the record as follows:

DD Form 490, Front Cover. The front cover will be followed by: (1) any orders transferring the accused to a confinement facility or paper-

work pertaining to excess/appellate leave; (2) appellate rights statement and the accused's election as to appellate counsel or any waiver thereof; (3) DD Form 494, "Court-Martial Data Sheet", if any; (4) any briefs of counsel submitted after trial; (5) court-martial orders promulgating the result of trial; (6) proof of service on the defense counsel of the Staff Judge Advocate's 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.C.M. 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.C.M. 1105); (7) either proof of service on the accused of the Staff Judge Advocate's recommendation or a statement explaining why the accused was not served personally; (8) signed review of the Staff Judge Advocate including any addenda and attached clemency matters; (9) matters submitted by the accused pursuant to R.C.M. 1105; (10) any request for deferment of post-trial confinement and action thereon; (11) any request for deferment/waiver of automatic forfeitures and any action thereon; (12) any request for deferment of reduction in grade and any action thereon.

DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if any, and all related exhibits and attachments. The original, signed investigation will be placed in the original copy of the record of trial.

Pretrial Allied Papers. These papers should include: (1) advice of the Staff Judge Advocate or legal officer; (2) requests by counsel and action of the convening authority taken thereon; (3) any other papers, endorsements, investigations which accompanied the charges when referred for trial; (4) record of any former trial.

Record of Proceedings of Court-Martial, in the following order: (1) errata sheet; (2) index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt;

Note. The preprinted index may be inadequate to properly reflect the proceedings, witnesses, and exhibits. Court reporters should liberally expand the index and use additional sheets as necessary. Special attention should be paid to noting the pages at which exhibits are offered and accepted/rejected, to include annotating those page numbers on the bottom of an exhibit, as appropriate.

(3) convening and all amending orders; (4) any written orders detailing the military judge or counsel; (5) request for trial by military judge alone if not marked as an appellate exhibit; (6) any written request for enlisted members if not marked as an appellate exhibit; (7) verbatim transcript of the proceedings of the court, including all Article 39(a) sessions and original DD Form 458, "Charge Sheet"; (8) authentication sheet followed by Certificate of Correction, if any; (9) action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.

Note. Any necessary assumption of command orders should be included in the record of trial.

Post-trial sessions. Post-trial sessions will be authenticated and served in accordance with R.C.M. 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.

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 DD Form 490.]

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 DD Form 490.]

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 DD Form 490.]

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 DD Form 490.]

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 DD Form 490.]

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. Top or left-side binding is acceptable with sufficient adjustment to the top or left margin. Volumes shall be bound to withstand repeated handling, utilizing DD Form 490.**Do not sew or stack fasteners together in gangs to bind thick volumes.**

13. *Dividing Records into Volumes.* Divide ROTs that are over 11/2 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 SJA recommendation, clemency matters, and other post-trial documents. Limit subsequent volumes to 11/2 inches thick, unless dividing them requires assembling an 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 ROT as follows: "Volume 1 of_____." In the upper right-hand corner of the DD Form 490, label the ROT to reflect which copy it is, i.e., "ORIGINAL," "ACCUSED," et cetera.

Words on the margins of this appendix are not part of the form of record.

As a general rule, all proceedings in the case should be recorded verbatim. *See* R.C.M. 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 general and special court-martial cases in which a verbatim record is required.

RECORD OF TRIAL

of

_____

(Name-last, first, middle initial) (SSN) (Rank or grade)

_____

(Organization and armed force) (Station or ship)

by

_____ COURT-MARTIAL

Convened by _____

(Title of convening authority)

_____

(Command of convening authority)

_____ on _____

(Place or places of trial) (Date or dates of trial)

Note. The title should be followed by an index. The form and content of this index will be as prescribed in publications of the Secretary concerned.

However, 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

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

Receipt for 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

_____, _____ _____

(Place) (Date)

Certificate in lieu of receipt

I certify that on this day delivery of a copy of the above-described record of trial was made to the accused,_____, at

(Name of accused)

_____, by_____ and that the receipt of the accused had

(Place of delivery) (Means of Delivery)

not been received on the date this record was forwarded to the convening authority. The receipt of the accused will be forwarded as soon as it is received.

(Signature of trial counsel)

(Name of trial counsel)

Note. If the accused's defense counsel receives the record, the trial counsel must attach an explanation to the record. *See* R.C.M. 1104(b)(1)(C). The following format may be used:

The accused's defense counsel was served the accused's copy of the record because (the accused so requested in a written request, which is attached) (the accused so requested on the record at the court-martial) (the accused was transferred to_____) (the accused is absent without authority) (_____).

(Signature of trial counsel)

(Name of trial counsel)

Note. If the accused cannot be served and has no counsel to receive the record, an explanation for failure to serve the record will be attached to the record. *See* R.C.M. 1104(b)(1)(C). The following format may be used:

The accused was not served a copy of this record because the accused (is absent without authority) (_____). Accused has no defense counsel to receive the record because (defense counsel has been excused under R.C.M. 505(d)(2)(B)) (_____).

(Signature of trial counsel)

(Name of trial counsel)

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 SPECIAL/GENERAL COURT-MARTIAL

[The military judge called the Article 39(a) session to order at/on board _____at, _____hours, _____ _____, pursuant to the following orders:]

[Court-Martial Convening Order Number _____, _____, dated _____.] (command that issued the order)

[END OF PAGE]

Note. Here insert a copy of the orders convening the court-martial and copies of any amending orders. Copies of any written orders detailing the military judge and counsel will be inserted here. *See* R.C.M. 503(b) and (c). Any request of an enlisted accused for enlisted court members will be inserted immediately following the convening orders, together with any declaration of the nonavailability of such enlisted persons unless marked as an appellate exhibit. *See* R.C.M.503(a)(2), 903. Any written request for trial by military judge alone (R.C.M. 903) or statement that a military judge could not be obtained (R.C.M. 201(f)(2)(B)(ii)) will be inserted at this point unless marked as an appellate exhibit.

MJ: This Article 39(a) session is called to order.

TC: This court-martial 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.

SSEs, Reporter's Notes and 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.

Paragraphing

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.

Punctuation Marks

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.

Prefixes

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.

Questions and Answer

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.

Sessions of court

Note. Each session of court, as well as each Article 39(a) session or bench conference, 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 court-martial during trial. For example:

[The (court-martial) (session) was called to order at_____ hours, _____ _____.]

[The (court-martial) (session was) (adjourned) (recessed) at_____ hours, _____ _____.]

[The court-martial closed at_____ hours, _____ _____.]

Administration of oaths

Note. It is not necessary to record verbatim the oath actually used, whether it be administered to a witness, the military judge, counsel, or the members. Regardless of the form of oath, affirmation, or ceremony by which the conscience of the witness is bound, R.C.M. 807, only the fact that a witness took an oath or affirmation is to be recorded. However, if preliminary qualifying questions are asked a witness prior to the administration of an oath, the questions and answers should be recorded verbatim. These preliminary questions and answers do not eliminate the requirement that an oath be administered. The following are examples of the recording of the administration of various oaths:

[The detailed 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.]

Accounting for personnel during trial

Note. After the reporter is sworn, the reporter will record verbatim the statements, of the trial counsel with respect to the presence of personnel of the court-martial, counsel, and the accused. The reporter should note whether, when a witness is excused, the witness withdraws from the courtroom or, in the case of the accused, whether the accused resumes a seat at counsel table. Similarly, if the military judge excuses a member as a result of challenge and the member withdraws, the reporter should note this fact in the record. In a special court-martial without a military judge, if a challenged member withdraws from the court-martial while it votes on a challenge, and then is excused as a result of challenge or resumes a seat after the court-martial has voted on a challenge, the reporter should note this fact in the record. Examples of the manner in which such facts should be recorded are as follows:

[The (witness withdrew from the courtroom) (accused resumed his/her seat at the counsel table).]

[_____, the challenged member, withdrew from the courtroom.]

[_____, resumed his/her seat as a member of the court-martial.]

Arraignment

Note. The original charge sheet or a duplicate should be inserted here. If the charges are read, the charges should also be transcribed as read. *See* R.C.M. 1103(b)(2)(D)(i).

Recording testimony

Note. The testimony of a witness will be recorded verbatim in a form similar to that set forth below for a prosecution witness:

_____was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the (trial counsel) (assistant trial counsel):

Q. State your full name, (etc.) _____ .

A. _____ .

Q. _____?

A. _____ .

CROSS-EXAMINATION

Questions by the (defense counsel) (assistant defense counsel) (individual military counsel) (civilian defense counsel):

Q. _____?

A. _____ .

REDIRECT EXAMINATION

Questions by the (trial counsel) (assistant trial counsel):

Q. _____?

A. _____ .

RECROSS-EXAMINATION

Questions by the (defense counsel) (assistant defense counsel) (individual military counsel) (civilian defense counsel):

Q. _____?

A. _____ .

EXAMINATION BY THE COURT-MARTIAL

Questions by (the military judge) (member's name):

Q. _____?

A. _____ .

REDIRECT EXAMINATION

Questions by the (trial counsel) (assistant trial counsel):

Q. _____?

A. _____ .

RECROSS-EXAMINATION

Questions by the (defense counsel) (assistant defense counsel) (individual military counsel) (civilian defense counsel):

Q. _____?

A. _____ .

Bench conferences and Article 39(a) sessions

Note. Bench conferences and Article 39(a) sessions should be recorded and incorporated in the record of trial. *See* R.C.M. 803.

b. Examination of record by defense counsel

Note. When the defense counsel has examined the record of trial prior to its being forwarded to the convening authority, the following form is appropriate:

Form

"I have examined the record of trial in the foregoing case.
(Captain) (Lieutenant)_____, Defense Counsel."

Note. If defense counsel was not given the opportunity to examine the record before authentication, the reasons should be attached to the record. *See* R.C.M. 1103(i)(l)(B).

c. Authentication of record of trial

Note. The authentication should be dated.

_____

(1) By general or special court-martial with members and a military judge.

Military Judge

_____(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].

(2) By general court-martial consisting of only a military judge.

Military Judge

_____(Captain) (Colonel)_____, Military Judge [or (LTJG) (1LT)_____ Trial Counsel, because of (death) (disability) (absence) of the military judge] [or the court reporter in lieu of the military judge and trial counsel because of (death) (disability) (absence) of the military judge, and of (death) (disability) (absence) of the trial counsel].

(3) By special court-martial without a military judge.

President

_____(CDR) (LTC)_____, President [or (LTJG) (lLT)_____, Trial Counsel, because of (death) (disability) (absence) of the president] [or (LT) (CPT)_____, a member in lieu of the president and the trial counsel because of (death) (disability) (absence) of the president, and of (death) (disability) (absence) of the trial counsel].

Note. If the rank of any person authenticating the record has changed since the court-martial, the current rank should he indicated, followed by "formerly (list the former rank)."

d. Exhibits. See R.C.M. 1103(b)(2)(D)

Note. Following the end of the transcript of the proceedings, insert any exhibits which were received in evidence, or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence, followed by exhibits marked/offered, but not admitted, and any appellate exhibits.

e. Attachments

Note. Attach to the record the matters listed in R.C.M. 1103(b)(3).

f. Certificate of correction. See R.C.M. 1104(d)

Note. The certificate should be dated.

_____ _____

United States

v.

_____

_____

The record of trial in the above case, which was tried by the _____ court-martial convened by _____, dated _____ _____, (at) (on board) _____, on _____ _____, is corrected by the insertion on page _____, immediately following line _____, of the following:

"[The detailed reporter, _____ was sworn.]"

This correction is made because the reporter was sworn at the time of trial but a statement of that effect was omitted, by error, from the record.

R.C.M. 1104(d) has been complied with.

Note. The certificate of correction is authenticated as indicated above for the record of trial in the case.

Copy of the certificate received by me this _____ day of _____, _____.

(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. Individual services may require additional copies. In a joint or common trial, an additional copy of the record must be prepared for each accused. *See* R.C.M. 1103(g)(1)(A).

APPENDIX 15
Record of Trial by Summary Court-Martial (DD Form 2329)

RECORD OF TRIAL BY SUMMARY COURT–MARTIAL

1a. NAME OF ACCUSED (Last, First, MI)	b. GRADE OR RANK	c. UNIT OR ORGANIZATION OF ACCUSED	d. SSN
Arthur N. Sherry	PFC	Co A, 1st Battalion, 61st Inf	111-11-1111

2a. NAME OF CONVENING AUTHORITY (Last, First, MI)	b. RANK	c. POSITION	d. ORGANIZATION OF CONVENING AUTHORITY
Gail L. Busybody	COL	Commander	61st Infantry Brigade

3a. NAME OF SUMMARY COURT-MARTIAL (If SCM was accuser, so state.)	b. RANK	c. UNIT OR ORGANIZATION OF SUMMARY COURT-MARTIAL
Ron F. Andrews	MAJ	2d Battalion, 61st Inf

(Check appropriate answer)	YES	NO
4. At a preliminary proceeding held on 20 September 19 93, the summary court-martial gave the accused a copy of the charge sheet.	X	
5. At that preliminary proceeding the summary court-martial informed the accused of the following:		
a. The fact that the charge(s) had been referred to a summary court-martial for trial and the date of referral.	X	
b. The identity of the convening authority.	X	
c. The name(s) of the accuser(s).	X	
d. The general nature of the charge(s).	X	
e. The accused's right to object to trial by summary court-martial.	X	
f. The accused's right to inspect the allied papers and immediately available personnel records.	X	
g. The names of the witnesses who could be called to testify and any documents or physical evidence which the summary court-martial expected to introduce into evidence.	X	
h. The accused's right to cross-examine witnesses and have the summary court-martial cross-examine on behalf of the accused.	X	
i. The accused's right to call witnesses and produce evidence with the assistance of the summary court-martial if necessary.	X	
j. That during the trial the summary court-martial would not consider any matters, including statements previously made by the accused to the summary court-martial, unless admitted in accordance with the Military Rules of Evidence.	X	
k. The accused's right to testify on the merits or to remain silent, with the assurance that no adverse inference would be drawn by the summary court-martial from such silence.	X	
l. If any findings of guilty were announced, the accused's right to remain silent, to make an unsworn statement, oral or written or both, and to testify and to introduce evidence in extenuation or mitigation.	X	
m. The maximum sentence which could be adjudged if the accussed was found guilty of the offense(s) alleged.	X	
n. The accused's right to plead guilty or not guilty.	X	

6. At the trial proceeding held on 21 September 19 93, the accused, after being given a reasonable time to decide, ☐ did ☒ did not object to trial by summary court-martial.

(Note: The SCM may ask the accused to initial this entry at the time the election is made.)

AK
(Initial)

7a. The accused ☐ was ☒ was not represented by counsel. *(If the accused was represented by counsel, complete b, c, and d below.)*

b. NAME OF COUNSEL (Last, First, MI)	c. RANK (If any)

d. COUNSEL QUALIFICATIONS

DD FORM 2329 84 AUG

8. The accused was arraigned on the attached charge(s) and specification(s). The accused's pleas and the findings reached are shown below:

CHARGE(S) AND SPECIFICATION(S)	PLEA(S)	FINDINGS *(Including any exceptions and substitutions)*
Ch. I	NG	G
Spec. 1	NG	NG
Spec. 2	NG	G except "$74.00" substituting "$25.00"
Ch. II	G	G
Spec.	G	G
Add'l Ch.	NG	NG
Spec.	NG	NG

9. The following sentence was adjudged:
Confinement for 15 days, forfeiture of $200.00 pay per month for 1 month, and reduction to to grade of E-1.

10. The accused was advised of the right to request that confinement be deferred. *(Note: When confinement is adjudged.)*
☒ YES ☐ NO

11. The accused was advised of the right to submit written matters to the convening authority, including a request for clemency, and of the right to request review by the Judge Advocate General.
☒ YES ☐ NO

12. AUTHENTICATION
Ron J. Andrews — *Signature of Summary Court Martial*
21 September 1993 — *Date*

13. ACTION BY CONVENING AUTHORITY
The sentence is approved and will be executed.

Gail L. Busybody — *Typed Name of Convening Authority*
Commander — *Position of Convening Authority*
Commander — *Rank*
Gail L. Busybody — *Signature of Convening Authority*
29 September 1993 — *Date*

☆ GPO : 1984 O - 421-646 (17049)

APPENDIX 16
FORMS FOR ACTION

The forms in this appendix are guides for preparation of the convening authority's initial action. Guidance is also provided for actions under R.C.M. 1112(f). Appendix 17 contains forms for later actions. The forms are guidance only, and are not mandatory. They do not provide for all cases. It may be necessary to combine parts of different forms to prepare an action appropriate to a specific case. Extreme care should be exercised in using these forms and in preparing actions. *See* R.C.M. 1107(f) concerning contents of the convening authority's action.

In addition to the matters contained in the forms below, the action should show the headquarters and place, or the ship, of the convening authority taking the action, and the date of the action. The signature of the convening authority is followed by the grade and unit of the convening authority, and "commander" or "commanding" as appropriate.

When the sentence includes confinement, the place of confinement is designated in the action unless the Secretary concerned prescribes otherwise. If the place of confinement is designated in the action, service regulations should be consulted first. *See* R.C.M. 1113(d)(2)(C).

In actions on a summary court-martial, when the action is written on the record of trial (*see* Appendix 15) the words "In the case of_____" may be omitted.

INITIAL ACTION ON COURT-MARTIAL SENTENCE—FINDINGS NOT AFFECTED

Forms 1–10 are appropriate when the adjudged sentence does not include death, dismissal, or a dishonorable or bad-conduct discharge.

Adjudged sentence approved and ordered executed without modification. See R.C.M. 1107(f)(4).

1. In the case of_____, the sentence is approved and will be executed. (_____ is designated as the place of confinement.)

Adjudged sentence modified. See R.C.M. 1107(d)(1), (f)(4).

— *Adjudged sentence approved in part and ordered executed.*

2. In the case of_____, only so much of the sentence as provides for_____ is approved and will be executed. (_____ is designated as the place of confinement.)

— *Adjudged sentence approved; part of confinement changed to forfeiture of pay.*

3. In the case of_____, so much of the sentence extending to_____ months of confinement is changed to forfeiture of $ _____ pay per month for_____ months. The sentence as changed is approved and will be executed. (_____ is designated as the place of confinement.)

Credit for illegal pretrial confinement. See R.C.M. 305(k); 1107(f)(4)(F).

4. In the case of_____, the sentence is approved and will be executed. The accused will be credited with_____ days of confinement against the sentence to confinement. (_____ is designated as the place of confinement.)

Suspension of sentence. See R.C.M. 1107(f)(4)(B); 1108(d).

— *Adjudged sentence approved and suspended.*

5. In the case of_____, the sentence is approved. Execution of the sentence is suspended for_____ (months) (years) at which time, unless the suspension is sooner vacated, the sentence will be remitted without further action.

— *Adjudged sentence approved; part of sentence suspended.*

6. In the case of_____, the sentence is approved and will be executed but the execution of that part of the sentence extending to (confinement) (confinement in excess of_____ months) (forfeiture of pay) (_____) is suspended for_____ (months) (years), at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted with-

out further action. (_____ is designated as the place of confinement.)

Deferment of confinement and termination of deferment. See R.C.M. 1101(c); 1107(f)(4)(E).

—Adjudged sentence approved; confinement deferred pending final review.

7. In the case of_____, the sentence is approved and, except for that portion extending to confinement, will be executed. Service of the sentence to confinement (is) (was) deferred effective_____ _____, and will not begin until (the conviction is final) (_____), unless sooner rescinded by competent authority.

—Adjudged sentence approved; deferment of confinement terminated.

8. In the case of_____, the sentence is approved and will be executed. The service of the sentence to confinement was deferred on_____ _____. (_____) is designated as the place of confinement.)

—Adjudged sentence approved; deferment of confinement terminated previously.

9. In the case of_____, the sentence is approved and will be executed. The service of the sentence to confinement was deferred on_____ _____, and the deferment ended on_____ 20_____; (_____ is designated as the place of confinement.)

Disapproval of sentence; rehearing on sentence only ordered. See R.C.M. 1107(e), (f)(4)(A).

10. In the case of_____, it appears that the following error was committed: (evidence of a previous conviction of the accused was erroneously admitted) (_____). This error was prejudicial as to the sentence. The sentence is disapproved. A rehearing is ordered before a (summary) (special) (general) court-martial to be designated.

When the adjudged sentence includes death, dismissal, or a dishonorable or a bad-conduct discharge, forms 1-10 are generally appropriate, but several will require modification depending on the action to be taken. This is because death, dismissal, or a dishonorable or bad-conduct discharge may not be ordered executed in the initial action. Therefore, unless an adjudged punishment of death, dismissal, or a dishonorable or bad-conduct discharge is disapproved, changed to another punishment, or (except in the case of death) suspended, the initial action must specifically except such punishments from the order of execution. This is done by adding the words "except for the (part of the sentence extending to death) (dismissal) (dishonorable discharge) (bad-conduct discharge)," after the words "is approved and" and before the words "will be executed" in the action. (A death sentence cannot be suspended. *See* R.C.M. 1108(b).)

Forms 11-14 provide examples of actions when the sentence includes death, dismissal, or a dishonorable or bad-conduct discharge.

Adjudged sentence approved and, except for death, dismissal, or discharge, ordered executed. See R.C.M. 1107(f)(4).

11. In the case of_____, the sentence is approved and, except for the (part of the sentence extending to death) (dismissal) (dishonorable discharge) (bad-conduct discharge), will be executed. (_____ is designated as the place of confinement.)

Adjudged sentence modified. See R.C.M. 1107(d)(1), (f)(4). Note if the part of the sentence providing for death, dismissal, or a dishonorable or a bad-conduct discharge is disapproved, *see* Form 2 above.

12. In the case of_____, only so much of the sentence as provides for (death) (dismissal) (a dishonorable discharge) (a bad-conduct discharge) (and_____) is approved and, except for the part of the sentence extending to (death) (dismissal) (dishonorable discharge) (bad-conduct discharge), will be executed.

(_____ _____ is designated as the place of confinement.)

— Adjudged sentence approved; discharge changed to confinement.

13. In the case of_____, so much of the sentence extending to a (dishonorable discharge) (bad conduct discharge) is changed to confinement for_____ months (thereby making the period of confinement total_____ months). The sentence as changed is approved and will be executed. (_____ is designated as the place of confinement.)

Suspension of sentence. See R.C.M. 1107(f)(4)(B); 1108(d). Note. If the portion of the sentence extending to dismissal or a dishonorable or a bad-conduct discharge is suspended, Form 5 or Form 6, as appro-

priate, may be used. If parts of the sentence other than an approved dismissal or discharge are suspended, the following form may be used:

— *Adjudged sentence approved; part of sentence, other than dismissal or dishonorable or bad-conduct discharge, suspended.*

14. In the case of_____, the sentence is approved and, except for that part of the sentence extending to (dismissal) (a dishonorable discharge) (a bad-conduct discharge), will be executed, but the execution of that part of the sentence adjudging (confinement) (confinement in excess of _____) (forfeiture of pay) (_____) is suspended for _____ (months) (years) at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. (_____ is designated as the place of confinement.)

INITIAL ACTION ON COURT-MARTIAL WHEN FINDINGS AFFECTED

Findings are addressed in the action only when any findings of guilty are disapproved, in whole or part. *See* R.C.M. 1107(c), (f)(3). The action must also indicate what action is being taken on the sentence. Appropriate parts of the foregoing forms for action on the sentence may be substituted in the following examples as necessary.

Some findings of guilty disapproved; adjudged sentence approved.

15. In the case of_____, the finding of guilty of Specification 2, Charge I is disapproved. Specification 2, Charge I is dismissed. The sentence is approved and (except for that part of the sentence extending to (dismissal) (a dishonorable discharge) (a bad-conduct discharge)) will be executed. (_____ is designated as the place of confinement.)

Finding of guilty of lesser included offense approved; adjudged sentence modified.

16. In the case of_____, the finding of guilty of Specification 1, Charge II is changed to a finding of guilty of (assault with a means likely to produce grievous bodily harm, to wit: a knife) (absence without authority from the (unit) (ship) (_____) alleged from _____ _____ to _____ _____(in violation of Article 86)) (_____). Only so much of the sentence as provides for_____ is approved and (, except for the (dismissal) (dishonorable discharge) (bad-conduct discharge)), will be executed. (_____ is designated as the place of confinement.)

Some findings of guilty and sentence disapproved; combined rehearing ordered. See 1107(e). A rehearing may not be ordered if any sentence is approved. *See* R.C.M. 1107(c)(2)(B); (e)(1)(c)(i).

17. In the case of_____, it appears that the following error was committed: (Exhibit 1, a laboratory report, was not properly authenticated and was admitted over the objection of the defense)_____. This error was prejudicial as to Specifications 1 and 2 of Charge II. The findings of guilty as to Specifications 1 and 2 of Charge II and the sentence are disapproved. A combined rehearing is ordered before a court-martial to be designated.

All findings of guilty and sentence disapproved; rehearing ordered. See R.C.M. 1107(c)(2)(B).

18. In the case of_____, it appears that the following error was committed: (evidence offered by the defense to establish duress was improperly excluded) (_____). This error was prejudicial to the rights of the accused as to all findings of guilty. The findings of guilty and the sentence are disapproved. A rehearing is ordered before a court-martial to be designated.

All findings of guilty and sentence disapproved based on jurisdictional error; another trial ordered. See R.C.M. 1107(e)(2). Note. This form may also be used when a specification fails to state an offense.

19. In the case of_____, it appears that (the members were not detailed to the court-martial by the convening authority) (_____). The proceedings, findings, and sentence are invalid. Another trial is ordered before a court-martial to be designated.

All findings of guilty and sentence disapproved; charges dismissed. See R.C.M. 1107(c)(2)(B).

20. In the case of_____, the findings of guilty and the sentence are disapproved. The charges are dismissed.

ACTION ON A REHEARING

The action on a rehearing is the same as an action on an original court-martial in most respects. It differs first in that, as to any sentence approved follow-

ing the rehearing, the accused must be credited with those parts of the sentence previously executed or otherwise served. Second, in certain cases the convening authority must provide for the restoration of certain rights, privileges, and property. *See* R.C.M. 1107(f)(5)(A).

Action on rehearing; granting credit for previously executed or served punishment.

21. In the case of_____, the sentence is approved and (except for the (dismissal) (dishonorable discharge) (bad-conduct discharge)), will be executed. The accused will be credited with any portion of the punishment served from_____ 20_____ to_____ 20_____ under the sentence adjudged at the former trial of this case.

Action on rehearing; restoration of rights.

22. In the case of_____, the findings of guilty and the sentence are disapproved and the charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the execution of the sentence adjudged at the former trial of this case on_____ 20_____ will be restored.

23. In the case of_____, the accused was found not guilty of all the charges and specifications which were tried at the former hearing. All rights, privileges, and property of which the accused has been deprived by virtue of the execution of the sentence adjudged at the former trial of this case on _____ will be restored.

WITHDRAWAL OF PREVIOUS ACTION

Form 24 is appropriate for withdrawal of an earlier action. *See* R.C.M. 1107(f)(2) concerning modification of an earlier action. Form 24a is appropriate for withdrawal of previous action pursuant to instructions from reviewing authority pursuant to R.C.M. 1107(f)(2) or (g). When the action of a predecessor in command is withdrawn due to ambiguity, *see United States v. Lower*, 10 M.J. 263 (C.M.A. 1981).

24. In the case of_____, the action taken by (me) (my predecessor in command) on _____ _____ is withdrawn and the following substituted therefor:

_____.

24a. In the case of_____, in accordance with instructions from (The Judge Advocate General) (the_____ Court of Criminal Appeals) pursuant to Rule for Courts-Martial [1107(f)(2)] [1107(g)], the action taken by (me) (my predecessor in command) is withdrawn. The following is substituted therefor:_____.

FORMS FOR ACTIONS APPROVING AND SUSPENDING PUNISHMENTS MENTIONED IN ARTICLE 58a AND RETAINING ACCUSED IN PRESENT OR INTERMEDIATE GRADE.

Under the authority of Article 58a, the Secretary concerned may, by regulation, limit or specifically preclude the reduction in grade which would otherwise be effected under that Article upon the approval of certain court-martial sentences by the convening authority. The Secretary concerned may provide in regulations that if the convening or higher authority taking action on the case suspends those elements of the sentence that are specified in Article 58a the accused may be retained in the grade held by the accused at the time of the sentence or in any intermediate grade. Forms 25-27 may be used by the convening or higher authority in effecting actions authorized by the Secretary concerned in regulations pursuant to the authority of Article 58a.

If the convening authority or higher authority when taking action on a case in which the sentence includes a punitive discharge, confinement, or hard labor without confinement elects to approve the sentence and to retain the enlisted member in the grade held by that member at the time of sentence or in any intermediate grade, that authority may do so if permitted by regulations of the Secretary concerned whether or not the sentence also includes a reduction to the lowest enlisted grade, by using one of the following forms of action. The first action, Form 25, is appropriate when the sentence does not specifically provide for reduction. The second and third actions, Forms 26 and 27, are appropriate when the sentence specifically provides for reduction to the grade of E-1. The action set forth in Form 26 is intended for a case in which the accused is to be probationally retained in the grade held by that accused at the time of sentence. The action set forth in Form 27 is for a case in which the accused is to serve probationally in an intermediate grade.

Automatic reduction suspended; sentence does not specifically include reduction.

25. In the case of_____, the sentence is approved and will be executed, but the execution of

that part of the sentence extending to (a dishonorable discharge) (a bad-conduct discharge) (confinement) (hard labor without confinement) (and _____) is suspended for_____ (months) (years) at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. The accused will (continue to) serve in the grade of_____ unless the suspension of (the dishonorable discharge) (the bad-conduct discharge) (confinement) (hard labor without confinement) is vacated, in which event the accused will be reduced to the grade of E-1 at that time.

Automatic reduction and adjudged reduction to E-l suspended; accused retained in grade previously held.

26. In the case of_____, the sentence is approved and will be executed, but the execution of that part of the sentence extending to (a dishonorable discharge) (a bad-conduct discharge) (confinement) (hard labor without confinement) (_____), and reduction to the grade of E-1 is suspended for_____ (months) (years), at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. The accused will continue to serve in the grade of_____ unless the suspension of (the dishonorable discharge) (the bad-conduct discharge) (confinement) (hard labor without confinement), or reduction to the grade of E-1 is vacated, in which event the accused will be reduced to the grade of E-1 at that time.

Automatic reduction and adjudged reduction to E-l suspended; accused retained in intermediate grade.

27. In the case of_____, the sentence is approved and will be executed but the execution of that part of the sentence extending to (a dishonorable discharge) (a bad-conduct discharge) (confinement) (hard labor without confinement), and that part of the reduction which is in excess of reduction to the grade of_____ is suspended for_____ (months) (years) at which time, unless the suspension is sooner vacated, the suspended part of the sentence will be remitted without further action. The accused will serve in the grade of_____ unless the suspension of (the dishonorable discharge) (bad-conduct discharge) (confinement) (hard labor without confinement), or reduction to the grade of E-1, is vacated, in which event the accused will be reduced to the grade of E-1 at that time.

ACTION UNDER R.C.M. 1112(f). The forms for action for the officer taking action under R.C.M. 1112(f) are generally similar to the foregoing actions. The officer taking action under R.C.M. 1112 (f) may order executed all parts of the approved sentence, including a dishonorable or bad-conduct discharge, except those parts which have been suspended without later vacation unless the record must be forwarded under R.C.M. 1112(g)(1). *See* R.C.M. 1113(c)(1)(A). The following are additional forms which may be appropriate:

Sentence approved when convening authority suspended all or part of it.

28. In the case of_____, the sentence as approved and suspended by the convening authority is approved.

Sentence approved and, when confinement was deferred, ordered executed. See R.C.M. 1101(c)(6).

29. In the case of_____, the sentence is approved and the confinement will be executed. The service of the sentence to confinement was deferred on _____ _____. (_____ is designated as the place of confinement.)

Sentence includes unsuspended dishonorable or bad-conduct discharge; order of execution. See R.C.M. 1113(c)(1) and (2).

30. In the case of_____, the sentence is approved. The (dishonorable discharge) (bad-conduct discharge) will be executed.

Findings and sentence disapproved; restoration as to parts ordered executed by convening authority. See R.C.M. 1208(b).

31. In the case of_____, the findings of guilty and the sentence are disapproved. The charges are dismissed. (The accused will be released from the confinement adjudged by the sentence in this case and all) (All) rights, privileges, and property of which the accused has been deprived by virtue of the findings and sentence disapproved will be restored.

Findings and sentence disapproved; rehearing authorized. See R.C.M. 1112(f).

32. In the case of_____, it appears that the following error was committed: (Exhibit 1, a statement of the accused, was not shown to have been preceded by Article 31 warnings as required and was admitted over the objection of the defense) (_____). This error was prejudicial to the

rights of the accused as to the findings and the sentence. The case is returned to the convening authority who may order a rehearing or dismiss the charges.

Action taken is less favorable to the accused than that recommended by the judge advocate. See R.C.M. 1112(e), (f).

33. In the case of_____, the sentence is approved. As this action is less favorable to the accused than that recommended by the judge advocate, the record and this action shall be forwarded to the Judge Advocate General for review under Article 69(b).

Action when approved sentence includes dismissal. See R.C.M. 1113(c)(2).

34. In the case of_____, the sentence is approved. The record shall be forwarded to the Secretary of the_____.

APPENDIX 17
FORMS FOR COURT-MARTIAL ORDERS

a. *Forms for initial promulgating orders*

[Note. The following is a form applicable in promulgating the results of trial and the action of the convening authority in all general and special court-martial cases. Omit the marginal side notes in drafting orders. *See* R.C.M. 1114(c).]

Heading

(General) (Special) (Headquarters) (USS)
Court-Martial Order No. _____ _____
[Note. The date must be the same as the date of the convening authority's action, if any.]

(Grade) (Name) (SSN) (Armed Force)

(Unit)

Arraignment

was arraigned (at/on board _____) on the following offenses at a court-martial convened by (this command) (Commander, _____).

Offenses

CHARGE I. ARTICLE 86. Plea: G. Finding: G.

Specification 1: Unauthorized absence from unit from 1 April 1984 to 31 May 1984. Plea: G. Finding: G.

[Note. Specifications may be reproduced verbatim or may be summarized. Specific factors, such as value, amount, and other circumstances which affect the maximum punishment should be indicated in a summarized specification. Other significant matters contained in the specification may be included. If the specification is copied verbatim, include any amendment made during trial. Similarly, information included in a summarized specification should reflect any amendment to that information made during the trial.]

Specification 2: Failure to repair on 18 March 1984. Plea: None entered. Finding: Dismissed on motion of defense for failure to state an offense.

[Note. If a finding is not entered to a specification because, for example, a motion to dismiss was granted, this should be noted where the finding would otherwise appear.]

CHARGE II. ARTICLE 91. Plea: NG. Finding: NG, but G of a violation of ARTICLE 92.

Specification: Disobedience of superior noncommissioned officer on 30 March 1984 by refusing to inspect sentinels on perimeter of bivouac site. Plea: NG. Finding: G, except for disobedience of superior noncommissioned officer, substituting failure to obey a lawful order to inspect sentinels on perimeter of bivouac site.

CHARGE III. ARTICLE 112a. Plea: G. Finding: G.

Specification 1: Wrongful possession of 150 grams of marijuana on 24 March 1984. Plea: G. Finding: G.

Specification 2: Wrongful use of marijuana while on duty as a sentinel on 24 March 1984. Plea: G. Finding G.

Specification 3: Wrongful possession of heroin with intent to distribute on 24 March 1984. Plea: NG.Finding: G.

CHARGE IV. ARTICLE 121. Plea: NG. Finding: G.

Specification: Larceny of property of a value of $150.00 on 27 March 1984. Plea: NG. Finding: G, except the word "steal," substituting "wrongfully appropriate."

Acquittal

If the accused was acquitted of all charges and specifications, the date of the acquittal should be shown: "The findings were announced on _____."

SENTENCE

Sentence adjudged on _____: Dishonorable discharge, forfeiture of all pay and allowances, confinement for 2 years, and reduction to the lowest enlisted grade.

Action of convening authority

ACTION

[Note. Summarize or enter verbatim the action of the convening authority. Whether or not the action is recited verbatim, the heading, date, and signature block of the convening authority need not be copied from the action if the same heading and date appear at the top of this order and if the name and rank of the convening authority are shown in the authentication.]

Authentication

[Note. *See* R.C.M. 1114(e) concerning authentication of the order.]

Joint or common trial

[Note. In case of a joint or common trial, separate trial orders should be issued for each accused. The description of the offenses on which each accused was arraigned may, but need not, indicate that there was a co-accused.]

b. Forms for supplementary orders promulgating results of affirming action

[Note. Court-martial orders publishing the final results of cases in which the President or the Secretary concerned has taken final action are promulgated by departmental orders. In other cases the final action may be promulgated by an appropriate convening authority, or by an officer exercising general court-martial jurisdiction over the accused at the time of final action, or by the Secretary concerned. The following sample forms may be used where such a promulgating order is published in the field. These forms are guides. Extreme care should be exercised in using them. If a sentence as ordered into execution or suspended by the convening authority is affirmed without modifications and there has been no modification of the findings, no supplementary promulgating order is required.]

Heading

*See above.

Sentence -Affirmed

In the (general) (special) court-martial case of *(name, grade or rank, branch of service, and SSN of accused,)* the sentence to bad-conduct discharge, forfeiture of _____, and confinement for _____, as promulgated in (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____ Naval District) dated _____ _____, has been finally affirmed. Article 71(c) having been complied with, the bad-conduct discharge will be executed.

or

-Affirmed in part

In the (general) (special) court-martial case of *(name, grade or rank, branch of service, and SSN of accused,)* only so much of the sentence promulgated in (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____ Naval District) _____,
dated _____ _____, as provides for _____, has been finally affirmed. Article 71(c) having been complied with, the bad-conduct discharge will be executed.

or

In the (general) (special) court-martial case of *(name, grade or rank, branch of service, and SSN of accused,)* the findings of guilty of Charge II and its specification have been set aside and only so much of the sentence promulgated in (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____, Naval District) _____,
dated _____ _____, as provides for _____, has been finally affirmed. Article 71(c) having been complied with, the bad-conduct discharge will be executed.

or

Affirmed in part; prior order of execution set aside in part

In the (general) (special) court-martial case of *(name, grade or rank, branch of service, and SSN of accused,)* the proceedings of which are promulgated in (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____ Naval District) _____,
dated _____ _____, the findings of guilty of Charge I and its specification, and so much of the sentence as in excess of _____ have been set aside and the sentence, as thus modified, has been finally affirmed. Article 71(c) having been complied with, all rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and that portion of the sentence so set aside will be restored.

Finding and sentence set aside

In the (general)(special) court-martial case of *(name, grade or rank, branch of service, and SSN, of accused,)* the findings of guilty and the sentence promulgated by (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____ Naval District), _____,
dated _____ _____, were set aside on _____ _____. (The charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the findings of guilty and the sentence so set aside will be restored.) (A rehearing is ordered before another court-martial to be designated.)

Authentication

See R.C.M. 1114(e).

c. Forms for orders remitting or suspending unexecuted portions of sentence

Heading

See a above.

Remissions; suspension
See R.C.M. 1108

The unexecuted portion of the sentence to _____, in the case of *(Name, grade or rank, branch of service and SSN of accused,)* promulgated in (General) (Special) Court-Martial Order No. _____, (this headquarters) (this ship) (Headquarters _____) (USS _____), _____, _____, is (remitted) (suspended for _____, months, at which time, unless the suspension is sooner vacated, the unexecuted portion of the sentence will be remitted without further action).

Authentication

See R.C.M. 1114(e).

d. Forms for orders vacating suspension

[Note. Orders promulgating the vacation of the suspension of a dismissal will be published by departmental orders of the Secretary concerned. Vacations of any other suspension of a general court-martial sentence, or of a special court-martial sentence which as approved and affirmed includes a bad-conduct discharge, will be promulgated by the officer exercising general court-martial jurisdiction over the probationer (Article 72(b)). The vacation of suspension of any other sentence may be promulgated by an appropriate convening authority under Article 72(c). *See* R.C.M. 1109.]

Heading

See a above.

Vacation of Suspension

So much of the order published in (General) (Special) (Summary) (Court-Martial Order No. _____) (the record of summary court-martial), (this headquarters) (this ship) (Headquarters _____) (USS _____), _____. _____, in the case of *(name, grade or rank, branch of service, and SSN)*, as suspends, effective _____ _____, execution of the approved sentence to (a bad-conduct discharge) (confinement for _____ (months) (years)) (forfeiture of _____), (and subsequently modified by (General) (Special) Court-Martial Order No. _____, (this headquarters) (this ship) (Headquarters _____) (USS _____), _____. _____, is vacated. (The unexecuted portion of the sentence to _____ will be executed.) (_____ is designated as the place of confinement.)

[Note. *See* R.C.M. 1113 concerning execution of the sentence.]

Authentication

See R.C.M.1114(e).

e. Forms for orders terminating deferment

[Note: When any deferment previously granted is rescinded after the convening authority has taken action in the case, such rescission will be promulgated in a supplementary order. *See* R.C.M. 1101(c)(7)(C).]

Heading

See a above.

Rescission of deferment

The deferment of that portion of the sentence that provides for confinement for _____ (months) (years) published in (General) (Special) Court-Martial Order _____ (this headquarters) (this ship) (Headquarters _____) (USS _____), _____ _____, in the case of *(name, grade or rank, branch of service, and SSN of accused)* (is rescinded) (was rescinded on _____ _____.) The portion of the sentence to confinement will be executed. (_____ is designated as the place of confinement.)

Authentication

See R.C.M. 1114(e).

[Note. Deferment may be terminated by an appropriate authority once the conviction is final under Article 71(c) and R.C.M. 1208(a). *See* R.C.M. 1101(c)(7).]

Heading

See a above.

In the (general) (special) court-martial case of *(name, grade or rank, branch of service, and SSN of accused,)* the sentence to confinement (and _____), as promulgated in (General) (Special) Court-Martial Order No. _____, (Headquarters) (Commandant, _____ Naval District) _____, dated _____ _____, has been finally affirmed. Service of confinement was deferred on _____ _____. Article 71(c) having been complied with, the (bad-conduct discharge and the) sentence to confinement will be executed. (_____ is designated as the place of confinement.)

Authentication

See R.C.M. 1114(e).

APPENDIX 18

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

REPORT OF PROCEEDINGS TO VACATE SUSPENSION OF A GENERAL COURT- MARTIAL SENTENCE OR OF A SPECIAL COURT-MARTIAL SENTENCE INCLUDING A BAD-CONDUCT DISCHARGE UNDER ARTICLE 72, UCMJ, and R.C.M. 1109

1a. TO: *(Name of Officer exercising general court-martial jurisdiction — Last, First, MI)*	2a. FROM: *(Name of Officer exercising special court-martial jurisdiction — Last, First, MI)*
Rabino, Arthur K.	Roberts, Leonard E.
b. TITLE: Commander	b. TITLE: Commander
c. ORGANIZATION: 5000th Support Wing, APO AP 99999	c. ORGANIZATION: 5001st Support Group, APO AP 99999

3a. NAME OF PROBATIONER *(Last, First, MI)*	b. RANK	c. SSN	d. ORGANIZATION
Dice, Morris L.	Airman	000-00-0000	5001st Support Group

4. DATA AS TO TRIAL BY COURT-MARTIAL. ATTACH A COPY OF THE COURT-MARTIAL ORDER AND ANY SUPPLEMENTARY ORDERS OR, IF NO COURT-MARTIAL ORDER HAS BEEN PROMULGATED OR IS AVAILABLE, ATTACH A SUMMARY OF THE CHARGES AND SPECIFICATIONS, FINDINGS, SENTENCE, INITIAL ACTION, AND ANY SUPPLEMENTARY ACTIONS. ATTACH A COPY OF THE WRITTEN NOTICE OF SUSPENSION [*see* R.C.M. 1108(c)].

5. ALLEGED VIOLATION(S) OF THE CONDITIONS OF SUSPENSION. (BRIEF STATEMENT AND DATE. *See* R.C.M. 1108(c) AND 1109(a) CONCERNING THE CONDITIONS OF SUSPENSION.)

Assault on Master Sgt Vic Timm, while in the execution of duties on 15 September 1993, in violation of Article 91.

(Check appropriate answer)	YES	NO
6. PURSUANT TO THE PROVISIONS OF ARTICLE 72, UCMJ, AND R.C.M. 1109, A HEARING WAS HELD ON THE ALLEGED VIOLATION(S) OF THE CONDITIONS OF SUSPENSION.	X	
7. BEFORE THE HEARING THE AUTHORITY CONDUCTING THE HEARING CAUSED THE PROBATIONER TO BE NOTIFIED OF [*see* R.C.M. 1109(d)(1)(B)]:		
a. THE TIME, PLACE, AND PURPOSE OF THE HEARING.	X	
b. THE RIGHT TO BE PRESENT AT THE HEARING.	X	
c. THE ALLEGED VIOLATION(S) OF THE CONDITIONS OF SUSPENSION AND THE EVIDENCE EXPECTED TO BE RELIED ON.	X	
d. THE RIGHT TO BE REPRESENTED AT THE HEARING BY CIVILIAN COUNSEL PROVIDED BY THE PROBATIONER OR, UPON REQUEST, BY MILITARY COUNSEL DETAILED FOR THIS PURPOSE.	X	
e. THE OPPORTUNITY TO BE HEARD, TO PRESENT WITNESSES AND OTHER EVIDENCE, AND THE RIGHT TO CONFRONT AND CROSS-EXAMINE ADVERSE WITNESSES UNLESS THE HEARING OFFICER DETERMINES THAT THERE IS GOOD CAUSE FOR NOT ALLOWING CONFRONTATION AND CROSS-EXAMINATION.	X	
8a. THE PROBATIONER REQUESTED DETAILED MILITARY COUNSEL.	X	

b. NAME OF DETAILED COUNSEL *(Last, First, MI)*	c. RANK	d. ORGANIZATION
Young, Louise	Captain	Area Defense Counsel, APO AP 99999

e. DETAILED COUNSEL WAS QUALIFIED WITHIN THE MEANING OF ARTICLE 27(b), UCMJ, and R.C.M. 502(d).	X	

NOTE: If this form is used and additional space is required for any item, enter the additional material in Block 18 or on a separate sheet. Identify such material with the proper heading *(Example: "3d")*. Securely attach any additional sheet(s) and add a note in the appropriate item: "See Block 18" or "See additional sheet." This form may be used to vacate a suspended special court-martial sentence not including a bad-conduct discharge or a suspended summary court-martial sentence under R.C.M. 1109(e) by lining through or altering the form, as appropriate.

DD FORM 455 84 AUG — EDITION OF OCT 69 IS OBSOLETE.

(Check appropriate answer)	YES	NO
9a. THE PROBATIONER INDICATED THAT HE/SHE WOULD BE REPRESENTED BY CIVILIAN COUNSEL PROVIDED BY HIM/HER.		X
b. NAME OF CIVILIAN COUNSEL *(Last, First, MI)* / c. ADDRESS OF CIVILIAN COUNSEL		
d. ENTRY OF APPEARANCE BY PROBATIONER'S CIVILIAN COUNSEL. I HEREBY ENTER MY APPEARANCE FOR THE ABOVE NAMED PROBATIONER AND REPRESENT THAT I AM A MEMBER IN GOOD STANDING OF THE FOLLOWING BAR(S) (LIST) OR LICENSED OR OTHERWISE AUTHORIZED TO PRACTICE LAW (EXPLAIN) [*see* R.C.M. 502(d)(3) CONCERNING QUALIFICATIONS]:		
e. SIGNATURE OF COUNSEL / f. DATE		
10a. DETAILED COUNSEL OR CIVILIAN COUNSEL WAS PRESENT THROUGHOUT THE PROCEEDINGS. *(If probationer waives the right to have counsel present throughout part or all of the proceedings after requesting detailed counsel or employing civilian counsel, complete b below.)*	X	
b. STATE CIRCUMSTANCES AND SPECIFIC PROCEEDINGS CONDUCTED IN ABSENCE OF COUNSEL.		
11. *(To be signed by probationer if answer to items 8 or 9 was "No." If probationer fails to sign, the hearing officer shall explain in Item 18.)* I have been informed and understand my right under R.C.M. 1109(d) to representation at this hearing by civilian counsel provided by me or, upon request, by detailed military counsel. I hereby knowingly waive my right to such: a. ☐ Detailed Counsel b. ☒ Civilian Counsel		
c. SIGNATURE OF PROBATIONER: Morris Dice / d. DATE: 1 October 1993		
12a. THE PROBATIONER WAS AFFORDED THE RIGHT TO OBTAIN WITNESSES AND PRODUCE EVIDENCE [*see* R.C.M. 405(g)].	X	
b. IN THE PRESENCE OF PROBATIONER I QUESTIONED UNDER OATH ALL AVAILABLE WITNESSES AND EXAMINED DOCUMENTARY AND REAL EVIDENCE FOR BOTH SIDES. ANY DOCUMENTS AND REAL EVIDENCE WERE SHOWN TO THE PROBATIONER.	X	
c. THE PROBATIONER WAS AFFORDED THE RIGHT TO CROSS-EXAMINE ALL AVAILABLE WITNESSES.	X	
d. I HAVE SUMMARIZED THE EVIDENCE CONSIDERED IN EXHIBIT 1.	X	
e. THE FOLLOWING WITNESSES REQUESTED BY THE ACCUSED WERE NOT AVAILABLE UNDER R.C.M. 405(g) FOR THE REASONS INDICATED. *(Explain why requested witnesses were unavailable and any alternatives to testimony under R.C.M. 405(g)(4) used.)*		

NAME *(Last, First, MI)*	REASON UNAVAILABLE	ALTERNATIVES

13. AFTER HAVING BEEN INFORMED OF THE RIGHT TO REMAIN SILENT OR MAKE A STATEMENT, THE PROBATIONER a. INDICATED THAT HE/SHE DID NOT WISH TO MAKE A STATEMENT.		X
b. MADE A STATEMENT SUMMARIZED IN EXHIBIT 2.	X	

(Check appropriate answer)	YES	NO
14a. THERE ARE REASONABLE GROUNDS TO BELIEVE THAT THE PROBATIONER NOW OR AT THE TIME OF THE ALLEGED VIOLATION WAS NOT MENTALLY RESPONSIBLE [*see* R.C.M. 916(k)] OR IS NOW INCOMPETENT TO PARTICIPATE IN THE VACATION PROCEEDING (*see* R.C.M. 909).		X
b. INDICATE THE GROUNDS FOR SUCH BELIEF AND THE ACTION TAKEN.		
c. A REPORT OF MEDICAL OFFICERS UNDER R.C.M. 706 IS ATTACHED IN EXHIBIT _____.		X
15. IF PROBATIONER WAS CONFINED PENDING VACATION PROCEEDINGS UNDER R.C.M. 1109(c):		
a. I FIND THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THE PROBATIONER VIOLATED THE CONDITIONS OF SUSPENSION.	X	
b. I DO NOT FIND THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THE PROBATIONER VIOLATED THE CONDITIONS OF SUSPENSION AND ORDER HIS/HER RELEASE UNDER R.C.M. 1109(d)(1)(E).		
16. RECOMMENDATION OF THE OFFICER EXERCISING SPECIAL COURT-MARTIAL JURISDICTION OVER THE PROBATIONER.		
a. I RECOMMEND THAT THE SUSPENSION OF THE SENTENCE BE VACATED. *(Indicate type and amount of punishment, if any, to be vacated.)* Bad-Conduct Discharge	X	
b. I RECOMMEND THAT THE PROCEEDINGS TO VACATE SUSPENSION BE DROPPED.		
c. I RECOMMEND *(state other recommendation)*:		

17a. NAME OF OFFICER EXERCISING SPECIAL COURT MARTIAL JURISDICTION OVER PROBATIONER	b. RANK	c. ORGANIZATION
Leonard E. Roberts	LTC	5001st Support Group

d. SIGNATURE	e. DATE
Leonard E. Roberts	1 October 1993

18. REMARKS

Airman Basic Dice struck Master Sgt Timm in the face twice with a closed fist after Timm directed Dice to clean up his living area. Although Airman Dice testified that Timm was prejudiced against him because he was a probationer, no evidence of such bias was offered. Dice offered no other extenuating or mitigating evidence and the record reveals none. Dice had served under the suspended sentence for 2 weeks before this offense without previous incident. Dice was previously convicted by a special court-martial of disrespect and disobedience toward superior NCOs on two different occasions. I am satisfied that Dice is guilty of the offense of assaulting a superior NCO in the execution of office. I recommend that the suspension of the bad-conduct discharge be vacated.

3

REMARKS *(Continued)*

(Check appropriate answer)	YES	NO
19. DECISION OF THE OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION OVER PROBATIONER.		
a. VACATE SUSPENSION OF THE SENTENCE TO *(specify type/amount of punishment to be vacated)*: Suspension of bad-conduct discharge vacated.	X	
b. NOT TO VACATE.		
c. OTHER *(specify)*:		

d. IF DECISION IS TO VACATE, INDICATE EVIDENCE RELIED ON:
Testimony of Master Sgt Timm and Airman I.C. Nitt and Warren Teed established Airman Dice assaulted Timm, without provacation, while Timm was in the execution of his office. Medical report reflects Timm was bruised on check and forehead, Dice therefore violated conditions of suspension.

e. IF DECISION IS TO VACATE, INDICATE REASONS FOR VACATING:
Airman Dice's offense strikes at the heart of military discipline and reflects his failure to adapt despite second chance. Bad-conduct discharge is appropriate.

20a. NAME OF OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION OVER PROBATIONER	b. RANK	c. ORGANIZATION
Arthur K. Rubino	MC	Commander 5000th Support Wing APO AP 99999

d. SIGNATURE: Arthur K Rubino — e. DATE: 30 October 1983

4

☆ GPO : 1984 O - 421-646 (17046)

APPENDIX 19

Waiver/Withdrawal of Appellate Rights in General and Special Courts-Martial Subject to Review by a Court of Military Review (DD Form 2330)

WAIVER/WITHDRAWAL OF APPELLATE RIGHTS IN GENERAL AND SPECIAL COURTS–MARTIAL SUBJECT TO REVIEW BY A COURT OF MILITARY REVIEW

NOTE: See R.C.M. 1203(b) concerning which cases are subject to review by a Court of Military Review. See R.C.M. 1110 concerning waiver or withdrawal of appellate review.

I have read the attached action dated 1 November 1993.

I have consulted with Lieutenant Fender, my (associate) defense counsel concerning my appellate rights and I am satisfied with his/her advice.

I understand that:

1. If I do not waive or withdraw appellate review —

   a. My court-martial will be reviewed by the Navy-Marine Corps Court of Military Review.

   b. The Court of Military Review will review my case to determine whether the findings and sentence are correct in law and fact and whether the sentence is appropriate.

   c. After review by the Court of Military Review, my case could be reviewed for legal error by the United States Court of Military Appeals, on petition by me or on request of the Judge Advocate General.

   d. If the Court of Military Appeals reviews my case, my case could be reviewed for legal error by the United States Supreme Court on petition by me or the Government.

   e. I have the right to be represented by military counsel, at no cost to me, or by civilian counsel, at no expense to the United States, or both, before the Court of Military Review, the Court of Military Appeals, and the Supreme Court.

2. If I waive or withdraw appellate review —

   a. My case will not be reviewed by the Court of Military Review, or be subject to further review by the Court of Military Appeals, or by the Supreme Court under 28 U.S.C. 1259.

   b. My case will be reviewed by a judge advocate for legal error, and I may submit in writing allegations of legal error for consideration by the judge advocate.

   c. After review by the judge advocate and final action in my case, I may petition the Judge Advocate General for correction of legal errors under Article 69(b). Such a petition must be filed within 2 years of the convening authority's action, unless I can show good cause for filing later.

   d. A waiver or withdrawal, once filed, cannot be revoked, and bars further appellate review.

Understanding the foregoing, I (waive my rights to appellate review) (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.

James R. Richards	PFC
TYPED NAME OF ACCUSED	RANK OF ACCUSED
James R Richards	3 November 1993
SIGNATURE OF ACCUSED	DATE

DD FORM 84 AUG 2330

STATEMENT OF COUNSEL

(Check appropriate block)

[X] 1. I represented the accused at his/her court-martial.

[ ] 2. I am associate counsel detailed under R.C.M. 1110(b). I have communicated with the accused's (detailed) (individual military) (civilian) (appellate) defense counsel concerning the accused's waiver/withdrawal and discussed this communication with the accused.

[ ] 3. I am substitute counsel detailed under R.C.M. 1110(b).

[ ] 4. I am a civilian counsel whom the accused consulted concerning this matter. I am a member in good standing of the bar of _____.

[ ] 5. I am appellate defense counsel for the accused.

I have advised the accused of his/her appellate rights and of the consequences of waiving or withdrawing appellate review. The accused has elected to (waive) ~~(withdraw)~~ appellate review.

Dudley D. Fender TYPED NAME OF COUNSEL	_____ UNIT OF COUNSEL
Lieutenant, JAGC, USN RANK OF COUNSEL	_____ BUSINESS ADDRESS *(If Civilian Counsel)*
/s/ Dudley D. Fender SIGNATURE OF COUNSEL	5 November 1993 DATE

☆ GPO : 1984 O - 421-646 (17050)

APPENDIX 20

Waiver/Withdrawal of Appellate Rights in General Courts-Martial Subject to Examination in the Office of the Judge Advocate General (DD Form 2331)

WAIVER/WITHDRAWAL OF APPELLATE RIGHTS IN GENERAL COURTS–MARTIAL SUBJECT TO EXAMINATION IN THE OFFICE OF THE JUDGE ADVOCATE GENERAL

NOTE: See R.C.M. 1201(b)(1) concerning which cases are subject to examination in the Office of the Judge Advocate General. See R.C.M. 1110 concerning waiver or withdrawal of appellate review.

I have read the attached action, dated 1 November 1993.

I have consulted with Captain Rater, my (associate) defense counsel concerning my appellate rights and I am satisfied with his/her advice.

I understand that:

1. If I do not waive or withdraw appellate review —

   a. My case will be examined in the Office of the Judge Advocate General to determine whether the findings and sentence are legally correct and whether the sentence is appropriate.

   b. After examination in the Office of the Judge Advocate General and final action in my case, I may petition the Judge Advocate General for review under Article 69(b). Such a petition must be filed within 2 years after the convening authority took action in my case, unless I can show good cause for filing later.

2. If I waive or withdraw appellate review —

   a. My case will not be examined in the Office of the Judge Advocate General under Article 69(a), UCMJ.

   b. My case will be reviewed by a judge advocate for legal error, and I may submit in writing allegations of legal error for consideration by the judge advocate.

   c. After review by the judge advocate and final action in my case, I may petition the Judge Advocate General for review under Article 69(b). Such a petition must be filed within 2 years after the convening authority took action in my case, unless I can show good cause for filing later.

   d. A waiver or withdrawal, once filed, may not be revoked.

3. Understanding the above, I hereby (waive my rights to appellate review) (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.

Gregory C. Johns	LCPL, USMC
TYPED NAME OF ACCUSED	RANK OF ACCUSED
Gregory C. Johns	5 November 1993
SIGNATURE OF ACCUSED	DATE

DD FORM 2331
84 AUG

STATEMENT OF COUNSEL

(Check appropriate block)

[X] 1. I represented the accused at his/her court-martial.

[ ] 2. I am associate counsel detailed under R.C.M. 1110(b). I have communicated with the accused's (detailed) (individual military) (civilian) (appellate) defense counsel concerning the accused's waiver/withdrawal and discussed this communication with the accused.

[ ] 3. I am substitute counsel detailed under R.C.M. 1110(b).

[ ] 4. I am a civilian counsel whom the accused consulted concerning this matter. I am a member in good standing of the bar of _____

[ ] 5. I am appellate defense counsel for the accused.

I have advised the accused of his/her appellate rights and of the consequences of waiving or withdrawing appellate review. The accused has elected to (waive) (withdraw) appellate review.

Libby Rater	LSSS, Camp Blank, GA
TYPED NAME OF COUNSEL	UNIT OF COUNSEL
Captain, USMC	
RANK OF COUNSEL	BUSINESS ADDRESS *(If Civilian Counsel)*
Libby Rater	5 November 1993
SIGNATURE OF COUNSEL	DATE

☆ GPO : 1984 O - 421-646 (1704)

APPENDIX 21
ANALYSIS OF RULES FOR COURTS-MARTIAL

Introduction

The Manual for Courts-Martial, United States, 1984, includes Executive Order No. 12473 signed by President Reagan on 13 April 1984. This publication also contains various supplementary materials for the convenience of the user.

History of the Manual for Courts-Martial. The President traditionally has exercised the power to make rules for the government of the military establishment, including rules governing courts-martial. *See* W. Winthrop, *Military Law and Precedents* 27–28 (2d ed. 1920 reprint). Such rules have been promulgated under the President's authority as commander-in-chief, *see* U.S. Const., Art. II, sec. 2, cl.1., and, at least since 1813, such power also has been provided for in statutes. *See*W. Winthrop, *supra* at 26–27. In 1875 Congress specifically provided for the President to make rules for the government of courts-martial. Act of March 1, 1775, Ch. 115. 18 Stat. 337. Similar authority was included in later statutes (*see e.g.*, A.W. 38 (1916)), and continues in Article 36 of the Uniform Code of Military Justice. *See also* Articles 18 and 56. *See generally Hearings on H.R. 3804 Before the Military Personnel Subcom. of the House Comm. on Armed Services*, 96th Cong., 1st Sess. 5–6, 14, 17–18, 20–21, 52, 106 (1979). In 1979, Article 36 was amended to clarify the broad scope of the President's rulemaking authority for courts-martial. Act of November 9, 1979, Pub. L.No. 96–107, Section 801(b), 93 Stat. 810,811. *See generally Hearings on H.R. 3804, supra*.

In the nineteenth century the President promulgated, from time to time, regulations for the Army. Those regulations were published in various forms, including "Manuals". W. Winthrop, *supra* at 28. Such publications were not limited to court-martial procedures and related matters; however, they were more in the nature of compendiums of military law and regulations. The early manuals for courts-martial were informal guides and were not promulgated by the President. *See* MCM, 1895 at 1, 2; MCM, 1905 at 3; MCM, 1910 at 3; MCM, 1917 at III. *See also* MCM, 1921 at XIX.

The forerunner of the modern *Manual for Courts-Martial* was promulgated by the Secretary of War in 1895. *See* MCM, 1895 at 2. *See also* Hearings on H.R. 3805, *supra* at 5. (Earlier Manuals were prepared by individual authors. *See e.g.*, A. Murray, *A Manual for Courts-Martial* (3d ed. 1893); H. Coppee, *Field manual for Courts-Martial* (1863)). Subsequent Manuals through MCM, 1969 (Rev.) have had the same basic format, organization, and subject matter as MCM, 1895, although the contents have been modified and considerably expanded. *See e.g.*, MCM, 1921 at XIX–XX. The format has been a paragraph format, numbered consecutively and divided into chapters. The subject matter has included pretrial, trial, and post-trial procedure. In MCM, 1917, rules of evidence and explanatory materials on the punitive articles were included. *See*, MCM, 1917 at XIV. The President first promulgated the Manual for Courts-Martial as such in 1921. *See* MCM, 1921 at XXVI.

Background of this Manual. During the drafting of the Military Rules of Evidence (*see* Analysis, Part III, introduction, *infra*), the drafters identified several portions of MCM, 1969 (Rev.) in specific areas. However, the project to draft the Military Rules of Evidence had demonstrated the value of a more comprehensive examination of existing law. In addition, changing the format of the Manual for Courts-Martial was considered desirable. In this regard it should be noted that, as indicated above, the basic format and organization of the Manual for Courts-Martial had remained the same for over 80 years, although court-martial practice and procedure had changed substantially.

Upon completion of the Military Rules of Evidence in early 1980, the General Counsel, Department of Defense, with the concurrence of the Judge Advocates General, directed that the Manual for Courts-Martial be revised. There were four basic goals for the revision. First, the new Manual was to conform to federal practice to the extent possible, except where the Uniform Code of Military Justice requires otherwise or where specific military requirements render such conformity impracticable. *See* Article 36. Second, current court-martial practice and applicable judicial precedent was to be thoroughly examined and the Manual was to be brought up to date, by modifying such practice and precedent or conforming to it as appropriate. Third, the format of the Manual was to be modified to make it more useful to lawyers (both military and civilian) and nonlawyers. Specifically, a rule as opposed to paragraph format was to be used and prescriptive rules would be separated from nonbinding discussion. Fourth, the procedures in the new Manual had to be workable across the spectrum of circumstances in which courts-martial are conducted, including combat conditions.

These goals were intended to ensure that the Manual for Courts-Martial continues to fulfill its fundamental purpose as a comprehensive body of law governing the trial of courts-martial and as a guide for lawyers and nonlawyers in the operation and application of such law. It was recognized that no single source could resolve all issues or answer all questions in the criminal process. However, it was determined that the Manual for Courts-Martial should be sufficiently comprehensive, accessible, and understandable so it could be reliably used to dispose of matters in the military justice system properly, without the necessity to consult other sources, as much as reasonably possible.

The Joint-Service Committee on Military Justice was tasked with the project. The Joint-Service Committee consists of representatives from each of the armed forces, and a nonvoting representative from the Court of Military Appeals. Since 1980 the Joint-Service Committee has consisted of Colonel (later Brigadier General) Donald W. Hansen, USA, 1980-July 1981 (Chairman, October 1980–July 1981); Colonel Kenneth A. Raby, USA, July

1981–January 1984 (Chairman, July 1981–September 1982); Captain Edward M. Byrne, USN, 1980–July 1981 (Chairman through September 1980); Captain John J. Gregory, USN, July 1981–January 1984; Colonel Richard T. Yery USAF, 1980–March 1982; Colonel John E. Hilliard, USAF, March 1982–October 1983 (Chairman, October 1982–October 1983); Colonel Thomas L. Hemingway, USAF, October 1983-January 1984 (Chairman, October 1983–January 1984); Lieutenant Colonel A.F. Mielczarski, USMC, 1980–July 1982; Lieutenant Colonel G.W. Bond, USMC, July 1982–October 1982, Lieutenant Colonel Gary D. Solis, USMC, October 1982–March 1983; Lieutenant Colonel George Lange, III, USMC, June 1983–January 1984; Commander William H. Norris, USCG, 1980–August 1981; Commander Thomas B. Snook, USCG, August 1981–September 1983; Captain William B. Steinbach, USCG, October 1983–January 1984; and Mr. Robert H. Mueller of the Court of Military Appeals (1980–January 1984).

In the summer of 1980, Commander James E. Pinnell, USN, and Major Frederic I. Lederer, USA, prepared an initial outline of the new Manual.

Drafting was done by the Working Group of the Joint-Service Committee on Military Justice. Since September 1980, when the drafting process began, the Working Group consisted of: Major John S. Cooke, USA (Chairman); Commander James E. Pinnell, USN; Lieutenant Colonel Richard R. James, USAF (1980–December 1982); Lieutenant Colonel Robert Leonard, USAF (December 1982 to January 1984); Major Jonathan R. Rubens, USMC; and Mr. John Cutts, and Mr. Robert Mueller of the staff of the Court of Military Appeals. Mr. Francis X. Gindhart and Mr. Jack McKay of the staff of the Court of Military Appeals also participated early in the drafting process. Clerical support was provided by the Court of Military Appeals. In this regard, Mrs. Gail L. Bissi has been instrumental in the success of this project.

The Working Group drafted the Manual in fourteen increments. Each increment was circulated by each service to various field offices for comment. Following such comment, each increment was reviewed in the respective offices of the Judge Advocate General, the Director, Judge Advocate Division, Headquarters, USMC, and the Chief Counsel, USCG, and in the Court of Military Appeals. Following such review, the Joint-Service Committee met and took action on each increment. After all increments had been reviewed and approved, the Code Committee approved the draft. At this time the Code Committee consisted of Chief Judge Robinson O. Everett, Judge William H. Cook, and Judge Albert B. Fletcher, of the Court of Military Appeals; Rear Admiral James J. McHugh, the Judge Advocate General, USN; Major General Hugh J. Clausen, The Judge Advocate General, USA; Major General Thomas Bruton, The Judge Advocate General, USAF; and Rear Admiral Edward Daniels, Chief Counsel, USCG. Brigadier General William H. J. Tiernan, USMC, also sat as an *ex officio* member.

Following approval by the Code Committee, the draft was made available for comment by the public. 48 Fed. Reg. 23688 (May 26, 1983). In September and October 1983, the comments were reviewed. The Working Group prepared numerous modifications in the draft based on comments from the public and from within the Department of Defense, and on judicial decisions and other developments since completion of the draft. In October 1983, the Joint-Service Committee approved the draft for forwarding to the General Counsel, Department of Defense, for submission to the President after coordination by the Office of Management and Budget.

On November 18, 1983, Congress passed the Military Justice Act of 1983. This act was signed into law by the President on December 6, 1983, Pub. L. No. 98–209, 97 Stat. 1393 (1983). The Working Group had previously drafted proposed modifications to the May 1983 draft which would be necessary to implement the act. These proposed modifications were approved by the Joint-Service Committee in November 1983 and were made available to the public for comment in December 1983. 48 Fed. Reg. 54263 (December 1, 1983). These comments were reviewed and modifications made in the draft by the Working Group, and the Joint-Service Committee approved these changes in January 1984. The draft of the complete Manual and the proposed executive order were forwarded to the General Counsel, Department of Defense in January 1984. These were reviewed and forwarded to the Office of Management and Budget in January 1984. They were reviewed in the Departments of Justice and Transportation. The Executive Order was finally prepared for submission to the President, and the President signed it on 13 April 1984.

A note on citation form. The drafters generally have followed the *Uniform System of Citation* (13th ed. 1981), copyrighted by the *Columbia, Harvard, and University of Pennsylvania Law Reviews* and the *Yale Law Journal*, subject to the following.

This edition of the Manual for Courts-Martial is referred to generally as "this Manual." The Rules for Courts-Martial are cited, *e.g.*, as R.C.M. 101. The Military Rules of Evidence are cited, *e.g.*, as Mil. R. Evid. 101. Other provisions of this Manual are cited to the applicable part and paragraph, *e.g.*, MCM, Part V, paragraph 1a(1) (1984).

The previous edition of the Manual for Courts-Martial will be referred to as "MCM, 1969 (Rev.)." Except as otherwise noted, this includes Exec. Order No. 11476, 34 Fed. Reg. 10,502 (1969), as amended by Exec. Order No. 11835, 40 Fed. Reg. 4,247 (1975); Exec. Order No. 12018, 42 Fed. Reg. 57,943 (1977); Exec. Order No. 12198, 45 Fed. Reg.16,932 (1980); Exec. Order No. 12223, 45 Fed. Reg. 58,503 (1980); Exec. Order No. 12306, 46 Fed. Reg. 29,693 (1981); Exec. Order No. 12315, 46 Fed. Reg. 39,107 (1981); Exec. Order No. 12340, 47 Fed. Reg. 3,071 (1982); Exec. Order No. 12383, 47 Fed. Reg. 42,317 (1982), and Executive Order No. 12460, Fed. Reg. (1984). Earlier editions of the Manual for Courts-Martial, will be identified by a complete citation.

The Uniform Code of Military Justice, 10 U.S.C. Sections 801–940, as amended by the Military Justice Act of 1983, Pub. L. No. 98–209, 97 Stat. 1393 will be cited as follows:

Each individual section is denominated in the statute as an "Article" and will be cited to the corresponding Article. *E.g.*, 10 U.S.C. Section 801 will be cited as "Article 1"; 10 U.S.C. Section 802 will be cited as "Article 2"; 10 U.S.C. Section 940 will be cited as "Article 140". The entire legislation, Articles 1 through 140, will be referred to as "the Code" or "the UCMJ" without citation to the United States Code. When a change from MCM, 1969 (Rev.) is based on the Military Justice Act of 1983, Pub. L. No. 98–209, 97 Stat, 1393 (1983), this will be noted in the analysis, with citation to the appropriate section of the act. When this analysis was drafted, the specific page numbers in the statutes at large were not available.

Composition of the Manual for Courts-Martial (1984)

a. *Executive Order (1983).*

The Executive Order includes the Manual for Courts-Martial, which consists of the Preamble, Rules for Courts-Martial, Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedure. Each rule states binding requirements except when the text of the rule expressly provides otherwise. Normally, failure to comply with a rule constitutes error. *See* Article 59 concerning the effect of errors.

b. *Supplementary Materials*

As a supplement to the Manual, the Department of Defense, in conjunction with the Department of Transportation, has published a Discussion (accompanying the Preamble, the Rules for Courts-Martial, and the Punitive Articles), this Analysis, and various Appendices.

(1) *The Discussion*

The Discussion is intended by the drafters to serve as a treatise. To the extent that the Discussion uses terms such as "must" or "will", it is solely for the purpose of alerting the user to important legal consequences that may result from binding requirements in the Executive Order, judicial decisions, or other sources of binding law. The Discussion itself, however, does not have the force of law, even though it may describe legal requirements derived from other sources. It is in the nature of treatise, and may be used as secondary authority. The inclusion of both the President's rules and the drafters' informal discussion in the basic text of the Manual provides flexibility not available in previous editions of the Manual, and should eliminate questions as to whether an item is a requirement or only guidance. *See e.g., United States v. Baker*, 14 M.J. 361, 373 (C.M.A. 1973). In this Manual, if matter is included in a rule or paragraph, it is intended that the matter be binding, unless it is clearly expressed as precatory. A rule is binding even if the source of the requirement is a judicial decision or a statute not directly applicable to courts-martial. If the President had adopted a rule based on a judicial decision or a statute, subsequent repeal of the statute or reversal of the judicial decision does not repeal the rule. On the other hand, if the drafters did not choose to "codify" a principle or requirement derived from a judicial decision or other source of law, but considered it sufficiently significant that users should be aware of it in the Manual, such matter is addressed in the Discussion. The Discussion will be revised from time to time as warranted by changes in applicable law.

(2) *The Analysis*

The Analysis sets forth the nonbinding views of the drafters as to the basis for each rule or paragraph, as well as the intent of the drafters, particularly with respect to the purpose of substantial changes in present law. The Analysis is intended to be a guide in interpretation. In that regard, note that the Analysis accompanied the project from the initial drafting stage through submission to the President, and was continually revised to reflect changes prior to submission to the President. Users are reminded, however, that primary reliance should be placed on the plain words of the rules. In addition, it is important to remember that the Analysis solely represents the views of staff personnel who worked on the project, and does not necessarily reflect the views of the President in approving it, or of the officials who formally recommended approval to the President.

The Analysis frequently refers to judicial decisions and statutes from the civilian sector that are not applicable directly to courts-martial. Subsequent modification of such sources of law may provide useful guidance in interpreting rules, and the drafters do not intend that citation of a source in this Analysis should preclude reference to subsequent developments for purposes of interpretation. At the same time, the user is reminded that the amendment of the Manual is the province of the President. Developments in the civilian sector that affect the underlying rationale for a rule do not affect the validity of the rule except to the extent otherwise required as a matter of statutory or constitutional law. The same is true with respect to rules derived from the decisions of military tribunals. Once incorporated into the Executive Order, such matters have an independent source of authority and are not dependent upon continued support from the judiciary. Conversely, to the extent that judicial precedent is set forth only in the Discussion or is otherwise omitted from the Rules or the Discussion, the continuing validity of the precedent will depend on the force of its rationale, the doctrine of *stare decisis*, and similar jurisprudential considerations. Nothing in this Introduction should be interpreted to suggest that the placement of matter in the Discussion (or the Analysis), rather than the rule, is to be taken as disapproval of the precedent or as an invitation for a court to take a different approach; rather, the difficult drafting problem of choosing between a codification and common law approach to the law frequently resulted in noncodification of decisions which had the unanimous support of the drafters. To the extent that future changes are made in the Rules or Discussion, corresponding materials will be included in the Analysis.

The Appendices contain various nonbinding materials to assist users of this Manual. The Appendices also contain excerpts from pertinent statutes. These excerpts are appropriated for judicial notice of law, *see* Mil. R. Evid. 201A, but nothing herein precludes a party from proving a change in law through production of an official codification or other appropriate evidence.

PART I. PREAMBLE

Introduction. The preamble is based on paragraphs 1 and 2 of MCM, 1969 (Rev.). *See generally Military Justice Jurisdiction of Courts-Martial*, DA PAM 27–174, chapter 1 (May 1980.)

1. Sources of military jurisdiction

This subsection is based on paragraph 1 of MCM, 1969 (Rev.). The provisions of the Constitution which are sources of jurisdiction of military courts or tribunals include: Art I, sec. 8, cl. 1, 9–16, 18; Art. II, sec. 2; Art. IV, sec. 4; and the fifth amendment. As to sources in international law, *see e.g., Ex Parte Quirin*, 317 U.S. 1 (1942); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 82–84, 6 U.S.T. 3316, 3382, T.I.A.S. No. 3365, 75 U.N.T.S. 287. *See generally* DA PAM 27–174, *supra* at paragraph 1–3.

2. Exercise of military jurisdiction

Subsection (a) is based on the first paragraph of paragraph 2 of MCM, 1969 (Rev.).

For additional materials on martial law, *see* W. Winthrop, *Mili-*

tary Law and Precedent 817–30 (2d ed. 1920 reprint); *Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).See also* paragraph 3, sec. 1 of MCM, 1910 (concerning the exercise of martial law over military affiliated persons).

For additional materials on military government, *see* W. Winthrop, *supra* at 798–817; *Madsen v. Kinsella*, 343 U.S. 341 (1952); *Mechanics' and Traders' Bank v. Union Bank*, 89 U.S. (22 Wall.) 276 (1875).

For additional materials on the exercise of military jurisdiction under the law of war, *see* W. Winthrop, *supra* at 831–46; *Trials of War Criminals Before the Nuremberg Tribunals* (U.S. Gov't Printing Off., 1950–51); *Trials of the Major War Criminals Before the International Military Tribunal* (International Military Tribunal, Nuremberg 1947); *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin, supra; Ex parte Milligan*, *supra*; Articles 18 and 21.

Subsection (b) is based on the second paragraph of paragraph 2 of MCM, 1969 (Rev.). *See also* Article 21; DA PAM 27–174, *supra* at paragraph 1–5*a*; W. Winthrop, *supra* at 802–05, 835–36. As to provost courts, *see also Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 975, 1061 (1949). As to trial of prisoners of war, *see* Article 2(a)(9) and Article 102, 1949 Geneva Convention Relative to the Treatment of Prisoners of War, *supra*

3. Purpose of military law

See generally Chappel v. Wallace, 462 U.S. 296, 103 S.Ct. 2362 (1983); *Parker v. Levy*, 417 U.S. 733 (1974); S.Rep. No. 53, 98th Cong., 1st Sess. 2–3 (1983). For a discussion of the nature and purpose of military law, *see* R. Everett, *Military Justice in the Armed Forces of the United States* (1956); J. Bishop, *Justice Under Fire* (1974); Hodson, *Military Justice: Abolish or Change?*, 22 Kan. L. Rev. 31 (1975), *reprinted in* Mil. L. Rev. Bicent. Issue 579 (1976); Hansen, *Judicial Functions for the Commander*, 41 Mil.L.Rev. 1 (1968); *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 606, 778–86 (1949); H. Moyer, *Justice and the Military* 5–23 (1972).

4. Structure and application of the Manual for Courts-Martial

Self-explanatory. *See also* the *Introduction* of the Analysis.

PART II. RULES FOR COURTS-MARTIAL

CHAPTER I. GENERAL PROVISIONS

Rule 101. Scope

(a) *In general.* This subsection is patterned after Fed. R. Crim. P. 1. "Courts-martial" are classified by Article 16. Supplementary procedures include all procedures directly relating to the court-martial process, such as preparation and authentication of the record, vacation proceedings, preparation of orders, and professional supervision of counsel and military judges. The rules do not govern imposition of nonjudicial punishment (*see* Part V) or administrative actions.

(b) *Title.* This subsection is patterned after Fed.R..Crim.P. 60.

Rule 102. Purpose and construction

This rule restates Fed. R. Crim. P. 2 in terms strictly limiting the application of these rules to military justice. *Accord*, Mil. R. Evid. 102.

Rule 103. Definitions

The drafters have, whenever possible, followed the definitions used in the United States Code. *See* subsection (20). Some definitions have been made and followed for convenience, to avoid frequent repetition of complicated phases. Others have been made to address variations in the terminology used among the services. The drafters have attempted to minimize the number of definitions. It is the drafters' intent that the words of the Manual be construed in accordance with their plain meaning, with due deference to previous usage of terms in military law or custom.

(1) "*Article.*" This definition was added to reduce repetitive citations to the Uniform Code of Military Justice. MCM, 1969 (Rev.) and its predecessors used the same convention.

(2) "*Capital case.*" This definition is based on the first two sentences of paragraph 15*a* (3) of MCM, 1969 (Rev.).

(3) "*Capital offense.*" This definition is based on the first sentence of paragraph 15*a*(2) of MCM, 1969 (Rev).

(4) "*Code.*" This definition was added to avoid frequent repetition of "Uniform Code of Military Justice."

(5) "*Commander.*" This definition was added to avoid frequent repetition of the longer phrase, "commanding officer or officer in charge." *See* Articles 1(3) and (4).

(6) "*Convening authority.*" This provision is based on paragraph 84*a* of MCM, 1969 (Rev.).

(7) "*Copy.*" This definition was added to ensure that no construction of the Manual could result in delays of cases for the sake of unavailable specialized forms or office equipment.

(8) "*Court-martial.*" Articles 16 and 39(a).

(9) "*Days.*" This definition is added for clarity. *Cf. United States v. Manalo*, 1 M.J. 452 (C.M.A. 1976).

(10) "*Detail.*" DoD Dir. 5550.7, Incl. 1, para. C.8 (Sep. 28, 1966).

(11) "*Explosive.*" 18 U.S.C. §§ 232(5); 844(j).

(12) "*Firearm.*" 18 U.S.C. § 232(4).

(13) "*Joint.*" This definition is based on Joint Chiefs of Staff Publication 1, Dictionary of Military and Associated Terms 187 (1 Jun 79).

(14) "*Members.*" This term is defined to avoid confusion about the membership of courts-martial.

(15) "*Military judge.*" Article 1 (10). As to presidents of special courts-martial, *see* Mil. R. Evid. 101(c). The latter aspect was added for convenience and brevity in drafting.

(16) "*Party.*" This definition was required by adoption of the texts of federal civilian rules, which frequently use the term. The code uses the same term. *See e.g.*, Article 49. The Military Rules of Evidence also use the term.

(17) "*Staff judge advocate.*" This term was not defined in the previous Manuals. It is defined to avoid variations in nomenclature among the services.

(18) *"Sua sponte."* "Sua sponte" has been used frequently to avoid gender-specific language ("on his or her own motion"). Its use has been limited to passages expected to be used mainly by lawyers or with their assistance. Nonetheless, a definition is necessary for the benefit of a president of a special court-martial without a military judge.

(19) *"War, time of."* This definition applies only to R.C.M.1004(c)(6) and to Parts IV and V of the Manual. Parts II (except for R.C.M. 1004(c)(6) and III do not use or refer to "time of war." The phrase appears in several articles of the code, other than punitive articles. *See* Articles 2(a)(10); 43(a), (e), and (f); 71(b). The discussions of several rules address "time of war" in relation to these articles. *See* R.C.M. 202(a) Discussion (4); 407(b) Discussion; 907(b)(2)(B) Discussion.

"Time of war" is used in six punitive articles. *See* Articles 101, 105, and 106 (which define offenses that can occur only in time of war—Articles 101 and 106 are capital offenses), and Articles 85, 90, and 113 (which are capital offenses in time of war). *See also* Article 82. In addition, three offenses in Part IV use time of war as an aggravating circumstance. *See* paragraphs 37, 40, and 104.

The code does not define "time of war," and Congress has not generally defined the term elsewhere, despite the appearance of "time of war" and similar language in many statutes. *See e.g.*, 18 U.S.C. § 3287; 37 U.S.C. §§ 301(d); 301a(c), 301(a). In at least one instance Congress has expressly qualified the phrase "time of war" by saying "time of war declared by Congress." 37 U.S.C. § 310(a). *Compare* 37 U.S.C. § 310(a) *with* 37 U.S.C. § 301(d); 301a(c). *See also* S.Rep. No. 544, 89th Cong., 1st Sess. 13 (1965) which equates "all out war" to a declared war.

The legislative history of the code contains few references to this matter. The only direct reference, relating to the deletion of the phrase from Article 102, indicates that the working group which initially drafted the code considered "time of war" to mean "a formal state of war." *Hearings on H.R. 2498 Before a Subcomm. of the House of Comm. on Armed Services*, 81st Cong., 1st Sess. 1228–29 (1949). This reference is not cited in any of the decisions of the Court of Military Appeals construing "time of war."

Judicial decisions before the code had long recognized that a state of war may exist without a declaration of war. *See Bas. v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Hamilton v. M'Claughry*, 136 F. 445 (10th Cir. 1905). *See also United States v. Ayers*, 4 U.S.C.M.A. 220, 15 C.M.R. 220 (1954) and cases cited therein, W. Winthrop, *Military Law and Precedents* 668 (2d ed. 1920 reprint). *See generally* Carnahan, *The Law of War in the United States Court of Military Appeals*, 22 A.F.L. Rev. 120 (1980–81); Stevens, *Time of War and Vietnam*, 8 A.F.JAGL.Rev. 23 (May–June 1966).

The Court of Military Appeals has held that time of war, as used in several provisions of the code, does not necessarily mean declared war. Under the court's analysis, whether a time of war exists depends on the purpose of the specific article in which the phrase appears, and on the circumstances surrounding application of that article. *See United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970) ("time of war" under Article 2(a)(10) means declared war; court-martial jurisdiction over civilians is to be construed narrowly); *United States v. Anderson*, 17 U.S.C.M.A. 558, 38 C.M.R. 386 (1968) (Vietnam war was time of war for purpose of suspension of statute of limitations under Article 43(a)); *accord Broussard v. Patton*, 466 F.2d 816 (9th Cir. 1972)); *United States v. Anderten*, 4 U.S.C.M.A. 354, 15 C.M.R. 354 (1954) (Korean war was time of war for purpose of Article 85); *United States v. Taylor*, 4 U.S.C.M.A. 232, 15 C.M.R. 232 (1954) (Korean war was time of war for purpose of suspension of statue of limitations under Article 43(f)); *United States v. Ayers*, *supra* (Korea war was time of war for purpose of suspension of statute of limitations under Article 43(a)); *United States v. Christensen*, 4 U.S.C.M.A. 22, 15 C.M.R. 22 (1954) (Korean war was time of war for purpose of Article 90); *United States v. Bancroft*, 3 U.S.C.M.A. 3. 11 C.M.R. 3 (1953) (Korean war was time of war for purpose of Article 113).

The circumstances the Court of Military Appeals has examined to determine whether time of war exists include: the nature of the conflict (generally, there must exist "armed hostilities against an organized enemy;" *United States v. Shell*, 7 U.S.C.M.A. 646, 650, 23 C.M.R. 110, 114 (1957)); the movement to and numbers of United States forces in, the combat area; the casualties involved and the sacrifices required; the maintenance of large numbers of active duty personnel; legislation by Congress recognizing or providing for the hostilities; executive orders and proclamations concerning the hostilities; and expenditures in the war effort. *See United States v. Bancroft*, *supra* at 5, 11 C.M.R. at 5. *See also United States v. Anderson*, *supra; United States v. Shell*, *supra; United States v. Sanders*, 7 U.S.C.M.A. 21, 21 C.M.R. 147 (1956); *United States v. Ayers*, *supra*.

During the Korean war it was suggested that "time of war" existed only in the Far Eastern theater. The court did not have to decide this issue with respect to whether the death penalty was authorized for Articles 85, 90, or 113 because the President suspended the Table of Maximum Punishments (paragraph 117c of MCM (Army), 1949; paragraph 127c of MCM, 1951), only in the Far Eastern command. *See* Exec. Order No. 10149, 3 C.F.R. 1949–53 Comp. 326 (1950); Exec. Order No. 10247, 3 C.F.R. 1949–53 Comp. 754 (1951). *See also United States v. Greco*, 36 C.M.R. 559 (A.B.R. 1965). The question as to Articles 85, 90, or 113 did not arise during the Vietnam war because the Table of Maximum Punishments was not suspended. There are no reported cases concerning Articles 101 and 106, and the only prosecutions under Article 105 were, of course, for offenses arising in the theater of operations. *See, e.g., United States v. Dickenson*, 6 U.S.C.M.A. 438, 20 C.M.R. 154 (1955); *United States v. Gallagher*, 23 C.M.R. 591 (A.B.R. 1957).

The Court of Military Appeals rejected the argument that "time of war" is geographically limited with respect to Article 43. *See United States v. Taylor, supra; United States v. Ayers, supra. See also United States v. Anderson, supra.* The court's analysis in *Taylor* and *Ayers* suggests, however, that for some purposes "time of war" may be geographically limited. For purposes of the death penalty, the prerequisite findings of aggravating circumstances under R.C.M. 1004 would screen out offenses which did not substantially affect the war effort. Therefore, possible geographic limitations in "time of war" would be subsumed in the necessary findings under R.C.M. 1004.

Based on the foregoing, for at least some purposes of the punitive articles, "time of war" may exist without a declaration of war. The most obvious example would be a major attack on the United States and the following period during which Congress

may be unable to meet. *Cf. New York Life Ins. Co. v. Bennion*, 158 F.2d 260 (10th Cir. 1946), *cert. denied*, 331 U.S. 811 (1947). Moreover, as both the Korean and Vietnam conflicts demonstrated, United States forces may be committed to combat of substantial proportions and for extended periods, while for many possible reasons (*see Bas v. Tingy*, *supra at 44*) war is not formally declared.

It should be noted that, under the article-by-article analysis used by the Court of Military Appeals to determine whether time of war exists, "time of war" as used in Article 106 may be narrower than in other punitive articles, at least in its application to civilians. *See United States v. Averette*, *supra*. *See also* Article 104.

The definition does not purport to give the President power to declare war. *See United States v. Ayers*, *supra* at 227, 15 C.M.R. at 227; *United States v. Bancroft*, *supra* at 5, 11 C.M.R. at 5. Instead, it provides a mechanism by which the President may recognize, for purposes of removing or specifically raising the maximum limits on punishments for certain offenses under Part IV, that a "time of war" exists. This determination would be based on the existing circumstances. For purposes of codal provisions triggered by "time of war," this determination would be subject to judicial review to ensure it is consistent with congressional intent. *Cf. United States v. Bancroft*, *supra.* Nevertheless, a determination by the President that time of war exists for these purposes would be entitled to great weight.

Paragraph 127c(5) of MCM, 1969 (Rev.) and the ninth paragraph 127c of MCM, 1951 provided for suspension of the Table of Maximum Punishments as to certain articles upon a declaration of war. The President could, and did in the Korean war, suspend the limits the President had established for those offenses. Thus, the effect of the definition of "time of war" in R.C.M. 103(19) is similar to the operation of those paragraphs. In either case, a declaration of war or specific action by the President affects the maximum punishments. The definition under R.C.M. 103(19) also provides guidance, subject to judicial review as noted above, on the application of codal provisions.

(20) "The definitions and rules of construction in 1 U.S.C. §§ 1 through 5 and in 10 U.S.C. §§ 101 and 801." Self-explanatory.

1990 Amendment: The change to the discussion corrects a previous typographical omission of clause (20) and misplacement of definitions of rank and rating. The note following clause (19) is not part of the definitions of 10 U.S.C. § 101 and was added to clarify usage of the terms "rank" and "grade" in this Manual.

1998 Amendment: The Discussion was amended to include new definitions of "classified information" in (14) and "national security" in (15). They are identical to those used in the Classified Information Procedures Act (18 U.S.C. App. III § 1, *et. seq.*). They were added in connection with the change to Article 62(a)(1) (Appeals Relating to Disclosure of Classified Information). *See* R.C.M. 908 (Appeal by the United States) and M.R.E. 505 (Classified Information).

Rule 104. Unlawful command influence

This rule based on Article 37 and paragraph 38 of MCM, 1969 (Rev.). *See also United States v. Charette*, 15 M.J. 197 (C.M.A. 1983); *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983); *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976); *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967); *United States v. Wright*, 17 U.S.M.A. 110, 37 C.M.R. 374 (1967); *United States v. Hawthorne*, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956). The discussion is based on H.R. Rep. No. 491, 81st Cong., 1st Sess. 21 (1949). As to supervision of military judges and counsel, *see* Articles 6, 26, and 27. Subsection (b)(2)(B) is retained. It is rare that a military judge in a special court-martial is not assigned to the judicial agency or activity of the service concerned. *See e.g.*, AR 27–10, para. 8–6b (3) (Nov. 1982). Subsection (b)(2)(B) ensures that in the unusual situation that it is necessary to detail a military judge not so assigned, the military judge's performance of judicial duties will not be the subject of comment or evaluation in an efficiency or fitness report prepared or reviewed by the convening authority. The second sentence in subsection (b)(2)(B) clarifies that the convening authority may comment only on the military judge's nonjudicial duties in such a report. Subsection (D) is new and clarifies that the military judge, members, and counsel are not immune from action for any offense they might commit while in that capacity, e.g. failure to repair.

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

This rule, while new to the Manual for Courts-Martial, is based on Article 6(b). Congress intended that Article 6(b) serve several purposes. First, by requiring convening authorities to communicate directly with their staff judge advocates on matters relating to the administration of military justice, it was intended that the position and effectiveness of the staff judge advocate be enhanced. Second, by providing for communications among judge advocates, it was intended to emphasize the independence of staff judge advocates, which in turn would ensure that staff judge advocates exercise their judicial functions in a fair and objective manner. Lastly, and most importantly, Article 6(b) was intended to help prevent interference with the due administration of military justice. *See* H.R. Rep. No. 491, 81st Cong., 1st Sess. 12–13 (1949); S.Rep. 486, 81st Cong., 1st Sess.9 (1949); 95 Cong. Rec.H. 5721 (1949); 96 Cong. Rec.S 1356 (1950). *See also Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982); *United States v. Davis*, 18 U.S.C.M.A. 170, 39 C.M.R. 170 (1969); *United States v. Walsh*, 11 M.J. 858 (N.M.C.M.R. 1981).

Rule 106. Delivery of military offenders to civilian authorities

This rule is based on Article 14(a) and on the second paragraph of paragraph 12 of MCM, 1969 (Rev.). *See also United States v. Reed*, 2 M.J. 64 (C.M.A. 1976) (delivery and speedy trial); 18 U.S.C. Appendix II. The second sentence is new. It provides express authority for restraining an offender to be delivered to civilian authorities, but only when such restraint is justified under the circumstances. Note that this rule does not apply to delivery to a foreign government; this situation ordinarily is governed by status of forces agreements. This rule applies to delivery to authorities of the United States or its political subdivisions. Occasionally when civilian authorities request delivery of a servicemember, the delivery cannot be effected immediately, e.g., when the offender is overseas. In such situations, reasonable restraint may be necessary to ensure that the delivery can be effected and to protect the community. The person responsible for

deciding whether to relinquish the offender must decide whether there are adequate grounds for restraint in such cases. This rule is not intended to permit the military to restrain an offender on behalf of civilian authorities pending trial or other disposition. Restraint imposed under this rule is strictly limited to the time reasonably necessary to effect the delivery. Thus, if the civilian authorities are dilatory in taking custody, the restraint must cease.

The discussion is based on Article 14(b).

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

This rule is based on Article 4 and paragraph 111 of MCM, 1969 (Rev.). *See also* H.R. Rep. No. 491, 81st Cong., 1st Sess. 12 (1949); W. Winthrop, *Military Law and Precedents* 64 (2d ed. 1920 reprint). The text of 10 U.S.C. § 1161(a) is as follows:

(a) No commissioned officer may be dismissed from any armed force except—

(1) by sentence of a general court-martial;

(2) in communication of a sentence of a general court-martial; or

(3) in time of war, by order of the President.

Rule 108. Rules of court

This rule is new and is based on Fed.R.Crim. P. 57(a) and Article 140. *Cf.* Article 66(f). *See also United States v. Kelson*, 3 M.J. 139 (C.M.A. 1977). Depending on the regulations, rules of court may be promulgated on a service-wide, judicial circuit, or trial judge level, or a combination thereof. The rule recognizes that differences in organization and operations of services and regional and local conditions may necessitate variations in practices and procedures to supplement those prescribed by the code and this Manual.

The manner in which rules of court are disseminated is within the sole discretion of the Judge Advocate General concerned. Service-wide rules, for example, may be published in the same manner as regulations or specialized pamphlets or journals. Local rules may be published in the same manner as local regulations or other publications, for example. Parties to any court-martial are entitled to a copy, without cost, of any rules pertaining thereto. Members of the public may obtain copies under rules of the military department concerned. The penultimate sentence ensures that failure to publish in accordance with the rules of the Judge Advocate General (or a delegate) will not affect the validity of a rule if a person has actual and timely notice or if there is no prejudice within the meaning of Article 59. *Cf.* 5 U.S.C. § 552(a)(1).

Rule 109. Professional supervision of military judges and counsel

This rule is based on paragraph 43 of MCM, 1969, (Rev.). *See also* Articles 1(13), 6(a), 26, and 27. The previous rule was limited to conduct of counsel in courts-martial. This rule also applies to military trial and appellate judges and to all judge advocates and other lawyers who practice in military justice, including the administration of nonjudicial punishment and pretrial and posttrial matters relating to courts-martial. The rule also applies to civilian lawyers so engaged, as did its predecessor. The rule does not apply to lay persons. Nothing in this rule is intended to prevent a military judge from excluding, in a particular case, a counsel from representing a party before the court-martial over which the military judge is presiding, on grounds of lack of qualifications under R.C.M. 502(d), or to otherwise exercise control over counsel in accordance with these rules. *See e.g.*, R.C.M. 801.

1993 Amendment: Subsection (a) was amended to conform with subsection (c). The amendment to subsection (a) clarifies that the Judge Advocates General are responsible for the supervision and discipline of judges and attorneys. The amendment to subsection (a) is not intended to limit the authority of a Judge Advocate General in any way.

New subsection (c) is based on Article 6a, Uniform Code of Military Justice. Article 6a, U.C.M.J. was enacted by the Defense Authorization Act for Fiscal Year 1990. "Military Appellate Procedures," Tit. XIII, § 1303, National Defense Authorization Act for Fiscal Year 1990, Pub. L. No. 101-189, 103 Stat. 1352, 1576 (1989). The legislative history reveals Congressional intent that, to the extent consistent with the Uniform Code of Military Justice, the procedures to investigate and dispose of allegations concerning judges in the military should emulate those procedures found in the civilian sector. *See* H.R. Conf. Rep. No. 331, 101st Cong., 1st Sess. 656 (1989) [hereinafter Conf. Rep. No. 331]. The procedures established by subsection (c) are largely patterned after the pertinent sections of the American Bar Association's Model Standards Relating to Judicial Discipline and Disability Retirement (1978) [hereinafter ABA Model Standard] and the procedures dealing with the investigation of complaints against federal judges in 28 U.S.C. § 372 (1988). The rule recognizes, however, the overall responsibility of the Judge Advocates General for the certification, assignment, professional supervision, and discipline of military trial and appellate military judges. *See* Articles 6, 26 & 66, Uniform Code of Military Justice.

Subsection (c)(2) is based on the committee report accompanying the FY 90 Defense Authorization Act. *See* Conf. Rep. No. 331 at 658. This subsection is designed to increase public confidence in the military justice system while contributing to the integrity of the system. *See, Landmark Communications v. Virginia*, 435 U.S. 829 (1978).

The first sentence of the Discussion to subsection (c)(2) is based on the committee report accompanying the Defense Authorization Act. Conf. Rep. No. 331 at 358. The second and third sentences of the discussion are based on the commentary to ABA Model Standard 3.4. *See also, Chandler v. Judicial Council*, 398 U.S. 74 (1970).

Subsection (c)(3), (c)(5), and (c)(7) reflect, and adapt to the conditions of military practice, the general principle that judges should investigate judges.

The first paragraph of the Discussion to subsection (c)(3) is based on the commentary to ABA Model Standard 4.1.

The discussion to subsection (c)(4) is based on the commentary to ABA Model Standard 4.6.

The clear and convincing standard found in subsection (c)(6)(c) is based on ABA Model Standard 7.10.

Under subsection (c)(7), the principle purpose of the commission is to advise the Judge Advocate General concerned as to whether the allegations contained in a complaint constitute a violation of applicable ethical standards. This subsection is not intended to preclude use of the commission for other functions such as rendering advisory opinions on ethical questions. *See,*

ABA Model Standard 9 on the establishment and role of an advisory committee.

Subsection (c)(7)(a) is based on ABA Model Standard 2.3, which provides that one-third of the members of a commission should be active or retired judges.

CHAPTER II. JURISDICTION

Rule 201. Jurisdiction in general

Introduction. The primary source of court-martial jurisdiction is Art. I, sec. 8, cl. 14 of the Constitution, which empowers Congress to make rules for the government and regulation of the armed forces of the United States. Courts-martial are recognized in the provisions of the fifth amendment expressly exempting "cases arising in the land or naval forces" from the requirement of presentment and indictment by grand jury. *See also* Part I, Preamble, for a fuller discussion of the nature of courts-martial and the sources of their jurisdiction.

(a) *Nature of court-martial jurisdiction.* Subsection (1) reiterates the first sentence of the second paragraph of paragraph 8 of MCM, 1969 (Rev.). The discussion is based on paragraph 8 of MCM, 1969 (Rev.). *Cf.* Fed R. Crim. P.7(c)(2); 18 U.S.C. §§ 3611–20. Courts-martial generally have the power to resolve issues which arise in connection with litigating criminal liability and punishment for offenses, to the extent that such resolution is necessary to a disposition of the issue of criminal liability or punishment.

Subsection (2) restates the worldwide extent of court-martial jurisdiction. Article 5. *See Autry v. Hyde*, 19 U.S.C.M.A. 433, 42 C.M.R. 35 (1970). The discussion points out that, despite the worldwide applicability of the code, geographical considerations may affect court-martial jurisdiction. *See* R.C.M. 202 and 203.

Subsection (3) restates the third paragraph of paragraph 8 of MCM, 1969 (Rev.). *See also Chenoweth v. Van Arsdall*, 22 U.S.C.M.A. 183, 46 C.M.R. 183 (1973), which held that Art. III, sec, 2, cl. 3 of the Constitution (requiring crimes to be tried in the state in which committed) does not apply to courts-martial. The second sentence is based on Article 18. *See also Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

(b) *Requisites of court-martial jurisdiction.* This rule is derived from the fourth paragraph of paragraph 8 of MCM, 1969 (Rev.). The first sentence in the rule is new. *See Rosado v. Wyman*, 397 U.S. 397, 404 n.3 (1970); *Wickham v. Hall*, 12 M.J. 145, 152 n.8 (C.M.A. 1981). *Cf. Ex parte Poresky*, 290 U.S. 30 (1933). The rule expands the list of requisites for court-martial jurisdiction to conform more accurately to practice and case law. Requisite (3) has been added to reflect the distinction, long recognized in military justice, between creating a court-martial by convening it, and extending to a court-martial the power to resolve certain issues by referring charges to it. Thus, a court-martial has power to dispose only of those offenses which a convening authority has referred to it. Not all defects in a referral are jurisdictional. *See United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983). Requisite (5) is listed separately for the first time. This requisite makes clear that courts-martial have the power to hear only those cases which they are authorized by the code to try (i.e., offenses made punishable by the code, and, in the case of general courts-martial, certain offenses under the law of war). Second, it recognizes the important effect of *O'Callahan v. Parker*, 395 U.S. 258 (1969), on courts-martial. Although nothing in this rule or R.C.M. 203 is intended to codify the service-connection requirement of *O'Callahan* or later decisions, the requirement cannot be ignored in the Manual for Courts-Martial.

Requisites (1) and (2) restate two requisites in paragraph 8 of MCM, 1969 (Rev.). *See Generally United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978); *United States v. Newcomb*, 5 M.J. 4 (C.M.A. 1978). Contrary to the holdings in *Ryan* and *Newcomb*, "errors in the assignment or excusal of counsel, members, or a military judge that do not affect the required composition of a court-martial will be tested solely for prejudice under Article 59." S.Rep. No. 53, 98th Cong., 1st Sess. 12 (1983). The second sentence of subsection (2) makes this clear, and also emphasizes that counsel is not a jurisdictional component of a court-martial. *See Wright v. United States*, 2 M.J. 9 (C.M.A. 1976). Requisite (4) is somewhat broader than the statement in MCM, 1969 (Rev.), since jurisdiction over the person has been affected by judicial decisions. *See e.g., McElroy v. United States ex. rel. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970). Thus it is misleading to refer solely to the code as determining whether jurisdiction over the person exists. The discussion restates the basic principle that the judgment of a court-martial without jurisdiction is void.

(c) *Contempt.* This subsection restates Article 48, except for the deletion of military commissions and provost courts. These tribunals are also governed by Article 48, but need to be mentioned in rules pertaining to courts-martial.

(d) *Exclusive and nonexclusive jurisdiction.* Subsection (d) is based on paragraph 12 of MCM, 1969 (Rev.). Military offenses are those, such as unauthorized absence, disrespect, and disobedience, which have no analog in civilian criminal law. The second paragraph of paragraph 12 is omitted here, as the subject now appears at R.C.M. 106. Concurrent jurisdiction of courts-martial and domestic tribunals was formerly discussed separately from concurrent jurisdiction of courts-martial and foreign tribunals. The present rule treats both at once since, for purposes of the rule, each situation is treated the same. The differing considerations and legal implications in the domestic and foreign situations are treated in the discussion. *See* R.C.M. 907(b)(2)(c) for a discussion of the former jeopardy aspects of exercise of jurisdiction by more than one agency or tribunal. With respect to the exercise of jurisdiction by the United States or a foreign government. *Wilson v. Girard*, 354 U.S. 524 (1957), establishes that the determination of which nation will exercise jurisdiction is not a right of the accused.

The first paragraph in the discussion reaffirms the policy found in DOD Directive 5525.1, Jan. 22, 1966 (superceded by DOD Directive 5525.1, Aug. 7, 1979), which is implemented by a triservice regulation, AR 27–50/SECNAVINST 5820.4E/AFR 110–12, Dec. 1, 1978, that the United States seeks to maximize jurisdiction over its personnel.

The second paragraph in the discussion restates the third paragraph in paragraph 12 of MCM, 1969 (Rev.), which was based on *The Schooner Exchange v. McFaddon and Others*, 11 U.S. (7 Cranch) 116 (1812). *See also Wilson v. Girard, supra.*

(e) *Reciprocal jurisdiction.* This subsection is based on Article 17 and paragraph 13 of MCM, 1969 (Rev.). It continues the express

presidential authorization for the exercise of reciprocal jurisdiction and the delegation of authority (Article 140) to the Secretary of Defense to empower commanders of joint commands or task forces to exercise such power. *See United States v. Hooper*, 5 U.S.C.M.A. 391, 18 C.M.R. 15 (1955). It also continues the guidance in MCM, 1969 (Rev.) concerning the exercise of reciprocal jurisdiction by commanders other than those empowered under R.C.M. 201(e)(2). The language is modified to clarify that manifest injury is not limited to a specific armed force. The subsection adds a clarification at the end of subsection (3) that a court-martial convened by a commander of a service different from the accused's is not jurisdictionally defective nor is the service of which the convening authority is a member an issue in which the accused has a recognized interest. The rule and its guidance effectuate the congressional intent that reciprocal jurisdiction ordinarily not be exercised outside of joint commands or task forces (*Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 612–615; 957–958 (1949)) and is designed to protect the integrity of intraservice lines of authority. *See United States v. Hooper*, *supra* (Brosman, J. and Latimer, J., concurring in the result).

1986 Amendment: Subsections (e)(2) and (e)(3) were revised to implement the Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub.L. No. 99 - 433, tit. II, § 211(b), 100 Stat. 992. Because commanders of unified and specified commands (the combatant commands) derive court-martial convening authority from Article 22(a)(3), as added by this legislation, they need not be established as convening authorities in the Manual.

Paragraph (2)(A), which sets forth the authority of the combatant commanders to convene courts-martial over members of any of the armed forces, is an exercise of the President's authority under Article 17(a). In paragraph (2)(B), the first clause is a delegation from the President to the Secretary of Defense of the President's authority to designate general court-martial convening authorities. This provision, which reflects the current Manual, may be used by the Secretary of Defense to grant general court-martial convening authority to commanders of joint commands or joint task forces who are not commanders of a unified or specified command. The second clause of paragraph 2(b) is an exercise of the President's authority under Article 17(a).

Nothing in this provision affects the authority of the President or Secretary of Defense, as superior authorities, to withhold court-martial convening authority from the combatant commanders in whole or in part.

Subsection (4) has been added to avoid possible questions concerning detailing military judges from different services.

Subsection (5) restates Article 17(b).

1986 Amendment: Subsection (6) was inserted in the context of the Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, tit. II, 100 Stat. 992, to specify the process for resolving disagreements when two organizations, at the highest levels of each, assert competing claims for jurisdiction over an individual case or class of cases. Under this legislation, the commanders of unified and specified commands are authorized to convene courts-martial. At the same time, the military departments retain authority over all aspects of personnel administration, including administration of discipline, with respect to all persons assigned to joint duty or otherwise assigned to organizations within joint commands. In effect, the combatant commands and the military departments have concurrent jurisdiction over persons assigned to such commands. Under most circumstances, any issues as to jurisdiction will be resolved between the military department and the joint command. Paragraph (6) has been added to provide a means for resolving the matter when the Service Secretary and the commander of the joint organization cannot reach agreement. *See* H.R. Rep. No. 824, 99th Cong., 2d Sess. (1986), at 125. Paragraph (6) also requires use of the same procedure when there is a disagreement between two Service Secretaries as to the exercise of reciprocal jurisdiction.

Subsection (7) was added to ensure that the Secretaries of the military departments retain responsibility for the administration of discipline, including responsibility for all persons in their departments assigned to joint duty.

Paragraphs (6) and (7) apply only when the commander is acting solely in his joint capacity or when he is seeking to assert jurisdiction over a member of a different armed force. There are various provisions of the Manual addressing the duties or responsibilities of superior authorities, and it was considered more useful to establish who may act as a superior authority as a general proposition rather than to specify in great detail the relationship between joint commanders and Service Secretaries as to each such matter. Accordingly, when action is required to be taken by an authority superior to a combatant commander, the responsibility is given to the Secretary of the Military Department that includes the armed force of which the accused is a member. This includes responsibility for acting on matters such as a request for counsel of the accused's own selection. An exception is expressly set forth in paragraph (6), however, which specifically provides the procedure for resolving disagreements as to jurisdiction. The Service Secretary cannot withhold or limit the exercise of jurisdiction under R.C.M. 504(b) or under Part V (Nonjudicial Punishment Procedure) by a combatant commander over persons assigned to the joint command. Such action may be taken, however, by the Secretary of Defense, who may assign responsibility to the military department or the unified command for any case or class of cases as he deems appropriate.

The amendments to R.C.M. 201 are designed to govern organizational relationships between joint commands and military departments over a range of issues, and are not intended to confer rights on accused servicemembers. These provisions reflect the President's inherent authority as Commander-in-Chief to prescribe or modify the chain of command, his specific authority under Article 17 to regulate reciprocal jurisdiction, and his authority (and that of the Secretary of Defense) under 10 U.S.C. §§ 161-65 (as added by the 1986 legislation) to prescribe or modify the chain of command.

To the extent that a commander of a joint organization is "dual-hatted" (i.e., simultaneously serving as commander of a joint organization and a separate organization within a military department), subsections (6) and (7) apply only to the actions taken in a joint capacity.

(f) *Types of courts-martial.* The source for subsection (1) is Article 18. This subsection is substantially the same as paragraph 14 of MCM, 1969 (Rev.), although it has been reorganized for clarity. Several statements in MCM, 1969 (Rev.) concerning punishments by general courts-martial have been placed in the discussion. As to the second sentence in subsection (1)(A)(i), *see*

also Wickham v. Hall, 12 M.J. 145 (C.M.A. 1983); *Wickham v. Hall*, 706 F.2d 713 (5th Cir. 1983).

The source for subsection (2) is Article 19. Subsection (2) is based on paragraph 15 of MCM, 1969 (Rev.), although it has been reorganized for clarity. Note that under subsection (2)(C)(ii) a general court-martial convening authority may permit a subordinate convening authority to refer a capital offense to a special court-martial. This is a modification of paragraph 15 *a*(1) of MCM, 1969 (Rev.), which said a general court-martial convening authority could "cause" a capital offense to be referred to a special court-martial without specifying whether the convening authority had to make the referral personally. Subsection (2)(C)(iii) permits the Secretary concerned to authorize special court-martial convening authorities to refer capital offense to special courts-martial without first getting authorization from a general court-martial convening authority. Several statements in MCM, 1969 (Rev.) have been placed in the discussion.

As to subsection (3) summary courts-martial are treated separately in R.C.M. 1301–1306.

(g) *Concurrent jurisdiction of other military tribunals.* This subsection is based on the last paragraph in paragraph 12 of MCM, 1969 (Rev.).

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

(a) *In general.* This subsection incorporates by reference the provisions of the code (*see* Articles 2,3,4, and 73) which provide jurisdiction over the person. *See also* Articles 83, 104, 106. The discussion under this subsection briefly described some of the more important requirements for court-martial jurisdiction over persons. Standards governing active duty servicemembers (Article 2(a)(1)) are emphasized, although subsection (4) brings attention to limitations on jurisdiction over civilians established by judicial decisions.

Subsection (2)(A) of the discussion dealing with inception of jurisdiction over commissioned officers, cadets, midshipmen, warrant officers, and enlisted persons is divided into three parts. The first part, enlistment, summarizes the area of the law in the wake of the amendment of Article 2 in 1979. Act of November 9, 1979, Pub.L. No. 96–107, § 801(a), 93 Stat. 810–11. In essence, the amendment eliminated recruiter misconduct as a factor of legal significance in matters involving jurisdiction, and reestablished and clarified the "constructive enlistment" doctrine. The statutory enlistment standards concerning capacity under 10 U.S.C. §§ 504 and 505 thus become critical, along with the issue of voluntariness. As to whether an enlistment is compelled or voluntary, *compare United States v. Catlow*, 23 U.S.C.M.A. 142, 48 C.M.R. 758 (1974) *with United States v. Wagner*, 5 M.J. 461 (C.M.A. 1978) *and United States v. Lightfoot*, 4 M.J. 262 (C.M.A. 1978). *See also United States v. McDonagh*, 14 M.J. 415 (C.M.A. 1983).

The second paragraph under (i) *Enlistment* is based on *United States v. Bean*, 13 U.S.C.M.A. 203, 32 C.M.R. 203 (1962); *United States v. Overton*, 9 U.S.C.M.A. 684, 26 C.M.R. 464 (1958); and 10 U.S.C. § 1170. The last sentence is based on Article 2(c) which provides that in case of constructive enlistment, jurisdiction continues until "terminated in accordance with law or regulations promulgated by the Secretary concerned."

The last paragraph restates Article 2(c). The last sentence of that paragraph takes account of the legislative history of Article 2(c). *See* S.Rep. No. 197, 96th Cong., 1st Sess. 122 (1979), which indicates that *United States v. King*, 11 U.S.C.M.A. 19, 28 C.M.R. 243 (1959) is overruled by the statute. This is also reflected in the first paragraph under (ii) *Induction.*

The first paragraph of (ii) *Induction* is (with the exception of the application of the constructive enlistment doctrine, *see* the immediately preceding paragraph) based on *United States v. Hall*, 17 C.M.A. 88, 37 C.M.R. 352 (1967); *United States v. Rodriguez*, 2 U.S.C.M.A. 101, 6 C.M.R. 101 (1952); *United States v. Ornelas*, 2 U.S.C.M.A. 96 C.M.R. 96 (1952). *See also Billings v. Truesdell*, 321 U.S. 542 (1944); *Mayborn v. Heflebower*, 145 F.2d 864 (5th Cir. 1944), *cert. denied*, 325 U.S. 854 (1945).

The second paragraph under (ii) *Induction* is based on *United States v. Scheunemann*, 14 U.S.C.M.A. 479, 34 C.M.R. 259 (1964). *See also United States v. Wilson*, 44 C.M.R. 891 (A.C.M.R. 1971). Although no military case has so held, *dicta* and *Scheunemann* supports the second sentence.

As to (iii) *Call to active duty, see* 10 U.S.C. §§ 672, 673 and 673(a), *See also United States v. Peel*, 4 M.J. 28 (C.M.A. 1977). The second paragraph of this section reflects decisions in *United States v. Barraza*, 5 M.J. 230 (C.M.A. 1978); *United States v. Kilbreth*, 22 U.S.C.M.A. 390, 47 C.M.R. 327 (1973).

1986 Amendment: Paragraph (2)(A)(iii) of the Discussion was amended and paragraph (5) was added to reflect amendments to Articles 2 and 3 of the UCMJ contained in the "Military Justice Amendment of 1986," tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub.L. No. 99–661, 100 Stat. 3905 (1986), which, among other things, preserves the exercise of jurisdiction over reservists for offenses committee in a duty status, notwithstanding their release from duty status, if they have time remaining on their military obligation. The legislation also provides express statutory authority to order reservists, including members of the National Guard of the United States and the Air National Guard of the United States who commit offenses while serving on duty under Title 10 of the United States Code, to active duty for disciplinary action, including the service of any punishment imposed.

The first paragraph under (B) *Termination of jurisdiction over active duty personnel* restates the basic rule. *See United States v. Brown*, 12 U.S.C.M.A. 693, 31 C.M.R. 297 (1962); *United States v. Scott*, 11 U.S.C.M.A. 646, 29 C.M.R. 462 (1960). *See also United States v. Griffin*, 13 U.S.C.M.A. 213, 32 C.M.R. 213 (1962).

Subsection (B)(i) is based on *United States v. Wheeley*, 6 M.J. 220 (C.M.A. 1979); *United States v. Smith*, 4 M.J. 265 (C.M.A. 1978); *United States v. Hutchins*, 4 M.J. 190 (C.M.A. 1978); *United States v. Hout*, 19 U.S.C.M.A. 299, 41 C.M.R. 299 (1970). *See also Dickenson v. Davis*, 245 F.2d 317 (10th Cir. 1957).

Subsection (B)(ii) describes what jurisdiction remains under Article 3(a) in light of *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955). *See also United States v. Clardy*, 13 M.J. 308 (C.M.A. 1982).

The exceptions is subsection (B)(iii) are restated in slightly different language for clarity from paragraph 11 *b* of MCM, 1969 (Rev.). Exception (*b*) is based on *United States v. Clardy*, *supra. See also* 14 M.J. 123 (C.M.A. 1982). As to exception (c), jurisdiction over prisoners in the custody of the armed forces, *see*

Kahn v. Anderson, 255 U.S. 1 (1921); *United States v. Nelson*, 14 U.S.C.M.A. 93, 33 C.M.R. 305 (1963). *See also Mosher v. Hunter*, 143 F.2d 745 (10th Cir. 1944), *cert. denied*, 323 U.S. 800 (1945). Although it has not been judicially interpreted, the sentence of paragraph 11 *b* of MCM, 1969 (Rev.) has been included here. The principle it expressed has long been recognized. *See* the last sentence in paragraph 11 *b* of MCM, 1951; the last sentence of the third paragraph of paragraph 10 of MCM (Army), 1949; and the last sentence of the fourth paragraph of paragraph 10 of MCM, 1928. As to jurisdiction under Article 3(b), see *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981); *Wickham v. Hall*, 706 F.2d 713 (5th Cir. 1983).

Subsection (3) described the jurisdiction under Article 2(a)(8). *See also* 33 U.S.C. § 855; 42 U.S.C. § 217.

Subsection (4) of the discussion points out that jurisdiction over civilians has been restricted by judicial decisions. *See generally Reid v. Covert*, 354 U.S. 1 (1957); *Toth v. Quarles, supra*. The MCM 1969 (Rev.) referred to such limitations only in footnotes to Articles 2(a)(10) and (11) and 3(a). The discussion of R.C.M. 202 is a more appropriate place to bring attention to these matters. A brief reference in the discussion was considered sufficient, while the analysis provides primary sources of law in the area, should an issue arise on the subject.

The second sentence in the subsection (4) of discussion is based on *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert, supra*. It is not settled whether "peacetime" as used in these decisions means all times other than a period of declared war or whether "peacetime" ceases when armed forces are involved in undeclared wars or hostilities. There is some authority for the latter view. *See* W. Winthrop, *Military Law and Precedents*, 101 (2d ed. 1920 reprint).

With respect to Article 2(a)(10), the Court of Military Appeals has held that "time of war" means a formally declared war (based on U.S. Const., art. I, sec. 8, cl. 11). *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970). *But cf. Latney v. Ignatius*, 416 F.2d 821 (D.C. Cir. 1969) (assuming without deciding that Article 2(a)(10) could be invoked during period of undeclared war, no court-martial jurisdiction existed over civilian merchant seaman for murder in Vietnam because crime and accused were not sufficiently connected with the military). *See also* Analysis, R.C.M. 103(19).

The words "in the field" and "accompanying an armed force" have also been judicially construed. "In the field" implies military operations with a view to the enemy. 14 Ops. Atty Gen. 22 (1872). The question whether an armed force is "in the field" is not to be determined by the locality in which it is found, but rather by the activity in which it is engaged. *Hines v. Mikell*, 259 F.28, 34 (4th Cir. 1919). Thus, forces assembled in the United States for training preparatory for service in the actual theater of war were held to be "in the field." *Hines v. Mikell, supra*. A merchant ship and crew transporting troops and supplies to a battle zone constitute a military expedition "in the field." *In re Berue*, 54 F. Supp. 252 (S.D. Ohio 1944); *McCune v. Kilpatrick*, 53 F.Supp. 80 (E.D. Va. 1943). *See also Ex parte Gerlach*, 247 F.616 (S.D.N.Y. 1917); *United States v. Burney*, 6 U.S.C.M.A. 776, 21 C.M.R. 98 (1956); *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 872–3 (1949). *But see*, W. Winthrop, *supra* at 100–102; *Reid v. Covert, supra* at 34 n. 61.

One may be "accompanying an armed force" although not directly employed by it or the Government. For example, an employee of a contractor engaged on a military project or serving on a merchant ship carrying supplies or troops is "accompanying an armed force." *Perlstein v. United States*, 151 F.2d 167 (3d Cir. 1945), *cert. dism.*, 328 U.S. 822 (1946); *In re DiBartolo*, 50 F.Supp. 929 (S.D.N.Y. 1943); *In re Berue, supra; McCune v. Kilpatrick, supra.* To be "accompanying an armed force" one's presence within a military installation must be more than merely incidental; it must be connected with or dependent upon the activities of the armed forces or its personnel. Although a person "accompanying an armed force" may be "serving with" it as well, the distinction is important because even though a civilian's contract with the Government ended before the commission of an offense, and hence the person is no longer "serving with" an armed force, jurisdiction may remain on the ground that the person is "accompanying an armed force" because of continued connection with the military. *Perlstein v. United States, supra; Grewe v. France*, 75 F.Supp. 433 (E.D. Wis. 1948).

McElroy v. Guagliardo, supra at 285–87, discusses possible methods for extending court-martial jurisdiction over civilians in some circumstances. To date these methods remain undeveloped. *See also* Everett and Hourcle, *Crime Without Punishment—Ex-servicemen, Civilian Employees and Dependents*, 13 A.F.JAG L. Rev. 184 (1971). Civilians may be tried by general court-martial under Article 18 and the law of war. *See* R.C.M. 201(f)(1)(B); 202(b). *See also* Article 21. This includes trial by court-martial in places where the United States is an occupying power. *See e.g., Madsen v. Kinsella*, 343 U.S. 341 (1952) [upholding jurisdiction of military commission to try a dependent spouse in occupied Germany in 1950. Although a state of war with Germany still technically existed (*see* Proclamation No. 2950, 3 C.F.R. (1948–53 Comp.) 135 (1951)) hostilities were declared terminated on 31 December 1946 (*see* Proclamation No. 2714, 3 C.F.R. (1948–53 Comp.) 99 (1947)) and the United States Supreme Court observed in dicta that military courts might have jurisdiction in occupied territory even in peacetime, 343 U.S. at 360)]. *See also Wilson v. Bohlender*, 361 U.S. 281, 283 n. 2 (1960); *Kinsella v. Singleton, supra* at 244.

(b) *Offenses under the law of war.* This subsection is based on Article 18. *See also* Article 21. The phrase "offense subject to trial by court-martial" or "offense triable by court-martial" is used in the R.C.M. in recognition of the fact that the Manual for Courts-Martial governs courts-martial for offenses under the law of war as well as under the code. *See e.g.,* R.C.M. 301(b); 302(c); 304(c); 305(d). In such contexts, the phrase does not include a requirement for a jurisdictional determination.

(c) *Attachment of jurisdiction over the person.* This subsection is based on paragraph 11 *d* of MCM, 1969 (Rev.), and states the basic principle that once the jurisdiction of a court-martial attaches, it continues until the process of trial, appeal, and punishment is complete. *See generally United States v. Douse*, 12 M.J. 473 (C.M.A. 1982); *United States v. Sippel*, 4 U.S.C.M.A. 50, 15 C.M.R. 50 (1954).

The discussion clarifies the distinction between the existence of personal jurisdiction and the attachment of jurisdiction. *Compare United States v. Douse, supra* at 479 (Everett, C.J., concurring in

the result); *United States v. Wheeley*, 6 M.J. 220 (C.M.A. 1979); *United States v. Hutchins*, 4 M.J. 190 (C.M.A. 1978); and *United States v. Hout, supra* (opinion of Quinn, C.J.) *with United States v. Douse, supra* (opinion of Cook, J.); *United States v. Smith*, 4 M.J. 265 (C.M.A. 1978); *United States v. Hout, supra* at 302; 41 C.M.R. 299, 302 (1970) (Darden, J., concurring in the result); and *United States v. Rubenstein*, 7 U.S.C.M.A. 523, 22 C.M.R. 313 (1957). *See also* W. Winthrop, *supra* at 90–91.

Subsection (2) includes examples of means by which jurisdiction may attach. They are taken from paragraph 11 *d* of MCM, 1969 (Rev.) although "filing of charges" has been clarified to mean preferral of charges. *See United States v. Hout, supra.* This list is not exhaustive. *See United States v. Self*, 13 M.J. 132 (C.M.A. 1982); *United States v. Douse, supra; United States v. Smith, supra. See also United States v. Fitzpatrick*, 14 M.J. 394 (C.M.A. 1983); *United States v. Handy*, 14 M.J. 202 (C.M.A. 1982); *United States v. Wheeley, supra; United States v. Rubenstein, supra; United States v. Mansbarger*, 20 C.M.R. 449 (A.B.R. 1955).

Rule 203. Jurisdiction over the offense

This rule is intended to provide for the maximum possible court-martial jurisdiction over offenses. Since the constitutional limits of subject-matter jurisdiction are matters of judicial interpretation, specific rules are of limited value and may unnecessarily restrict jurisdiction more than is constitutionally required. Specific standards derived from current case law are treated in the discussion.

The discussion begins with a brief description of the rule under *O'Callahan v. Parker*, 395 U.S. 258 (1969). It also describes the requirements established in *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977) to plead and prove jurisdiction. *See also* R.C.M. 907(b)(1)(A). The last three sentences in subsection (b) of the discussion are based on *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983). The remainder of the discussion reflects the Working Group's analysis of the application of service-connection as currently construed in judicial decisions. It is not intended as endorsement or criticism of that construction.

Subsection (c) of the discussion lists the *Relford* factors, which are starting points in service-connection analysis, although the nine additional considerations in *Relford* are also significant. These factors are not exhaustive. *United States v. Lockwood, supra. See also United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980). *Relford* itself establishes the basis for (c)(2) and (c)(3) of the discussion. It has never been seriously contended that purely military offenses are not service-connected per se. *See Relford* factor number 12. Decisions uniformly have held that offenses committed on a military installation are service-connected. *See, e.g., United States v. Hedlund, supra; United States v. Daniels*, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970). *See Relford* factors 2, 3, 10, and 11. As to the third sentence in (c)(3), *see United States v. Seivers*, 8 M.J. 63 (C.M.A. 1979); *United States v. Escobar*, 7 M.J. 197 (C.M.A. 1979); *United States v. Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); *Harkcom v. Parker*, 439 F.2d 265 (3d Cir. 1971). With respect to the fourth sentence of (c)(3), *see United States v. Hedlund, supra; United States v. Riehle*, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969). *But cf. United States v. Lockwood, supra.* Although much of the reasoning in *United States v. McCarthy*, 2 M.J. 26 (C.M.A. 1976) has been repudiated by *United States v. Trottier, supra*, the holding of *McCarthy* still appears to support the penultimate sentence in (c)(3). *See also United States v. Lockwood, supra; United States v. Gladue*, 4 M.J. 1 (C.M.A. 1977). The last sentence is based on *United States v. Lockwood, supra*.

The discussion of drug offenses in (c)(4) is taken from *United States v. Trottier, supra.*

As to (c)(5), the first sentence is based on *United States v. Lockwood, supra*. Whether the military status of the victim or the accused's use of military identification card can independently support service-connection is not established by the holding in *Lockwood*. The second sentence is based on *United States v. Whatley*, 5 M.J. 39 (C.M.A. 1978); *United States v. Moore*, 1 M.J. 448 (C.M.A. 1976). The last sentence is based on *United States v. Conn, supra; United States v. Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969) (officer status of accused does not establish service-connection under Article 134) (note: service-connection of Article 133 offenses has not been judicially determined); *United States v. Saulter*, 5 M.J. 281 (C.M.A. 1978); *United States v. Conn, supra* (fact that accused was military policeman did not establish service-connection); *United States v. Armes*, 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969) (wearing uniform during commission of offense does not establish service-connection).

Subsection (c)(6) of the discussion indicates that virtually all offenses by servicemembers in time of declared war are service-connected. There is little case authority on this point. The issue was apparently not addressed during the conflict in Vietnam; of course, the overseas exception provided jurisdiction over offenses committed in the theater of hostilities. The emphasis in *O'Callahan* on the fact that the offenses occurred in peacetime (*see Relford* factor number 5) strongly suggests a different balance in time of war. Furthermore, in *Warner v. Flemings*, a companion case decided with *Gosa v. Mayden*, 413 U.S. 665 (1973), Justices Douglas and Stewart concurred in the result in upholding Flemings' court-martial conviction for stealing an automobile while off post and absent without authority in 1944, on grounds that such an offense, during a congressionally declared war, is service-connected. The other Justices did not reach this question. Assigning *Relford* factor number 5 such extensive, indeed controlling, weight during time of declared war is appropriate in view of the need for broad and clear jurisdictional lines in such a period.

Subsection (d) of the discussion lists recognized exceptions to the service-connection requirement. The overseas exception was first recognized in *United States v. Weinstein*, 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969). *See also United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969). The overseas exception flows from *O'Callahan's* basic premise: that the service-connection requirement is necessary to protect the constitutional right of service members to indictment by grand jury and trial by jury. While this premise might not be evident from a reading of *O'Callahan* alone, the Supreme Court subsequently confirmed that this was the basis of the *O'Callahan* rule. *See Gosa v. Mayden, supra* at 677. Since normally no civilian court in which the accused would have those rights is available in the foreign setting, the service-connection limitation does not apply,

The situs of the offense, not the trial, determines whether the exception may apply. *United States v. Newvine*, 23 U.S.C.M.A. 208, 48 C.M.R. 960 (1974); *United States v. Bowers*, 47 C.M.R.

516 (A.C.M.R. 1973). The last sentence in the discussion of the overseas exception is based on *United States v. Black*, 1 M.J. 340 (C.M.A. 1976). *See also United States v. Gladue*, 4 M.J. 1(C.M.A. 1977); *United States v. Lazzaro*, 2 M.J. 76 (C.M.A. 1976). Some federal courts have suggested that the existence of court-martial jurisdiction over an overseas offense does not depend solely on the fact that the offense is not cognizable in the United States civilian courts. *See Hemphill v. Moseley*, 443 F.2d 322 (10th Cir. 1971). *See also United States v. King*, 6 M.J. 553 (A.C.M.R. 1978), *pet. denied*, 6 M.J. 290 (1979).

Several Federal courts which have addressed this issue have also held that the foreign situs of a trial is sufficient to support court-martial jurisdiction, although the rationale for this result has not been uniform. *See e.g., Williams v. Froehlke*, 490 F.2d 998 (2d Cir. 1974); *Wimberly v. Laird*, 472 F.2d 923 (7th Cir.), *cert. denied*, 413 U.S. 921 (1973); *Gallagher v. United States*, 423 F.2d 1371 (Ct. Cl.), *cert. denied*, 400 U.S. 849 (1970); *Bell v. Clark*, 308 F.Supp. 384(E.D. Va. 1970), *aff'd*, 437 F.2d 200 (4th Cir. 1971). As several of these decisions recognize, the foreign situs of an offense is a factor weighing heavily in favor of service-connection even without an exception for overseas offenses. *See Relford* factors 4 and 8. The logistical difficulties, the disruptive effect on military activities, the delays in disposing of offenses, and the need for an armed force in a foreign country to control its own members all militate toward service-connection for offenses committed abroad. Another consideration, often cited by the courts, is the likelihood that if the service-connection rule were applied overseas as it is in the United States, the practical effect would be far more frequent exercise of jurisdiction by host nations, thus depriving the individual of constitutional protections the rule is designed to protect.

The petty offenses exception rests on a similar doctrinal foundation as the overseas exception. Because there is no constitutional right to indictment by grand jury or trial by jury for petty offenses (*see Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Duke v. United States*, 301 U.S. 492 (1937)); the service-connection requirement does not apply to them. *United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969). *Under Baldwin v. New York, supra*, a petty offense is one in which the maximum sentence is six months confinement or less. Any time a punitive discharge is included in the maximum punishment, the offense is not petty. *See United States v. Smith*, 9 M.J. 359, 360 n. 1 (C.M.A. 1980); *United States v. Brown*, 13 U.S.C.M.A. 333, 32 C.M.R. 333 (1962).

Sharkey relied on the maximum punishment under the table of maximum punishments in determining whether an offense is petty. It is the view of the Working Group that offenses tried by summary courts-martial and special courts-martial at which no punitive discharge may be adjudged are "petty offenses" for purposes of *O'Callahan*, in view of the jurisdictional limitations of such courts. Whether the jurisdictional limits of a summary of such special court-martial makes an offense referred to such a court-martial petty has not been judicially determined.

1995 Amendment: The discussion was amended in light of *Solorio v. United States*, 483 U.S. 435 (1987). *O'Callahan v. Parker*, 395 U.S. 258 (1969), held that an offense under the code could not be tried by court-martial unless the offense was "service connected." *Solorio* overruled *O'Callahan.*

Rule 204. Jurisdiction over certain reserve component personnel

1987 Amendment: R.C.M. 204 and its discussion were added to implement the amendments to Articles 2 and 3, UCMJ, contained in the "Military Justice Amendments of 1986," tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, 100 Stat. 3905 (1986). Use of the term "member of a reserve component" in Article 3(d) means membership in the reserve component at the time disciplinary action is initiated. The limitation in subsection (b)(1) restricting general and special courts-martial to periods of active duty is based upon the practical problems associated with conducting a court-martial only during periods of scheduled inactive-duty training, and ensures that the exercise of court-martial jurisdiction is consistent with the policies set forth in Article 2(d). The last sentence of subsection (d) reflects legislative intent "not to disturb the jurisprudence of *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949)" (H.R. Rep. No. 718, 99th Cong., 2d Sess. at 227 (1986)).

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

Rule 301. Report of offense

The primary sources of this rule are paragraphs 29 *a* and 31 of MCM, 1969 (Rev.). Those provisions were adopted in substance except that subsection (b) provides that reports be conveyed to the "immediate commander" of suspects, meaning the "commander exercising immediate jurisdiction. . . under Article 15." The language was changed because the previous language was cumbersome and legalistic. There is no corresponding provision in the Federal Rules of Criminal Procedure. the most closely analogous provision of the Federal Rules of Criminal Procedure is Rule 3 (complaints). However, "[w]ith respect to the complaint, in general, it should be noted that its principle purpose is to serve as the basis for an arrest warrant." J. Moore, *Moore's Federal Practice, Rules Pamphlet* (part 3) 10 (1982). That purpose is not the same as the purpose of R.C.M. 301. R.C.M. 301 is simply to assure that ordinarily information relating to offenses is conveyed promptly to the suspect's immediate commander.

Rule 302. Apprehension

(a) *Definition and scope.* The definition of "apprehension" in subsection (1) is taken from Article 7(a), as was its predecessor, paragraph 18 *a* of MCM, 1969 (Rev.).

The peculiar military term "apprehension" is statutory (Article 7(a)) and cannot be abandoned in favor of the more conventional civilian term, "arrest." *See generally United States v. Kinane*, 1 M.J. 309 (C.M.A. 1976). *See also United States v. Cordero*, 11 M.J. 210, 217, n.1 (C.M.A. 1981) (Everett, C.J., concurring).

The discussion of "apprehension" is also consistent with paragraphs 18 *a* and *b*(1) of MCM, 1969 (Rev.). The discussion draws a distinction between apprehensions and detentions. The distinction is based upon the duration of the status, the legal consequences of the impairment of liberty, and the circumstances under which the two forms are used. *Brown v. Texas*, 443 U.S. 47 (1979); *Dunaway v. New York*, 442 U.S. 200 (1979); *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Schneider*, 14 M.J. 189

(C.M.A. 1982); *United States v. Texidor-Perez*, 7 M.J. 356 (C.M.A. 1979).

This rule conforms in intent with the substance of Fed. R. Crim. P. 3 through 5. However, the formal warrant application process and initial appearance requirement of those rules are impracticable, and, given the command control aspects of the military, unnecessary for military criminal practice. The purposes of Fed. R. Crim. P. 3 through 5 are achieved by later rules in this chapter.

Subsection (2) clarifies the scope of the rule. It does not affect apprehensions of persons not subject to trial by court-martial. Apprehension and detention of such persons by military law enforcement personnel is not part of the court-martial process; it is based on the commander's inherent authority to maintain law and order on the installation and on various state laws concerning citizen's arrest. *See United States v. Banks*, 539 F.2d 14 (9th Cir. 1976). The rule also does not affect the authority of persons not listed in subsection (b) to apprehend. The discussion gives some examples of such categories.

(b) *Who may apprehend.* This subsection restates the substance of Articles 7(b) and (c) and 8, and paragraphs 19a and 23 of MCM, 1969, (Rev.). Subsection (3), Federal civilian law enforcement officers, is the only new provision.

Subsection (1) is taken from paragraph 19 *a* of MCM, 1969 (Rev.). The phrase "whether subject to the code or not" is added to the present rule to make clear that contract civilian guards and police and similar civilian law enforcement agents of the military have the power to apprehend persons subject to the code.

The discussion of subsection (1) reflects the elimination of the previous restrictive policy against apprehensions of commissioned and warrant officers by enlisted and civilian law enforcement personnel. This recognizes the authority of such personnel commensurate with their law enforcement duties. The rule does not foreclose secretarial limitations on the discretion of such personnel.

1987 Amendment: The Discussion was amended to clarify that special agents of the Defense Criminal Investigative Service have the authority to apprehend persons subject to trial by courts-martial.

Subsection (2) restates the previous exercise of delegated authority under Article 7(b) to designate persons authorized to apprehend which appeared in the first clause in the first sentence of paragraph 19 *a* of MCM, 1969 (Rev.). The accompanying discussion is based on the second sentence of paragraph 19 *a* of MCM, 1969 (Rev.).

1990 Amendment: The words "or inactive-duty training" were added in conjunction with the enactment of the "Military Justice Amendments of 1986," tit. VIII, 804 National Defense Authorization for Fiscal Year 1987, Pub. L. No. 99–661, 100 Stat. 3905 (1986) expanding jurisdiction over reserve component personnel.

Subsection (3) restates Article 8. This seemingly duplicative statement is required because the codal provision as to deserters extends the Federal arrest power to state and local law enforcement agents who do not have the kind of Federal arrest power possessed by their colleagues listed in subsection (3). The fact that a person who apprehended a deserter was not authorized to do so is not a ground for discharging the deserter from military custody. *See* paragraph 23 of MCM, 1969 (Rev.).

(c) *Grounds of apprehension.* This subsection concerns apprehension of persons subject to the code or to trial by court-martial. Note that such persons may be apprehended under this rule only for offenses subject to trial by court-martial. *See also* the analysis of subsection (a)(2) of this rule. The power to apprehend under this rule lasts as long as the person to be apprehended is subject to the code or to trial by court-martial. This provision has no explicit parallel in MCM, 1969 (Rev.) but is consistent with the limitation of the apprehension power in both the code and that Manual to persons subject to the code. The Federal Rules of Criminal Procedure have no similar provision either, because the arrest power of civilian law enforcement officials is not similarly limited by the status of the suspect.

The subsection states alternative circumstances which must exist to permit apprehension during this period. The first two sentences restate the probable cause requirement for apprehension of suspects, the main use of the apprehension power of which Article 7(b) and paragraph 19 *a* of MCM, 1969 (Rev.) took note. They are consistent with Fed. R. Crim. P. 4(a). No change to the substance of those provisions has been made, but the discussion provides that probable cause may be based on "the reports of others" to make clear that hearsay may be relied upon as well as personal knowledge. This addition is consistent with Fed.R. Crim. P. 4(b). The wording has been changed to eliminate the legal term, "hearsay."

The last sentence of the subsection restates the codal authority of commissioned, warrant, petty, and noncommissioned officers to use the apprehension power to quell disorders, and is based on Article 7(c) and paragraph 19 *b* of MCM, 1969 (Rev.), changed only as necessary to accommodate format. *Cf.* paragraph 19 *a* of MCM, 1951, and of MCM, 1969 (Rev.) (authority of military law enforcement official to apprehend on probable cause). *See also* Article of War 68 (1920). *Compare* paragraph 20 *b* (authority of military police) *with* paragraph 20 *c* (quarrels and frays) of MCM (Army), 1949 and of MCM (AF), 1949. Article 7(b) expressly requires probable cause to believe an offense has been committed; Article 7(c) does not.

(d) *How an apprehension may be made.* In subsection (1) the general statement of procedure to make an apprehension is based on paragraph 19 *c*, MCM, 1969 (Rev.) but it has been amplified in accord with *United States v. Kinane*, 1 M.J. 309 (C.M.A. 1976). *See also United States v. Sanford*, 12 M.J. 170 (C.M.A. 1981).

Subsection (2) is consistent with military law. It is superficially inconsistent with Fed.R. Crim. P. 4, but the inconsistency is more apparent than real. Civilian law enforcement officials generally have power to arrest without warrant for offenses committed in their presence and for felonies upon probable cause. *See e.g.* 18 U.S.C. §§ 3052, 3053, and 3056. To restrict the military apprehension power by requiring warrants in all or most cases would actually be inconsistent with civilian practice. The problem of apprehensions in dwellings is addressed by cross-reference to subsection (e) (2).

Subsection (3) clarifies the power of military law enforcement officials to secure the custody of a person. There is no similar provision in the Federal Rules of Criminal Procedure. It is general, leaving to the services ample breadth in which to make more definitive regulations.

The discussion restates paragraph 19 *d* of MCM, 1969 (Rev.). There is no corollary provision in the Federal Rules of Criminal Procedure. The purpose of the notification is twofold. First, it

ensures that the unit commander of the person in custody will know the status of that member of the command and can participate in later decision making that will affect the availability of the member apprehended. Second, it ensures that law enforcement officials will promptly bring the case and suspect before the commander, thus ensuring that later procedural requirements of the code and these rules will be considered and met if appropriate. This is parallel in intent to Fed. R. Crim. P. 5 and 5.1.

(e) *Where an apprehension may be made.* Subsection (1) is based on Article 5. It is similar to Fed. R. Crim. P. 4(d)(2) but broader because the code is not similarly limited by geography.

Subsection (2) adds the warrant requirement of *Payton v. New York,* 445 U.S. 573 (1980), conforming the procedure to military practice. *See also Steagald v. United States,* 451 U.S. 204 (1981); *United States v. Mitchell,* 12 M.J. 265 (C.M.A. 1982); *United States v. Davis,* 8 M.J. 79 (C.M.A. 1979); *United States v. Jamison,* 2 M.J. 906 (A.C.M.R. 1976). The first sentence clarifies the extent of Payton by citing examples of the kinds of dwellings in which one may and may not reasonably expect privacy to be protected to such a degree as to require application of *Payton*. Subsection (C) joins the warrant requirement to the traditional power of military commanders, and military judges when empowered, to authorize similar intrusions for searches generally and other kinds of seizures. The first sentence of the last paragraph in subsection (2) is based on *Steagald v. United States, supra*. The Working Group does not regard *Steagald* as requiring an exclusionary rule or supplying standing to an accused on behalf of a third party when the accused's right to privacy was not violated. *See Rakas v. Illinois,* 439 U.S. 128 (1978). Failure to secure authorization or warrant to enter a private dwelling not occupied by the person to be apprehended may violate the rights of residents of that private dwelling.

Rule 303. Investigation of charges

This rule is based on paragraph 32 of MCM, 1969 (Rev.). Much of the predecessor now appears in the accompanying discussion.

Rule 304. Pretrial restraint

(a) *Types of pretrial restraint.* Except for the "conditions on liberty" provision, which is new, this subsection is based on paragraphs 20 *a, b,* and *c* of MCM, 1969 (Rev.). Some of the former Manual which explained the distinction between arrest and restriction in lieu thereof and which described the consequences of breaking restrictions has been moved to the Discussion.

The "conditions on liberty" provision is set out separately in the Manual for the first time, although such conditions (several examples of which are included in the Discussion) have been in practice previously and have received judicial recognition. *See United States v. Heard,* 3 M.J. 14, 20 (C.M.A. 1977); *cf. Pearson v. Cox,* 10 M.J. 317, 321 n. 2 (C.M.A. 1981) (conditions during period of deferment of adjudged sentence). Such conditions also parallel the conditions on release described in 18 U.S.C. § 3146(a). *See also ABA Standards, Pretrial Release* § 10-5.2 (1979). The discussion notes that pretrial restraint, including conditions on liberty, may not improperly hinder trial preparation. *See United States v. Aycock,* 15 U.S.C.M.A. 158, 35 C.M.R. 130 (1964); *United States v. Wysong,* 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958).

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

1986 Amendment: A fourth paragraph was added to the Discussion to provide a cross-reference to the speedy trial rule in R.C.M. 707(a).

(b) *Who may order pretrial restraint.* This subsection restates, in a reorganized format, paragraph 21 *a* of MCM, 1969 (Rev.). It is based on Article 9(b) and (c). The code does not address forms of restraint less severe than arrest; there is no reason to permit a broader class of persons than those who may impose arrest or confinement to impose less severe forms of restraint. Subsection (4) is based on *United States v. Gray,* 6 U.S.C.M.A. 615, 20 C.M.R. 331 (1956). A commander who, under subsection (4), has withheld authority to order pretrial restraint may, of course, later modify or rescind such withholding. Even if such modification or rescission is denominated a "delegation," it would be a rescission of the earlier withholding. The limits of subsection (3) would not apply.

(c) *When a person may be restrained.* This subsection is based on Articles 9(d) and 10. Although forms of restraint less severe than arrest are not addressed by these articles, it is appropriate to require probable cause and a need for restraint for all forms of pretrial restraint. An officer imposing restraint has considerable discretion in determining how much restraint is necessary (*cf.* 18 U.S.C. §§ 3146(a) and 3147), although a decision to confine is subject to thorough review under R.C.M. 305. The Discussion borrows from the language of Article 13 to admonish that the restraint must serve only the limited purpose of this rule. *See* subsection (f). *See also United States v. Haynes,* 15 U.S.C.M.A. 122, 35 C.M.R. 94 (1964).

(d) *Procedures for ordering pretrial restraint.* This subsection is based on Article 9(b) and (c) and on paragraph 20 *d*(2) and (3) of MCM, 1969 (Rev.). Since all forms of restraint other than confinement are moral rather than physical, they can be imposed only by notifying the person restrained.

(e) *Notice of basis for restraint.* This subsection is based on Article 10. Since all forms of restraint other than confinement involve some form of communication with the accused or suspect, this subsection will impose no undue burden on commanders. The Discussion refers to R.C.M. 305(e) which contains additional notice requirements for a person who is confined. Failure to comply with this subsection does not entitle the accused to specific relief in the absence of a showing of specific prejudice. *Cf. United States v. Jernigan,* 582 F. 2d 1211 (9th Cir.), *cert. denied,* 439 U.S. 991 (1978); *United States v. Grandi,* 424 F. 2d 399 (2d Cir. 1970); cert. denied, 409 U.S. 870 (1972).

Pretrial restraint other than pretrial confinement (*see* R.C.M. 305(e)(2) and (f)) does not alone require advice to the suspect of the right to detailed counsel or civilian counsel. Fed.R.Crim. P.5(c) is not analogous because the advice at the initial appearance serves multiple purposes other than for pretrial restraint short of confinement. The advice at the initial appearance is

designed to protect the defendant not only when pretrial confinement is imposed, but for events in the criminal process which follow shortly thereafter. Thus, it is necessary under that provision to inform a defendant of the right to counsel immediately because the suspect or accused may shortly thereafter be called upon to make important decisions. In contrast, the Rules for Courts-Martial treat each step in the pretrial process separately and provide for advice of the right to counsel when counsel is necessary. R.C.M. 305(e)(2) and (f) (pretrial confinement); 406 (detailing counsel for an accused in an investigation under Article 32); 503 and 506 (detailing counsel for an accused in courts-martial); Mil.R. Evid. 305 (warnings to accompany interrogations). The difference is a result of the structural differences between these Rules and the Federal Rules of Criminal Procedure. The intent and result of both systems are the same.

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

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

1986 Amendment: The Discussion was amended to clarify that pretrial restraint may be imposed not only when charges are to be reinstated but also when a convening authority intends to order a rehearing or an "other" trial. *See* R.C.M. 1107(e). Restraint imposed during any of these situations is considered "imposed before and during disposition of offenses." *See* R.C.M. 304(a).

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

Rule 305. Pretrial confinement

Introduction. This rule clarifies the basis for pretrial confinement, and establishes procedures for the imposition and review of pretrial confinement. The rule conforms with requirements established by recent decisions. *See United States v. Lynch*, 13 M.J. 394 (C.M.A. 1982); *United States v. Malia*, 6 M.J. 65 (C.M.A. 1978); *United States v. Heard*, 3 M.J. 14 (C.M.A. 1977); *Cortney v. Williams*, 1 M.J. 267 (C.M.A. 1976). The most significant changes include: prevention of foreseeable serious misconduct as a basis for pretrial confinement; a system of review of pretrial confinement by neutral and detached officials; specific authority for a military judge to direct release of an accused from pretrial confinement; and a specific and meaningful remedy for violation of the rule.

The Working Group considered various procedural mechanisms for imposition and review of pretrial confinement. Numerous practical, as well as legal, concerns were analyzed and weighed in striking a balance between individual liberty and protection of society. The Working Group proceeded from the premise that no person should be confined unnecessarily. Neither the prisoner nor the government benefits from unnecessary confinement. On the other hand, in determining when confinement may be necessary, the nature of the military and its mission is an important consideration. Moreover, some of the collateral impact associated with pretrial confinement in civilian life (loss of job, income, and access to defense counsel) is normally absent in the military setting and pretrial confinement is seldom lengthy. *See* R.C.M. 707. Finally, the procedures for imposition and review of pretrial confinement had to be compatible with existing resources. More specific considerations are addressed below.

(a) *In general.* This subsection is based on the first sentence of paragraph 20 *c* of MCM, 1969 (Rev.). The second sentence of that paragraph is deleted here; the subject is treated at subsections (d) and (h)(2) of this rule. The first sentence of the discussion, with the addition of the words "of the United States," is Article 12. The second sentence is new, and restates current practice.

(b) *Who may be confined.* This subsection is new. It restates current law.

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

(d) *When a person may be confined.* This subsection contains the two basic codal prerequisites for pretrial confinement: (1) probable cause to believe an offense has been committed by the person to be confined (Article 9(d)); and (2) circumstances require it (Article 10). This basic standard, which applies to all forms of pretrial restraint, was selected here in lieu of a more detailed formulation since the initial decision to confine often must be made under the pressure of events. The discussion encourages consideration of the factors discussed under (h)(2)(B) of this rule before confinement is ordered, and, as a practical matter, this will probably occur in many cases, since persons ordering confinement usually consider such matters in making their decision. An initial decision to confine is not illegal, however, merely because a detailed analysis of the necessity for confinement does not precede it. *Cf. Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975).

The discussion notes that confinement must be distinguished from custody incident to an apprehension. *See* R.C.M. 302. This paragraph is based on Article 9(e) and paragraphs 19 *d* and 174 *c* and *d* of MCM, 1969 (Rev.). Article 9(e) expressly distinguishes confinement from measures to "secure the custody of an alleged offender until proper authority may be notified". Such periods of custody are not confinement within the meaning of this rule. *See United States v. Ellsey*, 16 U.S.C.M.A. 455, 37 C.M.R. 75 (1966). Such custody may continue only for the period of time reasonably necessary for a proper authority under R.C.M. 304 to be notified and to act. *See* Article 9(e). *See also* paragraphs 21 and 22, Part IV.

(e) *Advice to the accused upon confinement.* Except for subsection (e)(1), which is based on Article 10 and appeared in subparagraph 20 *d*(4) of MCM, 1969 (Rev.) this subsection is new. It is similar to Fed.R.Crim. P.5(c) which requires the magistrate to give such advice to the defendant at the initial appearance. The rule does not specify who shall inform the accused. This affords considerable flexibility in implementing this provision.

Note that violation of this subsection does not trigger the remedy in subsection (k) of this rule. Consequently, a violation of this subsection must be tested for prejudice. *See* Article 59.

(f) *Military counsel.* This subsection is new. The primary purpose of the rule is to help protect the accused's interest in the pretrial confinement determinations. Secondarily, this requirement should

enable the accused to avoid injury to the defense in subsequent proceedings, and, when necessary, to begin to marshal a defense. *See e.g.,* Article 49(a). The assignment of counsel at this stage is of central importance to ensuring the fairness of the pretrial confinement process. The requirement parallels similar requirements in federal practice (Fed.R.Crim. P.5(c) and 44(a)) and under the District of Columbia Code (D.C. Code § 23-1322(c)(4)). *See generally United States v. Jackson,* 5 M.J. 223 (C.M.A. 1978); *United States v. Mason,* 21 U.S.C.M.A. 389, 45 C.M.R. 163 (1972); *United States v. Przybycien,* 19 U.S.C.M.A. 120, 122n. 2, 41 C.M.R. 120, 122n. 2 (1969). Consequently, failure to do so triggers the remedy in subsection (k) of this rule.

The subsection does not require that counsel appointed at this stage will represent the prisoner throughout subsequent proceedings. Although this would be desirable, the mobility of the armed forces, the locations of confinement facilities, and the limits on legal resources render an inflexible requirement in this regard impracticable. Nothing in the code or the Constitution requires such early appointment of defense counsel for purposes of representation at trial. *Cf. Gerstein v. Pugh, supra* at 123; *Kirby v. Illinois,* 406 U.S. 682 (1972). *But see United States v. Jackson, supra.* Current case law permits assignment of counsel for a limited duration, at least if the limited nature of the relationship is made clear to the client at the outset. *See United States v. Timberlake,* 22 U.S.C.M.A. 117, 46 C.M.R. 117 (1973); *Stanten v. United States,* 21 U.S.C.M.A. 431, 45 C.M.R. 205 (1972); *United States v. Kelker,* 4 M.J. 323 (C.M.A. 1978); *cf. United States v. Booker,* 5 M.J. 238 (C.M.A. 1977). Where such a limited relationship is the practice, it should be included in the advice under subsection (e) of this rule to help prevent misunderstanding. If the limited nature of the relationship is not explained to the prisoner, it may not be possible, without the prisoner's consent, to terminate the relationship for the convenience of the government. *United States v. Catt,* 1 M.J. 41 (C.M.A. 1975); *United States v. Eason,* 21 U.S.C.M.A. 335, 45 C.M.R. 109 (1972); *United States v. Murray,* 20 U.S.C.M.A. 61, 42 C.M.R. 253 (1970).

Nothing in this rule requires that counsel assigned for pretrial confinement purposes be located near the prisoner. Once again, as desirable as this may be, such a requirement would be impracticable. It is not uncommon for a prisoner to be confined, at least initially, far from any available counsel. The rule is designed to afford the services considerable flexibility in dealing with such situations. The distance between the prisoner and defense counsel should not pose a serious problem for the defense. They can communicate by telephone, radio, or other means, and, under Mil. R. Evid. 502, such communications would be protected by the attorney-client privilege. Moreover, since the initial review may be accomplished without the presence of prisoner or defense counsel, the defense counsel may submit appropriate written matters without personal contact with either the prisoner or the reviewing officer.

1993 Amendment: The amendment to subsection (f) provides a specific time period by which to measure compliance. Because it is possible to obtain credit for violations of this section under subsection (k), a standard of compliance was thought necessary. *See e.g., United States v. Chapman,* 26 M.J. 515 (A.C.M.R. 1988), *pet. denied* 27 M.J. 404 (C.M.A. 1989). This amendment, while protecting the rights of the prisoner, also gives reasonable protection to the Government in those cases where the prisoner is confined in a civilian facility and the request is never, or is belatedly, communicated to military authorities. While it is expected that military authorities will have procedures whereby civilian confinement authorities communicate such requests in a timely fashion, the failure to communicate such a request, or the failure to notify military authorities in a timely manner should be tested for prejudice under Article 59 U.C.M.J., and should not be considered as invoking the credit provisions of subsection (k) of this rule.

(g) *Who may direct release from confinement.* This subsection is a substantial change from the following language from paragraph 22 of MCM, 1969 (Rev.): "The proper authority to release from confinement in a military confinement facility is the commanding officer to whose authority that facility is subject." Notwithstanding this provision, the authority of the commander to whose authority the confinement facility is subject was often treated as ministerial in nature, at least in some of the services. Authority to direct release was recognized to repose in a commander of the accused. *See generally* Boller, *Pretrial Restraint in the Military,* 50 Mil.L.Rev. 71, 96-99 (1970); *see also United States v. Pringle,* 19 U.S.C.M.A. 324, 41 C.M.R. 324 (1970). More recently, the authority of military judges (*see Porter v. Richardson,* 23 U.S.C.M.A. 704, 50 C.M.R. 910 (1975); *Courtney v. Williams, supra)* and officials appointed to do so under regulations (*see United States v. Malia, supra*) to order release from pretrial confinement has been recognized. The subsection expressly establishes the authority of such officials to direct release from pretrial confinement.

(h) *Notification and action by commander*. Subsection (1) is based on Article 11(b), although the terminology has been changed somewhat since the terms "commander of a guard" and "master at arms" no longer accurately describes the confinement personnel who are responsible for making the report. This subsection is also important in setting in motion the procedures for approval or disapproval of confinement. *See also,* Fed.R.Crim. P.5(a). The discussion is based on *Hearings on H.R. 2498 Before a Subcomm. of the Comm. on Armed Services of the House of Representatives,* 81st Cong., 1st Sess. 913 (1949).

Subsection (2)(A) places the real initial decision for pretrial confinement with the prisoner's commander. Although the immediate commander may not be a neutral and detached official for pretrial confinement purposes (*United States v. Stuckey,* 10 M.J. 347 (C.M.A. 1981); *but cf. United States v. Ezell,* 6 M.J. 307 (C.M.A. 1979); *Courtney v. Williams, supra*), it is appropriate to give this officer the initial decision on pretrial confinement, so that the command implications of this determination may be fully considered and developed for later review. *See* subsections (B) and (C). This will enable the commander, who is in the best position to assess the predictive elements of the pretrial confinement decision, including not only the prisoner's likely behavior, but also the impact of release or confinement on mission performance, to make a record of such factors for the initial review. Subsection (2)(B) provides additional guidance for the commander in making this decision.

The 72-hour requirement is intended to ensure reasonably prompt action by the commander, while at the same time allowing for situations in which the commander is not immediately available. If a commander were unavailable for a longer period, then some other official would normally qualify as acting com-

mander (*see United States v. Kalscheuer*, 11 M.J. 373 (C.M.A. 1981); *United States v. Murray*, 12 U.S.C.M.A. 434, 31 C.M.R. 20 (1961); *United States v. Bunting*, 4 U.S.C.M.A. 84, 15 C.M.R. 84 (1954)) or the prisoner would be attached to another unit whose commander could act for these purposes.

1993 Amendment: The amendment to subsection (h)(2)(A) clarifies that the 72-hour period operates in two distinct situations: (a) if the commander orders the prisoner into pretrial confinement, the commander has 72 hours to decide whether pretrial confinement will continue; but (b) if someone other than the prisoner's commander orders the prisoner into pretrial confinement, the prisoner's commander has 72 hours from receipt of a report that the prisoner has been confined to decide whether pretrial confinement will continue.

Subsection (2)(B) sets forth the standards for pretrial confinement. Probable cause has long been recognized as a prerequisite to confinement in military law. *See* Article 9(d); paragraph 20 *d*(1) of MCM, 1969 (Rev.). Preventing flight is also well established as basis for confinement. *See* paragraph 20 *c* of MCM, 1969 (Rev.); *United States v. Bayhand*, 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956). Preventing foreseeable serious criminal misconduct has not been expressly recognized in the Manual before, although it was probably included in the "seriousness of the offense charged" language of paragraph 20 *c*. *See e.g., United States v. Nixon*, 21 U.S.C.M.A. 480, 45 C.M.R. 254 (1972). "Seriousness of the offense charged" was rejected as an independent justification for pretrial confinement in *United States v. Heard, supra*, at least insofar as it implied confinement may be ordered regardless of the need to prevent flight or serious criminal misconduct. *Cf. United States v. Nixon, supra; United States v. Jennings*, 19 U.S.C.M.A. 88, 41 C.M.R. 88 (1969).

Although prevention of serious misconduct is expressly authorized as a basis for pretrial confinement for the first time, it is, as the foregoing analysis indicates, not new to military practice. Indeed the phrase "foreseeable serious criminal misconduct" comes from *Heard. See also United States v. Nixon, supra; United States v. Gaskins*, 5 M.J. 772 (A.C.M.R. 1978); Dep't of Defense Directive 1325.4 (7 Oct 68). The need for confinement for such purposes has been recognized and sanctioned in civilian communities. *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981), *cert. denied*,455 U.S. 1022 (1982). *See also* U.S. Dep't of Justice, *Attorney General's Task Force on Violent Crime, Final Report* 50-53 (August 1981); Burger, *Report of the Chief Justice to the American Bar Association*—1981, 67 A.B.A.J. 290, 292 (1981); Note, *Preventive Detention Before Trial*, 79 Harv.L.Rev. 1489 (1966). The need for confinement to prevent serious misconduct is particularly acute in the military. The business of military units and the interdependence of their members render the likelihood of serious criminal misconduct by a person awaiting trial of even graver concern than in civilian life. Moreover, as expressed in the last sentence of subsection (B), these concerns render a broader range or misconduct of a potentially serious nature. For example, the "quitter" who disobeys orders and refuses to perform duties, while others are expected to carry out unpleasant or dangerous tasks, has immensely adverse effect on morale and discipline which, while intangible, can be more dangerous to a military unit than physical violence. Thus, although the "pain in the neck" (*United States v. Heard, supra*) may not be confined before trial solely on that basis, the accused whose behavior is not merely an irritant to the commander, but is rather an infection in the unit may be so confined. Even constant supervision accomplishes little in such cases, and military resources do not permit, nor is it reasonable to require, the establishment of some holding facility other than a confinement facility for such persons.

The definition of national security is based on Exec. Order No. 12065 § 6-104 (June 28, 1978), 43 Fed.Reg. 28949, as amended by Exec. Order No. 12148 (July 1979), 44 Fed.Reg. 43239, and Exec. Order No. 12148 (July 19, 1979), 44 Fed.Reg. 56673, *reprinted at* 50 U.S.C.A. § 401 (West Supp. 1982). The second ("includes") phrase is taken from Joint Chiefs of Staff Publication 1, Dictionary of Military and Associated Terms 228 (1 July 79).

The factors for consideration in the discussion are taken from 18 U.S.C. § 3146(b), with minor modifications. *See also ABA Standards, Pretrial Release* §§ 10-3.2, 10-3.3, 10-4.4(d), 10-5.1(b) (1979), "embraced" in *United States v. Heard, supra* at 23-24. The discussion also notes that the Military Rules of Evidence do not apply to the information considered. Although the commander's decision is not directly analogous to a bail determination before a magistrate, this provision is consistent with 18 U.S.C. § 3146(f).

The last paragraph in the discussion is a reminder of the obligation to consider less severe forms of restraint before approving continued confinement. *United States v. Heard* and *United States v. Gaskins*, both *supra.*The alternatives, which are also referred to in R.C.M. 304, are derived from 18 U.S.C. § 3146(a).

The procedures in this rule are the same whether the basis of confinement is risk of flight or foreseeable serious misconduct. This is appropriate since bail is unavailable in the military. *United States v. Heard, supra;* 18 U.S.C. § 3156. *Cf. Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967). Since the decision is whether or not to confine, whether the basis is risk of flight or foreseeable misconduct, and since the factual, predictive, and discretionary determinations are qualitatively the same in either case, there is no reason for procedures to differ concerning them. Indeed, the District of Columbia Court of Appeals acknowledged that even where possibility of bail exists in potential flight cases, the two determinations involve the same fundamental considerations. *See United States v. Edwards, supra* at 1336-37.

The requirement for a memorandum in subsection (2)(C) is new although not to military practice. *See e.g.*, AR 27–10, para. 9-5 *b*(1), 16-5 *a* (1 September 1982); SECNAVINST 1640.10, para. 6 (16 August 1978). The memorandum is important to the remaining pretrial confinement procedures since it ordinarily provides the primary basis for subsequent decisions concerning pretrial confinement.

(i) *Procedures for review of pretrial confinement.* This subsection is new, although it roughly parallels current practice in the services. The requirement for review by an official, other than the commander ordering the confinement, who is neutral and detached, in subsection (2) is consistent with the requirement of *Courtney v. Williams, supra.* Although in *United States v. Malia, supra*, the Court of Military Appeals identified the term "magistrate" with the term "judge," the Working Group did not construe this to require that a military judge must conduct the initial review. *Cf. United States v. Lynch, supra.* Judicial review is provided in subsection (j). Instead, the term as used in Malia appears to denote a neutral and detached official with independent

power to review and order release from pretrial confinement. In any event, it is not practicable to require that the reviewing officer be a military judge, especially if the review is to occur promptly and if the accused is to be permitted to appear personally before the reviewing officer. There are not enough military judges available to accomplish this task. Moreover, a legally trained magistrate is not necessary since the pretrial confinement decision is essentially factual and predictive. *Cf. Shadwick v. City of Tampa,* 407 U.S. 345 (1972) (magistrate need not be a lawyer). Thus the rule leaves the selection of reviewing officers to service Secretaries.

The review must take place within 7 days of the imposition of confinement under R.C.M. 305. This is a more extended period than is the norm for an initial appearance in federal courts. *See* Fed.R.Crim. P.5(a); *Gerstein v. Pugh, supra.* However, Federal courts are willing to tolerate delays of several days, so long as the defendant does not suffer prejudice beyond the confinement itself during such periods. *See e.g., United States v. Motes-Zarate,* 552 F.2d 1330 (9th Cir. 1977), *cert. denied,* 435 U.S. 947 (1978); *see generally* 8 J. Moore, *Moore's Federal Practice,* ch. 5 (1982). The 7-day period is more closely analogous to the time periods authorized for the preventive detention hearing under D.C. Code § 23-1322(c)(3). The 7-day period, with a possible extension up to 10 days, is intended to accommodate a wide variety of circumstances. Because the review may be conducted entirely with written documents, without the prisoner's presence when circumstances so dictate, there should be no reason why a reviewing officer cannot conduct a review of the imposition of confinement within that time. Note that the 7-day period begins running from the time confinement is imposed by a person authorized do so under subsection (c) of this rule.

1993 Amendment: The amendment to subsection (i)(1) provides that the required review only becomes applicable whenever the accused is confined under military control. For example, if the prisoner was apprehended and is being held by civilian authorities as a military deserter in another state from where the prisoner's unit is located and it takes three days to transfer the prisoner to an appropriate confinement facility, the seven day period under this rule would not begin to run until the date of the prisoner's transfer to military authorities. Any unreasonable period of time that it may take to bring a prisoner under military control should be tested for prejudice under Article 59, U.C.M.J., and should not be considered as invoking the credit provisions of subsection (k) of this rule absent evidence of bad faith by military authorities in utilizing civilian custody. *But see United States v. Ballesteros,* 29 M.J. 14 (C.M.A. 1989). However, any time spent in civilian custody at the request of military authorities would be subject to pretrial confinement credit mandated by *United States v. Allen,* 17 M.J. 126 (C.M.A. 1984).

The amendment further clarifies the method of calculation to determine if the rule has been violated. *See United States v. DeLoatch,* 25 M.J. 718 (A.C.M.R. 1987); *contra, United States v. New,* 23 M.J. 889 (A.C.M.R. 1987).

The rule calls for a limited proceeding. Matters are to be presented in writing to facilitate the promptness of the proceeding and to ensure that a record is kept of the matters considered by the reviewing officer. Notwithstanding some authority to the contrary (*United States v. Heard, supra* at 25 (Fletcher, C.J., concurring); *ABA Standards, Pretrial Release* § 10-5.9 (1979)), an adversary hearing is not required. *Gerstein v. Pugh* and *United States v. Edwards,* both *supra.* Even if a more elaborate hearing might be called for in the civilian sphere (*ABA Standards, supra; cf. United States v. Wind,* 527 F.2d 672 (6th Cir. 1975)), it is appropriate to consider the institutional goals and needs of the military in measuring the due process requirements for pretrial confinement. *Cf. Wolff v. McDonnell,* 418 U.S. 539 (1974). *See Middendorf v. Henry,* 425 U.S. 25 (1976); *Parker v. Levy,* 417 U.S. 733 (1974). The procedures in the review include the opportunity for representation by counsel, access to all information presented to the reviewing officer, the right to present matters for the defense, and, ordinarily, the opportunity for the prisoner and defense counsel to personally address the reviewing officer. Measured against the military's mission, its structure and organization, and the resources available to it, these procedures, coupled with the opportunity for judicial review at an Article 39(a) session, adequately protect the liberty interests of the prisoner.

The review procedures are patterned after the procedures for parole revocation proceedings prescribed in *Morrissey v. Brewer,* 408 U.S. 471 (1972). There the Supreme Court required that an initial review of parole revocation must be conducted by a neutral person, who need not be a judge; the prisoner must receive notice and have an opportunity to be present and speak, and to present written matters; and the hearing officer must prepare an informal summary of the findings. (A later, more thorough hearing, to be held within approximately 2 months is required under *Morrissey*; judicial review under Article 39(a) coupled with the trial itself fulfills these purposes for pretrial confinement). These requirements are virtually identical to those in R.C.M. 305(i)(1). The only requirement in *Morrissey* not present in 305 is that the hearing officer have discretionary power to call witnesses for purposes of confrontation. On the other hand, R.C.M. 305 provides the prisoner with the opportunity to obtain counsel in all cases. This is not required for parole or probation revocation. *Gagnon v. Scarpelli,* 411 U.S. 778 (1973).

Although parole and probation revocations differ from pretrial confinement in that in the former there has already been an adjudication of guilt, the distinction cuts in the opposite direction insofar as (as was emphasized by the Supreme Court in *Morrissey v. Brewer, supra* at 482) the probationer or parolee typically faces a long period of confinement, unlike the pretrial confinee who, especially in the military, is not subjected to such a lengthy period. Moreover, in *Gerstein v. Pugh, supra,* the Supreme Court, noting the burden of adversary hearings at this pretrial stage (*id.* at 121 n. 23), distinguished *Morrissey* and *Gagnon* from pretrial probable cause hearings (*id.* at 121 n. 21) and did not require an adversary hearing at such pretrial proceedings. The District of Columbia Court of Appeals deciding that this holding in *Gerstein* applies to preventive detention hearings as well. *United States v. Edwards, supra.*

The provision that the Military Rules of Evidence do not apply at the initial review parallels federal civilian practice. *See* 18 U.S.C. § 3146(f). The burden of proof is on the government. A preponderance standard was selected because it strikes the best balance between the interests in the military setting of the prisoner and society and because it is easily understood. A higher standard is not constitutionally required. *Gerstein v. Pugh, supra* at 119-21. *See also Morrissey v. Brewer, supra* at 485-89. Federal civilian courts may deny bail in capital cases if "the court or judge has reason to believe that no one or more conditions of

release will reasonably assure that the person will not flee or pose a risk of danger to the community." 18 U.S.C. § 3148. In non-capital cases, the judge "in the exercise of his discretion" decides whether and how much bail will be set and hence, in effect, whether the prisoner shall be released. 18 U.S.C. § 3146(a).

Subsection (7) specifically authorizes the presentation of additional matters to the reviewing officer, and thus makes clear the continuing authority and responsibility of that officer over pretrial confinement. This continuing authority is necessary, especially in the unusual case in which referral of charges is delayed.

(j) *Review by military judge.* This subsection is new. MCM, 1969 (Rev.) did not provide for review of pretrial confinement by the military judge, and it was only recently that the power of a military judge to order release from confinement was recognized, at least implicitly. *See Porter v. Richardson, supra; United States v. Lamb,* 6 M.J. 542 (N.C.M.R. 1978), *pet. denied*, 6 M.J. 162 (1979); *United States v. Otero,* 5 M.J. 781 (A.C.M.R.), *pet. denied*, 6 M.J. 121 (1978). *Contra,* paragraph 21 *c* of MCM, 1969 (Rev.).

This subsection establishes that the military judge has the power after referral (*United States v. Newcomb,* 5 M.J. 4 (C.M.A. 1977)) to review pretrial confinement and to order release when appropriate. Two separate, but related, issues may be involved: (1) whether the prisoner should be released as of the time of the hearing; and (2) whether confinement already served was legal. The prisoner may raise either or both of these issues by motion for appropriate relief. All the procedures and protections normally attendant to an Article 39(a) session (*see* R.C.M. 803) apply. The rule does not specify when such a session would take place. As with other pretrial motions (*see* R.C.M. 905) and with scheduling proceedings generally (*see* R.C.M. 801), the determination when an Article 39(a) session will be conducted and when a motion will be litigated is a matter within the sound discretion of the military judge. Note also that the matter may be addressed in a conference under R.C.M. 802 and, if the parties agree, resolved without need for an Article 39(a) session. The standards for either decision posit that the reviewing officer's decision is entitled to substantial weight (*see United States v. Otero, supra*) and may not be overturned in the absence of an abuse of discretion, violation of subsections (i)(1)(B) and (C) of this rule, or information not presented to the reviewing officer. This procedure is analogous to the appeal provisions in 18 U.S.C. § 3147.

The rule is silent concerning the overlapping responsibilities of the military judge and the reviewing officer. Once charges are referred, the need for a reviewing officer diminishes, and it could be argued that the reviewing officer's role should terminate on referral. On the other hand, even after referral, the reviewing officer may be more accessible to the parties than the military judge, so that it was considered unwise to rule out further action by the reviewing officer.

The remedy for certain violations of the rule is prescribed in subsection (k) of this rule and is analyzed below. Note that the military judge must order the remedy when one or more of the identified violations occur.

(k) *Remedy.* The requirement for an administrative credit for violations in subsection (f), (h), (i), or (j) of this rule is based on *United States v. Larner,* 1 M.J. 371 (C.M.A. 1976). This credit is the sole remedy for violation of these provisions. *See United States v. Nelson,* 18 U.S.C.M.A.\177, 39 C.M.R. 177 (1969). Violations of other provisions would not render confinement illegal and hence would not trigger the sentence relief requirements. Such violations would be tested for specific prejudice, and, where such was found, would trigger a requirement to grant relief appropriate to cure the prejudice suffered. Note that if one of the required steps is omitted, but the next step occurs within the time period for the omitted step, and pretrial confinement is otherwise valid, no credit is required. For example, if the commander does not prepare a memorandum under subsection (h)(2)(C), but the review under subsection (i)(l) occurs within 72 hours of imposition of restraint, and the grounds for pretrial confinement are established, the accused is entitled to no credit. Similarly. if the military judge reviews pretrial confinement under subsection (j) within 7 days of the imposition of confinement and confinement is approved, the omission of the review under subsection (i)(l) would not entitle the accused to credit.

The one day credit is in addition to the day for day credit provided by DOD Instruction 1325.4 as interpreted by *United States v. Allen,* 17 M.J. 126 (C.M.A. 1984) and is intended as an additional credit to deter violations of the rule. This remedy does not replace sanctions against persons who intentionally violate these rules. *See* Articles 97, and 98. The credit for illegal pretrial confinement (in addition to any other administrative credit) is provided as a matter of policy, and does not reflect a determination that such cumulative credit is otherwise required.

The credit applies against confinement, if adjusted, and then against several other specified penalties. Thus an accused entitled to sentence relief whose adjusted sentence includes no confinement usually will receive some form of sentence relief. Note, however, that the remedy does not apply to other forms of punishment including punitive discharges or reduction in grade. This is because these penalties are so qualitatively different from confinement that the fact that an accused has served confinement which was technically illegal should not automatically affect these forms of punishment.

The rule does not prescribe the mechanics for implementing the credit since this will depend on the stage at which the violation of the rule is discovered. *Cf. United States v. Larner, supra.* Usually the illegality will be determined by the trial judge, who shall also announce the remedy. After the sentence is announced, the military judge should announce on the record how the credit will apply to it. Where after application of this credit no confinement would remain to be served the accused should not be confined after trial. It is the responsibility of the convening authority to apply credit when action is taken on the sentence. *See* Article 57.

(l) *Confinement after release.* This subsection is new and is intended to prevent a "revolving door" situation by giving finality to the decision to release. *Cf. United States v. Malia, supra.*

(m) *Exceptions.* This subsection is new. Its purpose is to eliminate several procedural requirements in situations where military exigencies make then practically impossible to comply with. Subsection (1) would apply not only to combat situations, but also to circumstances in which a unit is deployed to a remote area or on a sensitive mission, albeit one not necessarily involving combat.

Subsection (2) recognizes the special problem of vessels at sea, and permits suspension of certain procedural requirements in such cases.

Rule 306. Initial disposition

Introduction. Rule 306 describes who may dispose of offenses and the options available to such authorities. Although these matters are covered more thoroughly elsewhere (*see* R.C.M. 401-407, and R.C.M. 601) they are included here to facilitate a chronological approach to disposition of offenses.

(a) *Who may dispose of offenses.* This rule and the first paragraph of the discussion are based on Articles 15, 22-24, and 30(b), and paragraphs 30-33, 35, and 128 of MCM, 1969 (Rev.). The second sentence of the rule and the discussion are also based on paragraphs 5 *b*(4) and 5 *c* of MCM, 1969 (Rev.); *United States v. Charette*, 15 M.J. 197 (C.M.A. 1983); *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983). *See also* Article 37; *United States v. Hawthorne*, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956); *United States v. Rembert*, 47 C.M.R. 755 (A.C.M.R. 1973); *pet. denied*, 23 U.S.C.M.A. 598 (1974).

As noted in the second paragraph of the discussion a referral decision commits the disposition of an offense to the jurisdiction of a specific judicial forum, and thus bars other action on that offense until it is withdrawn from that court-martial by the convening authority or superior competent authority. *See United States v. Charette*, *United States v. Blaylock* both *supra. But see* Article 44; R.C.M. 97(b)(2)(C). Neither dismissal of charges nor nonjudicial punishment (for a serious offense) bars subsequent contrary action by the same or a different commander. Thus, a decision to dismiss charges does not bar a superior commander from acting on those charges if repreferred or from personally preferring charges relating to the same offenses, if no jeopardy attached to the earlier dismissal. *See Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951*, 47. Cf. *United States v. Thompson*, 251 U.S. 407 (1920); Fed.R.Crim. P. 48; *United States v. Clay*, 481 F.2d 133 (7th Cir.), *cert. denied*, 414 U.S. 1009 (1973); *Mann v. United States*, 304 F.2d 394 (D.C.Cir.), *cert. denied*, 371 U.S. 896 (1962). *See also* Article 44, and R.C.M. 905(g) and Analysis, and R.C.M. 907(b)(3) and Analysis. Similarly, imposition of nonjudicial punishment does not bar a superior commander from referring the same offenses, if they are serious, to a court-martial (Article 15(f); *see also United States v. Fretwell*, 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960)), or from setting aside punishment already imposed. Article 15(e). *See generally* Part V.

(b) *Policy.* This subsection is based on paragraph 30 *g* of MCM, 1969 (Rev.). Although it is guidance only, it is sufficiently important to warrant inclusion in the rules as a presidential statement.

The second paragraph of the discussion provides guidelines for the exercise of the discretion to dispose of offenses. Guideline (A) is based on paragraph 33 *h* of MCM, 1969 (Rev.). Guidelines (B) through (G) are based on *ABA Standards, Prosecution Function* § 3-3.9(b) (1979). The other guidelines in § 3-3.9 are not needed here: § 3-3.9(a) (probable cause) is followed in the rule: § 3-3.9(b)(i) is inconsistent with the convening authority's judicial function; §§ 3-3.9(c) and (d) are unnecessary in military practice; and § 3-3.9(e) is implicit in § 3-3.9(a) and in the rule requiring probable cause. Guidelines (H), (I), and (J) were added to acknowledge other practical considerations.

(c) *How offenses may be disposed of.* This subsection is based generally on Articles 15, 22-24, and 30, and paragraphs 32-35, and 128 of MCM, 1969 (Rev.). The discussion provides additional guidance on the disposition options.

Rule 307. Preferral of Charges

(a) *Who may prefer charges.* This subsection is based on Article 30 and paragraph 29 *b* of MCM, 1969 (Rev.).

The first sentence of the first paragraph of the discussion is a new version of the former rule at paragraphs 5 *a*(4) and 29 *c* of MCM, 1969 (Rev.), which provided that "A person subject to the code cannot be ordered to prefer charges to which he is unable truthfully to make the required oath on his own responsibility." This rule is subsumed in the oath requirement of Article 30 and subsection (b) of the rule. The discussion clarifies the circumstances under which an order to prefer charges may be given, but warns against such orders in some circumstances in which they may tend to encourage litigation or to invalidate an otherwise valid court-martial. The practice of ordering persons to prefer charges has a historical basis. W. Winthrop, *Military Law and Precedents* 154 (2d ed. 1920 reprint); *but cf. Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Service*, 81st Cong., 1st Sess. 850 (1949) (reflecting the fact that under the code a person who orders another to prefer charges is an accuser).

The second paragraph of the discussion is a simplified version of paragraph 25 of MCM, 1969 (Rev.). The discussion observes that charges may be preferred against a person subject to trial by court-martial at any time. *But see* Article 43. Thus, when charges may be preferred depends only on continued or renewed personal jurisdiction. The policy forbidding accumulation of charges in paragraph 25 of MCM, 1969 (Rev.) is now general guidance in the discussion. Furthermore, the "reasonable delay" aspects of the discussion are no longer contingent upon the absence of pretrial arrest and confinement, because delay for a reasonable period and good cause is always permitted. *See also* R.C.M. 707.

(b) *How charges are preferred; oath.* This subsection is taken from Article 30(a). This subsection is similar in purpose to Fed.R.Crim. P. 7(c)(1)'s requirement that the indictment or information "shall be signed by the attorney for the government." The same concept of requiring accountability for bringing allegations to trial appears again at R.C.M. 601 (referral).

The first paragraph of the discussion is based on Article 30 and paragraph 114 *i* of MCM, 1969 (Rev.).

The last paragraph of the discussion is consistent with Fed.R.Crim. P. 4(b).

(c) *How to allege offenses.* Subsection (1) is based on paragraph 24a of MCM, 1969 (Rev.). The nomenclature of charge and specification is imbedded in the code. *Compare* Articles 30, 34(b), 43(b), 45(b), 54(a), 61, and 62 *with* Fed.R.Crim. P. 7(c)(1). Taking both the charge and specifications together, the practice is entirely consistent with Fed.R.Crim. P.7. There is no need in military practice for the differentiating nomenclature for indictments and informations (Fed.R.Crim P.7(a)); in military practice the same charges progress through the pretrial system without any change in nomenclature, regardless of the level of court-martial by which they are ultimately disposed. *See* U.S. Const, amend. V. That further permits military practice to disregard waiver of indictment (Fed.R.Crim. P.7(b)) insofar as the pleadings are concerned. Finally, military practice does not involve criminal

forfeitures in the same sense as federal civilian practice. *Cf.* Fed.R.Crim. P.7(c)(2).

Subsection (2) is based on paragraph 24 *a* and appendix 6 *a* of MCM, 1969 (Rev.). The definition is consistent with that part of Fed.R.Crim. P.7(c)(1) which requires that "The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged therein to have violated." The first paragraph of the accompanying discussion is based on paragraph 27 and appendix 6 *a* of MCM, 1969 (Rev.). The sources of the lettered subsections of the discussion are:

(A) *Numbering charges* —paragraph 24, and paragraph 3 of appendix 6 *a* of MCM, 1969 (Rev.);

(B) *Additional charges* —id.

(C) *Preemption* —Article 134;

(D) *Charges under the law of war* —paragraph 12 of appendix 6 *a* of MCM, 1969 (Rev.).

Subsection (3) restates Fed.R.Crim. P.7(c)(1) in military terms. That definition is consistent with paragraph 24 *a* and Chapter VI of MCM, 1969 (Rev.). The test of sufficiency of a specification follows *United States v. Sell,* 3 U.S.C.M.A. 202, 11 C.M.R. 202 (1953); paragraph 87 *a*(2) of MCM, 1969 (Rev.). Paragraph 29 *d* of MCM, 1969 (Rev.) is deleted as unnecessary. A specific format for specifications is not prescribed. *See also* Introductory Discussion, Part IV.

The sources of the lettered subsection of the accompanying discussion are:

(A) *Sample specifications* —paragraph 26 *a* of MCM, 1969 (Rev.);

(B) *Numbering specifications* —paragraph 3 of appendix 6 *a* of MCM, 1969 (Rev.);

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

(i) *Name* —paragraphs 4 and 5 of appendix 6a of MCM, 1969 (Rev.);

(ii) *Military association* —paragraph 4 of appendix 6 *a* of MCM, 1969 (Rev.);

(iii) *Social Security or service number* —paragraphs 4 and 6 of appendix 6 *a* of MCM, 1969 (Rev.) (note that the social security or service number ordinarily is entered in the data at the top of the charge sheet; *see* Appendix 4); and

(iv) *Basics of personal jurisdiction — United States v. Alef,* 3 M.J. 414 (C.M.A. 1977). *See also* Analysis, subsection (e)(3) Discussion (F) (Subject-matter jurisdiction) of this rule.

(D) *Date and time of offense* —paragraph 7 of appendix 6 *a* of MCM, 1969 (Rev.). As to "on or about," *see United States v. Heard,* 443 F.2d 856, 859 (6th Cir. 1971);

(E) *Place of offense* —paragraph 7 of appendix 6 *a* of MCM, 1969 (Rev.);

(F) *Subject-matter jurisdiction — United States v. Alef, supra.* As to subsection (iii), *United States v. Trottier,* 9 M.J. 337 (C.M.A. 1980) (jurisdiction over drug offenses). As to subsection (iv), *United States v. Newvine,* 23 U.S.C.M.A. 208, 48 C.M.R. 960 (1974); *United States v. Keaton,* 19 U.S.C.M.R. 64, 41 C.M.R. 64 (1969).

The guidance here is not prescriptive, just as the inclusion of subject-matter jurisdiction in the sample specifications (Part IV) is always parenthetical, a reminder and not as a requirement. The Working Group does not consider any particular format for such pleadings required by *Alef.*

Questions of jurisdiction are interlocutory questions to be decided by the military judge applying a preponderance standard. *See* R.C.M. 905(c); 907(b)(1)(A), and *United States v. Ruiz,* 4 M.J. 85 (C.M.A.1977); *United States v. Kuriger,* 4 M.J. 84 (C.M.A. 1977); *United States v. Cherry,* 4 M.J. 83 (C.M.A. 1977); *United States v. McCarthy,* 2 M.J. 26, 28n.1 (C.M.A. 1976); *United States v. Jessie,* 5 M.J. 573 (A.C.M.R.), *pet. denied,* 5 M.J. 300 (1978). *See also United States v. Laws,* 11 M.J. 475 (C.M.A. 1981). Ordinarily this finding will not be disturbed by findings by exceptions and substitutions on the general issue of guilt because of the higher standard of proof involved in such determinations. *See generally James, Pleadings and Practice under United States v. Alef,* 20 A.F.L. Rev. 22 (1978).

1995 Amendment: The discussion was amended in conformance with a concurrent change to R.C.M. 203, in light of *Solorio v. United States,* 483 U.S. 435 (1987). *O'Callahan v. Parker,* 395 U.S. 258 (1969), held that an offense under the code could not be tried by court-martial unless the offense was "service connected." *Solorio* overruled *O'Callahan.*

(G) *Description of offense.* —The sources of the section are:

(i) *Elements* —paragraph 28 *a*(3) of MCM, 1969 (Rev.);

(ii) *Words indicating criminality — id.*;

(iii) *Specificity* —paragraphs 28 *a*, 69 *b*, and 87 *a*(2) of MCM, 1969 (Rev.);

(iv) *Duplicity* —paragraph 28 *b* of MCM, 1969 (Rev.); accord, Fed.R.Crim. P.7,8.

(H) *Other considerations in drafting specifications.* —The sources of the sections are:

(i) *Principals* —paragraph 9 of appendix 6 *a* of MCM, 1969(Rev.);

(ii) *Victim* —paragraph 10 of appendix 6 *a* of MCM, 1969 (Rev.);

(iii) *Property* —paragraph 13 of appendix 6 *a* of MCM, 1969 (Rev.);

(iv) *Value* —paragraph 11 of appendix 6 *a* of MCM, 1969 (Rev.);

(v) *Documents* —paragraph 28 *c*, and paragraph 14 of appendix 6 *a* of MCM, 1969 (Rev.);

(vi) *Orders* —(a), (b)- *id.*; (c) *Negating exceptions- United States v. Cuffee,* 10 M.J. 381 (C.M.A. 1981); *United States v. Gohagen,* 2 U.S.C.M.A. 175, 7 C.M.R. 51 (1953);

(vii) *Oral Statements* —paragraph 28 *c* of MCM, 1969 (Rev.);

(viii) *Joint offenses* —paragraph 26 *d* and paragraph 8 of appendix 6 *a* of MCM, 1969 (Rev.);

(ix) *Matters in aggravation* —paragraph 127 *c* (Table of Maximum Punishments) of MCM, 1969 (Rev.); *United States v. Venerable,* 19 U.S.C.M.A. 174, 41 C.M.R. 174 (1970).

Subsection (4) is less restrictive than the former and traditional military practice reflected at paragraphs 25, 26 *b* and *c* of MCM, 1969 (Rev.) which favored trial of all known offenses at a single trial, but complicated that policy with policies against joining major and minor offenses and accumulating charges. The confusion is eliminated by leaving to the discretion of the convening authority which charges and specifications will be tried. *See*

R.C.M. 601(d) and accompanying discussion. The rule in this subsection does not follow Fed.R.Crim. P.8(a), because that rule is entirely too unwieldy for a military criminal system, particularly in combat or deployment.

Subsection (5) follows Fed.R.Crim. P.8(b). The civilian rule is consistent with the former approach of paragraph 26 *d* of MCM, 1969 (Rev.). The present rule goes even further by making it possible to allege related offenses against co-actors on a single charge sheet, but the rule does not require that approach. The rule is also consistent with the provision for common trials of paragraph 33 *1* of MCM, 1969 (Rev.).

(d) *Harmless error in citation.* The subsection restates in military nomenclature Fed.R.Crim. P.7(c)(3). The subsection is consistent with paragraphs 27 and 28 *c*, and paragraph 12 of appendix 6 *a* of MCM, 1969 (Rev.). It is not intended to provide a comprehensive rule on harmless error in drafting specifications.

Rule 308. Notification to accused of charges

(a) *Immediate commander*. This subsection paraphrases paragraphs 32 *f*(1) and 33 *c* of MCM, 1969 (Rev.). *See* Article 30. This subsection deletes the requirement for a report of the circumstances that make compliance impossible. The use of a certificate of notification is encouraged in the discussion. The identification of known accusers, including persons who ordered charges to be preferred, is new and protects the accused against unauthorized acts by such persons. *See* Article 1(9).

The certificate requirement is abandoned only as a requirement, and use of such certificates remains advisable, since they give evidence of compliance with Article 10. However, to require a certificate might risk an excessive remedy for a mere administrative failure to complete the certificate properly.

There is no precisely analogous rule in the federal civilian rules, though the federal civilian rules do reach the same end—to notify an accused of the pendency of the allegations. Fed.R.Crim. P.4 (arrest or summons upon complaint), 5 (initial appearance), 5.1 (preliminary examination), 6 (grand jury), 7 (indictment, information), and 9 (warrant or summons upon indictment or information) all provide a civilian defendant with notice of the impending prosecution.

The purpose of the subsection is to permit the accused to begin preparing a defense. *United States v. Stebbins*, 33 C.M.R. 677 (C.G.B.R. 1963). The subsection originates in Articles 10 and 30 and is one of the fundamental rights of an accused. *United States v. Clay*, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951). It gains additional importance in this respect since the right of both the United States and the accused to take depositions arises upon preferral. Article 49(a).

(b) *Commanders at higher echelons.* This subsection reflects the same continuing duty to give notice of the preferred charges that appeared at paragraph 33 *c* of MCM, 1969 (Rev.).

(c) *Remedy.* This subsection is new and is based on the approach taken in *United States v. Stebbins*, *supra*, and consistent with paragraph 58 (continuances and postponements) of MCM, 1969 (Rev.).

CHAPTER IV. FORWARDING AND DISPOSITION OF CHARGES

Rule 401. Forwarding and disposition of charges in general

(a) *Who may dispose of charges.* This subsection is based on paragraphs 5, 32, 33, 35, and 128 *a* of MCM, 1969 (Rev.). *See* Articles 15, 22-24. The second sentence is based on *United States v. Hawthorne*, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956); *United States v. Rembert*, 47 C.M.R. 755 (A.C.M.R. 1973), *pet. denied*, 23 U.S.C.M.A. 598 (1974). *See also United States v. Hardy*, 4 M.J. 20 (C.M.A. 1977). A superior authority who withholds from a subordinate the authority to dispose of offenses (*see* R.C.M. 306) or charges may later modify or rescind such withholding. Even if such modification or rescission is denominated a "delegation," it would be a rescission of the earlier withholding.

(b) *Prompt determination.* This subsection is based on Article 30(b) and the first sentence of paragraph 30 *i* of MCM, 1969 (Rev.). The discussion is also based on paragraphs 30 *f*, 32 *b*, *c*, *f*(1), 33 *a*, *d*, *m*, and 35 *a* of MCM, 1969 (Rev.).

(c) *How charges may be disposed of.* This subsection is based on paragraphs 32 and 33 of MCM, 1969 (Rev.). Most matters in those paragraphs, including the mechanics of forwarding charges, have been placed in the discussion as the practices of the services vary because of differing command structures. Specific requirements and additional details may be provided by service regulations.

(d) *National security matters.* This subsection is based on the first sentence in the second paragraph of paragraph 33 *f* of MCM, 1969 (Rev.). *See also* R.C.M. 407(b) and Article 43(e).

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

This rule is based on paragraph 32 of MCM, 1969 (Rev.). Paragraph 32 was written in terms of guidance. The structure of the paragraph and the descriptions of the alternatives available to an immediate commander indicated the powers of such commanders. R.C.M. 402 expresses these powers. The mechanics of forwarding charges, dismissal of charges, the requirement for prompt disposition, and guidance concerning these matters has been placed in R.C.M. 401 and its discussion because these matters apply to commanders at all levels. Other matters contained in paragraph 32 have been placed in other rules. *See* R.C.M. 303 (preliminary inquiry); 308 (notification of accused); 603 (amending charges). *See also* R.C.M. 306 which includes guidance on disposition determinations.

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

This rule and the discussion are based on paragraph 33 of MCM, 1969 (Rev.). *See* Article 24. Paragraph 33 was written in terms of guidance. The structure of the paragraph and the descriptions of the alternatives available to the commander exercising summary court-martial jurisdiction indicated the powers of such commanders. R.C.M. 403 expresses these powers in clearer terms. Several matters covered in paragraph 33 are now covered in other rules. *See* R.C.M. 303 (preliminary inquiry); 308 (notification of

accused); 401 (forwarding charges; discussion of suspected insanity, joint or common trials); 601 (instructions in referral order; common trials); 603 (amending charges). *See also* R.C.M. 306.

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

This rule is new. Paragraph 33 of MCM, 1969 (Rev.) treated both special and summary court-martial convening authorities. *See* paragraph 33 *j*(1) of MCM, 1969 (Rev.); Analysis, R.C.M. 403.

Rule 405. Pretrial investigation

(a) *In general.* This subsection is based on Article 32(a) and (d) and paragraph 34 *a* of MCM, 1969 (Rev.). Except insofar as the code requires otherwise, the rule is generally consistent with Fed.R.Crim. P.6 and 7. *See generally Johnson v. Sayre*, 158 U.S. 109 (1895); *Green v. Convening Authority*, 19 U.S.C.M.A. 576, 42 C.M.R. 178 (1970). The last sentence clarifies that the requirements for an Article 32 investigation apply only if charges are referred to a general court-martial. This sentence is not intended, however, to prevent the accused from challenging the fruits of a violation during a pretrial investigation of other rights the accused enjoys independent of the Article 32 investigation (e.g., moving to suppress a statement by the accused to the investigating officer because it was taken in violation of Article 31).

The first and third paragraphs of the discussion are based on paragraph 34 *a* of MCM, 1969 (Rev.). The second sentence has been added based on *Hutson v. United States*, 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970); *United States v. Samuels*, 10 U.S.C.M.A. 206, 27 C.M.R. 280 (1959); *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 997 (1949). *See also* Mil. R. Evid. 804(b) and Analysis. The second paragraph of the discussion is based on the third sentence of paragraph 33 *e*(2) of MCM, 1969(Rev.). The last paragraph in the discussion notes the possibility of waiver of the investigation. *See* subsection (k) of this rule and analysis. The Government is not required to accept waiver by the accused, and may conduct the investigation notwithstanding the accused's decision to waive it, since the investigation also serves the Government's interest.

(b) *Earlier investigation.* This subsection is based on Article 32(c) and paragraph 33 *e*(1) of MCM, 1969 (Rev.).

(c) *Who may direct investigation.* This subsection is new. There was previously no prescription of who had authority to direct an investigation under Article 32, although paragraph 33 *e* of MCM, 1969 (Rev.) suggested that the summary or special court-martial convening authority ordinarily would do so. The authority of convening authorities to direct an investigation is analogous to Fed.R.Crim. P.6(a) and the grand jury system generally.

(d) *Personnel.* This subsection follows Article 32 and paragraph 34 of MCM, 1969 (Rev.). It is consistent with Fed.R.Crim. P.6 in that witnesses, the investigating officer, and a representative of the prosecution may be present, but military practice extends further rights to presence and participation to the accused and defense counsel which are inconsistent with the grand jury system. *Compare* Article 32(B) *with* Fed.R.Crim. P.6(d) and (e)(2). Since the investigation under Article 32 is conducted by a single investigating officer, many of the provisions of the grand jury system are inconsistent, *e.g.*, Fed.R.Crim. P.6(b), (f), and (g).

Subsection (1) is based on Article 32 and paragraph 34a of MCM, 1969 (Rev.). *See also* Articles 25(d)(2), 26(d), 27(a). The discussion is also based on *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977); *United States v. Grimm*, 6 M.J. 890 (A.C.M.R.), *pet. denied*, 7 M.J. 135 (1979). Subsection (2) is based on Articles 32(b) and 38(b) and paragraph 34 *c* of MCM, 1969 (Rev.). *See also* Article 27(a). Subsections (3)(B) and (C) are new to the Manual but conform to current practice. Fed.R.Crim. P.6(c) also provides for using reporters.

(e) *Scope of investigation.* This subsection and the discussion are based on Article 32(a) and paragraph 34 *a* of MCM, 1969 (Rev.).

1998 Amendment: This change is based on the amendments to Article 32 enacted by Congress in section 1131, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 464 (1996). It authorizes the Article 32 investigating officer to investigate uncharged offenses when, during the course of the Article 32 investigation, the evidence indicates that the accused may have committed such offenses. Permitting the investigating officer to investigate uncharged offenses and recommend an appropriate disposition benefits both the government and the accused. It promotes judicial economy while still affording the accused the same rights the accused would have in the investigation of preferred charges.

(f) *Rights of the accused.* This subsection is based on Article 32 and paragraph 34 *b*, *c*, and *d* of MCM, 1969 (Rev.). As to subsection (f)(3), *see also* R.C.M. 804(b)(2) and Analysis. The accused may waive the right to be present. *Cf.* R.C.M. 804(b) and Analysis. As to subsection (6), *see* Fed.R.Crim. P.5.

(g) *Production of witnesses and evidence; alternatives.* Subsection (1) is based on the third sentence of Article 32(b) and the first sentence in the first paragraph and the first sentence in the third paragraph of paragraph 34 *d* of MCM, 1969 (Rev.) as amplified in *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976). *See also* United States v. Roberts, 10 M.J. 308 (C.M.A. 1981); *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976); *United States v. Webster*, 1 M.J. 496 (A.F.C.M.R. 1975); *United States v. Houghton*, 31 C.M.R. 579 (A.F.B.R. 1961), *aff'd.*, 13 U.S.C.M.A. 3, 32 C.M.R. 3 (1962). Standards for production of evidence are also provided. These parallel the standards for the production of witnesses. Because of the absence of subpoena power at the Article 32 investigation, only evidence under the control of the Government is subject to production under this rule. The discussion amplifies the considerations in determining reasonable availability, and is based on the same sources.

1991 Amendment: Subsection (g)(1)(A) was amended by adding a requirement that a witness be located within 100 miles of the situs of the investigation to be "reasonably available." Given the alternatives to testimony available under subsection (g)(4), a bright-line rule of 100 statute miles simplifies the "reasonably available" determination and improves the efficiency of the investigation without diminishing the quality or fairness of the investigation. If a witness is located within 100 statute miles of the situs of the investigation, the investigating officer must consider the other factors in subsection (g)(1)(A) in determining availability. The remaining provisions of section (g) remain applicable. The production of witnesses located more than 100 statute miles from the situs of the investigation is within the discretion of

the witness' commander (for military witnesses) or the commander ordering the investigation (for civilian witnesses).

1994 Amendment: Subparagraph (B)was amended to require the investigating officer to notify the appropriate authority of any requests by the accused for privileged information protected under Mil. R. Evid. 505 or 506. This puts the convening authority and other appropriate authorities on notice that a protective order, under subsection (g)(6) of this rule, may be necessary for the protection of any such privileged information that the government agrees to release to the accused. The Discussion was amended to reflect the purpose of the notice requirement.

Subsection (2) is new. The second sentence of the first paragraph of paragraph 34 *d* of MCM, 1969 (Rev.) recognized that the final decision on availability of a military witness is within the authority of that witness' commander. That paragraph did not elaborate on the reasonable availability determination. Subsection (2)(A) recognizes that a command determination of availability (which is essentially whether, and for how long, the witness can be spared without unduly impending the mission) is ordinarily only one of several factors to be weighed in determining reasonable availability. The investigating officer is in the best position to assess the potential significance of the witness and to weigh that against such factors as cost, difficulty, and delay. In many cases it will be clear that the witness need not be produced without formal application to the witness' commander. (The discussion notes, however, that advance communication with the commander will often be appropriate, as, for example, when the investigating officer needs to know how long a witness will be on leave.) Ultimately, the witness' importance to the witness' unit may outweigh all other factors; consequently, the commander of the witness may make a determination of nonavailability which is reviewable only at trial. Therefore, subsection (2)(A) allocates the responsibilities for determining reasonable availability in accordance with the practical considerations involved. *See generally United States v. Chestnut* and *United States v. Ledbetter*, both *supra; United States v. Cox*, 48 C.M.R. 723 (A.F.C.M.R.), *pet. denied*, 23 U.S.C.M.A. 616 (1974).

Subsection (2)(B) and the discussion are based on *United States v. Roberts*, *supra; United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978); *United States v. Chestnut*, *supra* and the first paragraph of paragraph 34 *d* of MCM, 1969 (Rev.).

Subsection (2)(C) applies a similar procedure for the production of evidence under the control of the Government. If the investigating officer questions the decision of the commander in subsection (2)(B) or the custodian in subsection (2)(C), the investigating officer may bring the matter to the attention of the commander who directed the investigation. When appropriate the matter can be pursued in command channels. It remains subject to judicial review on motion at trial.

Subsection (3) is based on paragraph 34 *d* of MCM, 1969 (Rev.).

Subsection (4) is based on the third and fourth paragraphs of paragraph 34 *d* of MCM, 1969 (Rev.). *See also United States v. Samuels, supra.*

1991 Amendment: Subsection (4)(B) was amended by adding a new clause (v) which authorizes the investigating officer to consider, during time of war, unsworn statements of unavailable witnesses over objection of the accused. The burdens of wartime exigencies outweigh the benefits to be gained from requiring sworn statements when unsworn statements are available. Article 32, U.C.M.J., does not require the investigating officer to consider only sworn evidence or evidence admissible at courts-martial. The investigating officer should consider the lack of an oath in determining the credibility and weight to give an unsworn statement.

Subsection (5) is new. It parallels subsection (4).

1994 Amendment. Subsection (6) was added to allow the convening authority, or other person designated by service Secretary regulations, to attach conditions to the release of privileged information protected under Mil. R. Evid. 505 and 506 through the issuance of a protective order similar in nature to that which the military judge may issue under those rules. Though the prereferral authority to attach conditions already exists in Mil. R. Evid. 505(d)(4) and 506(d)(4), these rules did not specify who may take such action on behalf of the government or the manner in which the conditions may be imposed.

(h) *Procedure.* The second and fourth sentences in subsection (1) are based on Article 32(b). The first sentence is based on the first two sentences in the second paragraph of paragraph 34 *d* of MCM, 1969 (Rev.) and on *United States v. Samuels*, *supra.* The third sentence is based on the first sentence in the last paragraph of paragraph 34 *d* of MCM, 1969 (Rev.) except that now the investigating officer must allow the defense to examine all matters considered by the investigation officer, without exception. *See United States v. Craig*, 22 C.M.R. 466 (A.B.R. 1956), *aff'd*, 8 U.S.C.M.A. 218, 24 C.M.R. 28 (1957).

The first paragraph in the discussion is based on paragraph 114*j* of MCM, 1969 (Rev.), except that the former oath has been divided into two oaths, one for the witness testifying at the investigation, the second to be given when the witness subscribes to a written summary after the hearing. The second oath is described in the second paragraph in the discussion. Note that instead of a second oath, the witness could be requested to sign a statement with the express proviso that the signature is made under penalty of perjury. *See* paragraph 57 of Part IV and Analysis. The second and third paragraph in the discussion are based on the second paragraph of paragraph 34 *d* of MCM, 1969 (Rev.). The admonition concerning the preservation of substantially verbatim notes and tapes of testimony at the end of the second paragraph has been added to avoid potential Jencks Act problems, 18 U.S.C. § 3500. *See* R.C.M. 914 Analysis.

The fourth paragraph in the discussion of subsection (1) is based on *United States v. Pruitt*, 48 C.M.R. 495 (A.F.C.M.R. 1974). *Cf. United States v. Washington*, 431 U.S. 181 (1977). Subsection (2) is new and is intended to promote the early identification of possible defects in the investigation so that they can be corrected promptly. *See also* subsection (k) of this rule. Subsection (2) clarifies the responsibility of the investigating officer as a judicial officer. *See generally United States v. Collins*, 6 M.J. 256 (C.M.A. 1979); *United States v. Payne*, *supra.* Requiring objections to be made to the investigating officer ensures that they will be placed in proper channels, so that they may be acted upon promptly. Many will concern matters which the investigating officer can rectify. *See generally United States v. Roberts*, and *United States v. Chestnut*, both *supra.* Other matters will fall within the province of the commander who directed the investigation, in whom most pretrial judicial authority reposes at this stage. *See generally United States v. Nix*, 15 U.S.C.M.A. 578, 36 C.M.R. 76 (1965). Nothing in R.C.M. 405 is intended to restrict the authority

of the commander who directed the investigation to resolve issues involved in it, as long as that commander does not encroach upon the investigating officer's discretion and ability to personally make conclusions and recommendations.

Subsection (3) is new and is based on *MacDonald v. Hodson*, 19 U.S.C.M.A. 582, 42 C.M.R. 184 (1970). *See also* R.C.M. 806 for examples of some reasons why a pretrial investigation hearing might be closed. Fed.R.Crim. P.6 is generally inapplicable due to its different nature and purposes; it requires closed proceedings. Subsection (3) is not intended to express any preference for closed or open hearings.

(i) *Military Rules of Evidence.* This subsection is solely a cross-reference to the Military Rules of Evidence. Mil. R. Evid. 412, which concerns testimony of victims of sexual offenses at trial, does not apply at Article 32 hearings. However, there may be circumstances in which questioning should be limited by Mil. R. Evid. 303, which prohibits requiring degrading testimony in pretrial investigations and elsewhere. The privacy interests of the victim may also be protected by closure of the Article 32 hearings during appropriate periods. *See* subsection (h)(3) of this rule.

The first paragraph of the discussion is consistent with present practice. It is added to give additional guidance not included in paragraph 34 of MCM, 1969 (Rev.). It is also consistent with General civilian practice. *See* Office of the United States Attorney for the Southern District of Ohio, *Proving Federal Crimes* 3-3 (1980).

1993 Amendment: The amendment to R.C.M. 405(i) makes the provisions of Mil. R. Evid. 412 applicable at pretrial investigations.

(j) *Report of investigation.* This subsection is based on paragraphs 34 *d* and *e* of MCM, 1969 (Rev.). The provision for informal reports in paragraph 34 *f* of MCM, 1969 (Rev.) has been deleted. Because R.C.M. 405 applies only if charges are ultimately referred to a general court-martial, there is no need to describe informal reports. It if becomes apparent before completion of the investigation that charges will not be referred to a general court-martial, no report need be prepared unless the commander who directed the investigation requires it. In other cases a formal report will be necessary.

Subsection (1) is based on Article 32(a) and (b) and paragraph 34 *e* of MCM, 1969 (Rev.).

Subsections (2)(A) through (E) are based on Article 32(b) and paragraph 34 *e* of MCM, 1969 (Rev.). Subsection (2)(F) is new but is consistent with current practice and with the need to account for pretrial delays in relation to speedy trial issues. Subsections (2)(G) and (H) are based on Article 32(a) and paragraph 34 *a* of MCM, 1969 (Rev.). The probable cause standard is based on *United States v. Engle*, 1 M.J. 387, 389, n. 4 (C.M.A. 1976); *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Sess. 997 (1949). Subsection (2)(I) is based on Article 32(a) and paragraph 34 *e*(6) of MCM, 1969 (Rev.).

Subsection (3) is based on the first sentence of paragraph 34 *e* of MCM, 1969 (Rev.) which implemented the requirement of the last sentence of Article 32(b). Subsection (3) leaves the mechanics of reproduction and distribution of the report to the Secretary concerned, or, in the absence of Secretarial regulations, to the commander concerned. Subsection (4) is new and is intended to encourage the early identification of possible defects in the report so that they can be corrected promptly when necessary. *See also* subsection (k) and Analysis.

(k) *Waiver.* The first sentence is based on Article 34(a), as amended. Military Justice Act of 1983, Pub.L.No. 98-209, § 4(a)(2), 97 Stat. 1393 (1983), which expressly permits waiver of the Article 32 investigation. This is consistent with previous practice. *See United States v. Schaffer*, 12 M.J. 425 (C.M.A. 1982). The remainder of this subsection is also new to the Manual for Courts-Martial. Along with subsections (h)(2) and (j)(4) of this rule, it is intended to promote efficiency in the pretrial process by placing the burden on the defense to raise objections when they can most easily be remedied, instead of waiting until trial. Recent decisions are consistent with this approach. *See United States v. Clark*, 11 M.J. 179 (C.M.A. 1981); *United States v. Cumberledge*, 6 M.J. 203 (C.M.A. 1979); *United States v. Cruz*, 5 M.J. 286 (C.M.A. 1978); *United States v. Chuculate*, *supra*. *See also* Article 34(d). Because the accused always has the right to be represented in the investigation by qualified counsel, this burden is appropriate. The amendment of Article 32(b) (Military Justice Amendments of 1981, Pub.L. No. 97-81, § 4, 95 Stat. 1085, 1088) guarantees that qualified counsel will be detailed to represent the accused for the investigation.

The defense may renew before the military judge any objection for which it has not received satisfactory relief. *See* R.C.M. 905(b)(2); R.C.M. 906(b)(3).

The last sentence in the discussion is based on *United States v. Cumberledge* and *United States v. Chuculate*, both *supra.*

Rule 406. Pretrial advice

(a) *In general.* This subsection is based on Article 34(a) as amended, Military Justice Act of 1983, Pub.L.No. 98–209, § 4, 97 Stat. 1393 (1983); and on paragraph 35 *b* of MCM, 1969 (Rev.).

(b) *Contents.* This subsection is based on Article 34(a). It is consistent with paragraph 35 *c* of MCM, 1969 (Rev.) (except insofar as Article 34 is modified). Matters which paragraph 35 *c* said "should" be included are not required, but are listed in the discussion. The rule states the minimum necessary to comply with Article 34(a). *Cf. United States v. Greenwalt*, 6 U.S.C.M.A. 569, 20 C.M.R. 285 (1955).

The first paragraph in the discussion is based on paragraph 35 *c* of MCM, 1969 (Rev.) and *United States v. Hardin*, 7 M.J. 399 (C.M.A. 1979); *United States v. Greenwalt, supra; United States v. Schuller*, 5 U.S.C.M.A. 101, 17 C.M.R. 101 (1954); *United States v. Pahl*, 50 C.M.R. 885 (C.G.C.M.R. 1975).

The second paragraph of the discussion is based on S.Rep. No. 53, 98th Cong., 1st Sess. 17 (1983), and on the second sentence in paragraph 35 *c* of MCM, 1969 (Rev.).

The last paragraph is based on *United States v. Greenwalt, supra. See also United States v. Rivera*, 20 U.S.C.M.A. 6, 42 C.M.R. 198 (1970); *United States v. Henry*, 50 C.M.R. 685 (A.F.C.M.R.), *pet. denied*, 23 U.S.C.M.A. 666, 50 C.M.R. 903 (1975); *United States v. Barton*, 41 C.M.R. 464 (A.C.M.R. 1969).

1991 Amendment: The Discussion to R.C.M. 406(b) was amended to state explicitly the applicable standard of proof. *See United States v. Engle*, 1 M.J. 387, 389 n.4 (C.M.A. 1976). The sentence concerning pretrial advice defects is based upon *United States v. Murray*, 25 M.J. 445 (C.M.A. 1988), in which the court reviewed the legislative history to the 1983 amendment to Article

34, U.C.M.J., and held that lack of a pretrial advice in violation of the article is neither jurisdictional nor *per se* prejudicial.

(C) *Distribution.* This subsection is based on Article 34(b), as amended, Military Justice Act of 1983, Pub.L. No. 98–209, § 4(b), 97 Stat. 1393 (1983). Paragraph 35 *c* of MCM, 1969 (Rev.) also required that the staff judge advocate's recommendation be forwarded with the charges if referred to trial. This subsection makes clear that the entire advice is to be forwarded. This ensures that the advice can be subjected to judicial review when necessary. *See* R.C.M. 906(b)(3). *See also United States v. Collins*, 6 M.J. 256 (C.M.A. 1979); *United States v. Engle, supra.*

Rule 407. Action by commander exercising general court-martial jurisdiction

(a) *Disposition.* This subsection is based on Article 34(a) and paragraph 35 *a* of MCM, 1969 (Rev.). *See* Article 22.

(b) *National security matters.* This subsection is based on the second and third sentences of the second paragraph of paragraph 33 *f* of MCM, 1969 (Rev.) and Article 43(e). It has been broadened to expressly recognize the authority of service Secretaries to promulgate regulations governing disposition of sensitive cases. Note that the rule applies regardless of whether hostilities exist, although as the discussion notes the Article 43(e) procedure for suspending the statute of limitations could only be used in time of war.

CHAPTER V. COURT-MARTIAL COMPOSITION AND PERSONNEL; CONVENING COURT-MARTIAL

Rule 501. Composition and personnel of courts-martial

(a) *Composition of courts-martial.* This subsection is based on Article 16. Except for the change in the requirement as to the form of the request for trial by military judge alone, it is consistent with paragraph 4 *a* of MCM, 1969 (Rev.).

(b) *Counsel in general and special courts-martial.* This subsection is based on Article 27(a). Except for the change concerning who details counsel (*see* R.C.M. 503(c)), it is consistent with paragraph 6 *a* of MCM, 1969 (Rev.). This subsection includes reference to detailing associate defense counsel. This is based on Article 27(a), as amended Pub.L. No. 98–209, § 3(c), (f), 97 Stat. 1393 (1983).

(c) *Other personnel.* This subsection is based on paragraph 7 of MCM, 1969 (Rev.).

Rule 502. Qualifications and duties of personnel of courts-martial

(a) *Members.* Subsection (1) is based on Article 25(a), (b) and (c) and on the first paragraph of paragraph 4 *b* and paragraph 4 *d* of MCM, 1969 (Rev.). Factors which disqualify a person from serving as a member are listed in R.C.M. 912(f)(1).

The discussion is based on the second paragraph of paragraph 4 *b* of MCM, 1969 (Rev.).

The references to use of members of the National Oceanic and Atmospheric Administration and of the Public Health Service carry forward the similar provision at paragraph 4 *b* of MCM, 1969 (Rev.). Similar provisions have been included in naval practice since at least 1937. *See, e.g., Naval Courts and Boards* § 347 (1937, 1945 reprint). The similar provision in MCM, 1951 was upheld in *United States v. Braud*, 11 U.S.C.M.A. 192, 29 C.M.R. 8 (1960) (Public Health Service commissioned officer served as member of Coast Guard court-martial), *decision below*, 28 C.M.R. 692 (C.G.B.R. 1959). *Braud* upheld the provision even though Article 25 is arguably ambiguous and the P.H.S. officer who served as a member had not been "militarized" and was not himself subject to the code. *Cf.* 42 U.S.C. § 217 (1976) (P.H.S. may be declared to be a military service in time of war; members become subject to personal jurisdiction of Code); 33 U.S.C. § 855 (NOAA may be transferred by President to military service in national emergency; members become subject to personal jurisdiction of Code); Art. 2(a)(8) (jurisdiction over members of Public Health Service and of Environmental Science Services Administration). The Environmental Science Services Administration, which succeeded the Coast and Geodetic Survey mentioned in some earlier Manuals, is now defunct. Its functions were transferred to the National Oceanic and Atmospheric Administration. Reorg. Plan No. 4 of 1970, 3 C.F.R. 1075 (1966–1970 Comp.), *reprinted in* 84 Stat. 2090. NOAA has only a commissioned officer corps. *Id.* § 2(f); 33 U.S.C.A. § 851 (Supp. 1981). P.H.S. has both commissioned and warrant officers. 42 § 204 (Supp. 1981).

Subsection (2) and the discussion are based on paragraph 41 *a* and *b* and the last paragraph of paragraph 53 *d* of MCM, 1969 (Rev.). The admonition of MCM, 1969 (Rev.) that misconduct by members may constitute an offense and that members should be attentive and dignified has been deleted as unnecessary.

(b) *President.* Subsection (1) is based on paragraph 40 *a* of MCM, 1969 (Rev.). Subsections (2)(A) and (B) are based on paragraphs 40 *b*(1)(c) and (d) of MCM, 1969 (Rev.). Paragraphs 40 *b*(1)(a) and (b) are deleted. Paragraph 40 *b*(1)(a) conflicts with the authority of the military judge under R.C.M. 801(a)(1). Paragraph 40 *b*(1)(b) is unnecessary. Subsection (2)(c) is based on paragraph 40 *b*(2) of MCM, 1969 (Rev.). The general description of the duties of a president of a special court-martial without a military judge in paragraph 40 *b*(2) is deleted here. Such a summarized description is an inadequate substitute for familiarity with the rules themselves.

(c) *Qualifications of military judge.* This subsection and the discussion are based on Article 26(b) and (c) and paragraph 4 *e* of MCM, 1969 (Rev.). Reasons for disqualification are described in R.C.M. 902.

1999 Amendment: R.C.M. 502(c) was amended to delete the requirement that military judges be "on active duty" to enable Reserve Component judges to conduct trials during periods of inactive duty for training (IDT) and inactive duty training travel (IATT). The active duty requirement does not appear in Article 26, UCMJ which prescribes the qualifications for military judges. It appears to be a vestigial requirement from paragraph 4 *e* of the 1951 and 1969 MCM. Neither the current MCM nor its predecessors provide an explanation for this additional requirement. It was deleted to enhance efficiency in the military justice system.

(d) *Counsel.* Subsection (1) is based on Article 27(b) and paragraph 6 of MCM, 1969 (Rev.). The possibility of detailing associate counsel has been added based on the amendment of Article

27(a) and 42(a). *See* Military Justice Act of 1983, Pub.L. No. 98–209, § 3(c), (f), 97 Stat. 1393 (1983). As the discussion indicates, "associate counsel" ordinarily refers to detailed counsel when the accused has military or civilian counsel. *See* Article 38(b)(6). An associate defense counsel must be qualified to act as defense counsel. An assistant defense counsel need not be. One other substantive change from MCM, 1969 (Rev.). has been made. Detailed defense counsel in special courts-martial must be certified by the Judge Advocate General concerned although this is not required by Article 27(c). Article 27(c) permits representation of an accused by a counsel not qualified and certified under Article 27(b) if the accused does not request qualified counsel, having been given the opportunity to do so, or when such counsel cannot be obtained on account of physical conditions or military exigencies. In the latter event, no bad-conduct discharge may be adjudged. Article 19. Currently, certified counsel is routinely provided in all special courts-martial, so the modification of the rule will not change existing practice. Moreover, the enforcement of waiver provisions in these rules and the Military Rules of Evidence necessitate, both for fairness and the orderly administration of justice, that the accused be represented by qualified counsel. *See also United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977). Because of this rule, the rule of equivalency in Article 27(c) and (3) is not necessary.

Subsection (2) is based on the fifth sentence of the first paragraph of paragraph 6 *c* of MCM, 1969 (Rev.).

Subsection (3) is based on the first sentence of the second paragraph of paragraph 48 *a* of MCM, 1969 (Rev.) and on *Soriano v. Hosken*, 9 M.J. 221 (C.M.A. 1980); *United States v. Kraskouskas*, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958). The discussion is taken from *Soriano v. Hosken, supra.*

Subsection (4) is based on Article 27(a) and on the fourth and fifth sentences of paragraph 6 *a* of MCM, 1969 (Rev.). *See also United States v. Catt*, 1 M.J. 41 (C.M.A. 1975). The accuser has been added to the list of disqualifications. *See ABA Standards, The Prosecution Function*, §§ 3–1(c); 3–3.9(c)(1979).

Subsection (5) is based on paragraph 44 *d* and 45 *a* of MCM, 1969 (Rev.) and on Article 38(d). The forum-based distinction as to the powers of an assistant trial counsel has been deleted. The trial counsel is responsible for the prosecution of the case. R.C.M. 805(c) requires the presence of a qualified trial counsel at general courts-martial. The discussion is based on paragraphs 44 *e, f, g,* and *h* of MCM, 1969 (Rev.). Some of the specific duties are now covered in other rules, *e.g.*, R.C.M. 701; 812, 813; 914; 919. Some examples and explanations have been deleted as unnecessary.

The first sentence of subsections (6) is new. *Cf.* paragraphs 46 *d* and 48 *c* of MCM, 1969 (Rev.). The second sentence of subsection (6) is based on Article 38(e). The rule does not require that defense counsel in the court-martial represent the accused in administrative or civil actions arising out of the same offenses. The discussion is based on paragraphs 46 *d*, 47, and 48 *c, d, e, f, g, h, j,* and *k* of MCM, 1969 (Rev.). The matters covered in paragraph 48 *k*(2) and (3) of MCM, 1969 (Rev.) are modified in the discussion based on the amendment of Articles 38(c) and 61. *See* Military Justice Act of 1983, Pub.L. No. 98–209, §§ 3(e)(3), 5(b)(1), 97 Stat. 1393 (1983). *See* R.C.M. 1105; 1110. As to associate counsel, *see* the Analysis subsection (d)(1) of this rule. *See also United States v. Breese*, 11 M.J. 17, 22 n. 13 (C.M.A. 1981); *United States v. Rivas, supra; United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977); *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975).

(e) *Interpreters, reporters, escorts, bailiffs, clerks, and guards.* This subsection is based on paragraphs 7, 49, 50, and 51 of MCM, 1969 (Rev.). The list of disqualifications, except for the accuser, is new and is intended to prevent circumstances which may detract from the integrity of the court-martial.

(f) *Action upon discovery of disqualification or lack of qualification.* This subsection is based on paragraphs 41 *c*, 44 *b*, 46 *b* of MCM, 1969 (Rev.).

Rule 503. Detailing members, military judge, and counsel

(a) *Members.* Subsection (1) is based on Article 25. Because of the amendment of Articles 26 and 27, the convening authority is no longer required to detail personally the military judge and counsel. Military Justice Act of 1983, Pub.L. No. 98–209, § 3(c), 97 Stat. 1393 (1983). The last sentence of paragraph 4 *b* of MCM, 1969 (Rev.) is deleted as unnecessary. The second paragraph in the discussion serves the same purpose as the third paragraph of paragraph 4 *b* of MCM, 1969 (Rev.): to alert the convening authority to avoid appointing people subject to removal for cause. Unlike that paragraph, however, no suggestion is now made that the convening authority commits error by appointing such persons, since the disqualifications are waivable. *See* Analysis, R.C.M. 912(f)(4).

Subsection (2) is based on Article 25(c) and the third paragraph of paragraph 4 *c* of MCM, 1969 (Rev.). The discussion is based on paragraph 36 *c*(2) of MCM, 1969 (Rev.).

1986 Amendment: Subsection (2) was amended to reflect an amendment to Article 25(c)(1), UCMJ, in the "Military Justice Amendments of 1986," tit. VIII, § 803, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99–661, 100 Stat. 3905, (1986) which authorizes enlisted accused to request orally on the record that at least one-third of the members of courts-martial be enlisted.

Subsection (3) is based on paragraphs 4 *f* and *g* of MCM, 1969 (Rev.). Subsection (3) combines treatment of members from a different command and those from a different armed force. The power of a commander to detail members not under the convening authority's command is the same whether the members are in the same or a different armed force. Therefore each situation can be covered in one rule. The discussion repeats the preference for members, or at least a majority thereof, to be of the same service as the accused which was found in paragraph 4 *g*(1) of MCM, 1969 (Rev.). Permission for the Judge Advocate General to detail members of another armed force is no longer required in the Manual. Detailing a military judge from a different command or armed force is now covered in subsection (d).

(b) *Military Judge.* Subsections (1) and (2) are based on Article 26(a), as amended, Military Justice Act of 1983, Pub. L. No. 98–209, § 3(c)(1), 97 Stat. 1393 (1983). The convening authority is no longer required to detail personally the military judge. *Id.* Subsection (1) requires that responsibility for detailing military judges will be in judicial channels. *See Hearings on S.2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 2nd Sess. 52 (1982). More specific requirements will be provided in service regula-

tions. Subsection (2) is intended to make detailing the military judge administratively efficient. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 3–5, 12 (1983), H.R. Rep. No. 549, 98th Cong., 1st Sess. 13–14 (1983). As long as a qualified military judge presides over the court-martial, any irregularity in detailing a military judge is not jurisdictional and would result in reversal only if specific prejudice were shown. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 12 (1983).

Subsection (3) is based on Article 26. *See also* Article 6(a).

(c) *Counsel.* Subsections (1) and (2) are based on Article 27(a), as amended, Military Justice Act of 1983, Pub. L. No. 98–209, § 3(c)(2), 97 Stat. 1393 (1983). The convening authority is no longer required to detail personally the counsel. *Id.* Efficient allocation of authority for detailing counsel will depend on the organizational structure and operational requirements of each service. Therefore, specific requirements will be provided in service regulations. Subsection (2) is intended to make detailing counsel administratively efficient. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 3–5, 12 (1983); H.R. Rep. No. 549, 98th Cong., 1st Sess. 13–14 (1983). Counsel are not a jurisdictional component of courts-martial. *Wright v. United States*, 2 M.J. 9 (C.M.A. 1976). Any irregularity in detailing counsel would result in reversal only if specific prejudice were shown. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 12 (1983).

Subsection (3) is based on Article 27. *See also* Article 6(a).

Rule 504. Convening courts-martial

(a) *In general.* This subsection substantially repeats the first sentence of paragraph 36 *b* of MCM, 1969 (Rev.).

(b) *Who may convene courts-martial.* Subsection (1) is based on Article 22 and paragraph 5 *a*(1) of MCM, 1969 (Rev.). The power of superiors to limit the authority of subordinate convening authorities is based on paragraph 5 *b*(4) of MCM, 1969 (Rev.). Although that paragraph applied only to special and summary courts-martial, the same principle applies to general courts-martial. *See* Article 22(b). *See generally United States v. Hardy*, 4 M.J. 20 (C.M.A. 1977); *United States v. Hawthorne*, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956); *United States v., Rembert*, 47 C.M.R. 755 (A.C.M.R. 1973), *pet. denied*, 23 U.S.C.M.A. 598 (1974). The discussion is based on the second and third sentences of paragraph 5 *a*(5) of MCM, 1969 (Rev.).

Subsection (2) is based on Article 23 and paragraphs 5 *b*(1), (3), and (4) of MCM, 1969 (Rev.).

As to subsection (3), *see* Analysis, R.C.M. 1302(a).

Subsection (4) is based on the first sentence of paragraph 5 *a*(5) of MCM, 1969 (Rev.). *See also United States v. Greenwalt*, 6 U.S.C.M.A. 569, 20 C.M.R. 285 (1955); *United States v. Bunting*, 4 U.S.C.M.A. 84, 15 C.M.R. 84 (1954).

(c) *Disqualification.* This subsection is based on Articles 22(b) and 23(b) and on paragraph 5 *a*(3) of MCM, 1969 (Rev.). *See also* Article 1(5) and (9); *United States v. Haygood*, 12 U.S.C.M.A. 481, 31 C.M.R. 67 (1961); *United States v. LaGrange*, 1 U.S.C.M.A. 342,3 C.M.R. 76 (1952); *United States v. Kostes*, 38 C.M.R. 512 (A.B.R. 1967).

(d) *Convening orders.* This subsection is based on paragraph 36 *b* of MCM, 1969 (Rev.) with two substantive modifications. First, in conformity with the amendment of Articles 26(a) and 27(a), *see* Military Justice Act of 1983, Pub. L. No. 98–209, § 3(c) 97 Stat. 1393 (1983), the military judge and counsel are no longer included in the convening order. *See* R.C.M. 503(b) and (c) and Analysis. Second, several matters, such as the unit of any enlisted members, which were required by paragraph 36 *b* are not included here. These may be required by service regulations. Summary courts-martial are treated separately from general and special courts-martial because of their different composition.

(e) *Place.* This subsection is new. It derives from the convening authority's power to fix the place of trial (*see also* R.C.M. 906(b)(11)) and from the convening authority's control of the resources for the trial. It does not change current practice.

Rule 505. Changes in members, military judge, and counsel

(a) *In general.* This subsection is based on the first sentence of paragraph 37 *a* of MCM, 1969 (Rev.) except that it has been modified to conform to the amendment of Articles 26(a) and 27(a). *See* Military Justice Act of 1983, Pub. L. No. 98–209, § 3(c), 97 Stat. 1393 (1983). The discussion is based on the third and fourth sentences of paragraph 37 *c* of MCM, 1969 (Rev.).

(b) *Procedure.* This subsection is based on the first two sentences of paragraph 37 *c*(1) and on paragraph 37 *c*(2) of MCM, 1969 (Rev.). *See also United States v. Ware*, 5 M.J. 24 (C.M.A. 1978). It has been modified to reflect that military judges and counsel no longer must be detailed by the convening authority. The second paragraph in the discussion is based on *United States v. Herrington*, 8 M.J. 194 (C.M.A. 1980). References in paragraph 37 *b* to excusal as a result of challenges are deleted here as challenges are covered in R.C.M. 902 and 912.

(c) *Changes of members.* This subsection is based on Articles 25(e) and 29, and paragraphs 37 *b* and *c*, and 39 *e* of MCM, 1969 (Rev.). The limitation on the authority of the convening authority's delegate to excuse no more than one-third of the members is based on S. Rep. No. 53, 98th Cong., 1st Sess. 13 (1983).

(d) *Changes of detailed counsel.* Subsection (1) is based on that part of the second sentence of paragraph 37 *a* of MCM, 1969 (Rev.) which covered trial counsel.

Subsection (2) is new and conforms to the amendment of Article 27(a) concerning who details counsel. Subsection (2)(A) is consistent with that part of the second sentence of paragraph 37 *a* of MCM, 1969 (Rev.) which dealt with defense counsel. Subsection (2)(B) is based on Article 38(b)(5); *United States v. Catt*, 1 M.J. 41 (C.M.A. 1975); *United States v. Timberlake*, 22 U.S.C.M.A. 117, 46 C.M.R. 117 (1973); *United States v. Andrews*, 21 U.S.C.M.A. 165, 44 C.M.R. 219 (1972); *United States v. Massey*, 14 U.S.C.M.A. 486, 34 C.M.R. 266 (1964).

(e) *Change of military judge.* This subsection is based on Articles 26(a) and 29(d) and on paragraph 39 *e* of MCM, 1969 (Rev.). *See also United States v. Smith*, 3 M.J. 490 (C.M.A. 1975).

(f) *Good cause.* This subject is based on Article 29 and on *United States v. Greenwell*, 12 U.S.C.M.A. 560, 31 C.M.R. 146 (1961); *United States v. Boysen*, 11 U.S.C.M.A. 331, 29 C.M.R. 147 (1960); *Unites States v. Grow*, 3 U.S.C.M.A. 77, 11 C.M.R. 77 (1953). *See* S. Rep. No. 53, 98th Cong., 1st Sess. 13 (1983). As to defense counsel, *see also United States v. Catt*, *United States v. Timberlake*, *United States v. Andrews*, and *United States v. Massey*, all *supra*.

Rule 506. Accused's rights to counsel

(a) *In general.* This subsection is taken from the first two sentences of paragraph 48 *a* of MCM, 1969 (Rev.), which was based on Article 38(b) as amended. Act of November 20, 1981, Pub. L. No. 97–81; 95 Stat. 1085. Note that the amendment of Article 38(b) effectively overruled *United States v. Jordan*, 22 U.S.C.M.A. 164, 46 C.M.R. 164 (1973), which held that an accused who has civilian counsel is not entitled to individual military counsel. The amendment of Article 38(b) provides that the accused may be represented by civilian counsel "and" by detailed or requested military counsel instead of civilian counsel "or" requested military counsel as it formerly did. *See also* H.R. Rep. No. 306, 97th Cong., 1st Sess. 4–7 (1981).

Nothing in this rule is intended to limit the authority of the military judge to ensure that the accused exercises the rights to counsel in a timely fashion and that the progress of the trial is not unduly impeded. *See Morris v. Slappy*, 461 U.S. (1983), 33 Cr.L. Rptr. 3013 (1983); *United States v. Montoya*, 13 M.J. 268 (C.M.A. 1982); *United States v. Kinard*, 21 U.S.C.M.A. 300, 45 C.M.R. 74 (1972); *United States v. Brown*, 10 M.J. 635 (A.C.M.R. 1980); *United States v. Alicea-Baez*, 7 M.J. 989 (A.C.M.R. 1979); *United States v. Livingston*, 7 M.J. 638 (A.C.M.R. 1979), *aff'd* 8 M.J. 828 (C.M.A. 1980). *See also United States v. Johnson*, 12 M.J 670 (A.C.M.R. 1981); *United States v. Kilby*, 3 M.J. 938 (N.C.M.R.), *pet. denied*, 4 M.J. 139 (1977).

(b) *Individual military counsel.* Subsection (1) is based on paragraphs 48 *b*(1) and (2) of MCM, 1969 (Rev.). *See also* Article 38(b); H.R. Rep. No. 306, *supra* at 5–7; *United States v. Kelker*, 4 M.J. 323 (C.M.A. 1978); *United States v. Eason*, 21 U.S.C.M.A. 335, 45 C.M.R. 109 (1972); *United States v. Murray*, 20 U.S.C.M.A. 61, 42 C.M.R 253 (1970). The second sentence of the last paragraph of this subsection has been modified based on the amendment of Article 38(b)(7), Military Justice Act of 1983, Pub. L. No. 98–209, § 3(e)(2), 97 Stat. 1393 (1983).

Subsection (2) is taken from paragraph 48 *b*(3) of MCM, 1969 (Rev.). *See also* Article 38(b)(7). It ensures substantial uniformity in procedure among the services for handling requests for individual military counsel.

Subsection (3) is based on the fourth through eighth sentences in the second paragraph of paragraph 46 *d* of MCM, 1969 (Rev.) and on Article 38(b)(6). *See also* H.R. Rep. No. 306, *supra* at 4–7. Authority to excuse detailed counsel has been modified based on the amendment of Article 38(b)(6). *See* Military Justice Act of 1983, Pub. L. No. 98–209, § 3(e)(1), 97 Stat. 1393 (1983).

(c) *Excusal or withdrawal.* This subsection is based on *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978); *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977); *United States v. Eason, supra*; *United States v. Andrews*, 21 U.S.C.M.A. 165, 44 C.M.R. 219 (1972). *See* Analysis, R.C.M. 505(c)(2).

(d) *Waiver.* This subsection is based on the third sentence of the second paragraph of paragraph 48 *a* of MCM, 1969 (Rev.) and on *Faretta v. California*, 422 U.S. 806 (1975). As to the last two sentences, *see id.* at 834 n.46.

(e) *Nonlawyer present.* This subsection is based on the last sentence of the second paragraph of paragraph 48 *a* of MCM, 1969 (Rev.).

CHAPTER VI. REFERRAL, SERVICE, AMENDMENT, AND WITHDRAWAL OF CHARGES

Rule 601. Referral

(a) *In general.* This definition is new. MCM, 1969 (Rev.) did not define "referral."

(b) *Who may refer.* This section is also new, although MCM, 1969 (Rev) clearly implied that any convening authority could refer charges. *See also United States v. Hardy*, 4 M.J. 29 (C.M.A. 1977). Paragraphs 5 *b*(4) and 5 *c* of MCM, 1969 (Rev.) contained similar provisions.

(c) *Disqualification.* This section is added to the Manual to express the statutory disqualification of an accuser to convene a court-martial in parallel terms in relation to referral. *See* Articles 22(b), 23(b). *Cf.* Article 24(b). The discussion follows paragraph 33 *i* of MCM, 1969 (Rev.).

(d) *When charges may be referred.* Subsection (1) is new. Neither the code nor MCM, 1969 (Rev) have previously provided a standard for referral except in general courts-martial. *See* Article 34(a). Subsection (1) promotes efficiency by helping to prevent groundless charges from being referred for trial. This is consistent with Fed. R. Crim. P. 5.1(a). *Accord ABA Standards Prosecution Function* section 3–3.9(a) (1979). Consistent with the amendment of Article 34, subsection (1) does not require the convening authority to evaluate the legal sufficiency of the case personally. In general courts-martial the legal sufficiency determination must be made by the staff judge advocate. *See* Article 34(a) and subsection (3)(2) of this rule. Subsection (1) requires a similar determination in all courts-martial, including special and summary courts-martial. Because of the judicial limitations on the sentencing power of special and summary courts-martial, any judge advocate may make the determination or the convening authority may do so personally. (A special or summary court-martial convening authority does not always have access to a judge advocate before referring charges; moreover, this subsection does not require reference to a judge advocate, even if one is available, if the convening authority elects to make the determination personally.) A person who serves as a trial counsel is not disqualified from rendering this advice. *Cf. ABA Standards Prosecution Function* Section 3–3.9(a) (1979). Note that there is no requirement under this subsection that the judge advocate's advice be written or that the convening authority memorialize the basis of the referral in any way.

The "reasonable grounds" standard is based on Article 34's prerequisite to referral of charges to a general court-martial that the charges be warranted by the evidence in the report of the Article 32 investigation. Further, the legislative history of Article 32 strongly suggests that this is the intended standard of the investigation. *Hearings on H.R. 2498 Before a Subcomm, of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 997–98 (1949). Nothing suggests that the standard governing referral to inferior courts-martial should be different from that applicable to general courts-martial. It appears that the reasonable grounds standard has been in operation even without an explicit requirement. *See, e.g., United States v. Eagle*, 1 M.J. 387, 389 n.4 (C.M.A. 1976); *United States v. Kauffman*, 33 C.M.R. 748, 795

(A.F.B.R.), *rev'd on other grounds*, 14 U.S.C.M.A. 283, 34 C.M.R. 63 (1963). *Cf. Gerstein v. Pugh*, 420 U.S. 103 (1975).

Subsection (2) restates the prerequisites for referral to a general court-martial of Articles 32 and 34. It is consistent with paragraphs 30 *c* and *d*, 34 *a*, and 35 of MCM, 1969 (Rev.) except insofar as the amendment of Article 34 (*see* Military Justice Act of 1983, Pub. L. No. 98–209, § 4, 97 Stat. 1393 (1983)) requires otherwise. The function of this provision is the same as paragraph 30 of MCM, 1969 (Rev.) to serve as a reminder of procedural limitations on referral. The waiver provision is based on Article 32(d); S. Rep. No. 53, 98th Cong., 1st Sess. 17 (1983); *United States v. Schaffer*, 12 M.J. 425 (C.M.A. 1982); *United States v. Ragan*, 14 U.S.C.M.A. 119, 33 C.M.R. 331 (1963).

(e) *How changes shall be referred.* Subsection (1) is consistent with paragraph 33 *j*(1) of MCM, 1969 (Rev.). The personal responsibility of the convening authority to decide whether to refer and how to refer is emphasized, but the discussion makes clear that the administrative aspects of recording that decision may be delegated.

The discussion's instructions for subsequent referrals are based on paragraph 33 *j*(1) of MCM, 1969 (Rev.).

The special case of referrals to summary courts-martial by the only officer present in command follows paragraph 33 *j*(1) of MCM, 1969 (Rev.) and Article 24(b).

The discussion of limiting instructions follows paragraphs 33 *j*(1) and *k* of MCM, 1969 (Rev.). The advice that convening authorities be guided by the criteria for capital punishment found at R.C.M. 1004 is new. *See Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (White, J., concurring in the judgment).

The last paragraph of the discussion on transmitting the referred charges and allied papers to the trial counsel is based on paragraph 33 *j*(2) of MCM, 1969 (Rev.).

Subsection (2) is less restrictive than the previous military rule found at paragraphs 26 *b* and *c* of MCM, 1969 (Rev.), which cautioned against joining major and minor offenses. This rule is inconsistent with Fed. R. Crim. P. 8(a), which requires (in general) separate trials for each offense. Such a requirement is too unwieldy to be effective, particularly in combat or deployment. Joinder is entirely within the discretion of the convening authority. The last two sentences of the rule dealing with additional charges are based on paragraph 65 *b* of MCM, 1969 (Rev.). The discussion encourages economy, following paragraph 33 *h* of MCM, 1969 (Rev.). The last sentence in subsection (2) is new and clarifies that the accused may consent to the referral of additional charges after arraignment. Since the prohibition of such referral is for the accused's benefit, the accused may forego it when it would be the accused's advantage. *See United States v. Lee*, 14 M.J. 983 (N.M.C.M.R. 1983).

The first two sentences of subsection (3) restate Fed. R. Crim. P. 8(b) in military nomenclature. They are consistent with the approach taken by paragraph 26 *d* of MCM, 1969 (Rev.). The last sentence is based on paragraph 33 *l* of MCM, 1969 (Rev.). There is no counterpart in federal civilian practice.

(f) *Referral by other convening authorities.* This new provision reflects the principle that a subordinate convening authority's decision does not preempt different dispositions by superior convening authorities. *See United States v. Charette*, 15 M.J. 197 (C.M.A. 1983); *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983). *See also* Analysis, R.C.M. 306(a), Analysis, R.C.M. 905(g), and Analysis, R.C.M. 907(b)(2)(C).

Rule 602. Service of charges

This rule is based on Article 35 and paragraph 44 *h* of MCM, 1969 (Rev.). Fed. R. Crim. P. 9 is consistent in purpose with this rule, but not in structure. The warrant system of Fed. R. Crim. P. 9(a), (b)(1), and (c)(2) is unnecessary in military practice. The remand provision of Fed. R. Crim. P. 9(d) is inconsistent with the structure of military procedure but consistent with the convening authority's discretion to refer charges to a minor forum. *See* R.C.M. 306. The provision of Fed. R. Crim. P. 9(c) for service by mail or delivery to a residence is inconsistent with Article 35.

Rule 603. Changes to charges and specifications

(a) *Minor changes defined.* This definition and the discussion consolidate the tests and examples found at paragraphs 33 *d*, 44 *f*(1), and 69 *b*(1) of MCM, 1969 (Rev.). They are consistent with Fed. R. Crim. P. 7(e).

(b) *Minor changes before arraignment.* This provision is based on and consolidates the authority of various persons to make minor changes as stated at paragraphs 33 *d* and 44 *f*(1) of MCM, 1969 (Rev.). It is inappropriate for an Article 32 investigating officer to make changes, but an investigating officer may recommend changes. *See also* Article 34(b) which provides authority for the staff judge advocate or legal officer to amend charges or specifications for the reasons stated therein.

(c) *Minor changes after arraignment.* This provision is based on Fed. R. Crim. P. 7(e), which is generally consistent with military practice.

(d) *Major changes.* This subsection is based on paragraphs 33 *d* and 33 *e*(2) of MCM, 1969 (Rev.). *See also* Article 34(b) which provides authority for the staff judge advocate or legal officer to amend charges or specifications for the reasons stated therein.

Rule 604. Withdrawal of charges

(a) *Withdrawal.* This rule is based on paragraphs 5 *a*(6) and 56 *a* of MCM, 1969 (Rev.). The rule parallels Fed. R. Crim. P. 48(a), but leave of the court is not required for the convening authority to withdraw (or dismiss) charges and specifications. This would be inconsistent with the responsibilities of the convening authority under the Code. *See* Articles 34 and 60. The potential abuses which the leave-of-court requirement in the federal rule are designed to prevent are adequately prevented by the restraint on a later referral of withdrawn charges in the subsection (b).

The first paragraph in the discussion is new. It recognizes the distinction between withdrawal of charges, which extinguishes the jurisdiction of a court-martial over them, and dismissal of charges, which extinguishes the charges themselves. The discussion cautions that withdrawn charges, like any other unreferred charges, should be disposed of promptly. Dismissal of charges disposes of those charges; it does not necessarily bar subsequent disposition of the underlying offenses (*see* Analysis, R.C.M. 306(a)), although a later preferral and referral would raise the same issues as are discussed under subsection (b).

The second paragraph in the discussion is based on the last sentence of paragraph 56 *a* of MCM, 1969 (Rev.).

The third paragraph in the discussion is based on the second

and fourth sentences in paragraph 56 *a* of MCM, 1969 (Rev.).

The first sentence of the fourth paragraph is based on the third sentence of paragraph 56 *a* of MCM, 1969 (Rev.) and *United States v. Charette*, 15 M.J. 197 (C.M.A. 1983); *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983). The remainder of this paragraph is based on the second sentence of paragraph 56 *a* and paragraph 56 *d* of MCM, 1969 (Rev.).

(b) *Referral of withdrawn charges.* This rule is based on paragraphs 33 *j*(1) and 56 of MCM, 1969 (Rev.) and numerous decisions. *See, e.g., United States v. Charette*, *United States v. Blaylock*, and *United States v. Hardy*, all *supra; United States v. Jackson*, 1 M.J. 242 (C.M.A. 1976); *United States v. Walsh*, 22 U.S.C.M.A. 509, 47 C.M.R. 926 (1973); *Petty v. Convening Authority*, 20 U.S.C.M.A. 438, 43 C.M.R. 278 (1971). The second sentence in the rule is derived from portions of paragraphs 56 *b* and *c* of MCM, 1969 (Rev.) which were in turn based on *Wade v. Hunter*, 336 U.S. 684 (1949); *Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951* at 64. *See* Article 44. The second sentence of paragraph 56 *b* of MCM, 1969 (Rev.) has been deleted. That sentence suggested that withdrawal after introduction of evidence on the merits for reasons other than urgent and unforeseen military necessity would not bar re-referral in some cases. If further prosecution is contemplated, such other possible grounds for terminating the trial after introduction of evidence has begun are more appropriately subject to a judicial determination whether to declare a mistrial under R.C.M. 915.

The first paragraph in the discussion contains a cross-reference to R.C.M. 915, Mistrial. Paragraph 56 of MCM, 1969 (Rev.) dealt with both withdrawal and mistrial. This was unnecessary and potentially confusing. Although the effect of a declaration of a mistrial may be similar to that of withdrawal, the narrow legal bases for a mistrial (*see United States v. Simonds*, 15 U.S.C.M.A. 641, 36 C.M.R. 139 (1966)) should be distinguished from withdrawal, which involves a far wider range of purposes and considerations. *See* Analysis, R.C.M. 915.

The second paragraph in the discussion is based on paragraph 56 *b* of MCM, 1969 (Rev.). Unlike paragraph 56 *b*, the current rules does not require a record in certain cases. Instead the discussion suggests that such a record is desirable if the later referral is more onerous to the accused. *See United States v. Blaylock*, *supra* at 192 n.1; *United States v. Hardy*, *supra*.

The third paragraph in the discussion is based on *United States v. Charette*, *United States v. Blaylock*, *United States v. Walsh*, and *Petty v. Convening Authority*, all *supra; United States v. Fleming*, 18 U.S.C.M.A. 524, 40 C.M.R. 236 (1969). *See* Article 37.

The fourth paragraph in the discussion is based generally on paragraphs 56 *b* and *c* of MCM, 1969 (Rev.), but more specificity is provided as to proper reasons for withdrawal and its effect at certain stages of the proceedings. The grounds for proper withdrawal and later referral are based on *United States v. Charette*, *United States v. Blaylock*, *United States v. Jackson*, all *supra*; *United States v. Lord*, 13 U.S.C.M.A. 78, 32 C.M.R. 78 (1962); and current practice. *United States v. Hardy* and *United States v. Walsh*, both *supra*, indicate that the commencement of court-martial proceedings is, by itself, not important in analyzing the propriety of withdrawal. Arraignment is normally the first significant milestone for the same reasons that make it a cut-off point for other procedures. *See, e.g.*, R.C.M. 601; 603; 804. It should be noted that assembly of the court-martial, which could precede arraignment, could also have an effect on the propriety of a withdrawal, since this could raise questions about an improper intent to interfere with the exercise of codal rights or the impartiality of the court-martial. The importance of the introduction of evidence is based on Article 44. *See also* R.C.M. 907(b)(2)(C) and Analysis.

CHAPTER VII. PRETRIAL MATTERS

Rule 701. Discovery

Introduction. This rule is based on Article 46, as well as Article 36. The rule is intended to promote full discovery to the maximum extent possible consistent with legitimate needs for nondisclosure (*see e.g.*, Mil. R. Evid. 301; Section V) and to eliminate "gamesmanship" from the discovery process. *See generally ABA Standards, Discovery and Procedure Before Trial* (1978). For reasons stated below, the rule provides for broader discovery than is required in Federal practice. *See* Fed. R. Crim. P. 12.1; 12.2; 16. *See also* 18 U.S.C. § 3500.

Military discovery practice has been quite liberal, although the sources of this practice are somewhat scattered. *See* Articles 36 and 46; paragraphs 34, 44 *h*, and 115 *c* of MCM, 1969 (Rev.). *See also United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980); *United States v. Cumberledge* 6 M.J. 203, 204 n.4 (C.M.A. 1979). Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial. It leads to better informed judgment about the merits of the case and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truth-finding process and to the efficiency with which it functions. It is essential to the administration of military justice; because assembling the military judge, counsel, members, accused, and witnesses is frequently costly and time-consuming, clarification or resolution of matters before trial is essential.

The rule clarifies and expands (at least formally) discovery by the defense. It also provides for the first time some discovery by the prosecution. *See* subsection (b) of the rule. Such discovery serves the same goal of efficiency.

Except for subsection (e), the rule deals with discovery in terms of disclosure of matters known to or in the possession of a party. Thus the defense is entitled to disclosure of matters known to the trial counsel or in the possession of military authorities. Except as provided in subsection (e), the defense is not entitled under this rule to disclosure of matters not possessed by military authorities or to have the trial counsel seek out and produce such matters for it. *But see* Mil. R. Evid. 506 concerning defense discovery of government information generally. Subsection (e) may accord the defense the right to have the Government assist the defense to secure evidence or information when not to do so would deny the defense similar access to what the prosecution would have if it were seeking the evidence or information. *See United States v. Killebrew*, *supra; Halfacre v. Chambers*, 5 M.J. 1099 (C.M.A. 1976).

(a) *Disclosure by the trial counsel.* This subsection is based in part on Fed. R. Crim. P. 16(a), but it provides for additional matters to be provided to the defense. *See ABA Standards, Discovery and Procedure Before Trial* § 11–2.1 (1978). Where a request is necessary, it is required to trigger the duty to disclose

as a means of specifying what must be produced. Without the request, a trial counsel might be uncertain in many cases as to the extent of the duty to obtain matters not in the trial counsel's immediate possession. A request should indicate with reasonable specificity what materials are sought. When obviously discoverable materials are in the trial counsel's possession, trial counsel should provide them to the defense without a request. "Inspect" includes the right to copy. *See* subsection (h) of this rule.

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

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

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

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

1991 Amendment: Subsection (a)(3)(B) was amended to provide for prosecution disclosure of rebuttal witnesses to a defense of innocent ingestion. This conforms to the amendment to R.C.M. 701(b).

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

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

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

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

1986 Amendment. The phrase "a mental disease, defect, or other condition bearing upon the guilt of the accused" was deleted from this subsection, with other language substituted, in conjunction with the implementation of Article 50a, and the phrase "or partial mental responsibility" was deleted from the discussion to conform to the amendment to R.C.M. 916(k)(2).

1991 Amendment: Subsection (b)(1) has been revised to expand the open discovery that is characteristic of military practice. It provides the trial counsel with reciprocal discovery and equal opportunity to interview witnesses and inspect evidence as that available to the defense under subsection (a). *See* Article 46, U.C.M.J., and R.C.M. 701(e). Enhanced disclosure requirements for the defense are consistent with a growing number of state jurisdictions that give the prosecution an independent right to receive some discovery from the defense. *See* Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 Calif. L. Rev. 1567, 1579–1583 (1986). Mandatory disclosure requirements by the defense will better serve to foster the truth-finding process.

1991 Amendment: Subsection (b)(2) was revised to add the requirement that the defense give notice of its intent to present the defense of innocent ingestion. The innocent ingestion defense, often raised during trials for wrongful use of a controlled substance, poses similar practical problems (*e.g.*, substantial delay in proceedings) as those generated by an alibi defense, and thus merits similar special treatment.

1991 Amendment: Subsection (b)(5) was amended to clarify that when the defense withdraws notice of an intent to rely upon the alibi, innocent ingestion, or insanity defenses, or to introduce expert testimony of the accused's mental condition, neither evidence of such intention, nor statements made in connection therewith, are admissible against the servicemember who gave notice. This rule applies regardless of whether the person against whom the evidence is offered is an accused or a witness. *Fed. R. Crim.* P. 12.1 and 12.2, upon which the subsection is based, were similarly amended [*See* H.R. Doc. No. 64, 99th Cong., 1st Sess. 17–18 (1985)].

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

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

(e) *Access to witnesses and other evidence.* This subsection is based on Article 46; paragraphs 42 *c* and 48 *h* of MCM, 1969 (Rev.); *United States v. Killebrew, supra; Halfacre, v. Chambers, supra; United States v. Enloe*, 15 U.S.C.M.A. 256, 35 C.M.R. 228 (1965); *United States v. Aycock*, 15 U.S.C.M.A. 158, 35

C.M.R. 130 (1964). The subsection permits witness (e.g., informant) protection programs and prevents improper interference with preparation of the case. *See United States v. Killebrew* and *United States v. Cumberledge, both supra*. *See also* subsection (f) of this rule; Mil. R. Evid. 507.

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

(f) *Information not subject to disclosure.* This subsection is based on the privileges and protections in other rules (*see, e.g.*, Mil. R. Evid. 301 and Section V). *See also Goldberg v. United States*, 425 U.S. 94 (1976); *United States v. Nobles*, 422 U.S. 225 (1975); *Hickman v. Taylor*, 329 U.S. 495 (1947). It differs from Fed. R. Crim. P. 16(a)(2) because of the broader discovery requirements under this rule. Production under the Jencks Act, 18 U.S.C. § 3500, is covered under R.C.M. 914.

(g) *Regulation of discovery.* Subsection (1) is based on the last sentence of Fed. R. Crim. P. 16(d)(2). It is a separate subsection to make clear that the military judge has authority to regulate discovery generally, in accordance with the rule. Local control of discovery is necessary because courts-martial are conducted in such a wide variety of locations and conditions. *See also* R.C.M. 108.

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

Subsection (g)(3) is based on Fed. R. Crim. P. 16(d)(2), but it also incorporates the noncompliance provision of Fed. R. Crim. P.12.1(d) and 12.2(d). *But see Williams v. Florida, supra* at 83 n. 14; *Alicea v. Gagnon*, 675 F. 2d 913 (7th Cir. 1982). The discussion is based on *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978).

1993 Amendment. The amendment to R.C.M. 701(g)(3)(C), based on the decision of *Taylor v. Illinois*, 484 U.S. 400 (1988), recognizes that the Sixth Amendment compulsory process right does not preclude a discovery sanction that excludes the testimony of a material defense witness. This sanction, however, should be reserved to cases where the accused has willfully and blatantly violated applicable discovery rules, and alternative sanctions could not have minimized the prejudice to the Government. *See Chappee v. Commonwealth Massachusetts*, 659 F.Supp. 1220 (D. Mass. 1988). The Discussion to R.C.M. 701(g)(3)(C) adopts the test, along with factors the judge must consider, established by the *Taylor* decision.

(h) *Inspect.* This subsection is based on Fed. R. Crim. P. 16.

Rule 702. Depositions

(a) *In general.* This subsection is based on the first sentence in Fed. R. Crim. P. 15(a). The language concerning preferral of charges is added based on Article 49(a). The language concerning use at Article 32 investigations is also added because depositions may be used at such hearings.

"Exceptional" means out of the ordinary. Depositions are not taken routinely, but only when there is a specific need under the circumstances. As used in Fed. R. Crim. P. 15(a) "exceptional circumstances" is generally limited to preserving the testimony of a witness who is likely to be unavailable for trial. *See* 8 J. Moore, *Moore's Federal Practice* Para. 15.02[1]; 15.03 (1982 rev.ed.); *United States v. Singleton*, 460 F.2d 1148 (2d Cir. 1972). A deposition is not a discovery device under the Federal rule. 8.J. Moore, *supra* Para. 15.02[1]. *See also United States v. Rich*, 580 F.2d 929 (9th Cir.), *cert. denied*, 439 U.S. 935 (1978); *United States v. Adcock*, 558 F.2d. 397 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977). The Court of Military Appeals has held that depositions may serve as a discovery device in certain unusual circumstances. *See* Analysis, subsection (c)(3)(A) *infra*. Consequently, "exceptional circumstances" may be somewhat broader in courts-martial. Nevertheless, the primary purpose of this rule is to preserve the testimony of unavailable witnesses for use at trial. *See* Article 49; *Hearings on H.R. 2498 Before a Subcomm. of the Comm. on Armed Services* 81st Cong. 1st Sess. 1064–1070 (1949).

The first paragraph in the discussion is based on Article 49(d) and (f) and on paragraph 117 *a* of MCM, 1969 (Rev.). The second and third paragraphs are based on Article 49(d), (e), and (f); paragraph 117 *b*(11) of MCM, 1969 (Rev.); Fed. R. Crim. P. 15(e). The admissibility of depositions is governed by Mil. R. Evid. 804 and by Article 49(d), (e), and (f) so it is unnecessary to prescribe further rules governing their use in R.C.M. 702. As to Article 49(d)(1), *see United States v. Davis*, 19 U.S.C.M.A. 217, 41 C.M.R. 217 (1970). *See also United States v. Bennett*, 12 M.J. 463, 471 (C.M.A. 1982); *United States v. Gaines*, 20 U.S.C.M.A. 557, 43 C.M.R. 397 (1971); *United States v. Bryson*, 3 U.S.C.M.A. 329, 12 C.M.R. 85 (1953). The fourth paragraph in the discussion is based on paragraphs 75 *b*(4) and 75 *e* of MCM, 1969 (Rev.).

(b) *Who may order.* This subsection is based on Article 49(a) and on the second and third sentences of paragraph 117 *b*(1) of MCM, 1969 (Rev.). As noted in subsection (i) the express approval of a competent authority is not required in order to take a deposition. *See also United States v. Ciarletta*, 7 U.S.C.M.A. 606, 23 C.M.R. 70 (1957). Express approval may be necessary in order to secure the necessary personnel or other resources for a deposition, when a subpoena will be necessary to compel the presence of a witness, or when the parties do not agree to the deposition.

(c) *Request to take deposition.* Subsection (1) is based on the first sentence in paragraph 117 *b*(1) of MCM, 1969 (Rev.). The discussion is based on the fourth sentence of that paragraph. Subsection (2) is based on the fifth and sixth sentences in paragraph 117 *b*(1).

Subsection (3)(A) is based on Article 49(a). The discussion provides guidance on what may be good cause for denial. The discussion indicates that ordinarily the purpose of a deposition is to preserve the testimony of a necessary witness when that witness is likely to be unavailable for trial. *See* Analysis, subsection (a) of this rule. The Court of Military Appeals has held that a deposition may be required in other circumstances described in the last sentence of the discussion. *See United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980); *United States v. Cumberledge*, 6 M.J. 203, 205, n. 3 (C.M.A. 1979) (deposition may be appropriate means to compel interview with witness when Government improperly impedes defense access to a witness); *United States v. Chuculate*, 5 M.J. 143, 145 (C.M.A. 1978) (deposition may be an appropriate means to allow sworn cross-examination of an essen-

tial witness who was unavailable at the Article 32 hearing); *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976) (deposition may be an appropriate means to cure error where witness was improperly found unavailable at Article 32 hearing). *Chuculate* and *Chestnut* have construed Article 49 as means of satisfying the discovery purposes of Article 32 when the Article 32 proceeding fails to do so. *Killebrew* and *Cumberledge* have construed Article 49 as a means of permitting full investigation and preparation by the defense when the Government improperly interferes. Whether a deposition is an appropriate tool for the latter purpose may bear further consideration, especially since R.C.M. 701(e) makes clear that such interference is improper. *See also* R.C.M. 906(b)(7).

Subsection (3)(B) is based on the first sentence of paragraph 117 *b*(1) and on paragraphs 75 *b*(4) and *e* of MCM, 1969 (Rev.). *See also United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

Subsection (3)(C) is new and is self-explanatory.

Subsection (3)(D) is based on *United States v. Cumberledge* and *United States v. Chuculate*, both *supra*.

(d) *Action when request is approved.* Subsection (1) and its discussion are new. *See* Article 49(c). Detailing the deposition officer is a ministerial act. When it is intended that the deposition officer issue a subpoena, it is important that the deposition officer be properly detailed. In other cases, proper detailing is not of critical importance so long as the deposition officer is qualified. *Cf. United States v. Ciarletta, supra.*

Subsection (2) is based on paragraph 117 *b* of MCM, 1969 (Rev.). That paragraph provided that the accused would have the same rights to counsel as that for the trial at which the deposition could be used. Under R.C.M. 502, the accused has the right to qualified counsel at both general and special courts-martial. If a summary court-martial is intended, ordinarily there is no need for an oral deposition; instead, the summary court-martial should be detailed and proceed to call the witness. Under subsection (g)(2)(A) the accused at a summary court-martial is not entitled to counsel for a written deposition. The first paragraph in the discussion is based on *United States v. Catt*, 1 M.J. 41 (C.M.A. 1975); *United States v. Timberlake*, 22 U.S.C.M.A. 117, 46 C.M.R. 117 (1973); *United States v. Gaines, supra*. *See also* R.C.M. 505(d)(2)(B) and analysis. The second paragraph in the discussion is based on the second sentence in paragraph 117 *b*(2) of MCM, 1969 (Rev.). The rule does not prohibit the accused from waiving the right to counsel at a deposition. *See* R.C.M. 506(d); *United States v. Howell*, 11 U.S.C.M.A. 712, 29 C.M.R. 528 (1960).

Subsection (3) is new and reflects the ministerial role of the deposition officer.

(e) *Notice.* This subsection is based on Article 49(b) and paragraph 117 *b*(4) of MCM, 1969 (Rev.). It is consistent with Fed. R. Crim. P. 15(b). *See generally United States v. Donati*, 14 U.S.C.M.A. 235, 34 C.M.R. 15 (1963).

(f) *Duties of the deposition officer.* This subsection is based on paragraphs 117 *b*(5), (7), and (8) and *c*(3) and (4) of MCM, 1969 (Rev.). It is organized to provide a deposition officer a concise list of the duties of that office.

(g) *Procedure.* Subsection (1)(A) is based on paragraph 117 *b*(2) of MCM, 1969 (Rev.); Fed. R. Crim. P. 15(b). *See also United States v. Donati, supra.* Subsection (1)(B) is based on paragraph 117 *b*(6) and (7) of MCM, 1969 (Rev.). *See also* Fed. R. Crim. P. 15(d). Subsection (2) is based on the first sentence of paragraph 117 *b*(2) and paragraph 117 *c* of MCM, 1969 (Rev.). Subsection (2)(B) is based on paragraph 117 *c* of MCM, 1969 (Rev.). Note that if the accused and counsel can be present, it ordinarily is feasible to conduct an oral deposition. Written interrogatories are expressly provided for in Article 49.

Subsection (3) is new and is based on Article 49(d) and (f), as amended, Military Justice Act of 1983, Pub. L. No. 98–209, § 6(b), 97 Stat. 1393 (1983). The convening authority or military judge who orders the deposition has discretion to decide whether it will be recorded in a transcript or by videotape, audiotape, or similar material. Nothing in this rule is intended to require that a deposition be recorded by videotape, audiotape, or similar material. Factors the convening authority or military judge may consider include the availability of a qualified reporter and the availability of recording equipment. *See also United States v. Vietor*, 10 M.J. 69, 77 n.7 (C.M.A. 1980) (Everett, C.J., concurring in the result).

(h) *Objections.* This subsection is based on the second and third sentences of the penultimate paragraph of paragraph 117 *b* of MCM, 1969 (Rev.) and on Fed. R. Crim. P. 15(f). The waiver provisions are more specific than in paragraph 117 *b* in order to ensure that objections are made when the defect arises. This promotes efficiency by permitting prompt corrective action. *See* Fed. R. Crim. P.15(f). This requirement should not be applied so as to unduly impede the taking of a deposition, however. Only objections to matters which are correctable on the spot need be made. For example, an objection to opinion testimony should ordinarily be made at the deposition so that the necessary foundation may be laid, if possible. On the other hand, objections on grounds of relevance ordinarily are inappropriate at a deposition. Subsection (1) is also based on *United States v. Ciarletta supra. See also United States v. Gaines* and *United States v. Bryson*, both *supra*. Matters which ordinarily are waived if not raised include lack of timely notice and lack of qualifications of the deposition officer.

(i) *Deposition by agreement not precluded.* This subsection is based on Article 49(a) and on Fed. R. Crim. P. 15(g).

Rule 703. Production of witnesses and evidence

(a) *In general.* This subsection is based on Article 46.

(b) *Right to witnesses.* Subsections (1) and (2) are based on the fourth paragraph of paragraph 115 *a* of MCM, 1969 (Rev.). The second paragraph in the discussion is based on *United States v. Roberts*, 10 M.J. 308 (C.M.A. 1981). *See also United States v. Jefferson*, 13 M.J. 1 (C.M.A. 1982); *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982); *United States v. Credit*, 8 M.J. 190 (C.M.A. 1980) (Cook, J.); *United States v. Hampton*, 7 M.J. 284 (C.M.A. 1979); *United States v. Tangpuz*, 5 M.J. 426 (C.M.A. 1978) (Cook, J.); *United States v. Lucas*, 5 M.J. 167 (C.M.A. 1978); *United States v. Williams*, 3 M.J. 239 (C.M.A. 1977); *United States v. Carpenter*, 1 M.J. 384 (C.M.A. 1976); *United States v. Iturralde-Aponte*, 1 M.J. 196 (C.M.A. 1975). *Cf.* Fed. R. Crim. P. 17(b). *See generally* 8 J.Moore, *Moore's Federal Practice* Para. 17.05 (1982 rev.ed). Subsection (3) is based on *United States v. Bennett, supra; United States v. Daniels*, 23 U.S.C.M.A. 94, 48 C.M.R. 655 (1974). *See also United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S. Ct. 3440 (1982).

(c) *Determining which witnesses will be produced.* This subsection is based generally on paragraph 115 *a* of MCM, 1969 (Rev.).

The procedure for obtaining witnesses under Fed. R. Crim. P. 17 is not practicable in courts-martial. Under Fed. R. Crim. P. 17, witnesses are produced by process issued and administered by the court. In the military trial judiciary, no comparable administrative infrastructure capable of performing such a function exists, and it would be impracticable to create one solely for that purpose. The mechanics and costs of producing witnesses are the responsibility of the command which convened the court-martial. Moreover, military judges often do not sit at fixed locations and must be available for service in several commands or places. Note, however, that any dispute as to production of a witness is subject to a judicial determination. Experience has demonstrated that these administrative tasks should be the responsibility of trial counsel.

Subsection (1) is based on the first three sentences in the fourth paragraph of paragraph 115 *a* of MCM, 1969 (Rev.).

Subsection (2) is based generally on the remainder of paragraph 115 *a* of MCM, 1969 (Rev.). The procedure for production of defense witnesses prescribed in paragraph 115 *a* was questioned in several decisions. *See United States v. Arias*, 3 M.J. 436, 439 (C.M.A. 1977); *United States v. Williams, supra* at 240 n.2; *United States v. Carpenter, supra* at 386 n.8. The practical advantages of that procedure were recognized, however, in *United States v. Vietor*, 10 M.J. 69, 77 (C.M.A. 1980) (Everett, C.J., concurring in the result).

Subsection (2) modifies the former procedures to reduce the criticized aspects of the earlier practice while retaining its practical advantages. For reasons states above, the trial counsel is responsible for the administrative aspects of production of witnesses. Thus, under subsection (2)(A) the defense submits its list of witnesses to the trial counsel so that the latter can arrange for their production. The trial counsel stands in a position similar to a civilian clerk of court for this purpose. Because most defense requests for witnesses are uncontested, judicial economy is served by routing the list directly to the trial counsel, rather than to the military judge first. This also allows the trial counsel to consider such alternatives as offering to stipulate or take a deposition, or recommending to the convening authority that a charge be withdrawn. *See United States v. Vietor, supra.* Further, it allows arrangements to be made in a more timely manner, since the trial counsel is usually more readily available than the military judge. Only if there is a genuine dispute as to whether a witness must be produced is the issue presented to the military judge by way of a motion.

Subsections (2)(B) and (C) also further judicial economy and efficiency by facilitating early arrangements for the production of witnesses and by permitting the prompt identification and resolution of disputes. Subsection (2)(B) is based on the fifth and sixth sentences of the fourth paragraph of paragraph 115 *a* of MCM, 1969 (Rev.). *See also United States v. Valenzuela-Bernal, supra; United States v. Wagner*, 5 M.J. 461 (C.M.A. 1978); *United States v. Lucas*, 5 M.J. 167 (C.M.A. 1978). *Cf. United States v. Hedgwood*, 562 F.2d 946 (5th Cir. 1977), *cert, denied*, 434 U.S. 1079 (1978); *United States v. Barker*, 553 F.2d 1013 (6th Cir. 1977). Subsection (2)(C) is new. *See generally United States v. Menoken*, 14 M.J. 10 (C.M.A. 1982); and *United States v. Johnson*, 3 M.J. 772 (A.C.M.R.), *pet. denied*, 4 M.J. 50 (1977).

Subsection (2)(D) provides for resolution of disputes concerning witness production by the military judge. Application to the convening authority for relief is not required. It is permitted under R.C.M. 905(j). The last sentence in this subsection is based on *United States v. Carpenter, supra. See* subsection (b) of this rule as to the test to be applied.

(d) *Employment of expert witnesses.* This subsection is based on paragraph 116 of MCM, 1969 (Rev.). *See also United States v. Johnson*, 22 U.S.C.M.A. 424, 47 C.M.R. 402 (1973); *Hutson v. United States*, 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970). Because funding for such employment is the responsibility of the command, not the court-martial, and because alternatives to such employment may be available, application to the convening authority is appropriate. In most cases, the military's investigative, medical, or other agencies can provide the necessary service. Therefore the convening authority should have the opportunity to make available such services as an alternative. *Cf. United States v. Johnson, supra; United States v. Simmons*, 44 C.M.R. 804 (A.C.M.R. 1971), *pet. denied*, 21 U.S.C.M.A. 628, 44 C.M.R. 940 (1972). This subsection has no reference to ratification of employment of an expert already retained, unlike 18 U.S.C. § 3006A(e). *See also* Ms. Comp. Gen. B–49109 (June 25, 1949). This subsection does not apply to persons who are government employees or under contract to the Government to provide services which would otherwise fall within this subsection. The reference in paragraph 116 of MCM, 1969 (Rev.), to service regulations has been deleted as unnecessary.

(e) *Procedures for production.* Subsection (1) and the discussion are based on paragraph 115 *b* of MCM, 1969 (Rev.).

Subsection (2)(A) is consistent with current practice.

Subsection (2)(B) is based on Fed. R. Crim. P. 17(a) and (c) and on Appendix 17 of MCM, 1969 (Rev.). *See* Article 46. The discussion is taken from the second sentence of the second paragraph of paragraph 115 *a* of MCM, 1969 (Rev.). Note that the purpose of producing books, papers, documents, and other objects before a proceeding for inspection is to expedite the proceeding, not as a general discovery mechanism. *See Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951). *See generally United States v. Nixon*, 418 683 (1974).

Subsection (2)(C) is based on paragraph 79 *b*, the third paragraph of paragraph 115 *a*, and the first sentence of paragraph 115 *d*(1) of MCM, 1969 (Rev.). Authority for the president of a court of inquiry and a deposition officer to issue a subpoena is expressly added to fill the gap left by MCM, 1969 (Rev). in regard to these procedures. *See* Article 47(a)(1), 135(f).

Subsection (2)(D) is based on Fed. R. Crim. P. 17(d) and on the second sentence of the fifth paragraph of paragraph 115 *d*(1) of MCM, 1969 (Rev.). *See also* 28 U.S.C. § 569(b). The discussion is based on paragraph 115 *d*(1) of MCM, 1969 (Rev.).

Subsection (2)(E) is based on Article 46 and the first sentence of paragraph 115 *d*(1) of MCM, 1969 (Rev.). It parallels Fed. R. Crim. P. 17(e)(1). Process in courts-martial does not extend abroad, except in occupied territory, nor may it be used to compel persons within the United States to attend courts-martial abroad. *See* Article 46; *United States v. Bennett, supra; United States v. Daniels, supra; United States v. Stringer*, 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954). *But see United States v. Daniels, supra* at 97, 48 C.M.R. at 658 (Quinn, J. concurring in the result) (suggesting possible use of 28 U.S.C. § 1783(a) to secure presence of witness overseas to testify in a court-martial). The discussion is based on the last paragraph of paragraph 115 *d*(1) of MCM, 1969 (Rev.). Note that under subsection (2)(E)(iii) any civilians in occupied

territory are subject to compulsory process of the occupying force.

Subsection (2)(F) is based on Fed. R. Crim. P. 17(c), but is broader in that is not limited to a subpoena duces tecum. *Cf.* Fed. R. Crim. P. 17(f)(2).

Subsection (2)(G) and the discussion are based on paragraphs 115 *d*(2) and (3), MCM, 1969 (Rev.). The definition of "warrant of attachment" is based on 12 Op. Atty. Gen. 501, 502 (1868). The military power to use a warrant of attachment is inherent in the power to subpoena. 12 Op. Atty. Gen. 501 (1868) (construing Act of 3 March 1863, ch. 79, § 25, 12 Stat. 754, which became Article of War 22 of 1916 (39 Stat. 654), the predecessor of Article 46.). *See also* W. Winthrop, *Military Law and Precedents* 200–202, 202 n.46 (2d ed. 1920 reprint). The power of attachment has been included in the Manuals for Courts-Martial since 1895. Treatment of this enforcement provision in the Manual is in accord with the legislative intent to "leave mechanical details as to the issuance of process to regulation." H. R. Rep. No. 491, 81st Cong., 1st Sess. 24 (1949). The power has been used and sustained. *See, e.g., United States v. Shibley*, 112 F. Supp. 734 (S.D. Cal. 1953) (court of inquiry). Federal civilian courts have previously used the warrant of attachment but no longer do because the power to issue an arrest warrant is implied from Fed. R. Crim. P. 46(b) and 18 U.S.C. § 3149. *See Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971) (arrest of material witness for testimony at grand jury before actual disobedience of subpoena). Warrants of attachment may be served in the same way and by the same officials as subpoenas. By their nature warrants of attachment have caused little litigation in military appellate courts. *See generally United States v. Sevaaetasi*, 48 C.M.R. 964 (A.C.M.R.), *pet. denied*, 23 U.S.C.M.A. 620, 49 C.M.R. 889 (1974); *United States v. Ercolin*, 46 C.M.R. 1259 (A.C.M.R. 1973); *United States v. Feeley*, 47 C.M.R. 581 (N.C.M.R.), *pet. denied*, 22 U.S.C.M.A. 635 (1973).

The procedure for issuing warrants of attachment is modified somewhat. The warrant must be authorized by the military judge, or, in special courts-martial without a military judge and summary courts-martial *(see* subsection (e)(2)(G)(v) of this rule), and for depositions and courts of inquiry, the convening authority. Paragraph 115 *d*(3) of MCM, 1969 (Rev.) required only that the trial counsel consult with the convening authority, or "after the court was convened" the military judge. Subsection (e)(2)(G) now requires written authorization from one of these persons. Second, subsection (e)(2)(G)(ii) incorporates as requirements the standards in the third paragraph 115 *d*(3) of MCM, 1969 (Rev.). That paragraph was seemingly advisory in nature. Subsection (e)(2)(G)(iv) is based on the second paragraph and the first sentence of the last paragraph of paragraph 115 *d*(3) of MCM, 1969 (Rev.). The last sentence of subsection (e)(2)(G)(iv) is new and is intended to ensure that any detention under this rule is limited to the minimum necessary to effect its purpose. These modifications provide additional safeguards to ensure that detention of witnesses is exercised only when necessary and appropriate. *See generally* Lederer, *Warrants of Attachment—Forcibly Compelling the Attendance of Witnesses*; 98 Mil. L. Rev. 1 (1982).

1998 Amendment. The Discussion was amended to reflect the amendment of Article 47, UCMJ, in section 1111 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 461 (1996). The amendment removes limitations on the punishment that a federal district court may impose for a civilian witness' refusal to honor a subpoena to appear or testify before a court-martial. Previously, the maximum sentence for a recalcitrant witness was "a fine of not more than $500.00, or imprisonment for not more than six months, or both." The law now leaves the amount of confinement or fine to the discretion of the federal district court.

(f) *Evidence.* This subsection is based generally on paragraph 115 *a* and *c* of MCM, 1969 (Rev.). *See also United States v. Toledo*, 15 M.J. 255 (C.M.A. 1983). It parallels the procedures for production of witnesses. Discovery and introduction of classified or other government information is covered by Mil. R. Evid. 505 and 506. Note that unlike the standards for production of witnesses, there is no difference in the standards for production of evidence on the merits and at sentencing. The relaxation of the rules of evidence at presentencing proceedings provides some flexibility as to what evidence must be produced at those proceedings.

Rule 704. Immunity

(a) *Types of immunity.* This subsection recognizes both transactional and testimonial or use immunity. *See Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983); *Kastigar v. United States*, 406 U.S. 441 (1972); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). *See also* 18 U.S.C. §§ 6001–6005; *United States v. Villines*, 13 M.J. 46 (C.M.A. 1982). *See generally* H. Moyer, *Justice and the Military* 376–381 (1972); Green, *Grants of Immunity and Military Law, 1971–1976*, 73 Mil. L. Rev. 1 (1976) (hereinafter cited as Green II); Green, *Grants of Immunity and Military Law*, 53 Mil. L. Rev. 1 (1971) (hereinafter cited as Green I).

Paragraph 68 *h* of MCM, 1969 (Rev.) expressly recognized transactional immunity. It did not address testimonial immunity. Nevertheless, testimonial immunity has been used in courts-martial. *See United States v. Villines, supra; United States v. Eastman*, 2 M.J. 417 (A.C.M.R. 1975); *United States v. Rivera*, 49 C.M.R. 259 (A.C.M.R.1974), *rev'd on other grounds*, 1 M.J. 107 (C.M.A. 1975). *See also* Mil. R. Evid. 301(c)(1).

Subsection (1) makes clear that transactional immunity extends only to trial by court-martial. *See* Dept. of Defense Dir. 1355.1 (July 21, 1981). Subsection (2) is written somewhat more broadly, however. Use immunity under R.C.M. 704 would extend to a State prosecution. *Cf. Murphy v. Waterfront Commission, supra*. Moreover, although a convening authority is not independently empowered to grant immunity extending to Federal civilian prosecutions, use immunity extending to such cases may be granted by a convening authority when specifically authorized under 18 U.S.C. §§ 6002 and 6004. *See* subsection (c) and Analysis.

The second paragraph in the discussion is based on 18 U.S.C. § 6004. The third paragraph in the discussion is based on *United States v. Rivera*, 1 M.J. 107 (C.M.A. 1975); *United States v. Eastman, supra.*

(b) *Scope.* This subsection clarifies the scope of R.C.M. 704. It is based on the last clause in 18 U.S.C. § 6002. Note that this rule relates only to criminal proceedings. A grant of immunity does not extend to administrative proceedings unless expressly covered by the grant.

(c) *Authority to grant immunity.* This subsection is based on paragraph 68 *h* of MCM, 1969 (Rev.) and on *United States v.*

Kirsch, 15 U.S.C.M.A. 84, 35 C.M.R. 56 (1964). *See also United States v. Villines, supra. Kirsch* recognized codal authority for a convening authority to grant immunity (*see* Articles 30, 44, and 60) and found implementing Manual provisions to be a proper exercise of authority under Article 36. (At the time *Kirsch* was decided, the convening authority's powers now contained in Article 60 were in Article 64.) The enactment of 18 U.S.C. § § 6001–6005 did not remove this power. *See United States v. Villines, supra;* Department of Justice Memorandum, Subject: Grants of Immunity by Court-Martial Convening Authorities (Sept. 22, 1971) *discussed in Grants of Immunity*, The Army Lawyer 22 (Dec. 1973). *See also* Dept. of Defense Dir. 1355.1 (July 21, 1981). *See generally* Green I, *supra* at 27–35; H. Moyer, *supra* at 377–380. The rule recognizes, however, that the authority under the code of a general court-martial convening authority to grant immunity does not extend to federal prosecutions. *Id.* Consequently, the rule directs military authorities to 18 U.S.C. §§ 6001–6005 as a means by which such immunity can be granted when necessary. The discussion under subsection (1) offers additional guidance on this matter. *See* the penultimate paragraph of the Analysis of subsection (a) of this rule as to the effect of a grant of immunity to state prosecutions.

The rule makes clear that only a general court-martial convening authority may grant immunity. *See United States v. Joseph*, 11 M.J. 333 (C.M.A. 1981); *United States v. Caliendo*, 13 U.S.C.M.A. 405, 32 C.M.R. 405 (1962); *United States v. Thompson*, 11 U.S.C.M.A. 252, 29 C.M.R. 68 (1960); *United States v. Werthman*, 5 U.S.C.M.A. 440, 18 C.M.R. 64 (1955). *Cf. Pillsbury Co. v. Conboy, supra. Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982), is not to the contrary. In *Cooke* the majority found that due process required enforcement of promises of immunity under the facts of that case. One member of the majority also opined that the convening authority could be held, on the facts, to have authorized the grant of immunity. The limitations in subsection (c)(3) and the procedural requirements in subsection (d) are intended to reduce the potential for the kinds of problems which arose in *Cooke.*

The power to grant immunity and the power to enter into a pretrial agreement, while related, should be distinguished. R.C.M. 704 does not disturb the power of the convening authority, including a special or summary court-martial convening authority, to make a pretrial agreement with an accused under which the accused promises to testify in another court-martial, as long as the agreement does not purport to be a grant of immunity. Note that the accused-witness in such a case could not be ordered to testify pursuant to the pretrial agreement; instead, such an accused would lose the benefit of the bargained-for relief upon refusal to carry out the bargain. *See also* R.C.M. 705.

The first paragraph in the initial discussion under subsection (c) is based on *Cooke v. Orser* and *United States v. Caliendo,* both *supra*. As to the second paragraph in the discussion, *see United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). The discussion under subsection (c)(1) is based on *Grants of Immunity*, The Army Lawyer 22 (Dec. 1973). *See also* Dept. of Defense Dir. 1355.1 (July 21, 1981); Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction (1955).

As to whether the threat of a foreign prosecution is a sufficient basis to refuse to testify in a court-martial notwithstanding a grant of immunity, *see United States v. Murphy*, 7 U.S.C.M.A. 32, 21 C.M.R. 158 (1956). *See also United States v. Yanagita*, 552 F.2d 940 (2d Cir.1977); *In re Parker*, 411 F.2d 1067 (10th Cir. 1969), *vacated as moot*, 397 U.S. 96 (1970); Green II, *supra* at 12–14. *But see In re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972); *McCormick's Handbook of the Law of Evidence* 262–63 (E. Cleary ed. 1972). The Supreme Court has not decided the issue. *See Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472 (1974).

(d) *Procedure.* This subsection is new. It is intended to protect the parties to a grant of immunity by reducing the possibility of misunderstanding or disagreement over its existence or terms. *Cf. Cooke v. Orser, supra.*

The first paragraph in the discussion is based on *United States v. Kirsch, supra.*

The second paragraph in the discussion is based on *United States v. Conway*, 20 U.S.C.M.A. 99, 42 C.M.R. 291 (1970); *United States v. Stoltz*, 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964). *See also United States v. Scoles*, 14 U.S.C.M.A. 14, 33 C.M.R. 226 (1963); Green I, *supra* at 20–23.

The last paragraph in the discussion is based on Mil. R. Evid. 301(c)(2) and *United States v. Webster*, 1 M.J. 216 (C.M.A. 1975).

(e) *Decision to grant immunity.* This subsection is based on *United States v. Villines, supra*. Although there was no majority opinion in that case, each judge recognized the problem of the need to immunize defense witnesses under some circumstances, and each suggested different possible solutions. The rule addresses these concerns and provides a mechanism to deal with them. Note that the military judge is not empowered to immunize a witness. If the military judge finds that a grant of immunity is essential to a fair trial, the military judge will abate the proceedings unless immunity is granted by an appropriate convening authority.

1993 Amendment. Subsection (e) to R.C.M. 704 was amended to make the military practice for granting immunity for defense witnesses consistent with the majority rule within the Federal Courts. *United States v. Burns*, 684 F.2d 1066 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983); *United States v. Shandell*, 800 F.2d 322 (2d Cir. 1986); *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982), *cert. denied*, 459 U.S. 825 (1982); *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984); *United States v. Taylor*, 728 F.2d 930 (7th Cir. 1984); *United States v. Brutzman*, 731 F.2d 1449 (9th Cir. 1984); *McGee v. Crist*, 739 F.2d 505 (10th Cir. 1984); *United States v. Sawyer*, 799 F.2d 1494 (11th Cir. 1986). The amended rule conforms R.C.M. 704(e) with case law requiring the military judge to consider the Government's interest in not granting immunity to the defense witness. *See United States v. Smith*, 17 M.J. 994, 996 (A.C.M.R. 1984), *pet. denied*, 19 M.J. 71 (C.M.A. 1984); *United States v. O'Bryan*, 16 M.J. 775 (A.F.C.M.R. 1983), *pet. denied*, 218 M.J. 16 (C.M.A. 1984).

The majority rule recognizes that an accused has no Sixth Amendment right to immunized testimony of defense witnesses and, absent prosecutorial misconduct which is intended to disrupt the judicial fact-finding process, an accused is not denied Fifth Amendment due process by the Government's failure to immu-

nize a witness. If the military judge finds that the witness is a target for prosecution, there can be no claim of Government overreaching or discrimination if the grant of immunity is denied. *United States v. Shandell, supra*.

The prior military rule was based on *United States v. Villines, supra*, which had adopted the minority view espoused in Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980). This view permitted the court to immunize also a defense witness when the witness' testimony was clearly exculpatory, was essential to the defense case and there was no strong Government interest in withholding testimonial immunity. This rule has been sharply criticized. *See, e.g., United States v. Turkish, supra; United States v. Taylor, supra; United States v. Pennel, supra; United States v. Zayas*, 24 M.J. 132, 137 (C.M.A. 1987) (dissenting opinion by Judge Cox).

The current rule continues to recognize that a military judge is not empowered to immunize a witness. Upon a finding that all three prerequisites exist, a military judge may only abate the proceedings for the affected charges and specifications unless the convening authority grants immunity to the witness.

Rule 705. Pretrial agreements

Introduction. This rule is new. The code does not address pretrial agreements, and MCM, 1969 (Rev.) did not discuss them. Pretrial agreements have long existed and been sanctioned in courts-martial, however, *see United States v. Allen*, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957). *See generally Gray, Pretrial Agreements*, 37 Fed. Bar. J. 49 (1978). The rule recognizes the utility of pretrial agreements. At the same time the rule, coupled with the requirement for judicial inquiry in R.C.M. 910, is intended to prevent informal agreements and protect the rights of the accused and the interests of the Government. *See also Santobello v. New York*, 404 U.S. 257 (1971); Fed. R. Crim. P. 11(e); *ABA Standards, Pleas of Guilty* (1979).

(a) *In general.* This subsection is based on *United States v. Allen, supra.* Only the convening authority may enter a pretrial agreement with an accused. *See United States v. Caruth*, 6 M.J. 184 (C.M.A. 1979); *United States v. Johnson*, 2 M.J. 541 (A.C.M.R. 1976); *United States v. Crawford*, 46 C.M.R. 1007 (A.C.M.R. 1972). *See also United States v. Troglin*, 21 U.S.C.M.A. 183, 44 C.M.R. 237 (1972). Pretrial agreements have long been subject to service regulations. *See, e.g.*, A.F.M. 111–1, para. 4–8 (May 13, 1980); JAGMAN Section 0114 (June 11, 1982). Subsection (a) expressly continues such authority. The discussion is based on Dept. of Defense Dir. 1355.1 (July 21, 1981).

(b) *Nature of agreement.* This subsection recognizes the matters contained in pretrial agreements. *See United States v. Cooke*, 12 M.J. 448 (C.M.A. 1982); *United States v. Schaffer*, 12 M.J. 425 (C.M.A. 1982); *United States v. Brown*, 12 M.J. 420 (C.M.A. 1982); *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977); *United States v. Allen, supra.* As to prohibited and permitted terms and conditions, *see* subsection (c) of this rule. This discussion under subsection (2)(C) is based on *United States v. Cook, supra.*

1994 Amendment: The amendment to the Discussion accompanying R.C.M. 705(b)(2)(C), regarding reinstitution of offenses withdrawn or dismissed pursuant to a pretrial agreement and the standard of proof required of the government to withstand a defense motion to dismiss the reinstituted offenses, is based on *United States v. Verrusio*, 803 F.2d 885 (7th Cir. 1986). Alternative procedures available in Federal civilian practice, such as a motion by the government for relief from its obligation under the agreement before it proceeds to the indictment stage (*see United States v. Ataya*, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988)), are inapposite in military practice and thus are not required. *See generally* R.C.M. 801(a).

(c) *Terms and conditions.* This subsection is intended to ensure that certain fundamental rights of the accused cannot be bargained away while permitting the accused substantial latitude to enter into terms or conditions as long as the accused does so freely and voluntarily. Subsection (1)(B) lists certain matters which cannot be bargained away. This is because to give up these matters would leave no substantial means to ensure judicially that the accused's plea was provident, that the accused entered the pretrial agreement voluntarily, and that the sentencing proceedings met acceptable standards. *See United States v. Mills*, 12 M.J. 1 (C.M.A. 1981); *United States v. Green*, 1 M.J. 453 (C.M.A. 1976); *United States v. Holland*, 1 M.J. 58 (C.M.A. 1975); *United States v. Care*, 18 U.S.C.M.A., 40 C.M.R. 247 (1969); *United States v. Cummings*, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968); *United States v. Allen, supra.* The discussion under subsection (2) is based on *United States v. Holland, supra.* The rule is not intended to codify *Holland* to the extent that *Holland* may prevent the accused from giving up the right to make any motions before trial. *Cf. United States v. Schaffer, supra.* Subsection (1)(A) provides that any term or condition, even if not otherwise prohibited, must be agreed to by the accused freely and voluntarily. *Cf. United States v. Green, supra; United States v. Care, supra.*

Subsection (2) makes clear that certain terms or conditions are not included in subsection (1)(B) and are permissible so long as they are freely and voluntarily agreed to by the accused. Since the accused may waive many matters other than jurisdiction, in some cases by failure to object or raise a matter (*see* R.C.M. 905(e); Mil. R. Evid. 103(a)), or by a plea of guilty (*see* R.C.M. 910(j) and Analysis), there is no reason why the accused should not be able to seek a more favorable agreement by agreeing to waive such matters as part of a pretrial agreement. Indeed, authorization for such terms or conditions, coupled with the requirement that they be included in the written agreement (*see* subsection (d)(3) of this rule) prevents *sub rosa* agreements concerning such matters and ensures that a careful judicial inquiry into, and record of, the accused's understanding of such matters will be made. The matters listed in subsection (2) have been judicially sanctioned. As to subsection (2)(A), *see United States v. Thomas*, 6 M.J. 573 (A.C.M.R. 1978). *Cf. United States v. Bertelson, supra.* Subsection (2)(B) is based on *United States v. Reynolds*, 2 M.J. 887 (A.C.M.R. 1976); *United States v. Tyson*, 2 M.J. 583 (N.C.M.R. 1976). *See also United States v. Chavez-Rey*, 1 M.J. 34 (C.M.A. 1975); *United States v. Stoltz*, 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964).

Subsection (2)(C) is based on *United States v. Callahan*, 8 M.J. 804 (N.C.M.R. 1980); *United States v. Brown*, 4 M.J. 654 (A.C.M.R. 1977). Enforcement of a restitution clause may raise problems if the accused, despite good faith efforts, is unable to comply. *See United States v. Brown, supra.*

Subsection (2)(D) is based on *United States v. Dawson*, 10 M.J. 142 (C.M.A. 1982). Although the post-trial misconduct provision in *Dawson* was rejected, a majority of the court was apparently

willing to permit such provisions if adequate protections against arbitrary revocation of the agreement are provided. However, *see United States v. Connell*, 13 M.J. 156 (C.M.A. 1982) in which a post-trial misconduct provision was held unenforceable without detailed analysis. Subsection (D) provides the same protections as revocation of a suspended sentence requires. *See* R.C.M. 1109 and Analysis. Given such protections, there is no reason why an accused who has bargained for sentence relief such as a suspended sentence should enjoy immunity from revocation of the agreement before action but not afterward. Other decisions have suggested the validity of post-trial misconduct provisions. *See United States v. Goode*, 1 M.J. 3 (C.M.A. 1975); *United States v. Thomas, supra; United States v. French*, 5 M.J. 655 (N.C.M.R. 1978). *Cf. United States v. Lallande*, 22 U.S.C.M.A. 170, 46 C.M.R. 170 (1973).

Subsection (2)(E) is based on *United States v. Schaffer, supra; United States v. Mills, supra; United States v. Schmeltz*, 1 M.J. 8 (C.M.A. 1975). Note that the list is not exhaustive. The right to enlisted members may be waived, for example.

1991 Amendment: Subsection (2) was amended to clarify that either side can propose the inclusion of the listed terms in a pretrial agreement. This conforms to the amendment to R.C.M. 705(d).

(d) *Procedure.* This subsection ensures that an offer to plead guilty pursuant to a pretrial agreement originates with the accused, and that the accused freely and voluntarily enters a pretrial agreement. At the same time it recognizes that a pretrial agreement is the product of negotiation and discussion on both sides, each of which is free to refuse to enter an agreement and go to trial. Subsection (1) is based on *United States v. Schaffer, supra.* This subsection, together with the prohibition against terms not freely and voluntarily agreed to by the accused and the requirement in R.C.M. 910 for an inquiry into the agreement, should prevent prosecutorial pressure or improper inducements to the accused to plead guilty or to waive rights against the accused's wishes or interest. *See United States v. Schaffer, supra* at 428–429.

Subsection (2) provides that once plea discussions are initiated by the defense the convening authority or a representative may negotiate with the defense. This recognizes that, while the offer must originate with the defense, the specific provisions in an agreement may be the product of discussions with the Government. *Schaffer, Mills, and Schmeltz* suggest that each term must originate with the defense. R.C.M. 705 is consistent with this insofar as it requires that the offer to plead guilty originate with the accused (subsection (d)(1)), that the written proposal be prepared by the defense (subsection (d)(3)), and that the accused enter or agree to each term freely and voluntarily (subsection (c)(1)(A)). It is of no legal consequence whether the accused's counsel or someone else conceived the idea for a specific provision so long as the accused, after thorough consultation with qualified counsel, can freely choose whether to submit a proposed agreement and what it will contain. *See United States v. Munt*, 3 M.J. 1082 (A.C.M.R. 1977), *pet. denied*, 4 M.J. 198 (C.M.A. 1978).

Subsection (3) ensures that all understandings be included in the agreement. This is in the interest of both parties. *See United States v. Cooke*, 11 M.J. 257 (C.M.A. 1981); *United States v. Lanzer*, 3 M.J. 60 (C.M.A. 1977); *United States v. Cox*, 22 U.S.C.M.A. 69, 46 C.M.R. 69 (1972). The last sentence is based on *United States v. Green, supra.* Note that the rule does not require the convening authority to sign the agreement. Although the convening authority must personally approve the agreement, (*see* subsection (a)) and has sole discretion whether to do so under subsection (4), the convening authority need not personally sign the agreement. In some circumstances, it may not be practicable or even physically possible to present the written agreement to the convening authority for approval. The rule allows flexibility in this regard. The staff judge advocate, trial counsel, or other person authorized by the convening authority to sign may do so. Authority to sign may by granted orally. Subsection (3) is not intended to preclude oral modifications in the agreement from being made on the record at trial with the consent of the parties.

Subsection (5) makes clear that neither party is bound by a pretrial agreement until performance begins. *See United States v. Kazena*, 11 M.J. 28 (C.M.A. 1981). In *Shepardson v. Roberts*, 14 M.J. 354 (C.M.A. 1983), the Court stated that the convening authority may be bound by a pretrial agreement before entry of a plea of guilty if the accused has detrimentally relied on the agreement. The Court indicated, however, that not all forms of reliance by the accused rise to the level of detrimental reliance as it used that term. Thus the Court held in *Shepardson* that exclusion of statements allegedly made by the accused as a result of the agreement (but not necessarily pursuant to it) was an adequate remedy, and enforcement of the agreement was not required when the convening authority withdrew from it before trial. Similarly, the Court opined that the fact that an accused made arrangements to secure employment or took similar actions in reliance on an agreement would not require enforcement of a pretrial agreement. Subsection (5) is consistent with this approach, but uses beginning of performance by the accused to provide a clearer point at which the right of the convening authority to withdraw terminates. Note that the beginning of performance is not limited to entry of a plea. It would also include testifying in a companion case, providing information to Government agents, or other actions pursuant to the terms of an agreement.

Note that the accused may withdraw from a pretrial agreement even after entering a guilty plea or a confessional stipulation, but, once the plea is accepted or the stipulation admitted, could not withdraw the plea or the stipulation except as provided under R.C.M. 910(h) or 811(d). The fact that the accused may withdraw at any time affords the accused an additional measure of protection against prosecutorial abuse. It also reflects the fact that the convening authority can retrieve any relief granted the accused. *See* Article 63; *United States v. Cook, supra.*

1991 Amendment: R.C.M. 705(d) was amended to authorize either party to initiate pretrial agreement negotiations and propose terms and conditions. The amendment does not change the general rule that all terms and conditions of a pretrial agreement proposed pursuant to this rule must not violate law, public policy, or regulation. Subparagraph (1) was eliminated and subparagraphs (2)–(5), as amended, were renumbered (1)–(4), respectively. This amendment is patterned after federal civilian practice [*see Fed. R. Crim. P.* 11(e)] where there is no requirement that negotiations for plea agreements originate with the defense. In courts-martial the military judge is required to conduct an exhaustive inquiry into the providence of an accused's guilty plea and the voluntariness of the pretrial agreement. R.C.M. 705(c) ensures that certain fundamental rights of the accused cannot be bargained away.

Furthermore it can be difficult to determine which side originated negotiations or proposed a particular clause. *Cf. United States v. Jones*, 23 M.J. 305, 308–309 (C.M.A. 1987) (Cox, J., concurring).

(e) *Nondisclosure of existence of agreement.* This subsection is based on *United States v. Green, supra; United States v. Wood*, 23 U.S.C.M.A. 57, 48 C.M.R. 528 (1974). *See also* R.C.M. 910(f); Mil. R. Evid. 410.

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

This rule is taken from paragraph 121 of MCM, 1969 (Rev.). Minor changes were made in order to conform with the format and style of the Rules for Courts-Martial. *See also United States v. Cortes-Crespo*, 13 M.J. 420 (1982); *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977); Mil. R. Evid. 302 and Analysis. The rule is generally consistent with 18 U.S.C. § 4244. The penultimate paragraph in paragraph 121 is deleted as an unnecessary statement.

1987 Amendment: Subsection (c)(1) was modified, in light of changes to federal law, to allow the use of available clinical psychologists. *See* 18 U.S.C. §§ 4241, 4242, and 4247. Subsection (c)(2) was revised to implement Article 50a, which was added to the UCMJ in the "Military Justice Amendments of 1986," tit. VIII, § 802, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99–661, 100 Stat. 3905 (1986). Article 50a adopted some provisions of the Insanity Defense Reform Act, ch. IV, Pub. L. No. 98–473, 98 Stat. 2057 (1984). *See also* Analysis of R.C.M. 916(k). The subsection dealing with the volitional prong of the American Law Institute's Model Penal Code test was deleted. Subsection (A) was amended by adding and defining the word "severe." *See* R.C.M. 916(k)(1); S. Rep. No. 225, 98th Cong., 1st Sess. 229 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 1, 231. Subsection (C) was amended to state the cognitive test as now set out in R.C.M. 916(k)(1).

1998 Amendment. Subsection (c)(2)(D) was amended to reflect the standard for incompetence set forth in Article 76b, UCMJ.

Rule 707. Speedy trial

Introduction. This rule applies the accused's speedy trial rights under the 6th Amendment and Article 10, UCMJ, and protects the command and societal interest in the prompt administration of justice. *See generally Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. Walls*, 9 M.J. 88 (C.M.A. 1980). The purpose of this rule is to provide guidance for granting pretrial delays and to eliminate after-the-fact determinations as to whether certain periods of delay are excludable. This rule amends the former rule, which excluded from accountable time periods covered by certain exceptions.

(a) *In general.* This subsection is based on *ABA Standards for Criminal Justice, Speedy Trial*, 12–2.1, 12–2.2 (1986). The ABA Standards set no time limit but leave the matter open depending on local conditions. The basic period from arrest or summons to trial under *The Federal Speedy Trial Act*, 18 U.S.C. § 3161, is 100 days. The period of 120 days was selected for courts-martial as a reasonable outside limit given the wide variety of locations and conditions in which courts-martial occur. The dates of the events which begin government accountability are easily ascertainable and will avoid the uncertainty involved in *Thomas v. Edington*, 26 M.J. 95 (C.M.A. 1988).

The 90-day rule previously established in R.C.M. 707(d) has been eliminated. As such, the 120-day rule established in subsection (a) of this rule applies to all cases, not just cases where the accused is in pretrial confinement. Judicial decisions have held, however, that when an accused has been held in pretrial confinement for more than 90 days, a presumption arises that the accused's right to a speedy trial under Article 10, UCMJ has been violated. In such cases, the government must demonstrate due diligence in bringing the case to trial. *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971). Unless *Burton* and its progeny are reexamined, it would be possible to have a *Burton* violation despite compliance with this rule.

The discussion is based on *United States v. McDonald*, 456 U.S. 1 (1982); *United States v. Marion*, 404 U.S. 307 (1971). *See also United States v. Lovasco*, 431 U.S. 783 (1977). Delay before restraint or referral of charges could raise due process issues. *See id.; United States v. McGraner*, 13 M.J. 408 (C.M.A. 1982). *See generally* Pearson and Bowen, *Unreasonable Pre-Preferral Delay*, 10 A.F. JAG Rptr. 73 (June 1981).

(b) *Accountability.* Subsection (1) is based on *United States v. Manalo*, 1 M.J. 452 (C.M.A. 1976). The reference to R.C.M. 304(a)(2)–(4) conforms to the language of R.C.M. 707(a)(2).

Subsection (2) is based on *ABA Standards, supra* at 12–2.2(a) (1986). *See also United States v. Talaveraz*, 8 M.J. 14 (C.M.A. 1979).

Subsection (3)(A) establishes that a mistrial or dismissal by any proper authority begins a new trial period. This subsection clarifies the date from which to begin measuring new time periods in cases involving rereferral, restraint, or no restraint.

Subsection (3)(B) clarifies the intent of this portion of the rule. The harm to be avoided is continuous pretrial restraint. *See United States v. Gray*, 21 M.J. 1020 (N.M.C.M.R. 1986). Where an accused is released from pretrial restraint for a substantial period, he will be treated the same as an accused who was not restrained. Therefore, unless the restraint is reimposed, the 120-day time period will run from the date of preferral or entry on active duty regardless of whether that event occurs before or after the accused was released from restraint.

Subsection (3)(C) clarifies the effect of government appeals on this rule. This subsection treats all government appeals the same. Once the parties are given notice of either the government's decision not to appeal under R.C.M. 908(b)(8) or the decision of the Court of Criminal Appeals under R.C.M. 908(c)(3), a new 120-day period begins.

This subsection clarifies how time should be counted for those charges not affected by the ruling that is subject to appeal. Under R.C.M. 908(b)(4), trial on such charges may in some circumstances proceed notwithstanding the appeal, or trial may await resolution of the appeal. Since the traditional policy of resolving all known charges at a single trial has not changed (*see* R.C.M. 906(b)(10), Discussion), charges not the subject of the appeal may be properly delayed without violating this rule. Accordingly where the trial is interrupted by a government appeal, all charges may be treated the same and proceeded upon at the same time once the appeal is resolved.

(c) *Excludable delays.* This subsection, based on *ABA Standards for Criminal Justice, Speedy Trial*, 12–1.3 (1986), follows the

principle that the government is accountable for all time prior to trial unless a competent authority grants a delay. *See United States v. Longhofer*, 29 M.J. 22 (C.M.A. 1989). The rule of procedure established in subsection (1) is based on *United States v. Maresca*, 28 M.J. 328 (C.M.A. 1989). *See also United States v. Carlisle*, 25 M.J. 426, 428 (C.M.A. 1988).

The discussion to subsection (1) provides guidance for judges and convening authorities to ensure the full development of speedy trial issues at trial. *See United States v. Maresca*, *supra.* This amendment follows ABA guidance and places responsibility on a military judge or the convening authority to grant reasonable pretrial delays. Military judges and convening authorities are required, under this subsection, to make an independent determination as to whether there is in fact good cause for a pretrial delay, and to grant such delays for only so long as is necessary under the circumstances. *ABA Standards*, *supra* at 12–1.3; *United States v. Longhofer*, *supra.* Decisions granting or denying pretrial delays will be subject to review for both abuse of discretion and the reasonableness of the period of delay granted. *Id.; United States v. Maresca*, *supra.*

1998 Amendment. In creating Article 76b, UCMJ, Congress mandated the commitment of an incompetent accused to the custody of the Attorney General. As an accused is not under military control during any such period of custody, the entire period is excludable delay under the 120-day speedy trial rule.

(d) *Remedy.* This subsection is based on *The Federal Speedy Trial Act*, 18 U.S.C. § 3162. The Federal Rule provides dismissal as the sanction for speedy trial violations but permits the judge to dismiss with or without prejudice. Accordingly, this subsection permits the judge to dismiss charges without prejudice for nonconstitutional violations of this rule. If, however, the accused has been denied his or her constitutional right to a speedy trial, the only available remedy is dismissal with prejudice. *Strunk v. United States*, 412 U.S. 434 (1973).

(e) *Waiver.* A lack of a demand for immediate trial will not constitute waiver and will not preclude an accused from raising speedy trial issues at trial. *See Barker v. Wingo*, *supra.*

CHAPTER VIII. TRIAL PROCEDURE GENERALLY

Rule 801. Military judge's responsibility; other matters

(a) *Responsibilities of military judge.* This subsection is based on paragraphs 39 *b* and 40 *b*(2) and the first sentence of paragraph 57 *a* of MCM, 1969 (Rev.). It is intended to provide the military judge or president of a special court-martial without a military judge broad authority to regulate the conduct of courts-martial within the framework of the code and the Manual, and to establish the outlines of their responsibilities. Much of the discussion is also derived from paragraphs 39 *b*, 40 *b*(2), and 53 *g* of MCM, 1969 (Rev.). A few minor changes have been made. For instance, the military judge, not the president, determines the uniform to be worn, and the military judge is not required to consult with the president, nor is the president of a special court-martial without a military judge required to consult with trial counsel, concerning scheduling. As a practical matter, consultation or coordination among the participants concerning scheduling or uniform may be appropriate, but the authority for these decisions should rest with the presiding officer of the court, either military judge or president of a special court-martial without a military judge, without being required to consult with others.

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

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

(d) *Interlocutory questions and questions of law.* This subsection is similar in substance to paragraph 57 of MCM, 1969 (Rev.) and is based on Articles 51(b) and 52(c).

Subsections (1) and (2) are based on Articles 51(b) and 52(c). The provisions (R.C.M. 801(e)(1)(C); 801(e)(2)(C)) permitting a military judge or president of a special court-martial without a military judge to change a ruling previously made (Article 51(b)) have been modified to preclude changing a previously granted motion for finding of not guilty. *United States v. Hitchcock*, 6 M.J. 188 (C.M.A. 1979). Under R.C.M. 916(k) the military judge does not rule on the question of mental responsibility as an interlocutory matter. *See* Analysis, R.C.M. 916(k). Thus there are no rulings by the military judge which are subject to objection by a member.

Subsection (2)(D) makes clear that all members must be present at all times during special courts-martial without a military judge. The president of a special court-martial lacks authority to conduct the equivalent of an Article 39(a) session. *Cf. United States v. Muns*, 26 C.M.R. 835 (C.G.B.R. 1958).

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

Subsection (4) is taken from paragraph 57 *g*(1) of MCM, 1969 (Rev.). The rule recognizes, however, that a different standard of proof may apply to some interlocutory questions. *See, e.g.*, Mil. R. Evid. 314(e)(5). The assignments of the burden of persuasion are determined by specific rules or, in the absence of a rule, by the source of the motion. This represents a minor change from the language in paragraph 67 *e* of MCM, 1969 (Rev.), which placed the burden on the accused for most questions. This assignment was rejected by the Court of Military Appeals in several cases, *see, e.g., United States v. Graham*, 22 U.S.C.M.A. 75, 46 C.M.R. 75 (1972). Assignments of burdens of persuasion and, where appropriate, going forward are made in specific rules. "Burden of persuasion" is used instead of the more general "burden of proof" to distinguish the risk of non persuasion once an issue is raised from the burden of production necessary to raise it. *See McCormick's Handbook of the Law of Evidence* § 336 (E. Cleary ed. 1972). For example, although the defense may have the burden of raising an issue (e.g., statute of limitations), once it has done so the prosecution may bear the burden of persuasion.

The discussion under subsection (5) describes the differences between interlocutory questions and ultimate questions, and between questions of fact and questions of law. It is taken, substantially, from paragraph 57 *b* of MCM, 1969 (Rev.). As to the distinction between questions of fact and questions of law, *see United States v. Carson*, 15 U.S.C.M.A. 407, 35 C.M.R. 379

(1965). The discussion of issues which involve both interlocutory questions and questions determinative of guilt is based on *United States v. Bailey*, 6 M.J. 965 (N.C.M.R. 1979); *United States v. Jessie*, 5 M.J. 573 (A.C.M.R.), *pet. denied*, 5 M.J. 300 (1978). It is similar to language in the third paragraph of paragraph 57 *b* of MCM, 1969 (Rev.), which was based on *United States v. Ornelas*, 2 U.S.C.M.A. 96, 6 C.M.R. 96 (1952). *See Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition*, DA PAM 27–2, 10–5 (July 1970). That example, and the decision in *United States v. Ornelas, supra* were questioned in *United States v. Laws*, 11 M.J. 475 (C.M.A. 1981). The discussion clarifies that when a military offense (i.e., one which requires that the accused be a "member of the armed forces," *see* Articles 85, 86, 99; *see also* Articles 88–91, 133) is charged and the defense contends that the accused is not a member of the armed forces, two separate questions are raised by that contention: first, whether the accused is subject to court-martial jurisdiction (*see* R.C.M. 202); and, second, whether, as an element of the offense, the accused had a military duty which the accused violated (e.g., was absent from the armed forces or a unit thereof without authority). The first question is decided by the military judge by a preponderance of the evidence. The second question, to the extent it involves a question of fact, must be decided by the factfinder applying a reasonable doubt standard. *United States v. Bailey, supra. See also United States v. McGinnis*, 15 M.J. 345 (C.M.A. 1983); *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983); *United States v. McDonagh*, 14 M.J. 415 (C.M.A. 1983). Thus it would be possible, in a case where larceny and desertion are charged, for the military judge to find by a preponderance of the evidence that the accused is subject to military jurisdiction and for the members to convict of larceny but acquit of desertion because they were not satisfied beyond reasonable doubt that the accused was a member of the armed forces.

Ornelas does not require a different result. The holding in *Ornelas* was that the law officer (military judge) erred in failing to permit the members to resolve a contested issue of the accused's status as a servicemember on a desertion charge. Language in the opinion to the effect that the "jurisdictional" issue should have been submitted to the members is attributable to language in paragraph 67 *e* of MCM, 1951, which suggested that "defenses," including "jurisdiction," were to be resolved by the members. Such a procedure for resolving motions to dismiss has been abolished. *See* R.C.M. 905; 907; and 916. Thus the procedure implied by a broad reading of *Ornelas* for resolving jurisdiction is not required by the Manual. *See generally United States v. Laws, supra. Cf. United States v. McDonagh, supra.* On the other hand, when military status is an element of the offense, the fact of such military status must be resolved by the factfinder. *Cf. United States v. McGinnis* and *United States v. Marsh*, both *supra.*

(f) *Rulings on record.* This subsection is based on paragraph 39 *c* of MCM, 1969 (Rev.). Paragraph 39 *c* did not include a reference to rulings and instructions by the president of a special court-martial without a military judge, nor was specific reference to them made elsewhere in the Manual. Since such rulings and instructions are subject to the same review as those of a military judge, the same standard should apply to both at this stage. The rule is based on Article 54. The discussion refers to R.C.M. 808 and 1103 to indicate what must be recorded at trial. Concerning requirements for verbatim records, *see United States v. Douglas*, 1 M.J. 354 (C.M.A. 1976); *United States v. Boxdale*, 22 U.S.C.M.A. 414, 47 C.M.R. 351 (1973); *United States v. Weber*, 20 U.S.C.M.A. 82, 42 C.M.R. 274 (1970).

(g) *Effect of failure to raise defenses or objections.* This subsection is based on Fed. R. Crim. P. 12(f), except for the addition of the term "motions" to make clear that motions may be covered by the rule and changes to conform to military terminology and procedure. Such waiver provisions are more specifically implemented as to many matters throughout the Rules. Several examples are listed in the discussion.

Rule 802. Conferences

Introduction. This rule is new. It is based on Fed. R. Crim. P. 17.1, but is somewhat broader and more detailed. Fed. R. Crim. P. 17.1 apparently authorizes, by its title, only pretrial conferences. Conferences other than pretrial conferences are also authorized in federal practice. *See* Fed. R. Crim. P. 43(c)(3); *Cox v. United States*, 309 F.2d 614 (8th Cir. 1962). R.C.M. 802 applies to all conferences. Nothing in this rule is intended to prohibit the military judge from communicating, even ex parte, with counsel concerning routine and undisputed administrative matters such as scheduling, uniform, and travel arrangements. Such authority was recognized in the fourth sentence of paragraph 39 *c* of MCM, 1969 (Rev.).

Like Fed. R. Crim. P. 17.1, this rule provides express authority for what is already common practice in many courts-martial, and regularizes the procedure for them. Fed. R. Crim. P. 17.1 is designed to be used in unusual cases, such as complicated trials. Conferences are needed more frequently in courts-martial because in many instances the situs of the trial and the home bases of the military judge, counsel, and the accused may be different. Even when all the participants are located at the same base, conferences may be necessary. *See ABA Standards, Discovery and Procedural Before Trial* § 11–5.4 (1978). After the trial has begun, there is often a need to discuss matters in chambers. *Cf.* Fed. R. Crim. P. 43(c); *United States v. Gregorio*, 497 F.2d 1253 (4th Cir.), *cert. denied*, 419 U.S. 1024 (1974).

(a) *In general.* This subsection is taken directly from the first sentence of Fed. R. Crim. P. 17.1, with modifications to accommodate military terminology. Subsection (c) provides that a conference may not proceed over the objection of a party and that, in effect, matters may be resolved at a conference only by agreement of the parties. Thus, the military judge can bring the parties together under subsection (a), but a conference could not proceed further without the voluntary participation of the parties. Nothing in this rule is intended to prohibit the military judge from communicating to counsel, orally or in writing, matters which may properly be the subject of rules of court. *See* R.C.M. 108; 801. This is also true under the federal rule. *See Committee on Pretrial Procedure of the Judicial Conference of the United States, Recommended Procedures in Criminal Trials*, 37 F.R.D. 95, 98 (1965); C. Wright, *Wright's Federal Practice and Procedure* Para. 292 (1969). *Cf. United States v. Westmoreland*, 41 F.R.D. 419 (S.D. Ind. 1967).

The discussion provides some examples of the potential uses of conferences. As noted, issues may be resolved only by agreement of the parties; they may not be litigated or decided at a conference. To do so would exceed, and hence be contrary to, the

authority established under Article 39(a). The prohibition against judicial participation in plea bargaining is based on *United States v. Caruth*, 6 M.J. 184, 186 (C.M.A. 1979). *Cf. United States v. Allen*, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957). *But, cf. ABA Standards, Pleas of Guilty* § 14–3.3(c) (1979).

(b) *Matters on record.* This subsection is based on the second sentence in Fed. R. Crim. P. 17.1. The federal rule requirement for a written memorandum was rejected as too inflexible and unwieldy for military practice. The interests of the parties can be adequately protected by placing matters on the record orally. If any party fears that such an oral statement will be inadequate, that party may insist on reducing agreed-upon matters to writing as a condition of consent. In any event, a party is not prohibited from raising the matters again at trial. *See* subsection (c) below.

The waiver provision has been added because the conference is not part of the record of trial under Article 54. The purpose of the requirement for inclusion in the record is to protect the parties, and therefore it may be waived. *United States v. Stapleton*, 600 F.2d 780 (9th Cir. 1979).

(c) *Rights of parties.* This subsection does not appear in the federal rule. It is intended to ensure that conferences do not become a substitute for Article 39(a) sessions. In this respect Fed. R. Crim. P. 17.1 is broader than R.C.M. 802, since the federal rule apparently includes "conferences" held on the record and permits the parties to be bound by matters resolved at the conference. *See* C. Wright, *supra* at Para. 292.

1991 Amendment: The prohibition against conferences proceeding over the objection of any party was eliminated as it conflicted with the military judge's specific authority to order conferences under section (a) of this rule and general authority to control the conduct of court-martial proceedings. While the military judge may compel the attendance of the parties, neither party may be compelled to resolve any issue or be pressured to make any concessions.

(d) *Accused's presence.* This subsection does not appear in Fed. R. Crim. P. 17.1. The silence of the federal rule on this matter has been controversial. *See* Douglas, J., dissenting from approval of Fed. R. Crim. P. 17.1 at 39 F.R.D. 276, 278 (1966). *See also* 8 J. Moore, *Moore's Federal Practice* Para. 17.1.02 [1]; 17.1.03 [3] (1982 rev. ed.); Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L. J. 1276, 1294–99 (1966); *ABA Standards, Discovery and Procedure Before Trial* § 11–5.4(a) (1978). The presence of the accused is not necessary in most cases since most matters dealt with at conferences will not be substantive. The participation of the defense in conferences and whether the accused should attend are matters to be resolved between defense counsel and the accused.

Fed. R. Crim. P. 43(c)(2) authorizes conferences concerning questions of law to be held without the presence of the accused. The proceedings described in Fed. R. Crim. P. 43(c)(2) are analogous to those described in Article 39(a)(2), since the judge may make rulings at a 43(c)(2) conference and such a conference is "on the record." Article 39(a) expressly gives the accused the right to be present at similar proceedings in courts-martial. Because of this inconsistency, Fed. R. Crim. P. 43(c)(2) is not adopted. Questions of law may be discussed at a conference under R.C.M. 802, but the military judge may not decide them at such conferences.

(e) *Admission.* This subsection is taken from the third sentence of Fed. R. Crim. P. 17.1.

(f) *Limitations.* This subsection is based on the last sentence in Fed. R. Crim. P. 17.1, with the addition of the prohibition against conferences in special courts-martial without a military judge.

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

Article 39(a) authorizes the military judge to call and conduct sessions outside the presence of members. The discussion contains a general description, based on paragraph 53 *d*(1) of MCM, 1969 (Rev.), of the types of matters which may be dealt with at Article 39(a) sessions. The quoted language in the first paragraph of the discussion is found in the legislative history of Article 39(a). *See* S. Rep. No. 1601, 90th Cong., 2nd Sess. 9–10 (1968).

The rule modifies the language concerning Article 39(a) sessions after sentence is announced. The former provision permitted such sessions only "when directed by the appropriate reviewing authority." Yet paragraphs 80 *b* and *c* of MCM, 1969 (Rev.) implied that a military judge could call such a session on the judge's own motion. R.C.M. 1102 also authorizes such action.

The first two paragraphs of the discussion are based on the second and third paragraphs of paragraph 53 *d*(1) of MCM, 1969 (Rev.), except that the present language omits "defenses" from the matters a military judge may hear at an Article 39(a) session. Clearly a military judge does not rule on the merits of a defense at an Article 39(a) session, and matters collateral to a defense which might be heard at an Article 39(a) session are adequately described elsewhere in the discussion.

As to the third paragraph of the discussion, *see* Articles 35 and 39. *See also United States v. Pergande*, 49 C.M.R. 28 (A.C.M.R. 1974).

Rule 804. Presence of the accused at trial proceedings

Introduction. Subsections (a) and (b) of this rule are very similar to Fed. R. Crim. P. 43(a) and (b). Subsection (c) is derived from paragraph 60 of MCM, 1969 (Rev.). Fed. R. Crim. P. 43(c) was not adopted since it is not compatible with military practice, as it concerns corporate defendants, misdemeanor proceedings, conferences or arguments upon questions of law, and sentence reduction proceedings. Of these, only presence of the accused at conferences or arguments upon questions of law has relation to military procedure. Article 39(b) would preclude absence by the accused from arguments, except as provided in subsection (b). Conferences are treated in R.C.M. 802.

Other differences between this rule and Fed. R. Crim. P. 43 and paragraphs 11 and 60 of the MCM, 1969 (Rev.) are discussed below.

(a) *Presence required.* Article 39 establishes the right of the accused to be present at all trial proceedings and Article 39(a) sessions. The right is grounded in the due process clause of the Fifth Amendment and the right to confrontation clause of the Sixth Amendment of the Constitution. This subsection is basically the same as Fed. R. Crim. P. 43(a) with modifications in language to conform to military procedures.

The requirement that the accused be present is not jurisdictional. While proceeding in the absence of the accused, without the

express or implied consent of the accused, will normally require reversal, the harmless error rule may apply in some instances. *See United States v. Walls*, 577 F.2d 690 (9th Cir.) *cert. denied*, 439 U.S. 893 (1978); *United States v. Nelson*, 570 F.2d 258 (8th Cir. 1978); *United States v. Taylor*, 562 F.2d 1345 (2d Cir.), *cert. denied*, 434 U.S. 853 (1977).

(b) *Continued presence not required.* This subsection is similar to Fed. R. Crim. P. 43(b). Aside from modifications in terminology, two minor substantive changes have been made. First, this subsection specifies that sentencing, as well as trial on the merits, may take place when the accused is absent under this rule. Such a construction is necessary in the military because delaying a sentence determination increases the expense and inconvenience of reassembling the court-martial and the risk that such reassembly will be impossible. Federal courts do not face a similar problem. *See United States v. Houghtaling*, 2 U.S.C.M.A. 230, 235, 8 C.M.R. 30, 35 (1953).

The second change substitutes the word "arraignment" for "the trial has commenced." This is a clearer demarcation of the point after which the accused's voluntary absence will not preclude continuation of the proceedings. Since there are several procedural steps, such as service of charges, which, while associated with the trial process, do not involve a session, the arraignment is a more appropriate point of reference. This is consistent with the previous military rule.

The discussion points out that, although not explicitly stated in this subsection (or Fed. R. Crim. P. 43(b)), the accused may expressly waive the right to be present at trial. Federal courts have so construed Rule 43. *See* 8 J. Moore, *Moore's Federal Practice*, § 43.02[2] (1982 rev. ed.):

[Rule 43] does not refer to express waiver of presence on the part of felony defendants, although it includes such a provision for misdemeanants. This omission was not intended to negate the right of felony defendants expressly to waive presence at the trial, for the *Diaz* case (*Diaz v. United States*, 223 U.S. 442 (1912)) cited as authority for the "voluntary absence" provision itself involved an express waiver. [Footnote omitted.]

See also Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (dicta); *In re United States*, 597 F.2d 27 (2d Cir. 1979); *United States v. Jones*, 514 F.2d 1331 (D.C. Cir. 1975); *United States v. Crutcher*, 405 F.2d 239 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); *Pearson v. United States*, 325 F.2d 625 (D.C. Cir. 1963); *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963). Such waiver should be made expressly by the accused in open court. *Compare Cross v. United States, supra, with Pearson v. United States, supra.* Federal cases also establish that there is no right to waive presence, *see, e.g., United States v. Durham*, 587 F.2d 799 (5th Cir. 1979); *United States v. Fitzpatrick*, 437 F.2d 19 (2d Cir. 1970). In *In re United States, supra*, the court stated that there is a duty on the part of a defendant in a felony trial to be present. 597 F.2d at 28.

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

Subsection (1) is similar to paragraph 11 *c* of MCM, 1969 (Rev.). The language in MCM, 1969 (Rev.), which indicated that an absence had to be unauthorized, has been omitted. The language now conforms to the federal rule in this respect. The term "unauthorized" has never been treated as significant. *See United States v. Peebles*, 3 M.J. 177 (C.M.A. 1977). As the discussion notes in the fourth paragraph, a person who is in custody or otherwise subject to military control cannot, while in such a status, voluntarily be absent from trial without expressly waiving the right on the record and receiving the permission of the military judge to be absent. *Cf. United States v. Crutcher, supra.* This appears to be the treatment that the term "unauthorized" was designed to effect. *See United States v. Peebles, supra* at 179 (Cook, J.).

Trial in absentia, when an accused voluntarily fails to appear at trial following arraignment, has long been permitted in the military. *United States v. Houghtaling, supra.* Authority for the third and fourth paragraphs of the discussion under *Voluntary absence* is found in *United States v. Peebles, supra. United States v. Cook, supra* requires that the voluntariness of an absence be established on the record before trial in absentia may proceed. Because the prosecution will be the party moving for trial in absentia, the discussion notes that the prosecution has the burden to prove voluntariness as well as absence. The example of an inference is taken from Judge Perry's separate opinion in *United States v. Peebles, supra. Compare United States v. Partlow*, 428 F.2d 814 (2d. Cir. 1970) *with Phillips v. United States*, 334 F.2d 589 (9th Cir. 1964), *cert, denied*, 379 U.S. 1002 (1965).

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

(c) *Voluntary absence for limited purpose of child testimony. 1999 Amendment:* The amendment provides for two-way closed circuit television to transmit a child's testimony from the courtroom to the accused's location. The use of two-way closed circuit television, to some degree, may defeat the purpose of these alternative procedures, which is to avoid trauma to children. In such cases, the judge has discretion to direct one-way television communication. The use of one-way closed circuit television was approved by the Supreme Court in *Maryland v. Craig*, 497 U.S. 836 (1990). This amendment also gives the accused the election to absent himself from the courtroom to prevent remote testimony. Such a provision gives the accused a greater role in determining how this issue will be resolved.

(d) *Appearance and security of accused.* This subsection is similar to paragraph 60 of MCM, 1969 (Rev.).

In subsection (1), the last sentence represents a modification of previous practice by making the accused and defense counsel primarily responsible for the personal appearance of the accused. Because of difficulties the defense may face in meeting these responsibilities, the rule requires the commander to give reasonable assistance to the defense when needed. The discussion empha-

sizes the right (*see United States v. West*, 12 U.S.C.M.A. 670, 31 C.M.R. 256 (1962)) and the duty (*see United States v. Gentile*, *supra*) of the accused to appear in proper military uniform.

Subsection (2) reflects the changes since 1969 in rules governing pretrial restraint. These rules are now found in the sections referred to by R.C.M. 804(c)(2). Insofar as paragraph 60 of MCM, 1969 (Rev.) was a means of allocating responsibility for maintaining (as opposed to authorizing) custody over an accused until completion of trial, and insofar as this allocation is not mandated by other rules in this Manual, the service secretaries are authorized to prescribe rules to accomplish such allocation.

Subsection (3) is taken verbatim from paragraph 60 of MCM, 1969 (Rev.).

Rule 805. Presence of military judge, members, and counsel

(a) *Military judge.* This subsection is based on paragraph 39 *d* of MCM, 1969 (Rev.).

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

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

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

(d) *Effect of replacement of member or military judge.* This subsection is based on Article 29(b), (c), and (d) and on paragraphs 39 *e* and 41 *e* and *f* of MCM, 1969 (Rev.). MCM, 1969 (Rev.) also provided a similar procedure when a member of a court-martial was temporarily excused from the trial. This rule does not authorize such a procedure. If a member must be temporarily absent, a continuance should be granted or the member should be permanently excused and the trial proceed as long as a quorum remains. Trial may not proceed with less than a quorum present in any event. This subsection provides a means to proceed with a case in the rare circumstance in which a court-martial is reduced below a quorum after trial on the merits has begun and a mistrial is inappropriate.

Rule 806. Public trial

Introduction. This rule recognizes and codifies the basic principle that, with limited exceptions, court-martial proceedings will be open to the public. The thrust of the rule is similar to paragraph 53 *e* of MCM, 1969 (Rev.), but the right to a public trial is more clearly expressed, and exceptions to it are more specifically and more narrowly drawn. This construction is necessary in light of recent decisions, particularly *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

(a) *In general.* This subsection reflects the holding in *United States v. Grunden*, *supra*, that the accused has a right to a public trial under the Sixth Amendment. *See also United States v. Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956); *United States v. Zimmerman*, 19 C.M.R. 806 (A.F.B.R. 1955).

Although the Sixth Amendment right to a public trial is personal to the accused (*see Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979)), the public has a right under the First Amendment to attend criminal trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The applicability of these cases to courts-martial is not certain (*cf. Greer v. Spock*, 424 U.S. 828 (1976); *In re Oliver*, 333 U.S. 257, 26 n. 12 (1948); *but see United States v. Czarnecki*, 10 M.J. 570 (A.F.C.M.R. 1980) (dicta)), especially in view of the practical differences between civilian courts and courts-martial (i.e., courts-martial do not necessarily sit at a permanent or fixed site; they may sit overseas or at sea; and at remote or dangerous locations). Nevertheless the rule and the discussion are based on recognition of the value to the public of normally having courts-martial open to the public. This is particularly true since the public includes members of the military community.

(b) *Control of spectators.* Neither the accused nor the public has an absolute right to a public trial. This subsection recognizes the power of a military judge to regulate attendance at courts-martial to strike a balance between the requirement for a public trial and other important interests.

As the discussion notes, the right to public trial may be violated by less than total exclusion of the public. *See United States v. Brown*, *supra.* Whether exclusion of a segment of the public is proper depends on a number of factors including the breadth of the exclusion, the reasons for it, and the interest of the accused, as well as the spectators involved, in the presence of the excluded individuals. *See United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir. 1977), *cert, denied*, 434 U.S. 1076 (1978); *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975). *See also Stamicarbon v. American Cyanamid Co.*, 506 F.2d 532 (2d Cir. 1974).

The third paragraph in the discussion of Rule 805(b) is based on *United States v. Grunden, supra.*

Judicial authority to regulate access to the courtroom to prevent overcrowding or other disturbances is clearly established and does not conflict with the right to a public trial. *See Richmond Newspapers, Inc. v. Virginia, supra* at 581 n. 18. *Cf. Illinois v. Allen*, 397 U.S. 337 (1970). In addition, there is substantial authority to support the example in the discussion concerning restricting access to protect certain witnesses. *See, e.g., United States v. Eisner*, 533 F.2d 987 (6th Cir.), *cert. denied*, 429 U.S. 919 (1976) (proper to exclude all spectators except press to avoid embarrassment of extremely timid witness); *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966) (proper to exclude all spectators except press and bar to avoid intimidation of witnesses); *United States ex rel. Latimore v. Sielaff, supra* (proper to exclude all spectators except press, cler-

gy, and others with specific interest in presence during testimony of alleged rape victim); *United States ex rel. Lloyd v. Vincent, supra* (proper to exclude spectators in order to preserve confidentiality of undercover agents' identity). *See also Gannett Co., Inc. v. DePasquale, supra* at 401–500 (Powell J., concurring); *United States v. Brown, supra; United States v. Kobli*, 172 F.2d 919 (3rd Cir. 1949).

Subsection (b) authorizes closure of court-martial proceedings over the accused's objection only when otherwise authorized in this Manual. Effectively, this means that the only time trial proceedings may be closed without the consent of the accused is when classified information is to be introduced. *See* Mil. R. Evid. 505(j). Article 39(a) sessions may also be closed under Mil. R. Evid. 505(i); 506(i); and 412(c). Some federal cases seem to suggest that criminal proceedings may be closed for other purposes. *See, e.g., United States ex rel. Lloyd v. Vincent, supra.* Selective exclusion of certain individuals or groups for good cause, under the first clause of this subsection, is a more appropriate and less constitutionally questionable method for dealing with the problems treated in such cases.

Court-martial proceedings may be closed when the accused does not object. As noted in the discussion, however, such closure should not automatically be granted merely because the defense requests or acquiesces in it. *See Richmond Newspapers, Inc., v. Virginia, supra. See also Gannett Co., Inc. v. DePasquale, supra.*

With respect to methods of dealing with the effect of publicity on criminal trials, as treated in the discussion, *see Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R.), *aff'd*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973); *Caley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). *See also ABA Standards, Fair Trial and Free Press* part III (1972).

(c) *Photography and broadcasting prohibited.* This subsection is based on Fed. R. Crim. P. 53, and is consistent with paragraph 53 *e* of MCM, 1969 (Rev.) and practice thereunder. *See* C. Wright, *Wright's Federal Practice and Procedure* § 861 (1969); 8 *B* J. Moore, *Moore's Federal Practice* Para. 53.02 (1982 rev. ed.). The exception which authorizes contemporaneous transmission of the proceedings to another room (e.g., by closed circuit television) has been added to the language of the federal rule. Many military courtrooms have limited space, and such methods have been used to accommodate the accused's and the public's interest in attendance at courts-martial, as in the case of *United States v. Garwood*, NMC 81–1982 (1981). The Working Group considered the constitutional alternatives identified in *Chandler v. Florida*, 449 U.S. 560 (1981), but determined that Article 36 requires adherence to the federal rule except to the extent described. As to the matters in the discussion, *see Amsler v. United States*, 381 F.2d 37 (9th Cir. 1967).

Rule 807. Oaths

(a) *Definition.* This rule and the discussion are taken from paragraph 112 *a* of MCM, 1969 (Rev.). *See also* Fed. R. Crim. P. 54(c).

(b) *Oaths in courts-martial.* Subsection (1) including the discussion is based on Article 42 and is based on paragraph 112 *b* and *c* of MCM, 1969 (Rev.). Subsection (2) is taken from paragraph 112 *d* of MCM, 1969 (Rev.). The discussion is taken in part from paragraph 112 *d* and in part from paragraph 114 of MCM, 1969 (Rev.). The oath for questioning members has been combined with the oath concerning performance of duties for administrative convenience and to impress upon the members the significance of voir dire. The reference in paragraph 112 *a* of MCM, 1969 (Rev.), to Article 135 has been deleted. The oaths for preferral of charges, and witnesses at Article 32 investigations and depositions are contained in the discussion of applicable rules.

Rule 808. Record of trial

The primary purpose of this rule is to highlight for participants at the trial stage the requirements for the record of trial. The discussion is based on paragraph 82 *a, b,* and *h,* of MCM, 1969 (Rev.). *See also United States v. Eichenlaub*, 11 M.J. 239 (C.M.A. 1981); *United States v. McCullah*, 11 M.J. 234 (C.M.A. 1981); *United States v. Boxdale*, 22 U.S.C.M.A. 414, 47 C.M.R. 351 (1973); *United States v. Bielecki*, 21 U.S.C.M.A. 450, 45 C.M.R. 224 (1972); *United States v. DeWayne*, 7 M.J. 755 (A.C.M.R.), *pet. denied*, 8 M.J. 25 (1979); *United States v. Hensley*, 7 M.J. 740 (A.F.C.M.R.), *pet. denied*, 8 M.J. 42 (1979); *United States v. Pearson*, 6 M.J. 953 (A.C.M.R.), *pet. denied*, 7 M.J. 164 (1979). The preparation, authentication, and disposition of records of trial is covered in Chapter XI. The administrative responsibility of trial counsel to prepare the record is codal. Article 38(a). *See also* R.C.M. 1103(b).

Rule 809. Contempt proceedings

(a) *In general.* This subsection restates codal authority. The discussion is based on paragraph 118 *a* of MCM 1969 (Rev.). The language of Article 48 applies only to "direct" contempts. *See* W. Winthrop, *Military Law and Precedents* 301–302 (2d ed. 1920 reprint); paragraph 101 of MCM, 1928; paragraph 109 of MCM (Army), 1949; paragraph 118 *a* of MCM, 1951; paragraph 118 *a* of MCM, 1969 (Rev.). The definition of a "direct" contempt is also based on these sources. *See also* 8B J. Moore, *Moore's Federal Practice* Para. 42.02[3] (1982 rev. ed); 18 U.S. § 401; *cf. Ex parte Savin*, 131 U.S. 267, witnessed by the court and other direct contempts is based on *Cooke v. United States*, 267 U.S. 517 (1925), and is important for procedural purposes. *See* subsection (b) below.

(b) *Method of disposition.* The subsection is based on Fed. R. Crim. P. 42. By its terms, Article 48 makes punishable contemptuous behavior which, while not directly witnessed by the court-martial, disturbs its proceedings (e.g., a disturbance in the waiting room). As Fed. R. Crim. P. 42(b) recognizes, this type of contempt may not be punished summarily. *See Johnson v. Mississippi*, 403 U.S. 212 (1971); *Cooke v. United States, supra.* Paragraph 118 of MCM, 1969 (Rev.) did not adequately distinguish these types of contempt. There may be technical and practical problems associated with proceeding under subsection (b)(2) but the power to do so appears to exist under Article 48.

(c) *Procedure; who may punish for contempt.* This subsection prescribes different procedures for punishment for contempt when members are or are not present. The Working Group examined the possibility of vesting contempt power solely in the military judge; but Article 48 provides that "court[s]-martial" may punish for contempt. When members are present, the military judge is not the court-martial. *See* Article 16. When trial by military judge

alone is requested and approved, the military judge is the court-martial. Under Article 39(a) the military judge may "call the court into session without the presence of the members," and the military judge therefore acts as the court-martial within the meaning of Article 16 and 48. Since Article 48 authorizes summary punishment for contempt committed in the presence of the court-martial (*see Hearings of H. R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1060 (1949)), its purpose would be destroyed by requiring members who were not present and did not observe the behavior to decide the matter. The second sentence in subsection (c)(1) parallels Fed. R. Crim. P. 42(a).

The procedure for contempt proceedings before members has been simplified to the extent possible consistent with the requirement for the members to decide the issue. The procedure for a preliminary ruling by the military judge to decide as a matter of law that no contempt has occurred is expressly recognized for the first time. *See* Article 51(b). The requirement for a two-thirds vote on findings and punishment is based on Article 52(a) and (b)(3).

(d) *Record; review*. This subsection is based on the eighth paragraph of paragraph 118 *b* of MCM, 1969 (Rev.) concerning the record and post-trial action. The requirement for approval and execution of the sentence by the convening authority is based on previous practice. *See* W. Winthrop, *supra* at 301–312; paragraph 101 of MCM, 1928, paragraph 109 of MCM (Army) and MCM (AF), 1949, paragraph 118 of MCM, 1951; paragraph 118 *b* of MCM, 1969 (Rev.). This requirement also reflects the need of the command to control its assets. The last sentence is also based on *Hearings on H. R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1060 (1949).

(e) *Sentence.* This subsection is based on Article 57 and paragraph 118 *b* of MCM, 1969 (Rev.). It clarifies that the military judge may delay announcement of a sentence to permit participation of the contemnor when necessary. Paragraph 118 *b* of MCM, 1969 (Rev.) was ambiguous in this regard.

(f) *Informing person held in contempt.* This subsection and the discussion are based on paragraph 118 *b* of MCM, 1969 (Rev.); it has been modified for clarity.

1998 Amendment: R.C.M. 809 was amended to modernize military contempt procedures, as recommended in *United States v. Burnett*, 27 M.J. 99, 106 (C.M.A. 1988). Thus, the amendment simplifies the contempt procedure in trials by courts-martial by vesting contempt power in the military judge and eliminating the members' involvement in the process. The amendment also provides that the court-martial proceedings need not be suspended while the contempt proceedings are conducted. The proceedings will be conducted by the military judge in all cases, outside of the members' presence. The military judge also exercises discretion as to the timing of the proceedings and, therefore, may assure that the court-martial is not otherwise unnecessarily disrupted or the accused prejudiced by the contempt proceedings. See *Sacher v. United States*, 343 U.S. 1, 10, 72 S. Ct. 451, 455, 96 L. Ed. 717, 724 (1952). The amendment also brings court-martial contempt procedures into line with the procedure applicable in other courts.

Rule 810. Procedures for rehearings, new trials, and other trials

Introduction. This rule is based on Articles 63 and 73. It concerns only the procedures for rehearings, new trials, and other trials. Matters relating to ordering rehearings or new trials are covered in R.C.M. 1107 and 1210.

(a) *In general.* This subsection is based on paragraph 81 *b* of MCM, 1969 (Rev.).

(b) *Composition.* This subsection is based on Article 63(b) and the seventh paragraph of paragraph 92 *a* of MCM, 1969 (Rev.). As to subsection (3), *see also United States v. Staten*, 21 U.S.C.M.A. 493, 45 C.M.R. 267 (1972).

(c) *Examination of record of former proceedings.* This subsection is based on paragraph 81 *c* of MCM, 1969 (Rev.).

(d) *Sentence limitations.* Subsection (1) is based on the second sentence of Article 63 and its legislative history. *See* H. R. Rep. No. 491, 81st Cong., 1st Sess. 30 (1949) and paragraph 81 *d* of MCM, 1969 (Rev.). *See also United States v. Ball*, 163 U.S. 662 (1896); *United States v. Culver*, 22 U.S.C.M.A. 141, 46 C.M.R. 141 (1973); *United States v. Eschmann*, 11 U.S.C.M.A. 64, 28 C.M.R. 288 (1959); *United States v. Jones*, 10 U.S.C.M.A. 532, 28 C.M.R. 98 (1959); *United States v. Dean*, 7 U.S.C.M.A. 721, 23 C.M.R. 185 (1957). The provision (prohibiting advising members of the basis of the sentence limitation) in the third paragraph of paragraph 81 *d*(1) of MCM, 1969 (Rev.) has been placed, in precatory language, in the discussion. The prohibition was based on *United States v. Eschmann, supra. Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised edition*, DA PAM 27–2 at 15–2 (1970). The rationale of *Eschmann* is subject to reasonable challenge. *See United States v. Gutierrez*, 11 M.J. 122, 125 n.3 (C.M.A. 1981) (Everett, C. J., concurring in the result); *United States v. Eschmann, supra* at 67, 28 C.M.R. at 291 (Latimer, J., concurring in the result). By placing an admonition against such instructions in the discussion, rather than a prohibition in the rule, users are alerted to current decisional requirements while the issue is left open to future judicial development.

1995 Amendment: Subsection (d) was amended in light of the change to Article 63 effected by the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315, 2506 (1992). The amendment reflects that subsection (d) sentencing limitations only affect the sentence that may be approved by the convening or higher authority following the rehearing, new trial, or other trial. Subsection (d) does not limit the maximum sentence that may be adjudged at the rehearing, new trial, or other trial.

Subsection (2) is based on the last sentence of Article 63, as amended, Military Justice Act of 1983, Pub. L. No. 98–209, § 5(d)(2)(C), 97 Stat. 1393 (1983).

(e) *Definition.* This definition is taken from paragraph 81 *d*(2) of MCM, 1969 (Rev.). *See also* paragraph 92 *b* of MCM, 1969 (Rev.).

Rule 811. Stipulations

(a) *In general.* This subsection restates the first sentence of paragraph 54 *f*(1) of MCM, 1969 (Rev.).

(b) *Authority to reject.* This subsection affirms the authority of the military judge to decline to accept a stipulation, as an exercise

of discretion and in the interest of justice. This authority was implicit in paragraph 54 *f*(1) of MCM, 1969 (Rev.) which suggested that stipulations should not be accepted in certain circumstances. These examples are now included in the discussion. *See also United States v. Cambridge*, 3 U.S.C.M.A. 377, 12 C.M.R. 133 (1953); *United States v. Field*, 27 C.M.R. 863 (N.B.R. 1958).

(c) *Requirements.* This subsection makes clear that a stipulation can be received only with the consent of the parties. This consent must be manifested in some manner before the military judge may receive the stipulation, although the rule does not specify any particular form for the manifestation, as this rests within the discretion of the trial judge. *United States v. Cambridge*, *supra.* Although it is normally preferable to obtain it, the express consent of the accused on the record is not always necessary for admission of a stipulation. In the absence of circumstances indicating lack of consent by the accused (*see e.g., United States v. Williams*, 30 C.M.R. 650 (N.B.R. 1960)), the defense counsel's concurrence in the stipulation will bind the accused. *United States v. Cambridge*, *supra.* If there is any doubt, the accused should be personally questioned. *See United States v. Barbeau*, 9 M.J. 569 (A.F.C.M.R. 1980).

The last three paragraphs of the discussion deal with stipulation "which practically amount to a confession." Paragraph 54 *f*(1) of MCM, 1969 (Rev.), states that such a confession "should not be received in evidence." Despite this admonition, such stipulations were occasionally received in order to allow the defense to avoid waiving certain issues by pleading guilty while saving the parties the time and expense of a full trial when the accused's guilt, as a practical if not legal matter, was conceded. *See, e.g., United States v. Rempe*, 49 C.M.R. 367 (A.F.C.M.R. 1974). The Court of Military Appeals has approved this procedure, but only if an inquiry of the sort described in the discussion is conducted. *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977). The definition of a stipulation which practically amounts to a confession in the discussion is based on *Bertelson*, along with *United States v. Schaffer*, 12 M.J. 425, 427–428 nn. 4.6 (C.M.A. 1982);; *United States v. Reagan*, 7 M.J. 490 (C.M.A. 1979); *United States v. Aiello*, 7 M.J. 99 (C.M.A. 1979); and *United States v. Long*, 3 M.J. 400 (C.M.A. 1977). These cases indicate that a stipulation practically amounts to a confession when it amounts to a *"de facto"* plea of guilty, rather than simply one which makes out a *prima facie* case. The example in the discussion is taken from *United States v. Long*, *supra.*

(d) *Withdrawal.* This subsection is taken, substantially verbatim, from paragraph 54 *f*(1) of MCM, 1969 (Rev.), and restates current law. *See also United States v. Daniels*, 11 U.S.C.M.A. 52, 28 C.M.R. 276 (1959).

(e) *Effect of stipulations.* This subsection modifies previous Manual rules in two respects. First, it states that a stipulation of fact is binding on the court-martial. This is consistent with federal practice, *see e.g., Jackson v. United States*, 330 F.2d 679 (8th Cir.), *cert. denied.* 379 U.S. 855 (1964), as well as the prevailing view in the vast majority of states. *See* 4 J. Wigmore, *Wigmore on Evidence* § 2590 (3d ed. 1940); 73 Am. Jur. 2d. *Stipulations*, § 8 (1974); 83 C.J.S. Stipulations, §§ 12–13 (1953). *See also H. Hackfield & Co. v. United States*, 197 U.S. 442 (1905). Paragraph 154 *b* of MCM, 1951, contained the following provision: "The court is not bound by a stipulation even if received. For instance its own inquiry may convince the court that the stipulated fact is not true." The provision was drawn verbatim from paragraph 140 *b* of MCM (Army), 1949, and of MCM(AF), 1949, and can be traced to paragraph 126 *b* of MCM, 1928. The Court of Military Appeals questioned the validity of this provision in *United States v. Gerlach*, 16 U.S.C.M.A. 383, 37 C.M.R. 3 (1966), but did not have to resolve whether the court-martial was bound by a stipulation of fact, since it held that the parties were. The above quoted language was omitted from MCM, 1969 (Rev.). The analysis to the Manual does not explain why. *See Analysis of Contents, Manual for Courts-Martial, 1969, Revised Edition*, DA PAM 27–2 at 27–49 (1970). Despite this omission, some courts-martial have apparently continued to apply the earlier rule. *See Military Criminal Law, Evidence* DA PAM 27–22, AFP 111–8 at paragraph 6–2 (1975). There is no reason not to follow federal practice on this matter. If the court-martial's "own inquiry" indicates that the stipulated facts may not be true, the parties should be afforded the opportunity to withdraw from the stipulation and to present evidence on the matter in question.

The second change is in the treatment of stipulations of a document's contents. MCM, 1969 (Rev.), applied the same "observations" it made concerning stipulations of facts to stipulations of documents' contents thus implying that, by stipulating to a documents' contents, the parties agreed that the contents are true. This may have been due to the treatment of admissions concerning documents' contents as a matter of civil procedure in Federal courts, *see* Fed. R. Civ. P. 36 (1948) (since replaced by Fed. R. Civ. P. 36 (1970)); *see also Wigmore, supra*, § 2596, and the fact that stipulations of a documents' contents, like stipulations of fact, are handed to the members of the court. Yet, it is clear that the parties may stipulate that a document contains certain text or other information, or that a given document is genuine, without necessarily agreeing that the text or other information in the document is true. In this sense, a stipulation as to a document's contents is like a stipulation of expected testimony, and the rule so treats it.

Otherwise, this subsection essentially restates paragraph 54 *f*(1) and (2) of MCM, 1969 (Rev.). *See also United States v. Bennett*, 18 U.S.C.M.A. 96, 39 C.M.R. 96 (1969) and *United States v. Gerlach, supra* for further discussion of the effects of stipulations. If the parties fail to object to inadmissible matters in a stipulation, this will normally constitute a waiver of such objection. Mil. R. Evid. 103. *Cf. United States v. Schell*, 18 U.S.C.M.A. 410, 40 C.M.R. 122 (1969). *See also Wigmore, supra* at § 2592.

(f) *Procedure.* This subsection is based on the second paragraph in paragraph 54 *f*(2) of MCM, 1969 (Rev.).

Rule 812. Joint and common trials

This rule is taken from paragraph 53 *c* of MCM, 1969 (Rev.). The rule itself substantially repeats the first sentence in paragraph 53 *c*. The discussion refers to other rules dealing with joint or common trials, and includes the examples discussed in paragraph 53 *c* of MCM, 1969 (Rev.). It also incorporates a statement on stipulations which appeared at paragraph 54 *f*(3) of MCM, 1969 (Rev.), and a statement concerning severances from paragraph 61 *h* of MCM, 1969 (Rev.). The rule does not change current law.

Rule 813. Announcing personnel of the court-martial and accused

This rule is based on paragraph 61 *c* of MCM, 1969 (Rev.) and is placed in Chapter 8 since the requirement for announcing the presence or absence of parties usually recurs several times during the trial. The rule has been rephrased to acknowledge the responsibility of the military judge to ensure that the matters covered are reflected in the record. Paragraph 61 *c* of MCM, 1969 (Rev.) required the trial counsel to make these announcements. This rule leaves to the discretion of the military judge who will make the announcements. The importance of requiring such announcements to be made on the record is emphasized in *United States v. Nichelson*, 18 U.S.C.M.A. 69, 39 C.M.R. 69 (1968).

CHAPTER IX. TRIAL PROCEDURE THROUGH FINDINGS

Rule 901. Opening session

Introduction. R.C.M. 901 through 903 set out in chronological order the procedures to be followed before arraignment. The order need not be followed rigidly.

(a) *Call to order.* This subsection is based on the first sentence in paragraph 61 *b* of MCM, 1969 (Rev.). The purpose of the subsection is to establish a definite point to indicate when a court-martial is in session. The first paragraph in the discussion is taken from paragraph 61 *a* of MCM, 1969 (Rev.), but the present provision has been expanded to include comparing the record of the referral on the charge sheet with the convening orders to ensure that they are consistent. The other matters in paragraphs 61 *a* and *b* of MCM, 1969 (Rev.), are omitted here as unnecessary.

The second paragraph in the discussion is based on paragraph 58 *c* of MCM, 1969 (Rev.) and serves as a reminder of the Article 35 requirements. *See United States v. Pergande*, 49 C.M.R. 28 (A.C.M.R. 1974). The failure to object is normally a waiver of the statutory right. *United States v. Lumbus*, 48 C.M.R. 613 (A.C.M.R. 1974). Because of the importance of the right, however, the military judge should secure an affirmative waiver. *See United States v. Perna*, 1 U.S.C.M.A. 438, 4 C.M.R. 30 (1952); *United States v. Pergande, supra.*

(b) *Announcement of parties.* This subsection is based on paragraph 61 *c* of MCM, 1969 (Rev.). Requiring an announcement is intended to guard against inadvertently proceeding in the absence of necessary personnel and to ensure that the record reflects the presence of required personnel. Failure to make the announcement is not error if it otherwise appears that no essential personnel were absent.

(c) *Swearing reporter and interpreter.* This subsection and its discussion are taken directly from paragraph 61 *d* of MCM, 1969 (Rev.).

(d) *Counsel.* This subsection, except for subsection (4)(A) and (D), is based on paragraphs 61 *e* and *f* of MCM, 1969 (Rev.). The qualifications of counsel and matters which disqualify counsel are treated at R.C.M. 502(d) and are not repeated here. The subsection makes clear that at trial the military judge is responsible for determining whether counsel is disqualified, *Soriano v. Hosken*, 9 M.J. 221 (C.M.A. 1980), and for seeing that appropriate action is taken. Of course, if a detailed counsel is disqualified the responsibility will fall upon the convening authority to rectify the problem. The discussion points out that defects in the qualification of counsel are not jurisdictional. *Wright v. United States*, 2 M.J. 9 (C.M.A. 1976). Subsection (4)(A) has been added to conform to the requirements of *United States v. Donohew*, 18 U.S.C.M.A. 149, 39 C.M.R. 149 (1969). *Cf.* Fed. R. Crim. P. 5(c). Subsection (4)(D) is based on Fed. R. Crim. P. 44(c) and *United States v. Breese*, 11 M.J. 17 (C.M.A. 1981). *See also United States v. Davis*, 3 M.J. 430 (C.M.A. 1977); *United States v. Blakey*, 1 M.J. 247 (C.M.A. 1976); *United States v. Evans*, 1 M.J. 206 (C.M.A. 1975).

(e) *Presence of members.* This subsection is new. Its purpose is to eliminate unnecessary attendance by members. *Accord* Article 39(a).

Rule 902. Disqualification of military judge

Introduction. This rule is based on 28 U.S.C. § 455, which is itself based on Canon III of the *ABA Code of Judicial Conduct*, and on paragraph 62 of MCM, 1969 (Rev.).

The procedures prescribed by 28 U.S.C. § 144 were not adopted. That statute provides that whenever a party "files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein." This section does not establish a different test from 28 U.S.C. § 455 for disqualification for prejudice or bias. Instead, 28 U.S.C. § 144 provides a procedure mechanism by which the disqualification determination may be made. *United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980); *see also Parrish v. Board of Commissioners of Alabama State Bar*, 524 F.2d 98 (5th Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976).

This procedure is not practicable for courts-martial because of the different structure of the military judiciary and the limited number of military judges.

(a) *In general.* This subsection is, except for changes in terminology, identical to 28 U.S.C. § 455(a). *See also* paragraph 62 *f*(13) of MCM, 1969 (Rev.); *United States v. Conley*, 4 M.J. 327 (C.M.A. 1978); *United States v. Head*, 2 M.J. 131 (C.M.A. 1977).

(b) *Specific grounds.* The stem and subsection (1) are, with changes in terminology, identical to the stem and subsection (1) of 28 U.S.C. § 455(b). *See also* paragraph 62 *f*(13) of MCM, 1969 (Rev.). Note that any interest or bias to be disqualifying must be personal, not judicial, in nature. *Berger v. United States*, 255 U.S. 22 (1921); *Azhocar v. United States*, 581 F.2d 735 (9th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979); *United States v. Lewis*, 6 M.J. 43 (C.M.A. 1978); *United States v. Grance*, 2 M.J. 846 (A.C.M.R. 1976); *United States v. Stewart*, 2 M.J. 423 (A.C.M.R. 1975). *See also United States v. Lynch*, 13 M.J. 394, 398, n. 3 (C.M.A. 1982) (Everett, C.J. concurring).

Subsection (2) is based on paragraphs 62 *f*(5), (6), and (11) of MCM, 1969 (Rev.). *See United States v. Goodman*, 3 M.J. 1 (C.M.A. 1977). These grounds are analogous to the disqualifying activities in 28 U.S.C. § 455(b)(2).

Subsection (3) is based on paragraphs 62 *f*(3), (4), (9), (10), and (13) of MCM, 1969 (Rev.). *See also* Mil. R. Evid. 605; *United States v. Cooper*, 8 M.J. 5 (C.M.A 1979); *United States v.*

Bradley, 7 M.J. 332 (C.M.A. 1979). The purpose of this section is analogous to that of 28 U.S.C. § 455(b)(3).

Subsection (4) is based on Article 26 and paragraph 62 *f*(1) and (2) and 62 *g* of MCM, 1969 (Rev). The matters in 28 U.S.C. § 455(b)(4) regarding financial interest in the proceedings are not of significance in courts-martial. The remote possibility that a judge or a member of the family might have a financial interest in the outcome of a court-martial is adequately covered in subsection (5) of this rule.

Subsection (5) is taken directly from 28 U.S.C. § 455(b)(5), with the added clarification that the interest in subsection (C) may be financial or otherwise.

The discussion is based on 28 U.S.C. § 455(c).

(c) *Definitions.* Subsections (1) and (2) are, with changes in terminology, identical to 28 U.S.C. § 455(d)(1) and (2). Subsection (3) has been added to clarify that the president of a special court-martial without a military judge is treated as any other member for purposes of qualifications and challenges. *See* R.C.M. 912. Subsection (3) of 28 U.S.C. § 455(d) is unnecessary.

(d) *Procedure.* This section including the discussion is based on Article 41 and paragraph 62 *d*, *g*, and *h* of MCM, 1969 (Rev.).

(e) *Waiver.* This section is, with changes in terminology, identical to 28 U.S.C. § 455(e).

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

(a) *Time of elections.* This subsection is based on Articles 16, 18, 19, and 25. It is similar to paragraphs 53 *d*(2)(c) and 61 *g* and *h* of MCM, 1969 (Rev.) insofar as it concerns the timing of requests for enlisted members of trial by military judge alone. It parallels Fed. R. Crim. P. 23(a). Section (b) of Fed. R. Crim. P. 23 is inapplicable in the military, and the matters covered in Fed. R. Crim. P. 23(c) are covered in R.C.M. 918(b).

Article 25 states that a request for enlisted members must be made before the end of an Article 39(a) session, if any. The first Article 39(a) session is appropriate to consider these matters. Although the Court of Military Appeals has not decided the issue (*United States v. Morris*, 23 U.S.C.M.A. 319, 321, 49 C.M.R. 653, 655 n.2 (1975)), the Working Group concluded that this does not establish a jurisdictional deadline. *Cf. United States v. Bryant*, 23 U.S.C.M.A. 326, 49 C.M.R. 660 (1975); *United States v. Morris*, *supra* (Article 16 requirement that request be submitted before assembly is not jurisdictional). To permit greater flexibility, the military judge is authorized to permit the defense to defer a request for enlisted members until a later time. Such a request should be granted for good cause only, bearing in mind the burden which it may impose on the Government.

A request for trial by military judge alone should be made at the initial Article 39(a) session to simplify procedure and facilitate scheduling and preparation. However, since Article 16 gives the accused a statutory right to wait until assembly to request trial by military judge alone, subsection (2) allows automatic deferral of this request.

The discussion points out the statutory limits on requesting enlisted members or trial by military judge alone. *See* Articles 16, 18, and 25.

(b) *Form of election.* This subsection is based on Articles 16 and 25. The amendment of Article 16 permits a request for trial by military judge alone to be made orally on the record. Military Justice Act of 1983, Pub. L. No. 98–209, § 3(a), 97 Stat. 1393 (1983).

(c) *Action on request.* This subsection is based on Articles 16 and 25. Subsection (2)(A) is based on Article 16(1)(B) and on paragraph 53 *d*(2)(C) of MCM, 1969 (Rev.). It does not require an inquiry of the accused by the military judge, although, as the discussion points out, it is good practice to do so, and failure to do so could be error if the record otherwise left the accused's understanding of the rights in doubt. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 12 (1983); *United States v. Parkes*, 5 M.J. 489 (C.M.A. 1978); *United States v. Turner*, 20 U.S.C.M.A. 167, 43 C.M.R. 7 (1970); *United States v. Jenkins*, 20 U.S.C.M.A. 112, 42 C.M.R. 304 (1970). This is consistent with prevailing federal civilian practice. *See, e.g., Estrada v. United States*, 457 F.2d 255 (7th Cir.), *cert. denied*, 409 U.S. 858 (1972); *United States v. Mitchell*, 427 F.2d 1280 (3d Cir. 1970); *United States v. Straite*, 425 F.2d 594 (D.C. Cir. 1970); *United States v. Hunt*, 413 F.2d 983 (4th Cir. 1969); *but see United States v. Scott*, 583 F.2d 362 (7th Cir. 1978) (establishing requirement for personal inquiry into jury waiver in Seventh Circuit). *See generally* 8AJ. Moore, *Moore's Federal Practice* Para. 23.03[2] (1982 rev. ed.).

Subsection (2)(B) is based on Article 16(1)(B) which makes trial by military judge alone contingent on approval by the military judge. *See United States v. Morris*, *supra* at 324, 49 C.M.R. at 658. The discussion is based on *United States v. Butler*, 14 M.J. 72 (C.M.A. 1982); *United States v. Ward*, 3 M.J. 365 (C.M.A. 1977); *United States v. Bryant*, *supra.*

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

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

Subsection (2) is based on the fifth sentence of paragraph 39 *e* and on paragraph 53 *d* (2)(b) of MCM, 1969 (Rev.), and current practice.

(e) *Untimely requests.* This subsection is based on Articles 16 and 25, and *United States v. Jeanbaptiste*, 5 M.J. 374 (C.M.A. 1978); *United States v. Thorpe*, 5 M.J. 186 (C.M.A. 1978); *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978); *United States v. Bryant*, *supra. See also United States v. Holmen*, 586 F.2d 322 (4th Cir. 1978).

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

1987 Amendment: Subsections (b)(1), (c)(1) and (c)(3) were amended to reflect an amendment to Article 25(c)(1) UCMJ, in the "Military Justice Amendments of 1986," tit. VIII, § 803, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99–661, 100 Stat. 3905 (1986). *See* Analysis R.C.M. 503.

Rule 904. Arraignment

This rule is based on Fed. R. Crim. P. 10 and paragraph 65 *a* of MCM, 1969 (Rev.). The second sentence of Fed. R. Crim. P. 10 has been deleted as unnecessary since in military practice the accused will have been served with charges before arraignment.

Article 35; R.C.M. 602. the discussion is based on paragraph 65 of MCM, 1969 (Rev.).

Rule 905. Motions generally

Introduction. This rule is based generally on Fed. R. Crim. P. 12 and 47 and paragraphs 66 and 67 of MCM, 1969 (Rev.). Specific similarities and differences are discussed below.

(a) *Definitions and form.* The first sentence of this subsection is taken from the first sentence of paragraph 66 *b* of MCM, 1969 (Rev.). It is consistent with the first sentence of Fed. R. Crim. P. 47 and the second sentence of Fed. R. Crim. P. 12(a). The second sentence is based on the second sentence of paragraph 67 *c* of MCM, 1969 (Rev.), although to be consistent with Federal practice (*see* Fed. R. Crim. P. 12(b) (second sentence) and 47 (second sentence)) express authority for the military judge to exercise discretion over the form of motions has been added. The third sentence is based on the third sentence of Fed. R. Crim. P. 47 and is consistent with the first sentence of paragraph 67 *c* and the fourth sentence of paragraph 69 *a* of MCM, 1969 (Rev.). The last sentence in this subsection is based on the third sentence of paragraph 67 *c* of MCM, 1969 (Rev.). Although no parallel provision appears in the Federal Rules of Criminal Procedure, this standard is similar to federal practice. *See Marteney v. United States*, 216 F.2d 760 (10th Cir. 1954); *United States v. Rosenson*, 291 F. Supp. 867 (E.D. La. 1968), *affd*, 417 F.2d 629 (5th Cir. 1969); *cert. denied*, 397 U.S. 962 (1970). The last sentence in Fed. R. Crim. P. 47, allowing a motion to be supported by affidavit, is not included here. *See* subsection (h) of this rule and Mil. R. Evid. 104(a). *See generally* Fed. R. Crim. P. 47 *Notes Of Advisory Committee on Rules* n. 3.

(b) *Pretrial motions.* This subsection, except for subsection (6), is based on Fed. R. Crim. P. 12(b). Subsections (1) and (2) have been modified to conform to military practice and are consistent with the first two sentences of paragraph 67 *b* of MCM, 1969 (Rev.). Subsection (3) is consistent with Mil. R. Evid. 304(d)(2)(A); 311(d)(2)(A); 321(c)(2)(A). The discussion is based on paragraph 69A of MCM, 1969 (rev.). Subsection (4) is new. *See* R.C.M. 701; 703; 1001(e). Subsection (5) is also new. Subsection (6) is based on paragraphs 46 *d* and 48 *b*(4) of MCM, 1969 (Rev.) and *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981).

(c) *Burden of proof.* This subsection is based on paragraphs 57 *g*(1) and 67 *e* of MCM, 1969 (Rev.). The assignment of the burden of persuasion to the moving party is a minor change from the language in paragraph 67 *e* of MCM, 1969 (Rev.), which placed the burden on the accused "generally." The effect is basically the same, however, since the former rule probably was intended to apply to motions made by the accused. *See also United States v. Graham*, 22 U.S.C.M.A. 75, 46 C.M.R. 75 (1972). The exceptions to this general rule in subsection (B) are based on paragraphs 68 *b*(1), 68 *c*, and 215 *e* of MCM, 1969 (Rev.). *See also United States v. McCarthy*, 2 M.J. 26, 28 n. 1 (C.M.A. 1976); *United States v. Graham, supra; United States v. Garcia*, 5 U.S.C.M.A. 88, 17 C.M.R. 88 (1954). The Federal Rules of Criminal Procedure are silent on burdens of proof.

Fed. R. Crim. P. 12(c) is not adopted. This is because in courts-martial, unlike civilian practice, arraignment does not necessarily, or even ordinarily, occur early in the criminal process. In courts-martial, arraignment usually occurs only a short time before trial and in many cases it occurs the same day as trial. Because of this, requiring a motions date after arraignment but before trial is not appropriate, at least as a routine matter. Instead, entry of pleas operates, in the absence of good cause, as the deadline for certain motions. A military judge could, subject to subsections (d) and (e), schedule an Article 39(a) session (*see* R.C.M. 803) for the period after pleas are entered but before trial to hear motions.

(d) *Ruling on motions.* This subsection is based on Fed. R. Crim. P. 12(e). It is consistent with the first sentence in paragraph 67 *e* of MCM, 1969 (Rev.). The admonition in the second sentence of that paragraph has been deleted as unnecessary. The discussion is based on the third paragraph of paragraph 67 *f* of MCM, 1969 (Rev.).

1991 Amendment: The discussion was amended to reflect the change to R.C.M. 908(b)(4).

(e) *Effect of failure to raise defenses or objections.* The first two sentences in the subsection are taken from Fed. R. Crim. P. 12(f) and are consistent with paragraph 67 *b* of MCM, 1969 (Rev.). The third sentence is based on paragraph 67 *a* of MCM, 1969 (Rev.). The Federal Rules of Criminal Procedure do not expressly provide for waiver of motions other than those listed in Fed. R. Crim. P. 12(b). (*But see* 18 U.S.C. § 3162(a)(2) which provides that failure by the accused to move for dismissal on grounds of denial of speedy trial before trial or plea of guilty constitutes waiver of the right to dismissal under that section.) Nevertheless, it has been contended that because Fed. R. Crim. P. 12(b)(2) provides that lack of jurisdiction or failure to allege an offense "shall be noticed by the court at any time during the pendency of the proceedings," "it may, by negative implications be interpreted as foreclosing the other defense if not raised during the trial itself." 8A J. Moore, *Moore's Federal Practice* Para. 12.03[1] (1982 rev. ed.). "Pendency of the proceedings" has been held to include the appellate process. *See United States v. Thomas*, 444 F.2d 919 (D.C. Cir. 1971). Fed. R. Crim. P. 34 tends to support this construction insofar as it permits a posttrial motion in arrest of judgment only for lack of jurisdiction over the offense or failure to charge an offense. There is no reason why other motions should not be waived if not raised at trial. *Moore's, supra* at Para. 12.03[1]; *accord* C. Wright, *Federal Practice and Procedure* §193 (1969). *See also United States v. Scott*, 464 F.2d 832 (D.C. Cir. 1972); *United States v. Friedland*, 391 F.2d 378 (2d Cir. 1968), *cert. denied*, 404 U.S. 867 (1969). *See generally United States ex rel. DiGiangiemo v. Regan*, 528 F.2d 1262 (2d Cir. 1975). Decisions of the United States Court of Military Appeals are generally consistent with this approach. *See United States v. Troxell*, 12 U.S.C.M.A. 6, 30 C.M.R. 6 (1960) (statute of limitations may be waived); *United States v. Schilling*, 7 U.S.C.M.A. 482, 22 C.M.R. 272 (1957) (former jeopardy may be waived). *Contra United States v. Johnson*, 2 M.J. 541 (A.C.M.R. 1976).

1990 Amendment: Subsection (e) was amended to clarify that "requests" and "objections" include "motions".

(f) *Reconsideration.* This subsection is new and makes clear that the military judge may reconsider rulings except as noted. The amendment of Article 62 (*see* Military Justice Act of 1983, Pub. L. No. 98–209, § 5(c), 97 Stat. 1393 (1983)), which deleted the requirement for reconsideration when directed by the convening

authority' does not preclude this. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 24 (1983).

1994 Amendment: The amendment to R.C.M. 905(f) clarifies that the military judge has the authority to take remedial action to correct any errors that have prejudiced the rights of an accused. *United States v. Griffith*, 27 M.J. 42, 47 (C.M.A. 1988). Such remedial action may be taken at a pre-trial session, during trial, or at a post-trial Article 39(a) session. *See also United States v. Scaff*, 29 M.J. 60, 65-66 (C.M.A. 1989). The amendment, consistent with R.C.M. 1102(d), clarifies that post-trial reconsideration is permitted until the record of trial is authenticated.

The amendment to the Discussion clarifies that the amendment to subsection (f) does not change the standard to be used to determine the legal sufficiency of evidence. R.C.M. 917(d); *see Griffith, supra; see also Scaff, supra*.

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

Subsection (g) differs from paragraph 71 *b* in two significant respects. First, the term, "res judicata" is not used in R.C.M. 905(g) because the term is legalistic and potentially confusing. "Res judicata" generally includes several distinct but related concepts: merger, bar, direct estoppel, and collateral estoppel. *Restatement of Judgments*, Chapter 3 Introductory Note at 160 (1942). *But see* 1B J. Moore, *Moore's Federal Practice* Para. 0.441(1) (1980 rev. ed.) which distinguishes collateral estoppel from res judicata generally. Second, unique aspects of the doctrine of collateral estoppel are recognized in the "except" clause of the first sentence in the rule. Earlier Manuals included the concept of collateral estoppel within the general discussion of res judicata (*see* paragraph 72 *b* of MCM (Army), 1949; paragraph 71 *b* of MCM, 1951, paragraph 71 *b* of MCM, 1969 (Rev.); *see also United States v. Smith, supra*) without discussing its distinguishing characteristics. Unlike other forms of res judicata, collateral estoppel applies to determinations made in actions in which the causes of action were different. 1B J. Moore, *supra*, Para. 0.441[1]. Because of this, its application is somewhat narrower. Specifically, parties are not bound by determinations of law when the causes of action in the two suits arose out of different transactions. *Restatement of Judgments, supra*, §§ 68, 70. *See also Commissioner v. Sunnen, supra.* This distinction is now recognized in the rule.

The absence of such a clarifying provision in earlier Manuals apparently caused the majority, despite its misgivings and over the dissent of Judge Brosman, to reach the result it did in *United States v. Smith, supra*. When paragraph 71 *b* was rewritten in MCM, 1969 (Rev.), the result in *Smith* was incorporated into that paragraph, but neither the concerns of the Court of Military Appeals nor the distinguishing characteristics of collateral estoppel were addressed. *See Analysis of Contents of the Manual for Courts-Martial, United States, 1969, Revised Edition*, DA Pam 27–2 at 12–5 (July 1970). To the extent that *Smith* relied on the Manual, its result is no longer required. *But see United States V Martin*, 8 U.S.C.M.A. 346, 352, 24 C.M.R. 156, 162 (1957) (Quinn, C.J., joined by Ferguson, J. concurring in the result).

The discussion is based on the sources indicated above. *See also Restatement of Judgments, supra* § 49; *United States v. Guzman*, 4 M.J. 115 (C.M.A. 1977). As to the effect of pretrial determinations by a convening authority, *see* Analysis, R.C.M. 306(a).

(h) *Written motions.* This subsection is based on Fed. R. Crim. P. 47.

(i) *Service.* This subsection is based on Fed. R. Crim. P. 49(a) and (b), insofar as those provisions apply to motions.

(j) *Application to convening authority.* This subsection is taken from paragraph 66 *b* of MCM, 1969 (Rev.) although certain exceptions provided elsewhere in these rules (*e.g.*, R.C.M. 906(b)(1)) have been established for the first time. It is consistent with the judicial functions of the convening authority under Article 64. It also provides a forum for resolution of disputes before referral and in the absence of the military judge after referral. It has no counterpart in the Federal Rules of Criminal Procedure.

Fed. R. Crim. P. 12(g) and (h) are not included. Fed. R. Crim. P. 12(g) is covered at R.C.M. 803 and 808. The matters in Fed. R. Crim. P. 12(h) would fall under the procedures in R.C.M. 304 and 305.

(k) *Production of statements on motion to suppress.* This subsection is based on Fed. R. Crim. P. 12(i).

906. Motions for appropriate relief

(a) *In general.* This subsection is based on the first sentence of paragraph 69 *a* of MCM, 1969 (Rev.). The phrase concerning deprivation of rights is new; it applies to such pretrial matters as defects in the pretrial advice and the legality of pretrial confinement. Paragraph 69 *a* of MCM, 1969 (Rev.) provided only for the accused to make motions for appropriate relief. This rule is not so restricted because the prosecution may also request appropriate relief. *See e.g., United States v. Nivens*, 21 U.S.C.M.A. 420, 45 C.M.R. 194 (1972). This change is not intended to modify or restrict the power of the convening authority or other officials to direct that action be taken notwithstanding the fact that such action might also be sought by the trial counsel by motion for appropriate relief before the military judge. Specific modifications of the powers of such officials are noted expressly in the rules or analysis.

(b) *Grounds for appropriate relief.* This subsection has the same general purpose as paragraph 69 of MCM, 1969 (Rev.). It identifies most of the grounds for motions for appropriate relief commonly raised in courts-martial, and provides certain rules for litigating and deciding such motions where these rules are not provided elsewhere in the Manual. Specific sources for the rules and discussion are described below.

Subsection (1) and the accompanying discussion are based on Article 40 and paragraphs 58 *b* and *c* of MCM, 1969 (Rev.). The rule provides that only a military judge may grant a continuance. Paragraph 58 *a* of MCM, 1969 (Rev.) which provided for "postponement" has been deleted. Reposing power to postpone proceedings in the convening authority is inconsistent with the authority of the military judge to schedule proceedings and con-

trol the docket. *See generally United States v. Wolzok*, 1 M.J. 125 (C.M.A. 1975). To the extent that paragraph 58 *a* extended to the military judge the power to direct postponement, it was duplicative of the power to grant a continuance and unnecessary.

Subsection (2) is based on paragraph 48 *b*(4) of MCM, 1969 (Rev.). *See also United States v. Redding*, 11 M.J. 100 (C.M.A. 1981).

Subsection (3) is based on paragraph 69 *c* of MCM, 1969 (Rev.). *See also* Articles 32(d) and 34; *United State v. Johnson*, 7 M.J. 396 (C.M.A. 1979); *United States v. Donaldson*, 23 U.S.C.M.A. 293, 49 C.M.R. 542 (1975); *United States v. Maness*, 23 U.S.C.M.A. 41, 48 C.M.R. 512 (1974).

Subsection (4) is based on paragraph 69 *b* of MCM, 1969 (Rev.). *See also* Article 30(a); paragraphs 29e and 33 *d* of MCM, 1969 (Rev.); Fed. R. Crim. P. 7(d). *See generally United States v. Arbic*, 16 U.S.C.M.A. 292, 36 C.M.R. 448 (1966); *United States v. Krutsinger*, 15 U.S.C.M.A. 235, 35 C.M.R. 207 (1965); *United States v. Johnson*, 12 U.S.C.M.A. 710, 31 C.M.R. 296 (1962).

Subsection (5) and its discussion are based on paragraph 28 *b* of MCM, 1969 (Rev.); *United States v. Collins*, 16 U.S.C.M.A. 167, 36 C.M.R. 323 (1966); *United States v. Means*, 12 U.S.C.M.A. 290, 30 C.M.R. 290 (1961); *United States v. Parker*, 3 U.S.C.M.A. 541, 13 C.M.R. 97 (1953); *United States v. Voudren*, 33 C.M.R. 722 (A.B.R. 1963). *See also* paragraphs 158 and 200 *a*(8) of MCM, 1969 (Rev). *But see United States v. Davis*, 16 U.S.C.M.A. 207, 36 C.M.R. 363 (1966) (thefts occurring at different places and times over four-month period were separate).

Subsection (6) is based on Fed. R. Crim. P. 7(f). Although not expressly provided for in the previous Manual, bills of particulars have been recognized in military practice. *See United States v. Alef*, 3 M.J. 414 (C.M.A. 1977); *United States v. Paulk*, 13 U.S.C.M.A. 456, 32 C.M.R. 456 (1963); *United States v. Calley*, 46 C.M.R. 1131, 1170 (A.C.M.R.), *aff'd*, 22 U.S.C.M.A 534, 48 C.M.R. 19 (1973); James, *Pleadings and Practice under United States v. Alef*, 20 A.F.L. Rev. 22 (1978); Dunn, *Military Pleadings*, 17 A.F.L. Rev. 17 (Fall, 1975). The discussion is based on *United States V. Mannino*, 480 F. Supp. 1182, 1185 (S.D. N.Y. 1979); *United States v. Deaton*, 448 F. Supp. 532 (N.D. Ohio 1978); *see also United States v. Harbin*, 601 F.2d 773, 779 (5th Cir. 1979); *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979); *United States v. Davis*, 582 F. 2d 947, 951 (5th Cir. 1978), *cert. denied*, 441 U.S. 962 (1979). Concerning the contents of a bill, *see United States v. Diecidue*, 603 F.2d 535, 563 (5th Cir. 1979); *United States v. Murray*, 527 F.2d 401, 411 (5th Cir. 1976); *United States v. Mannino, supra; United States v. Hubbard*, 474 F. Supp. 64, 80–81 (D. D.C. 1979).

Subsection (7) is based on paragraphs 75 *e* and 115 *a* of MCM, 1969 (Rev.). *See also* Fed. R. Crim. P. 12(b)(4); *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980); *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978).

Subsection (8) is new to the Manual although not to military practice. *See* Analysis, R.C.M. 305(j).

Subsection (9) is based on paragraph 69 *d* of MCM, 1969 (Rev.) and Fed. R. Crim. P. 14 to the extent that the latter applies to severance of codefendants. Note that the Government may also accomplish a severance by proper withdrawal of charges against one or more codefendants and rereferrals of these charges to another court-martial. *See* R.C.M. 604. The discussion is based on paragraph 69 *d* of MCM, 1969 (Rev.).

Subsection (10) is new. It roughly parallels Fed. R. Crim. P. 14, but is much narrower because of the general policy in the military favoring trial of all known charges at a single court-martial. *See* R.C.M. 601(e) and discussion; *United States v. Keith*, 1 U.S.C.M.A. 442, 4 C.M.R. 34 (1952). Motions to sever charges have, in effect, existed through the policy in paragraph 26c of MCM, 1969 (Rev.), against joining minor and major offenses. *See, e.g., United States v. Grant*, 26 C.M.R. 692 (A.B.R. 1958). Although that provision has been eliminated, severance of offenses may still be appropriate in unusual cases. *See generally United States v. Gettz*, 49 C.M.R. 79 (N.C.M.R. 1974).

Subsection (11) is based generally on paragraph 69 *e* of MCM, 1969 (Rev.) and on Fed. R. Crim. P. 21. *See United States v. Nivens, supra; United States v. Gravitt*, 5 U.S.C.M.A. 249, 17 C.M.R. 249 (1954). The constitutional requirement that the trial of a crime occur in the district in which the crime was committed (U.S. Const. Art. II, sec. 2, cl. 3; amend VI) does not apply in the military. *Chenoweth v. VanArsdall*, 22 U.S.C.M.A. 183, 46 C.M.R. 183 (1973). Therefore Fed. R. Crim. P. 21(b) is inapplicable. In recognition of this, and of the fact that the convening authority has an interest, both financial and operational, in fixing the place of the trial, the rule allows the situs of the trial to be set and changed for the convenience of the Government, subject to judicial protection of the accused's rights as they may be affected by that situs. *See United States v. Nivens, supra.*

Subsection (12) is based on paragraph 76 *a*(5) of MCM, 1969 (Rev.). *See also* Analysis, R.C.M. 907(b)(3)(B) and Analysis, R.C.M. 1003(c)(1)(C).

Subsection (13) is new to the Manual, although motions *in limine* have been recognized previously. *See* Mil. R. Evid. 104(c); *United States v. Cofield*, 11 M.J. 422 (C.M.A. 1981); Siano, *Motions in Limine*, The Army Lawyer, 17 (Jan. 1976).

*1994 Amendment.*The Discussion to subparagraph (13) was amended to reflect the holding in *United States v. Sutton*, 31 M.J. 11 (C.M.A. 1990). The Court of Military Appeals in *Sutton* held that its decision in *United States v. Cofield*, 11 M.J. 422 (C.M.A. 1981), should not be relied upon to determine reviewability of preliminary rulings in courts-martial. Instead, reviewability of preliminary rulings will be controlled by *Luce v. United States*, 469 U.S. 38 (1984).

Subsection (14) is based on paragraph 69 *f* of MCM, 1969 (Rev.). *See* Analysis, R.C.M. 706, R.C.M. 909, and Analysis, R.C.M. 916(k).

907. Motions to dismiss

(a) *In general.* This subsection is based on paragraphs 68 and 214 of MCM, 1969 (Rev.).

Fed. R. Crim. P. 48(a) is inapposite because the trial counsel may not independently request dismissal of charges, and unnecessary because the convening authority already has authority to withdraw and to dismiss charges. *See* R.C.M. 306(c)(1); 401(c)(1); 604. The matters contained in Fed. R. Crim. P. 48(b) are addressed by R.C.M. 707 and 907(b)(2)(A).

(b) *Grounds for dismissal.* This subsection lists common grounds for motions to dismiss. It is not intended to be exclusive. It is divided into three subsections. These correspond to nonwaivable (subsection (1)) and waivable (subsection (2) and (3)) motions to

dismiss (*see* R.C.M. 905(e) and analysis), and to circumstances which require dismissal (subsections (1) and (2)) and those in which dismissal is only permissible (subsection (3).

Subsection (1) is based on paragraph 68 *b* of MCM, 1969 (Rev.). *See also* Fed. R. Crim. P. 12(b)(2) and 34.

Subsection (2)(A) is based on paragraph 68 *i* of MCM, 1969 (Rev.). *See also* 18 U.S.C. § 3162(a)(2). The rules for speedy trial are covered in R.C.M. 707.

Subsection (2)(B) is based on the first two paragraphs in paragraph 68 *c* of MCM, 1969 (Rev.); *United States v. Troxell*, 12 U.S.C.M.A. 6, 30 C.M.R. 6 (1960); *United States v. Rodgers*, 8 U.S.C.M.A. 226, 24 C.M.R. 36 (1957). The discussion is based on paragraphs 68 *c* and 215 *d* of MCM, 1969 (Rev.). *See also United States v. Arbic*, 16 U.S.C.M.A. 292, 36 C.M.R. 448 (1966); *United States v. Spain*, 10 U.S.C.M.A. 410, 27 C.M.R. 484 (1959); *United States v. Reeves*, 49 C.M.R. 841 (A.C.M.R. 1975).

1987 Amendment: The discussion under subsection (b)(2)(B) was revised to reflect several amendments to Article 43, UCMJ, contained in the "Military Justice Amendments of 1986," tit. VIII, § 805, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99–661, 100 Stat. 3905, (1986). These amendments were derived, in part, from Chapter 213 of Title 18, United States Code.

1990 Amendment: The fourth paragraph of the discussion under subsection (b)(2)(B) was amended to reflect the holding in *United States v. Tunnell*, 23 M.J. 110 (C.M.A. 1986).

Subsection (2)(C) is based on paragraph 215 *b* of MCM, 1969 (Rev.) and Article 44. *See also* paragraph 56 of MCM, 1969 (Rev.). Concerning the applicability to courts-martial of the double jeopardy clause (U.S. Const. Amend. V), *see Wade v. Hunter*, 336 U.S. 684 (1949); *United States v. Richardson*, 21 U.S.C.M.A. 54, 44 C.M.R. 108 (1971). *See also United States v. Francis*, 15 M.J. 424 (C.M.A. 1983).

Subsection (2)(C)(i) is based on Article 44(c). The applicability of *Crist v. Bretz*, 437 U.S. 28 (1978) was considered. *Crist* held that, in jury cases, jeopardy attaches when the jury is empanelled and sworn. For reasons stated below, the Working Group concluded that the beginning of the presentation of evidence on the merits, which is the constitutional standard for nonjury trial (*Crist v. Bretz, supra* at 37 n. 15; *Serfass v. United States*, 420 U.S. 377 (1975)) and is prescribed by Article 44(c), is the proper cutoff point.

There is no jury in courts-martial. *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Ex parte Quirin*, 317 U.S. 1 (1942); *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3, (1964). *See also United States v. McCarthy*, 2 M.J. 26, 29 n.3 (C.M.A. 1976). Members are an essential jurisdictional element of a court-martial. *United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978). Historically the members, as an entity, served as jury *and* judge, or, in other words, as the "court." W. Winthrop, *Military Law and Precedents* 54–55, 173 (2d. ed., 1920 reprint). Assembling the court-martial has not been the last step before trial on the merits. *See* paragraph 61 *j* and appendix 8 *b* of MCM, 1969 (Rev.); paragraph 61 *h* and *i* and appendix 8 *a* of MCM, 1951; paragraph 61 of MCM, 1949 (Army); paragraph 61 of MCM, 1928; W. Winthrop, *supra* at 205–80. Congress clearly contemplated that the members may be sworn at an early point in the proceedings. *See* Article 42(a); H. Rep. No. 491, 81st Cong. 1st Sess. 22 (1949).

The role of members has become somewhat more analogous to that of a jury. *See, e.g.*, Article 39(a). Nevertheless, significant differences remain. When they are present, the members with the military judge constitute the court-martial and participate in the exercise of contempt power. Article 48. *See* R.C.M. 809 and analysis. Moreover members may sit as a special court-martial without a military judge, in which case they exercise all judicial functions. Articles 19; 26; 40; 41; 51; 52.

The holding in *Crist* would have adverse practical effect if applied in the military. In addition to being unworkable in special court-martial without a military judge, it would negate the utility of Article 29, which provides that the assembly of the court-martial does not wholly preclude later substitution of members. This provision recognizes that military exigencies or other unusual circumstances may cause a member to be unavailable at any stage in the court-martial. It also recognizes that the special need of the military to dispose of offenses swiftly, without necessary diversion of personnel and other resources, may justify continuing the trial with substituted members, rather that requiring a mistrial. This provision is squarely at odds with civilian practice with respect to juries and, therefore, with the rationale in *Crist*.

Subsection (2)(C)(ii) is based on paragraph 56 of MCM, 1969 (Rev). *See also Wade v. Hunter, supra; United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). "Manifest necessity" is the traditional justification for a mistrial. *Id. See United States v. Richardson, supra. Cf.* Article 44(c), which does not prohibit retrial of a proceeding terminated on motion of the accused. *See also* Analysis, R.C.M. 915.

Subsection (2)(C)(ii) is taken from Article 44(b). *See United States v. Richardson, supra. See also* Article 63. *But see* R.C.M. 810(d).

Subsection(2)(C)(iv) is new. It is axiomatic that jeopardy does not attach in a proceeding which lacks jurisdiction. *Ball v. United States*, 163 U.S. 662 (1973). Therefore, if proceedings are terminated before findings because the court-martial lacks jurisdiction, retrial is not barred if the jurisdictional defect is corrected. For example, if during the course of trial it is discovered that the charges were not referred to the court-martial by a person empowered to do so, those proceedings would be terminated. This would not bar later referral of those charges by a proper official to a court-martial. *Cf. Lee v. United States*, 432 U.S. 23 (1977); *Illinois v. Somerville*, 410 U.S. 458 (1973). *See also United States v. Newcomb*, 5 M.J. 4 (C.M.A. 1977); *United States v. Hardy*, 4 M.J. 20 (C.M.A. 1977) authorizing re-referral of charges where earlier proceedings lacked jurisdiction because of defects in referral and composition. Res judicata would bar retrial by a court-martial for a jurisdictional defect which is not "correctable." *See, e.g.*, R.C.M. 202 and 203. *See also* R.C.M. 905(g).

By its terms, the rule permits a retrial of a person acquitted by a court-martial which lacks jurisdiction. The Court of Military Appeals decision in *United States v. Culver*, 22 U.S.C.M.A. 141, 46 C.M.R. 141 (1973) does not preclude this, although that decision raises questions concerning this result. There was no majority opinion in *Culver*. Judge Quinn held that the defect (absence of a written judge alone request) was not jurisdictional. In the alternative, Judge Quinn construed paragraph 81 *d* of MCM, 1969 (Rev.) and the automatic review structure in courts-martial as

precluding retrial on an offense of which the accused had been acquitted. (Note that R.C.M. 810(d), using slightly different language, continues the same policy of limiting the maximum sentence for offenses tried at an "other trial" to that adjudged at the earlier defective trial.) Judge Duncan, concurring in the result in *Culver*, found that although the original trial was jurisdictionally defective, the defect was not so fundamental as to render the proceedings void. In Judge Duncan's view, the original court-martial had jurisdiction when it began, but "lost" it when the request for military judge alone was not reduced to writing. Therefore, the double jeopardy clause of the Fifth Amendment and Article 44 barred the second trial for an offense of which the accused had been acquitted at the first. Chief Judge Darden dissented. He held that because the earlier court-martial lacked jurisdiction, the proceedings were void and did not bar the second trial. Thus in *Culver*, two judges divided over whether the double jeopardy clause bars a second trial for an offense of which the accused was acquitted at a court-martial which lacked jurisdiction because of improper composition. The third judge held retrial was barred on non constitutional grounds.

Subsection (2)(D) is based on paragraph 68 *e f, g,* and *h* of MCM, 1969 (Rev.). As to subsection (iv) *see United States v. Williams*. 10 U.S.C.M.A. 615, 28 C.M.R. 181 (1959).

Subsection (3) sets out grounds which, unlike those in subsection (1) and (2), do not *require* dismissal when they exist. The military judge has discretion whether to dismiss or to apply another remedy (such as a continuance in the case of subsection (3)(A), or sentencing instructions in the case of subsection (3)(B)). *But see United States v. Sturdivant*, 13 M.J. 323 (C.M.A. 1982). *See also United States v. Baker*, 14 M.J. 361 (C.M.A. 1983).

Subsection (3)(A) and the discussion are based on paragraph 69 *b*(3) of MCM, 1969 (Rev.).

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

Rule 908. Appeal by the United States

Introduction. This rule is based on Article 62, as amended, Military Justice Act of 1983, Pub. L. No. 98–209, § 5(c)(1), 97 Stat 1393 (1983). *See also* S. Rep. No. 53, 98th Cong., 1st. Sess. 23 (1983); 18 U.S.C. § 3731. Article 62 now provides the Government with a means to seek review of certain rulings or orders of the military judge. The need for such procedure has been recognized previously. *See United States v. Rowel*, 1 M.J. 289, 291 (C.M.A. 1976) (Fletcher, C.J., concurring). *See also Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1978). It is not expected that every ruling or order which might be appealed by the Government will be appealed. Frequent appeals by the Government would disrupt trial dockets and could interfere with military operations and other activities, and would impose a heavy burden on appellate courts and counsel. Therefore this rule includes procedures to ensure that the Government's right to appeal is exercised carefully. *See* S. Rep. No. 53 *supra* at 23.

(a) *In general.* This subsection repeats the first sentence of Article 62(a).

1998 Amendment: The change to R.C.M. 908(a) resulted from the amendment to Article 62, UCMJ, in section 1141, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104–106, 110 Stat. 186, 466–67 (1996). It permits interlocutory appeal of rulings disclosing classified information.

(b) *Procedure.* Subsection (1) provides the trial counsel with a mechanism to ensure that further proceedings do not make an issue moot before the Government can file notice of appeal.

The first sentence in subsection (2) is based on the second sentence of Article 62(a). The second sentence in subsection(2) authorizes an initial measure to ensure that a decision to file notice of appeal is carefully considered. The Secretary concerned may require trial counsel to secure authorization from another person, such as the convening authority, the convening authority's designee, or the staff judge advocate. Because the decision whether to file the notice must be made within 72 hours, it probably will not be practicable in many cases to secure authorization from a more distant authority (*see* subsection (b)(5) and Analysis, below), but nothing in this subsection prohibits requiring this authorization to be secured from, for example, the chief of appellate Government counsel or a similar official in the office of the Judge Advocate General. Note that the Secretary concerned is not required to require authorization by anyone before notice of appeal is filed. The provision is intended solely for the benefit of the Government, to avoid disrupting trial dockets and the consequences this has on command activities, and to prevent overburdening appellate courts and counsel. The accused has no right to have the Government forego an appeal which it might take. *But see* R.C.M. 707(c)(1)(D). The authorization may be oral and no reason need be given.

Subsection (3) is based on the second and third sentences of Article 62(a). The second sentence is added to permit decisions by defense counsel and the military judge on how to proceed as to any unaffected charges and specifications under subsection (4).

Subsection (4) is necessary because, unlike in Federal civilian trials (*see* Fed. R. Crim. P. 8(a)), unrelated offenses may be and often are tried together in courts-martial. Consequently, a ruling or order which is appealable by the Government may affect only some charges and specifications. As to those offenses, the pendency of an appeal under this rule necessarily halts further proceedings. It does not necessarily have the same effect on other charges and specifications unaffected by the appeal. Subsection (4) provides several alternatives to halting the court-martial entirely, even as to charges and specifications unaffected by the appeal. Subsection (4)(A) permits motions to be litigated as to unaffected charges and specifications, regardless of the stage of the proceedings. Subsection (4)(B) permits unaffected charges and specifications to be served, but only before trial on the merits has begun, that is, before jeopardy has attached. *See* R.C.M. 907(b)(2)(C) and Analysis. Once jeopardy has attached, the accused is entitled to have all the charges and specification resolved by the same court-martial. *Cf. Crist v. Bretz*, 437 U.S. 28 (1978). It is expected that in most cases, rulings or orders subject to appeal by the Government will be made before trial on the merits has begun. *See* R.C.M. 905(b) and (e); Mil. R. Evid. 304(d), 311(d), and 321(c). Subsection (4)(C) provides a mechanism to alleviate the adverse effect an appeal by the Government may have on unaffected charges and specifications. Thus witnesses who are present but whom it may be difficult and expensive to recall at a later time may, at the request of the proponent party

and in the discretion of the military judge, be called to testify during the pendency of any appeal. Such witnesses may be called out of order. *See also* R.C.M. 801(a); 914; Mil. R. Evid. 611. Note, however, that a party cannot be compelled to call such witnesses or present evidence until the appeal is resolved. This is because a party's tactics may be affected by the resolution of the appeal. Note also that if similar problems arise as to witnesses whose testimony relates to an affected specification, a deposition could be taken, but it could not be used at any later proceedings unless the witness was unavailable or the parties did not object.

Subsection (5) ensures that a record will be prepared promptly. Because the appeal ordinarily will involve only specific issues, the record need be complete only as to relevant matters. Defense counsel will ordinarily have the opportunity to object to any omissions. *See* R.C.M. 1103(i)(1)(B). Furthermore, the military judge and the Court of Criminal Appeals may direct preparation of additional portions of the record.

Subsection (6) provides for the matter to be forwarded promptly. No specific time limit is established, but ordinarily the matters specified should be forwarded within one working day. Note that the record need not be forwarded at this point as that might delay disposition. If the record is not ready, a summary may be forwarded for preliminary consideration before completion of the record. An appropriate authority will then decide whether to file the appeal, in accordance with procedures established by the Judge Advocate General. *See* S.Rep. No. 53, *supra* at 23. This is an administrative determination; a decision not to file the appeal has no effect as precedent. Again, no specific time limit is set for this decision, but it should be made promptly under the circumstances.

Subsection (7) is based on Article 62(b).

Subsection (8) ensures that trial participants are notified in the event no appeal is filed.

1991 Amendment: Subsection (4) was amended to state explicitly that, upon timely notice of appeal, the legal effect of an appealable ruling or order is stayed pending appellate resolution. Although most military practitioners understood this necessary effect of an appeal under the rule, some civilian practitioners were confused by the absence of an explicit statement in the rule.

New subsection (9) is based on 18 U.S.C. § 3143(c) governing the release of an accused pending appeal by the United States of an order of dismissal of an indictment or information, or an order suppressing evidence. Since appeals by the United States under Article 62, U.C.M.J., contemplate a situation in which the accused has not been convicted, a commander's decision whether to subject the individual to continued confinement after an appeal has been taken should be based on the same considerations which would authorize the imposition of pretrial confinement.

(c) *Appellate proceedings.* Subsection (1) is based on Article 70(b) and (c).

Subsection (2) is based on Article 62(b).

Subsection (3) is based on Article 67(b) and (h) and on 28 U.S.C. § 1259. Note that if the decision of the Court of Criminal Appeals permits it (i.e., is favorable to the Government) the court-martial may proceed as to the affected charges and specifications notwithstanding the possibility or pendency of review by the Court of Appeals for the Armed Forces or the Supreme Court. Those courts could stay the proceedings. The penultimate sentence is similar in purpose to Article 66(e) and 67(f).

(d) *Military judge.* This subsection is necessary because Article 62 authorizes appeals by the Government only when a military judge is detailed.

1998 Amendment: The change to R.C.M. 908(a) resulted from the amendment to Article 62, UCMJ, in section 1141, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 466-67 (1996). It permits interlocutory appeal of rulings disclosing classified information.

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

This rule is based on paragraphs 120 *a* and *d*, and 122 of MCM, 1969 (Rev.). It has been reorganized and minor changes were made in some language in order to conform to the format and style of the Rules for Courts-Martial. The procedures for examining the mental capacity of the accused are covered in R.C.M. 706. Matters referring solely to the accused's sanity at the time of the offense are treated at R.C.M. 916(k). The rule is generally consistent with 18 U.S.C. § 4244. The standard of proof has been changed from beyond reasonable doubt to a preponderance of the evidence. This is consistent with the holdings of those federal courts which have addressed the issue. *United States v. Gilio*, 538 F.2d 972 (3d. Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Makris*, 535 F.2d 899 (5th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977).

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

1998 Amendment: The rule was changed to provide for the hospitalization of an incompetent accused after the enactment of Article 76b, UCMJ, in section 1133 of the Nation Defense Authorization act for Fiscal Year 1996, Pub. L. No. 104–106, 110 Stat. 464–66 (1996).

Rule 910. Pleas

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

(a) *In general.* Subsection (1) is based on Article 45 and paragraph 70 *a* of MCM, 1969 (Rev.). The first sentence parallels the first sentence in Fed. R. Crim. P. 11(a)(1), except that no provision is made for pleas of nolo contendere. Such a plea is unnecessary in courts-martial. *Hearings on H. R. 4080 Before A Subcomm, of the Comm. on Armed Services of the House of Representatives*. 81st Cong., 1st Sess. 1054 (1949). *See* 8A.J. Moore, *Moore's Federal Practice* Para. 11.07(1) (1980 rev. ed) concerning the purpose of nolo pleas in civilian practice, and a discussion of the controversy about them. Furthermore, the practice connected with nolo pleas (*see* Fed. R. Crim. P. 11(f) which does not require that a factual basis be established in order to accept a plea of nolo contendere; *see also Moore's supra* at Para. 11.07(1) is inconsistent with Article 45. The second sentence on Fed. R. Crim. P. 11(a) is covered under subsection (b) of this rule insofar as it pertains to military practice.

1993 Amendment: The amendment to R.C.M. 910(a)(1) re-

moved the necessity of pleading guilty to a lesser included offense by exceptions and substitutions. This parallels the amendment to R.C.M. 918(a)(1), allowing a finding of guilty to a named lesser included offense without mandating the use of exceptions and substitutions, made to correspond more closely to verdict practice in federal district courts. *See* Analysis comments for R.C.M. 918(a)(1).

Subsection (2) is based on Fed. R. Crim. P. 11(a)(2). Conditional guilty pleas can conserve judicial and governmental resources by dispensing with a full trial when the only real issue is determined in a pretrial motion. As in the federal courts, the absence of clear authority in courts-martial for such a procedure has resulted in some uncertainty as to whether an accused could preserve some issues for appellate review despite a plea of guilty. *See e.g., United States v. Schaffer*, 12 M.J. 425 (C.M.A. 1982); *United States v. Mallett*, 14 M.J. 631 (A.C.M.R. 1982). Now such issues may be preserved, but only in accordance with this subsection. *See* also subsection (j) of this rule.

There is no right to enter a conditional guilty plea. The military judge and the Government each have complete discretion whether to permit or consent to a conditional guilty plea. Because the purpose of a conditional guilty plea is to conserve judicial and government resources, this discretion is not subject to challenge by the accused. The rationale for this discretion is further explained in Fed. R. Crim. P. 11 advisory committee note:

> The requirement of approval by the court is most appropriate, as it ensures, for example, that the defendant is not allowed to take an appeal on the matter which can only be fully developed by proceeding to trial (citation omitted). As for consent by the government, it will ensure that conditional pleas will be allowed only when the decision of the court of appeals will dispose of the case either by allowing the pleas to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence. Absent such circumstances, the conditional plea might only serve to postpone the trial and require the government to try the case after substantial delay, during which time witnesses may be lost, memories dimmed, and the offense grown so stale as to lose jury appeal. The government is in a unique position to determine whether the matter at issue would be case-dispositive, and, as a party to the litigation, should have an absolute right to refuse to consent to potentially prejudicial delay.

The last sentence of subsection (a)(2) has been added to the language of Fed. R. Crim. P. 11(a)(2). This permits the Secretary concerned to require that consent of the Government be obtained at higher echelons or at a centralized point. The consequences of overuse of conditional guilty pleas will be visited upon appellate courts and activities and the consequences of inappropriate use of them will typically fall on a command or installation different from the one where the original court-martial sat. Thus, it may be deemed appropriate to establish procedures to guard against such problems.

(b) *Refusal to plead, irregular plea.* The subsection is based on Article 45(a) and paragraph 70 *a* of MCM, 1969 (Rev.). It parallels the second sentence of Fed. R. Crim. P. 11(a), but is broadened to conform to Article 45(a). The portion of Fed. R. Crim. P. 11(a) concerning corporate defendants does not apply in courts-martial. The discussion is based on the last sentence of the first paragraph of paragraph 70 *a* of MCM, 1969 (Rev.).

(c) *Advice of accused.* This subsection is taken from Fed. R. Crim. P. 11(c) and is consistent with paragraph 70 *b*(2) of MCM, 1969 (Rev.). *See also* H.R. Rep. No. 491, *supra* at 23–24; S.Rep. No. 486, *supra* at 20–21; *Boykin v. Alabama*, 395 U.S. 238 (1969); *McCarthy v. United States*, 394 U.S. 459 (1969); *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

As to subsection (1), the requirement that the accused understand the elements of the offense is of constitutional dimensions. *Henderson v. Morgan*, 426 U.S. 637 (1976); *see also United States v. Care, supra*. The elements need not be listed as such, seriatim, if it clearly appears that the accused was apprised of them in some manner and understood them and admits (*see* subsection (e) of this rule) that each element is true. *See Henderson v. Morgan, supra; United States v. Grecco*, 5 M.J. 1018 (C.M.A. 1976); *United States v. Kilgore*, 21 U.S.C.M.A. 35, 44 C.M.R. 89 (1971). *But see United States v. Pretlow*, 13 M.J. 85 (C.M.A. 1982).

Advice concerning a mandatory minimum punishment would be required only when the accused pleads guilty to murder under clause (1) or (4) of Article 118. The accused could only do so if the case had been referred as not capital. As to advice concerning the maximum penalty, the adoption of the language of the federal rule is not intended to eliminate the requirement that the advice state the maximum including any applicable escalation provisions. As to misadvice concerning the maximum penalty *see United States v. Walls*, 9 M.J. 88 (C.M.A. 1981).

Subsection (2) of Fed. R. Crim. P. 11(c) has been modified because of the absence of a right to counsel in summary courts-martial. *See* R.C.M.1301(e) and Analysis. In other courts-martial, full advice concerning counsel would ordinarily have been given previously (*see* R.C.M.901(d)(4)) and need not be repeated here. The discussion is based on paragraph 70 *b*(1) of MCM, 1969 (Rev.) and H.Rep. 491, *supra* at 23–24, S.Rep. 486, *supra* at 20–21.

Subsections (3), (4), and (5) have been taken without substantial change from Fed. R. Crim. P. 11(c). Subsections (3) and (4) are consistent with the last paragraph and paragraph 70 *b* (2) of MCM, 1969 (Rev.). Subsection (5) corresponds to Mil. R. Evid. 410. As to the effect of failure to give the advice in subsection (5) *see United States v. Conrad*, 598 F.2d 506 (9th Cir. 1979).

(d) *Ensuring that the plea is voluntary.* This subsection is based on Fed. R. Crim. P. 11(d) and is consistent with paragraph 70 *b*(3) of MCM, 1969 (Rev.). As to the requirement to inquire concerning the existence of a plea agreement, *see United States v. Green*, 1 M.J. 453 (C.M.A. 1976).

(e) *Determining accuracy of plea.* This subsection is based on Fed. R. Crim. P. 11(f), except that “shall” replaces “should” and

it is specified that the military judge must inquire of the accused concerning the factual basis of the plea. This is required under Article 45(b) and is consistent with paragraph 70 *b*(3) of MCM, 1969 (Rev.). *See also* H.R. Rep. 491, *supra* at 23–24; S.Rep. 486, *supra* at 20–21; *United States v. Davenport*, 9 M.J. 364 (C.M.A. 1980); *United States v. Johnson*, 1 M.J. 36 (C.M.A. 1975); *United States v. Logan*, 22 U.S.C.M.A. 349, 47 C.M.R. 1 (1973). Notwithstanding the precatory term "should," the factual basis inquiry in Fed. R. Crim. P. 11(f) is, in practice, mandatory, although the means for establishing it are broader. *See* J. Moore, *supra* at Para.11.02(2). *See also ABA Standards, Pleas of Guilty* §1.6 (1978). The last sentence requiring that the accused be placed under oath is designed to ensure compliance with Article 45 and to reduce the likelihood of later attacks on the providence of the plea. This is consistent with federal civilian practice. *See* Fed.R.Evid. 410.

The first paragraph in the discussion is also based on *United States v. Jemmings*, 1 M.J. 414 (C.M.A. 1976); *United States v. Kilgore, supra; United States v. Care, supra. See also United States v. Crouch*, 11 M.J. 128 (C.M.A. 1981).

The second paragraph in the discussion is new and is based on *United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977); *United States v. Luebs*, 20 U.S.C.M.A. 475, 43 C.M.R. 315 (1971); *United States v. Butler*, 20 U.S.C.M.A. 247, 43 C.M.R. 87 (1971).

(f) *Plea agreement inquiry.* This subsection is based on Fed. R. Crim. P. 11(e), with substantial modifications to conform to plea agreement procedures in the military. *See* R.C.M. 705 and Analysis. The procedures here conform to those prescribed in *United States v. Green, supra. See also United States v. Passini*, 10 M.J. 109 (C.M.A. 1980).

It is not intended that failure to comply with this subsection will necessarily result in a improvement plea. *See United States v. Passini, supra; cf. United States v. Davenport, supra. Contra United States v. King*, 3 M.J. 458 (C.M.A. 1977). Proceedings in revision may be appropriate to correct a defect discovered after final adjournment. *United States v. Steck*, 10 M.J. 412 (C.M.A. 1981). Even if a prejudicial defect in the agreement is found, as a result of an inadequate inquiry or otherwise, allowing withdrawal of the plea is not necessarily the appropriate remedy. *See Santobello v. New York*, 404 U.S. 257 (1971); *United States v. Kraffa*, 11 M.J. 453 (C.M.A. 1981); *United States v. Cifuentes*, 11 M.J. 385 (C.M.A. 1981). If an adequate inquiry is conducted, however, the parties are normally bound by the terms described on the record. *Id,; United States v. Cooke*, 11 M.J. 257 (C.M.A. 1981). *But see United States v. Partin*, 7 M.J. 409 (C.M.A. 1979) (the parties were not bound by military judge's interpretation which had the effect of adding illegal terms to the agreement; the plea was held provident).

(g) *Findings.* This subsection is based on the last paragraph of paragraph 70 *b* of MCM, 1969 (Rev.). *See also* Articles 39(a)(3) and 52(a)(2). The discussion is new and recognizes that it may be unnecessary and inappropriate to bring to the member's attention the fact that the accused has pleaded guilty to some offenses before trial on the merits of others. *See United States v. Nixon*, 15 M.J. 1028 (A.C.M.R. 1983). *See also United States v. Wahnon*, 1 M.J. 144 (C.M.A. 1975).

1990 Amendment: The discussion to the subsection was changed in light of the decision in *United States v. Rivera*, 23 M.J. 89 (C.M.A.), *cert. denied*, 479 U.S. 1091 (1986).

(h) *Later action.* Subsection (1) is based on the fourth and fifth sentences of the penultimate paragraph of paragraph 70 *b* of MCM, 1969 (Rev.). Note that once a plea of guilty is accepted the accused may withdraw it only within the discretion of the military judge. Before the plea is accepted, the accused may withdraw it as a matter of right. *See United States v. Leonard*, 16 M.J. 984 (A.C.M.R. 1983); *United States v. Hayes*, 9 M.J. 825 (N.C.MR. 1980).

Subsection (2) is based on the first two sentences in the penultimate paragraph of paragraph 70 *b* of MCM, 1969 (Rev.) and on Article 45(a). *See also* Fed. R. Crim. P. 32(d). The discussion is based on *United States v. Cooper*, 8 M.J. 5 (C.M.A. 1979); *United States v. Bradley*, 7 M.J. 332 (C.M.A. 1979). Subsection (3) is based on *United States v. Green, supra. See also United States v. Kraffa, supra.*

(i) *Record of proceedings.* This subsection is based on subparagraph (4) of the first paragraph of paragraph 70 *b* of MCM, 1969. *See also* Article 54; H.R. Rep. No. 491, *supra* at 24; S. Rep. No. 486, *supra* at 21; *ABA Standards, Pleas of Guilty supra* at §1.7. This subsection parallels Fed. R. Crim. P. 11(g), except insofar as the former allows for nonverbatim records in inferior courts-martial. *See* Article 54(b).

(j) *Waiver.* This subsection replaces the third paragraph in paragraph 70 *a* of MCM, 1969 (Rev.) which listed some things a guilty plea did not waive, and which was somewhat misleading in the wake of the pleading standards under *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977). This subsection is based on *Menna v. New York*, 423 U.S. 61 (1975); *Tollett v. Henderson*, 411 U.S. 258 (1973); *Parker v. North Carolina*, 397 U.S. 790 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970); *United States v. Engle*, 1 M.J. 387 (C.M.A. 1976); *United States v. Dusenberry*, 23 U.S.C.M.A. 287, 49 C.M.R. 536 (1975); *United States v. Hamil*, 15 U.S.C.M.A. 110, 35 C.M.R. 82 (1964). *See also* subsection (a)(2) of this rule and its analysis.

Rule 911. Assembly of the court-martial

The code fixes no specific point in the court-martial for assembly although, as noted in the discussion, it establishes assembly as a point after which the opportunities to change the composition and membership of the court-martial are substantially circumscribed. *See United States v. Morris*, 23 U.S.C.M.A. 319, 49 C.M.R. 653 (1975); *United States v. Dean*, 20 U.S.C.M.A. 212, 43 C.M.R. 52 (1970).

The purpose of this rule is simply to require an overt manifestation of assembly in order to mark clearly for all participants the point at which the opportunities to elect freely as to composition or to substitute personnel has ended. Failure to make the announcement described in the rule has no substantive effect other than to leave open a dispute as to whether a change in composition or membership was timely.

The rule prescribes no specific point for assembly. The points noted in the discussion are based on paragraph 61 *j* of MCM, 1969 (Rev.). It is normally appropriate to assemble the court-martial at these points to protect the parties from untimely changes in membership or composition. In some circumstances flexibility is desirable, as when the military judge approves a request for trial by military judge alone, but recognizes that it may be necessary to substitute another judge because of impend-

ing delays. The discussion is also based on paragraphs 53 *d*(2)(c) and 61 *b* of MCM, 1969 (Rev.).

Rule 912. Challenge of selection of members; examination and challenges of members

(a) *Pretrial matters.* Subsection (1) recognizes the usefulness of questionnaires to expedite voir dire. Questionnaires are already used in some military jurisdictions. This procedure is analogous to the use of juror qualification forms under 28 U.S.C. § 1864(a). *See also* ABA Standards, Trial by Jury § 2.1(b) (1979). It is not intended that questionnaires will be used as a complete substitute for voir dire. As to investigations of members, *see also ABA Standards, The Prosecution Function* § 3-5.3(b) (1979); *The Defense Function* § 4-7.2(b) (1979).

Subsection (2) recognizes that in order to challenge the selection of the membership of the court-martial (*see* subsection (b) of this rule) discovery of the materials used to select them is necessary. Such discovery is already common. *See, e.g., United States v. Greene*, 20 U.S.C.M.A. 232, 43 C.M.R. 72 (1970); *United States v. Herndon*, 50 C.M.R. 166 (A.C.M.R. 1975); *United States v. Perry*, 47 C.M.R. 89 (A.C.M.R. 1973). The purpose of this procedure is analogous to that of 18 U.S.C. §§ 1867(f) and 1868. The rule is a discovery device; it is not intended to limit the types of evidence which may be admissible concerning the selection process.

(b) *Challenge of selection of members.* This subsection is based on 28 U.S.C. § 1867(a), (b) and (d). Other subsections in that section are inapposite to the military. No similar provision appeared in MCM, 1969 (Rev.). Nevertheless, a motion for appropriate relief challenging the selection of members and requesting a new one was recognized. *See United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975); *United States v. Young*, 49 C.M.R. 133 (A.F.C.M.R. 1974). Except for matters affecting the composition of the court-martial (*see* Article 16 and 25(a), (b) and (c)), improper selection of members is not a jurisdictional defect. *United States v. Daigle, supra. See also* S. Rep. No. 53, 98th Cong., 18th Sess. 12 (1983). *Cf. United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983). The issue may be waived if not raised in a timely manner.

(c) *Stating of grounds for challenge.* This subsection is based on the second sentence of paragraph 62*b* of MCM, 1969 (Rev.).

(d) *Examination of members.* This subsection is based on Fed. R. Crim. P. 24(a). Paragraph 62*b* and *h* of MCM, 1969 (Rev.) discussed questioning members. Paragraph 62*b* provided that "... the trial or defense counsel may question the court, or individual members thereof." *United States v. Slubowski*, 7 M.J. 461 (C.M.A. 1979), *reconsideration not granted by equally divided court*, 9 M.J. 264 (C.M.A. 1980), held that this provision did not establish a right of the parties to personally question members. Instead, the court recognized that the procedures in Fed. R. Crim. P. 24(a) are applicable to the military. *See also United States v. Parker*, 6 U.S.C.M.A. 274, 19 C.M.R. 400 (1955). Therefore, subsection (d) does not change current practice.

The discussion is based generally on paragraph 62 *b* of MCM, 1969 (Rev.) and encourages permitting counsel to question personally the members. *See United States v. Slubowski, supra* at 463 n.4; ABA Standards, Trial by Jury § 2.4 (1979). As to the scope of voir dire generally, *see Ristaino v. Ross*, 424 U.S. 589 (1977); *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979); *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979); *United States v. Slubowski, supra; United States v. Parker, supra.* The second paragraph of the discussion is based on *ABA Standards, The Prosecution Function* § 3-5.3(c). (1979); *The Defense Function* § 4-7.2(c) (1979).

(e) *Evidence.* This subsection is based on the first sentence of paragraph 62 *h*(2) of MCM, 1969 (Rev.).

(f) *Challenges and removal for cause. See generally* Article 41(a). Subsection (1) is based on Article 25 and paragraph 62 *f* of MCM, 1969 (Rev.). The examples in the last paragraph of paragraph 62 *f* have been placed in the discussion.

Subsection (2) is based on paragraphs 62 *d* and *h*(1) of MCM, 1969 (Rev.).

Subsection (3) is based on Article 41(a) and paragraph 62 *h* of MCM, 1969 (Rev.). The first sentence is new. MCM, 1969 (Rev.) was silent on this matter. The procedure is intended to protect the parties from prejudicial disclosures before the members, and is in accord with practice in many courts-martial. Paragraph 62 *h*(2) of MCM, 1969 (Rev.) advised that the military judge "should be liberal in passing on challenges, but need not sustain a challenge upon the mere assertion of the challenger." The precatory language has been deleted from the rule as an unnecessary statement. This deletion is not intended to change the policy expressed in that statement.

The waiver rule in subsection (4) is based on *United States v. Beer*, 6 U.S.C.M.A. 180, 19 C.M.R. 306 (1955). *See also United States v. Dyche*, 8 U.S.C.M.A. 430, 24 C.M.R. 240 (1957); *United States v. Wolfe*, 8 U.S.C.M.A. 247, 24 C.M.R. 57 (1957). Grounds (A) and (B) in subsection (f)(1) may not be waived, except as noted. *See generally* H. R. Rep. No. 491, 81st Cong, 1st Sess. 17-18 (1949); *United States v. Newcomb*, 5 M.J. 4 (C.M.A. 1978). Membership of enlisted members of the enlisted members of the accused's unit has been held not to be jurisdictional, and, therefore, may be waived. *United States v. Wilson*, 16 M.J. 678 (A.C.M.R. 1983); *United States v. Kimball*, 13 M.J. 659 (N.M.C.M.R. 1982); *United States v. Tagert*, 11 M.J. 677 (N.M.C.M.R. 1981); *United States v. Scott*, 25 C.M.R. 636 (A.B.R. 1957). *Contra United States v. Anderson*, 10 M.J. 803 (A.F.C.M.R. 1981). The Court of Military Appeals has held that the presence of a statutorily ineligible member is not a jurisdictional defect. *United States v. Miller*, 3 M.J. 326 (C.M.A. 1977); *United States v. Beer, supra.* Ineligibility of enlisted members from the accused's unit is designed to protect the accused from prejudice and does not affect their competency. *See Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1st Sess. 1140, 1150-52 (1949). *See also* S. Rep. No. 53, 98th Cong., 1st Sess. 12(1983).

The second sentence in subsection (4) is based on *United States v. Seabrooks*, 48 C.M.R. 471 (N.C.M.R. 1974). *See also United States v. Jones*, 7 U.S.C.M.A. 283, 22 C.M.R. 73 (1956). This is consistent with federal practice. *See, e.g., United States v. Richardson*, 582 F.2d 968 (5th Cir. 1978). The third sentence clarifies the effect of using or failing to use a peremptory challenge after a challenge for cause is denied. This has been a subject of some controversy. *See United States v. Harris*, 13 M.J. 288 (C.M.A. 1982); *United States v. Russell*, 43 C.M.R. 807 (A.C.M.R. 1971) and cases cited therein. Failure to use a peremptory challenge at all has been held to waive any issue as to denial

of a challenge for cause. *United States v. Henderson*, 11 U.S.C.M.A. 556, 29 C.M.R. 372 (1960). Because the right to a peremptory challenge is independent to the right to challenge members for cause, *see* Article 41, that right should not be forfeited when a challenge for cause has been erroneously denied. *See United States v. Baker*, 2 M.J. 773 (A.C.M.R. 1976). *See also United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977); *United States v. Nell*, 526 F.2d 1223 (5th Cir. 1976). *See generally Swain v. Alabama*, 380 U.S. 202 (1965). The requirement that a party peremptorily challenging a member it has unsuccessfully challenged for cause state that it would have peremptorily challenged another member is designed to prevent a "windfall" to a party which had no intent to exercise its preemptory challenge against any other member. *See United States v. Harris, supra*; *United States v. Shaffer*, 2 U.S.C.M.A. 76, 6 C.M.R. 75 (1952); *United States v. Cooper*, 8 M.J. 538 (N.C.M.R. 1979).

(g) *Peremptory challenges.* Subsection (1) is based on Article 41(b). The second sentence is new. Paragraph 62 *e* of MCM, 1969 (Rev.) stated that a peremptory challenge "may be used before, during, or after challenges for cause." Subsection (1) does not prevent a party from exercising a peremptory challenge before challenges for cause, but it protects a party against being compelled to use a peremptory challenge before challenges for cause are made. Each party is entitled to one peremptory challenge. Article 41(b); *United States v. Calley*, 46 C.M.R. 1131, 1162 (A.C.M.R.), aff'd, 23 U.S.C.M.A. 534, 48 C.M.R. 19 (1973). *But see United States v. Harris, supra* at 294 n. 3 (C.M.A. 1982) (Everett, C.J., dissenting). Fed. R. Crim. P. 24(b) is inapplicable.

*1994 Amendment.*The Discussion for R.C.M. 912(g)(1) was amended to incorporate *Batson v. Kentucky*, 476 U.S. 79 (1986); *United States v. Curtis*, 33 M.J. 101 (C.M.A. 1991), *cert. denied*, 112 S.Ct. 1177 (1992); *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989); and *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988).

Subsection (2) is based on *United States v. White*, 22 C.M.R. 892 (A.B.R. 1956); *United States v. Graham*, 14 C.M.R. 645 (A.F.B.R. 1954). *See also United States v. Fetch*, 17 C.M.R. 836 (A.F.B.R. 1954). The discussion is based on the last sentence of paragraph 62 *d* and the last sentence of paragraph 62 *h*(4) of MCM, 1969 (Rev.). The last sentence in the discussion is also based on *United States v. Lee*, 31 C.M.R. 743 (A.F.B.R. 1962).

(h) *Special courts-martial without a military judge.* This subsection is based on Articles 41, 51(a), and 52(c) and on paragraph 62 *h*(3) of MCM, 1969 (Rev.).

(i) *Definitions.* Subsection (2) is based on paragraph 63 of MCM, 1969 (Rev.). *See also United States v. Griffin*, 8 M.J. 66 (C.M.A. 1979); *United States v. Wilson*, 7 U.S.C.M.A. 656, 23 C.M.R. 120 (1957); *United States v. Moore*, 4 U.S.C.M.A. 675, 16 C.M.R. 249 (1954). The distinction between witnesses for the prosecution and witnesses for the defense has been eliminated for purpose of challenges, notwithstanding the statutory basis for the former (Article 25(d)(2)) but not the latter. Disqualification as a witness for the prosecution has been held to be waivable. *United States v. Beer*, 6 U.S.C.M.A. 180, 19 C.M.R. 306 (1955). Consequently, there is no substantive distinction between either ground.

Subsection (3) is taken from paragraph 64 of MCM, 1969 (Rev.). *Cf. United States v. Goodman*, 3 M.J. 1 (C.M.A. 1977) (military judge as investigator).

Rule 913. Presentation of the case on the merits

(a) *Preliminary instructions.* This subsection is based on Appendix 8 at 10-11 of MCM, 1969 (Rev.). *See also United States v. Waggoner*, 6 M.J. 77 (C.M.A. 1978).

1990 Amendment: The second sentence to the rule and the discussion which follows are based on the decision in *United States v. Rivera*, 23 M.J. 89 (C.M.A. 1986). *See also United States v. Wahnon*, 1 M.J. 144 (C.M.A. 1975).

(b) *Opening statement.* This subsection is based on the first of paragraph of paragraph 44 *g*(2) and the first paragraph of paragraph 48 *i* of MCM, 1969 (Rev.). The discussion is taken from *ABA Standards, The Prosecution Function* § 3-5.5 (1979); *The Defense Function* § 4-7.4 (1979).

(c) *Presentation of evidence.* Subsection (1) is based on paragraph 54a of MCM, 1969 (Rev.), except that (E), *Additional rebuttal evidence*, has been added to expressly note the occasional need for further rebuttal.

Subsection (2) is based on the first sentence of Fed. R. Crim. P. 26. The first paragraph of the discussion of subsection (2) is based on paragraphs 44 *g*(2), 48 *i*, and 54 *a* of MCM, 1969 (Rev.) and Mil. R. Evid. 611 and 614. The second paragraph of the discussion is based on paragraphs 54 *d* and *g* of MCM, 1969 (Rev.).

Subsection (3) and the discussion are based on paragraph 54 *e* of MCM, 1969 (Rev).

Subsection (4) is based on paragraph 54 *c* of MCM, 1969 (Rev.).

Subsection (5) is based on the fourth sentence of the second paragraph of paragraph 71 *a* of MCM, 1969 (Rev.) and is consistent with current practice.

Rule 914. Production of statements of witnesses

Introduction. This rule is based on Fed. R. Crim. P. 26.2. Fed. R. Crim. P. 26.2 is based on the Jencks Act, 18 U.S.C. § 3500, which has long been applied in courts-martial. *United States v. Albo*, 22 U.S.C.M.A. 30, 46 C.M.R. 30 (1972); *United States v. Walbert*, 14 U.S.C.M.A. 34, 33 C.M.R. 246 (1963); *United States v. Heinel*, 9 U.S.C.M.A. 259, 26 C.M.R. 39 (1958). *See United States v. Jarrie*, 5 M.J. 193 (C.M.A. 1978); *United States v. Herndon*, 5 M.J. 175 (C.M.A. 1978); *United States v. Scott*, 6 M.J. 547 (A.F.C.M.R. 1978) (applied to statements made during Article 32 investigation and demand at trial); *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R.), *aff'd*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973); Kesler, *The Jencks Act: An Introductory Analysis*, 13 The Advocate 391 (Nov- Dec. 1981); Lynch, *Possession Under the Jencks Act*, 10 A.F.JAG Rptr 177 (Dec. 1981); O'Brien, *The Jencks Act- A Recognized Tool for Military Defense Counsel*, 11 The Advocate 20 (Jan- Fed 1979); Waldrop, *The Jencks Act*, 20 A.F.L. Rev. 93 (1978); Bogart, *Jencks Act*, 27 JAG J. 427 (1973); West, *Significance of the Jencks Act in Military Law*, 30 Mil. L. Rev. 83 (1965). Fed. R. Crim. P. 26.2 expands the Jencks Act by providing for disclosure by the defense as well as the prosecution, based on *United States v. Nobles*, 422 U.S. 225 (1975). Otherwise, it is not intended to change the requirements of the Jencks Act. Fed. R. Crim. P. 26.2 Advisory Committee Note (Supp. v. 1981). Prosecution compliance with R.C.M. 701 should make resort to this rule by the defense unnecessary in most cases.

This rule, like Fed. R. Crim. P. 26.2, applies at trial. It is not a

discovery rule (*United States v. Ciesielski*, 39 C.M.R. 839 (N.M.C.R. 1968)), and it does not apply to Article 32 hearings (*contra, United States v. Jackson*, 33 C.M.R. 884, 890 nn.3, 4 (A.F.B.R. 1963)). It is a distinct rule from the rule requiring production for inspection by an opponent of memoranda used by a witness to refresh recollection. *United States v. Ellison*, 46 C.M.R. 839 (A.F.C.M.R. 1972); *cf.* Mil. R. Evid. 612 and accompanying Analysis. The rule is not intended to discourage voluntary disclosure before trial, even where R.C.M. 701 does not require disclosure, so as to avoid delays at trial. Further, this rule does not foreclose other avenues of discovery.

(a) *Motion for production.* This subsection is based on Fed. R. Crim. P. 26.2(a). It has been reworded to clarify what statements must be produced. "(I)n the possession of the United States," and "in the possession of the accused or defense counsel" are substituted for "in their possession" to make clear that the rule is not limited to statements in the personal possession of counsel. *See* 18 U.S.C. § 3500(a). As to the meaning of "in the possession of the United States," *see United States v. Calley, supra* (testimony at congressional hearing); *see also United States v. Ali*, 12 M.J. 1018 (A.C.M.R. 1982) (statements in possession of commander); *United States v. Boiser*, 12 M.J. 1010 (A.C.M.R. 1982) (notes of undercover informant); *United States v. Fountain*, 2 M.J. 1202 (N.C.M.R. 1976); *United States v. Brakefield*, 43 C.M.R. 828 (A.C.M.R. 1971) (notes taken by government psychiatrist).

(b) *Production of entire statement.* This subsection is taken from Fed. R. Crim. P. 26.2(b).

(c) *Production of excised statement.* This subsection is taken from Fed. R. Crim. P. 26.2(c). Failure of a judge to make the required examination on request is error. *United States v. White*, 37 C.M.R. 791 (A.F.B.R. 1966) (decision under Jencks Act). Failure to preserve the statement after denial or excision frustrates appellate review and is also error under decisions interpreting 18 U.S.C. § 3500. *United States v. Dixon*, 8 M.J. 149 (C.M.A. 1979); *United States v. Jarrie, supra.* However, the statement need not be appended to the record (where it would become public) because it is not error to consider the statement when forwarded separately as this rule provides. *United States v. Dixon, supra.*

(d) *Recess for examination of the statement.* This subsection is taken from Fed. R. Crim. P. 26.2(d).

(e) *Remedy for failure to produce statement.* This subsection is based on Fed. R. Crim. P. 26.2(e). Although not expressly mentioned there, the good faith loss and harmless error doctrines under the Jencks Act would apparently apply. *See United States v. Patterson*, 10 M.J. 599 (A.F.C.M.R. 1980); *United States v. Kilmon*, 10 M.J. 543 (N.C.M.R. 1980), *United States v. Dixon, United States v. Scott, United States v. Jarrie, and United States v. White, all supra.* Note, however, that under the Jencks Act decisions the accused need not demonstrate prejudice on appeal (*United States v. Albo, supra; but see United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971); *United States v. Ali*, and *United States v. Boiser*, both *supra*) and that the military judge may not substitute the judge's assessment of the usefulness of the statement for the assessment of the accused and defense counsel *(United States v. Dixon and United States v. Kilmon*, both *supra).*

(f) *Definitions.* This subsection is taken from Fed. R. Crim. P. 26.6(f).

In subsection (1) the inclusion of statements approved or adopted by a witness is consistent with 18 U.S.C. § 3500(e)(1). *See United States v. Jarrie* and *United States v. Kilmon*, both *supra.*

In subsection (2) the inclusion of substantially verbatim recordings or transcriptions exceeds some interpretations under 18 U.S.C. § 3500. *See, e.g., United States v. Matfield*, 4 M.J. 843 (A.C.M.R.), *pet. denied.*, 5 M.J. 182 (1978) (testimony in a prior court-martial not accessible under 18 U.S.C. § 3500 but accessible under a general "military due process" right to discovery).

Rule 914A. Use of remote live testimony of a child

*1999 Amendment:*This rule allows the military judge to determine what procedure to use when taking testimony under Mil. R. Evid. 611(d)(3). It states that normally such testimony should be taken via a two-way closed circuit television system. The rule further prescribes the procedures to be used if a television system is employed. The use of two-way closed circuit television, to some degree, may defeat the purpose of these alternative procedures, which is to avoid trauma to children. In such cases, the judge has discretion to direct one-way television communication. The use of one-way closed circuit television was approved by the Supreme Court in *Maryland v. Craig*, 497 U.S. 836 (1990). This amendment also gives the accused an election to absent himself from the courtroom to prevent remote testimony. Such a provision gives the accused a greater role in determining how this issue will be resolved.

Rule 915. Mistrial

(a) *In general.* This subsection is based on the second and third sentences of paragraph 56 *e*(1) of MCM, 1969 (Rev.). *See generally Oregon v. Kennedy*, 456 U.S. 667 (1982); *Arizona v. Washington*, 434 U.S. 497 (1978); *Lee v. United States*, 432 U.S. 23 (1977); *United States v. Dinitz*, 424 U.S. 600 (1976); *Illinois v. Somerville*, 410 U.S. 458 (1973); *United States v. Jorn*, 400 U.S. 470 (1971); *United States v. Perez*, 22 U.S. (9 Wheat) 579 (1824); *United States v. Richardson*, 21 U.S.C.M.A. 54, 44 C.M.R. 108 (1971); *United States v. Schilling*, 7 U.S.C.M.A. 482, 22 C.M.R. 272 (1957).

(b) *Procedure.* This subsection is based on paragraph 56 *e*(2) of MCM, 1969 (Rev.). Because consent or lack thereof by the defense to a mistrial may be determinative of a former jeopardy motion at a second trial, the views of the defense must be sought.

(c) *Effect of a declaration of mistrial.* Subsection (1) is based on the first sentence of paragraph 56 *e*(1) of MCM, 1969 (Rev.). Note that dismissal of charges may have the same effect as declaring a mistrial, depending on the grounds for dismissal. *See Lee v. United States* and *Illinois v. Somerville*, both *supra.* Subsection (2) is based on the first two sentences of paragraph 56 *e*(3) of MCM, 1969 (Rev). *See also Oregon v. Kennedy, supra; United States v. Scott*, 437 U.S. 82 (1978); *Arizona v. Washington, United States v. Dinitz, Illinois v. Somerville*, and *United States v. Jorn, all supra; Gori v. United States*, 367 U.S. 364 (1961); *United States v. Richardson, supra.* Subsection (2) notes, as paragraph 56 *e* of MCM, 1969 (Rev.) did not, that a declaration of a mistrial after findings does not trigger double jeopardy protections. *See United States v. Richardson, supra.* Moreover subsection (2) notes that certain types of prosecutorial misconduct resulting in mistrial will trigger double jeopardy protections. *See*

United States v. Jorn, and *United States v. Gori*, both *supra*. *See also United States v. Dinitz*, and *Illinois v. Sommerville*, both *supra.*

Rule 916. Defenses

(a) *In general.* This subsection and the discussion are based on the third paragraph of paragraph 214 of MCM, 1969 (Rev.).

Motions in bar of trial, which were also covered in paragraph 214, are now covered in R.C.M. 907 since they are procedurally and conceptually different from the defenses treated in R.C.M. 916.

(b) *Burden of proof.* This subsection is based on the fourth paragraph of paragraph 214 of MCM, 1969 (Rev.). *See also* paragraph 112 *a* of MCM, 1969 (Rev.). *See, e.g., United States v. Cuffee*, 10 M.J. 381 (C.M.A. 1981). The first paragraph in the discussion is based on the fifth paragraph of paragraph 214 of MCM, 1969 (Rev.). The second paragraph in the discussion is based on *United States v. Garcia*, 1 M.J. 26 (C.M.A. 1975); *United States v. Walker*, 21 U.S.C.M.A. 376, 45 C.M.R.150 (1972); *United States v. Ducksworth*, 13 U.S.C.M.A. 515, 33 C.M.R. 47 (1963); *United States v. Bellamy*, 47 C.M.R. 319 (A.C.M.R. 1973). It is unclear whether, under some circumstances, an accused's testimony may negate a defense which might otherwise have been raised by the evidence. *See United States v. Garcia, supra.*

1986 Amendment: The requirement that the accused prove lack of mental responsibility was added to implement Article 50 *a*, which was added to the UCMJ in the "Military Justice Amendments of 1986," Tit. VIII, § 802, National Defense Authorization Act for fiscal year 1987, Pub.L. No. 99-661, 100 Stat. 3905 (1986). Article 50a(b) adopted the provisions of 18 U.S.C. 20(b), created by the Insanity Defense Reform Act, ch. IV, Pub. L. No. 98-473, 98 Stat. 2057 (1984). *See generally Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043, 3051 n.17 (1983); *Leland v. Oregon*, 343 U.S. 790, 799 (1952); S.Rep. No. 225, 98th Cong., 1st Sess. 224-25 (1983), reprinted in 1984 U.S. Code Cong. & Ad. News 1, 226-27.

1998 Amendment: In enacting section 1113 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 462 (1996), Congress amended Article 120, UCMJ, to create a mistake of fact defense to a prosecution for carnal knowledge. The accused must prove by a preponderance of the evidence that the person with whom he or she had sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this person was at least 16 years of age. The changes to R.C.M. 916(b) and (j) implement this amendment.

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

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

(e) *Self-defense.* Subsection (1) is based on the first paragraph of paragraph 216 *c* of MCM, 1969 (Rev.). The discussion is based on the second paragraph of paragraph 216 *c* of MCM 1967 (Rev.). *See also United States v. Jackson*, 15 U.S.C.M.A. 603, 36 C.M.R. 101 (1966).

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

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

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

Subsection (4) is based on the third paragraph of paragraph 216 *c* of MCM, 1969 (Rev.). *See also United States v. Yabut*, 20 U.S.C.M.A. 393, 43 C.M.R. 233 (1971); *United States v. Green*, 13 U.S.C.M.A. 545, 33 C.M.R. 77 (1963); *United States v. Brown*, 13 U.S.C.M.A. 485, 33 C.M.R. 7 (1963). The second paragraph in the discussion is based on *United States v. Smith*, 13 U.S.C.M.A. 471, 33 C.M.R. 3 (1963).

Subsection (5) is based on paragraph 216c of MCM, 1969 (Rev.) which described self-defense in terms which also apply to defense of another. It is also based on *United States v. Styron*, 21 C.M.R. 579 (C.G.B.R. 1956); *United States v. Hernandez*, 19 C.M.R. 822 (A.F.B.R. 1955). *But see* R. Perkins, *Criminal Law* 1018-1022 (2d ed. 1969).

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

(g) *Entrapment.* This subsection and the discussions are based on paragraph 216 *e* of MCM, 1969 (Rev.). *See also United States v. Vanzandt*, 14 M.J. 332 (C.M.A. 1982).

(h) *Coercion or duress.* This subsection is based on paragraph 216 *f* of MCM, 1969 (Rev.). Paragraph 216 *f* required that the fear of the accused be that the accused would be harmed. This test was too narrow, as the fear of injury to relatives or others may be a basis for this defense. *United States v. Jemmings*, 1 M.J. 414 (C.M.A. 1976); *United States v. Pinkston*, 18 U.S.C.M.A. 261, 39 C.M.R. 261 (1969). The discussion is based on *United States v. Jemmings, supra.*

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

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

1998 Amendment: In enacting section 1113 of the National

Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 462(1996), Congress amended Article 120, UCMJ to create a mistake of fact defense to a prosecution for carnal knowledge. The accused must prove by a preponderance of the evidence that the person with whom he or she had sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this person was at least 12 years of age, and that the accused reasonably believed that this person was at least 16 years of age. The changes to R.C.M. 916(b) and (j) implement this amendment.

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

1986 Amendment: The test for lack of mental responsibility in subsection (1) was changed to implement Article 50a, which was added to the UCMJ in the "Military Justice Amendments of 1986, " tit. VIII, 802, National Defense Authorization Act for fiscal year 1987, Pub.L. No. 99-661, 100 stat. 3905 (1986). Article 50a is modeled on 18 U.S.C. 20. *See* Insanity Defense Reform Act, ch. IV, Pub. L. No. 98-473, 98 Stat. 2057 (1984). The new test deletes the volitional prong of the American Law Institute's Model Penal Code Standard (*see United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984) (en banc), *cert. denied*, 105 S. Ct. 323 (1985)), which was applied to courts-martial in *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977). The new standard also changes the quantity of mental disability necessary to establish the defense from "lacks substantial capacity to appreciate" to being "unable to appreciate." The new test is very similar to the test in *M'Naghten's Case*, 10 Cl. & F. 200, 8 Eng. Rep. 718 (House of Lords. 1843). *See also* Carroll, *Insanity Defense Reform*, 114 Mil. L. Rev. 183 (1986).

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

1986 Amendment: Subsection (2) was amended to eliminate the defense of partial mental responsibility in conformance with Article 50a, which was added to the UCMJ in the "Military Justice Amendments of 1986," tit. VIII 802, National Defense Authorization Act for fiscal year 1987, Pub.L. No. 99-661, 100 Stat. 3905 (1986). Article 50a(a) is adopted from 18 U.S.C. § 20(a). Congress wrote the last sentence of 18 U.S.C. § 20(a) (now also the last sentence of Article 50(a)) "to insure that the insanity defense is not improperly resurrected in the guise of showing some other affirmative defense, such as that the defendant had has a'diminished responsibility' on some similarly asserted state of mind which would serve to excuse the offense and open the door, once again, to needlessly confusing psychiatric testimony." S.Rep. No. 225, 98th Cong. 1st Sess. 229(1983), *reprinted in* 1984 U.S.Code Cong. & Ad. News 1. 231. *See Muench v. Israel*, 715 F.2d 1124 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 2682 (1984); *State v. Wilcox*, 436 N.E. 2d 523 (Ohio 1982).

Because the language of section 20(a) and its legislative history have been contended to be somewhat ambiguous regarding "diminished capacity" or "diminished responsibility," this aspect of the legislation has been litigated in Article III courts. *United States v. Pohlot*, Crim. No. 85-00354-01 (E.D. Pa. March 31, 1986) held that section 20(a) eliminated the defense of diminished capacity. *See also United States v. White*, 766 F.2d 22, 24-25 (1st Cir. 1985); U.S. DEPARTMENT OF JUSTICE, HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 AND OTHER CRIMINAL STATUTES ENACTED BY THE 98TH CONGRESS 58, 60 (December 1984). *Contra United States v. Frisbee*, 623 F. Supp. 1217 (N.D. Cal. 1985) (holding that Congress did not intend to eliminate the defense of diminished capacity). *See also* Carroll, *Insanity Defense Reform*, 114 Mil. L. Rev. 183, 196 (1986). The drafters concluded that Congress intended to eliminate this defense in section 20(a).

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

1986 Amendment: Subsection (3)(A) was amended to conform to article 50a(b) and R.C.M. 916(b).

Subsection (3)(B) and the discussion are based on paragraph 122 *b*(2) of MCM, 1969 (Rev.). The procedures for an inquiry into the mental responsibility of the accused are covered in R.C.M. 706.

Subsection (3)(C) is new. Article 51(b) prohibits a military judge from ruling finally on the factual question of mental responsibility. It does not, however, require that the question be treated as an interlocutory one, and there is no apparent reason for doing so. The import of Article 51(b) is that the issue of mental responsibility may not be removed from the factfinder. Moreover, to permit mental responsibility to be treated separately from other issues relating to the general issue could work to the detriment of the accused. *Cf. United States v. Laws*, 11 M.J. 475 (C.M.A. 1981).

(l) *Not defenses generally.*

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

Subsection (2) is based on paragraph 216h of MCM, 1969 (Rev.). *See also United States v. Hernandez*, 20 U.S.C.M.A. 219 43 C.M.R. 59 (2970); *United States v. Ferguson*, 17 U.S.C.M.A. 441, 38 C.M.R. 239 (1968); *United States v. Garcia*, 41 C.M.R. 638 (A.C.M.R. 1969). *See United States v. Santiago-Vargas*, 5 M.J. (C.M.A. 1978) (pathological intoxication).

Rule 917. Motion for a finding of not guilty

(a) *In general.* This subsection is based on Fed. R. Crim. P. 29(a) and on the first two sentences of paragraph 71 *a* of MCM, 1969 (Rev.). Paragraph 71 *a* did not expressly provide for a motion for a finding of not guilty to be made sua sponte, as does Fed. R. Crim. P. 29(a). Unlike Fed. R. Crim. P. 29, this rule requires the motion to be resolved before findings are entered. If the evidence is insufficient to support a rational finding of guilty, there is no reason to submit the issue to the members. That would be inefficient. Moreover, if a military judge set aside some but not all of the findings as "irrational," it would be awkward to proceed to sentencing before the same members. However, nothing in this rule is intended to limit the authority of a military judge to dismiss charges after findings on other grounds, such as multiplicity or improper findings (*e.g.*, conviction for both larceny as perpetrator and receiving stolen property, *see United States v. Cartwright*, 13 M.J. 174 (C.M.A. 1982); *United States v. Ford*,

12 U.S.C.M.A. 3, 30 C.M.R. 3 (1960); *cf. United States v. Clark*, 20 U.S.C.M.A. 140, 42 C.M.R. 332 (1970)).

(b) *Form of motion.* This subsection is based on the first sentence in the second paragraph of paragraph 71 *a* of MCM, 1969 (Rev.), except that now a statement of the deficiencies of proof is required. This will enable the trial counsel to respond to the motion.

(c) *Procedure.* This subsection is new, although it conforms to current practice. By ensuring that counsel may be heard on the motion, a precipitant ruling will be avoided. This is important since a ruling granting the motion may not be reconsidered. *See United States v. Hitchcock*, 6 M.J. 188 (C.M.A. 1979). The first paragraph in the discussion is based on the fifth sentence of the second paragraph of paragraph 71 *a* of MCM, 1969 (Rev.).

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

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

(f) *Effect of ruling.* This subsection is based on the third sentence of Article 51(a) and on *United States v. Hitchcock, supra.*

*1994 Amendment.*The amendment to subsection (f) clarifies that the military judge may reconsider a ruling denying a motion for a finding of not guilty at any time prior to authentication of the record of trial. This amendment is consistent with *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988). As stated by the court, the reconsideration is limited to a determination as to whether the evidence adduced is legally sufficient to establish guilt rather than a determination based on the weight of the evidence which remains the exclusive province of the finder of fact.

(g) *Effect of denial on review.* This subsection is based on the last sentence of the first paragraph of paragraph 71 *a* of MCM, 1969 (Rev.). *See also United States v. Bland*, 653 F.2d 989 (5th Cir.), *cert. denied*, 454 U.S. 1055 (1981).

Rule 918. Findings

(a) *General findings.* This subsection and the discussion are based on paragraphs 74 *b* and *c* of MCM, 1969 (Rev.). The discussion of lesser included offenses is also based on Article 80. *See also United States v. Scott*, 50 C.M.R. 630 (C.G.C.M.R. 1975).

Failure to reach findings as to the charge or the designation of a wrong article is not necessarily prejudicial. *United States v. Dilday*, 471 C.M.R. 172 (A.C.M.R. 1973).

1986 Amendment: The provisions allowing for findings of not guilty only by reason of lack of mental responsibility were added to subsections (a)(1) and (2) to implement Article 50a(c), which was added to the UCMJ in the "Military Justice Amendments of 1986," Tit. VIII, 802, National Defense Authorization Act for Fiscal Year 1987, Pub.L. No. 99-661, 100 Stat. 3905 (1986). This finding is modeled after 18 U.S.C. § 4242(b)(3), section 403 of the Insanity Defense Reform Act, ch. IV, Pub.L. No. 98-473, 98 Stat. 2057, 2059. The drafters intended that adoption of the finding of "not guilty only by reason of lack of mental responsibility" does not require conformance to the procedures that follow an insanity acquittal in federal courts (*see* U.S.C. § 4243 *et. seq.*). The Services are free to use available medical and administrative procedures which address disposition of servicemembers having psychiatric illnesses. The drafters further intended that, for purposes of subsequent appellate and other legal reviews under this Manual, a finding of "not guilty only by reason of lack of mental responsibility" shall be treated as any other acquittal.

1993 Amendment: The amendment to R.C.M. 918(a)(1) allows for a finding of guilty of a named lesser included offense of the charged offense, and eliminates the necessity of making findings by exceptions and substitutions. This serves to conform military practice to that used in criminal trials before federal district courts. *See* Fed. R. Crim. P. 31(c); E. Devitt and C. Blackman, *Federal Jury Practice and Instructions*, 18.07 (1977). The practice of using exceptions and substitutions is retained for those cases in which the military judge or court members must conform the findings to the evidence actually presented, *e.g.*, a larceny case in which the finding is that the accused stole several of the items alleged in the specification but not others.

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

The requirement that a request for special findings be made before general findings are announced is based on the fifth sentence of paragraph 74 *i* of MCM, 1969 (Rev.), and on Fed. R. Crim. P.23(c). Article 51(d) is patterned after Fed. R. Crim. P. 23(c). *United States v. Gerard, supra.* The language in Article 51(d) is virtually identical to that in Fed. R. Crim. P. 23(c) as it existed when Article 51(d) was adopted in 1968. Fed. R. Crim. P. 23(c) was amended in 1977 to provide specifically that a request for special findings be made before general findings are entered. Pub. L. No. 95-78 § 2(b), 91 Stat. 320. This was done "to make clear that deadline for making a request for findings of fact and to provide that findings may be oral." *Id.*, Advisory Committee Note (Supp. v. 1981). Subsection (b), therefore, continues conformity with federal practice.

(c) *Basis of findings.* This subsection and the discussion are based on paragraph 74 *a* of MCM, 1969 (Rev.). The discussion of reasonable doubt has been modified based on *United States v. Cotten*, 10 M.J. 260 (C.M.A. 1981); *United States v. Salley*, 9 M.J. 189 (C.M.A. 1980). *See also Holland v. United States*, 348 U.S. 121, 140-41 (1954); *United States v. Previte*, 648 F.2d 73 (1st Cir. 1981); *United States v. De Vincent*, 632 F.2d 147 (1st Cir.), *cert denied*, 449 U.S. 986 (1980); *United States v. Cortez*, 521 F.2d 1 (5th Cir. 1975); *United States v. Zeigler*, 14 M.J. 860 (A.C.M.R. 1982); *United States v. Sauer*, 11 M.J. 872 (N.C.M.R.), *pet. granted*, 12 M.J. 320 (1981); *United States v. Crumb*, 10 M.J. 520 (A.C.M.R. 1980); E. Devitt and C. Blackmar, *Federal Jury Practice Instructions*, § 11.14 (3d. ed. 1977). As to instructions concerning accomplice testimony, *see United States v. Lee*, 6 M.J. 96 (C.M.A. 1978); *United States v. Moore*, 8

M.J. 738 (A.F.C.M.R. 1980), *aff'd*, 10 M.J. 405 (C.M.A. 1981) (regarding corroboration).

Rule 919. Argument by counsel on findings

(a) *In general.* This subsection is based on Fed. R. Crim. P. 29.1. It has been reworded slightly to make clear that trial counsel may waive the opening and the closing argument. The rule is consistent with the first sentence of paragraph 72 *a* of MCM, 1969 (Rev.).

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

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

Rule 920. Instructions on findings

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

(b) *When given.* This subsection is based on the first sentence of paragraph 73 *a* and on paragraph 74 *e* of MCM, 1969 (Rev.), and is consistent with Fed. R. Crim. P. 30. This subsection expressly provides that additional instructions may be given after deliberations have begun without a request from the members. MCM, 1969 (Rev.) was silent on this point. The discussion is based on *United States v. Ricketts*, 1 M.J. 78 (C.M.A. 1975).

1993 Amendment: The amendment to R.C.M. 920(b) is based on the 1987 amendments to Federal Rule of Criminal Procedure 30. Federal Rule of Criminal Procedure 30 was amended to permit instructions either before or after arguments by counsel. The previous version of R.C.M. 920 was based on the now superseded version of the federal rule.

The purpose of this amendment is to give the court discretion to instruct the members before or after closing arguments or at both times. The amendment will permit courts to continue instructing the members after arguments as Rule 30 and R.C.M. 920(b) had previously required. It will also permit courts to instruct before arguments in order to give the parties an opportunity to argue to the jury in light of the exact language used by the court. *See United States v. Slubowski*, 7 M.J. 461 (C.M.A 1979); *United States v. Pendry*, 29 M.J. 694 (A.C.M.R. 1989).

(c) *Requests for instructions.* This subsection is based on the first three sentences in Fed. R. Crim. P. 30 and on the second and fourth sentences of paragraph 73 *d* of MCM, 1969 (Rev.). The discussion is based on the remainder of paragraph 73 *d*.

(d) *How given.* The first sentence of this subsection is based on the last paragraph of paragraph 73 *a* of MCM, 1969 (Rev.). The second sentence of this subsection permits the use of written copies of instructions without stating a preference for or against them. *See United States v. Slubowski*, 7 M.J. 461 (C.M.A. 1979); *United States v. Muir*, 20 U.S.C.M.A. 188, 43 C.M.R. 28 (1970); *United States v. Sampson*, 7 M.J. 513 (A.C.M.R. 1979); *United States v. Sanders*, 30 C.M.R. 521 (A.C.M.R. 1961). Only copies of instructions given orally may be provided, and delivery of only a portion of the oral instructions to the members in writing is prohibited when a party objects. This should eliminate the potential problems associated with written instructions. *See United States v. Slubowski, supra; United States v. Caldwell*, 11 U.S.C.M.A. 257, 29 C.M.R. 73 (1960); *United States v. Helm*, 21 C.M.R. 357 (A.B.R. 1956). Giving written instructions is never required. The discussion is based on the last paragraph of paragraph 73 *a* of MCM, 1969 (Rev.) and *United States v. Caldwell, supra.* As to the use of written instructions in federal district courts, *see generally United States v. Read*, 658 F.2d 1225 (7th Cir. 1981); *United States v. Calabrase*, 645 F.2d 1379 (10th Cir.), *cert. denied*, 454 U.S. 831 (1981).

(e) *Required instructions.* This subsection is based on Article 51(c) and on the first paragraph of paragraph 73 *a* of MCM, 1969 (Rev.). *See also United States v. Steinruck*, 11 M.J. 322 (C.M.A. 1981); *United States v. Moore, supra; United States v. Clark*, 1 U.S.C.M.A. 201, 2 C.M.R. 107 (1952). As to whether the defense may affirmatively waive certain instructions (*e.g.*, lesser included offenses) which might otherwise be required, *see United States v. Johnson*, 1 M.J. 137 (C.M.A. 1975); *United States v. Mundy*, 2 U.S.C.M.A. 500, 9 C.M.R. 130 (1953). *See generally* Cooper, *The Military Judge: More Than a Mere Reference*, The Army

Lawyer (Aug. 1976) 1; Hilliard, *The Waiver Doctrine: Is It Still Viable?*, 18 A.F.L. Rev. 45 (Spring 1976).

1986 Amendment: Subsection (2) was amended to require the accused to waive the bar of the statute of limitations if the accused desires instructions on any lesser included offense otherwise barred. *Spaziano v. Florida*, 468 U.S. 447 (1984). This overturns the holdings in *United States v. Wiedemann*, 16 U.S.C.M.A. 356, 36 C.M.R. 521 (1966) and *United States v. Cooper*, 16 U.S.C.M.A. 390, 37 C.M.R. 10 (1966). The same rule applies in trials by military judge alone. Article 51(d). This is consistent with Article 79 because an offense raised by the evidence but barred by the statute of limitations is "necessarily included in the offense charged," unless the accused waives the statute of limitations.

The first paragraph in the discussion is based on *United States v. Jackson*, 12 M.J. 163 (C.M.A. 1981); *United States v. Waldron*, 11 M.J. 36 (C.M.A. 19810; *United States v. Evans*, 17 U.S.C.M.A. 238, 38 C.M.R. 36 (1967); *United States v. Clark, supra. See United States v. Johnson*, 637 F.2d 1224 (9th Cir. 1980); *United States v. Burns*, 624 F.2d 95 (10th Cir), *cert. denied*, 449 U.S. 954 (1980).

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

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

1986 Amendment: Subsection (e)(5)(D) was amended to conform to amendments to R.C.M. 916(b).

1998 Amendment: This change to R.C.M. 920(e) implemented Congress' creation of a mistake of fact defense for carnal knowledge. Article 120(d), UCMJ, provides that the accused must prove by a preponderance of the evidence that the person with whom he or she had sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this person was at least 16 years of age.

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

Rule 921. Deliberations and voting on findings

(a) *In general.* This subsection is based on Article 39(b) and on the second, third, and fifth sentences of paragraph 74 *d*(1) of MCM, 1969 (Rev.). The first sentence of that paragraph is unnecessary and the fourth is covered in subsection (b) of this rule.

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

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

Subsection (2) is based on Article 52(a) and on the first two sentences of paragraph 74 *d*(3) of MCM, 1969 (Rev.). *See also United States v. Guilford*, 8 M.J. 598 (A.C.M.R. 1979), *pet. denied*, 8 M.J. 242 (1980) (holding *Burch v. Louisiana*, 441 U.S. 130 (1979), does not apply to courts-martial.) The discussion is based on the third sentence of paragraph 74 *d*(3) of MCM, 1969 (Rev.).

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

1986 Amendment: Subsections (4) and (5) were redesignated as subsections (5) and (6) and a new subsection (4) was inserted. New subsection (4) is based on Article 50a(e) and provides for bifurcated voting on the elements of the offense and on mental responsibility, and defines the procedures for arriving at a finding of not guilty only by reason of lack on mental responsibility. When the prosecution had the burden of proving mental responsibility beyond a reasonable doubt, the same as the burden regarding the elements of the offense, the members were unlikely to confuse the two general issues. Without any procedure for bifurcated voting under the 1984 amendment, substantial confusion might result if the members were required to vote simultaneously on whether the defense has proven lack of mental responsibility by clear and convincing evidence, and whether the prosecution has proven the elements of the offense beyond a reasonable doubt. Each issue might result in a different number of votes. Bifurcated voting is also necessary to provide the finding of "not guilty only by reason of lack of mental responsibility" provided for in R.C.M. 918(a). *But see* Carroll, *Insanity Defense Reform*, 114 Mil. L. Rev. 183, 216 (1986).

Subsection (4) is new to the Manual but it conforms to practice generally followed in courts-martial. Paragraph 74 *d*(2) of MCM, 1969 (Rev.) suggested that findings as to a specification and all lesser offenses included therein would be resolved by a single ballot. Such an approach is awkward, however, especially when there are multiple lesser included offenses. It is more appropriate to allow separate consideration of each included offense until a finding of guilty has been reached. *See Military Judges Benchbook*, DA Pam 27–9, para. 2.28 (May 1982).

Subsection (5) is based on the second sentence of Article 51(b) and on paragraph 74 *d*(2) of MCM, 1969 (Rev.). *See also United States v. Dilday*, 47 C.M.R. 172 (A.C.M.R. 1973).

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

Barclay, 6 M.J. 785 (A.C.M.R. 1978), *pet. denied*, 7 M.J. 71 (1979).

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

Rule 922. Announcement of findings

(a) *In general.* This subsection is based on Article 53 and on the first sentence of paragraph 74 *g* of MCM, 1969 (Rev.). *See also United States v. Dilday*, 47 C.M.R. 172 (A.C.M.R. 1973). The discussion is based on *United States v. Ricketts*, 1 M.J. 78 (C.M.A. 1975); *United States v. Stewart*, 48 C.M.R. 877 (A.C.M.R. 1974). The requirement for the announcement to include a statement of the percentage of members concurring in each finding of guilty and that the vote was by secret written ballot has been deleted. Article 53 does not require such an announcement and when instructions on such matters are given (*see* R.C.M. 920(e)(6)), the members are "presumed to have complied with the instructions given them by the judge," *United States v. Ricketts*, *supra* at 82. *See United States v. Jenkins*, 12 M.J. 222 (C.M.A. 1982). *Cf. United States v. Hendon*, 6 M.J. 171, 173-174 (C.M.A. 1979).

(b) *Findings by members.* This subsection is based on the second sentence of paragraph 74 *g* of MCM, 1969 (Rev.). The last sentence is based on the last sentence of paragraph 70 *b* of MCM, 1969 (Rev.).

1986 Amendment: R.C.M. 922(b) was amended by adding a new paragraph (2) as a conforming change to the amendment in R.C.M. 1004(a) making unanimity on findings a precondition to a capital sentencing proceeding. The Rule and the Discussion also preclude use of the reconsideration procedure in R.C.M. 924 to change a nonunanimous finding of guilty to a unanimous verdict for purposes of authorizing a capital sentencing proceeding. Thus, if a nonunanimous finding of guilty is reaffirmed on reconsideration and the vote happens to be unanimous, the president of the court-martial does not make a statement as to unanimity.

(c) *Findings by military judge.* This subsection is based on the second sentence of the last paragraph of paragraph 70 *b* and on the second paragraph of paragraph 74 *g* of MCM, 1969 (Rev.) *See also* Article 39(a).

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

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

Rule 923. Impeachment of findings

This rule is based on *United States v. Bishop*, 11 M.J. 7 (C.M.A. 1981); *United States v. West*, 23 U.S.C.M.A. 77, 48 C.M.R. 548 (1974). *See also United States v. Witherspoon*, 12 M.J. 588 (A.C.M.R. 1981), *pet. granted*, 13 M.J. 210 (C.M.A. 1982), *aff'd* 16 M.J. 252 (1983); *United States v. Hance*, 10 M.J. 622 (A.C.M.R. 1980); *United States v. Zinsmeister*, 48 C.M.R. 931, 935 (A.F.C.M.R.), *pet. denied*, 23 U.S.C.M.A. 620 (1974); *United States v. Perez-Pagan*, 47 C.M.R. 719 (A.C.M.R. 1973); *United States v. Connors*, 23 C.M.R. 636 (A.B.R. 1957); Mil. R. Evid. 606(b).

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

The rule is not intended to prevent a military judge from setting aside improper findings. This would include improper findings of guilty of "mutually exclusive" offenses, for example, larceny (as a perpetrator) of certain property and receiving the same stolen property. In such a case, the members should be instructed before they deliberate that they may convict of no more than one of the two offenses. *See Milanovich v. United States*, 365 U.S. 551 (1961); *United States v. Cartwright*, 13 M.J. 174 (C.M.A. 1982); *United States v. Clark*, U.S.C.M.A. 140, 42 C.M.R. 332 (1970); *United States v. Ford*, 12 U.S.C.M.A. 3, 30 C.M.R. 3 (1960).

Rule 924. Reconsideration of findings

(a) *Time for reconsideration.* This subsection is based on Article 52(c) and on the fourth and fifth sentences of paragraph 74 *d*(3) of MCM, 1969 (Rev.).

(b) *Procedure.* This subsection is based on Articles 52(a) and 53(c) and on the last three sentences of paragraph 74 *d*(3) of MCM, 1969 (Rev.). *See also United States v. Boland*, 20 U.S.C.M.A. 83, 42 C.M.R. 275 (1970).

1987 Amendment: R.C.M. 924(b) was amended in conjunction with the adoption in R.C.M. 921(c)(4) of bifurcated voting on lack of mental responsibility. It is also necessary to bifurcate the vote on reconsideration to retain the relative burdens for reconsideration and to prevent prejudice to the accused.

(c) *Military judge sitting alone.* This subsection is new to the Manual, although the power of the military judge to reconsider findings of guilty has been recognized. *United States v. Chatman*, 49 C.M.R. 319 (N.C.M.R. 1974). It is also implicit in Article 16 which empowers the military judge sitting alone to perform the functions of the members. *See* Article 52(c).

1995 Amendment: The amendment limits reconsideration of findings by the members to findings reached in closed session but not yet announced in open court and provides for the military judge, in judge alone cases, to reconsider the "guilty finding" of a not guilty only by reason of lack of mental responsibility finding.

CHAPTER X. SENTENCING

Rule 1001. Presentencing procedure

Introduction. This rule is based on paragraph 75 of MCM, 1969 (Rev.). Additions, deletions, or modifications, other than format or style changes, are noted in specific subsections *infra*.

Sentencing procedures in Federal civilian courts can be followed in courts-martial only to a limited degree. Sentencing in courts-martial may be by the military judge or members. *See* Article 16 and 52(b). The military does not have—and it is not feasible to create—an independent, judicially supervised probation service to prepare presentence reports. *See* Fed. R. Crim. P. 32(c). This rule allows the presentation of much of the same information to the court-martial as would be contained in a presentence report, but it does so within the protections of an adversarial proceeding, to which rules of evidence apply (*but cf. Williams v. New York*, 337 U.S. 241 (1949)), although they may be relaxed for some purposes. *See* subsections (b)(4) and (5), (c)(3), (d), and (e) of this rule. The presentation of matters in the accused's service records (*see* subsection (b)(2) of this rule) provides much of the information which would be in a presentence report. Such records are not prepared for purposes of prosecution (*cf. United States v. Boles*, 11 M.J. 195 (C.M.A. 1981)) and are therefore impartial, like presentence reports. In addition, the clarification of the types of cases in which aggravation evidence may be introduced (*see* subsection (b)(4) of this rule) and authorization for the trial counsel to present opinion evidence about the accused's rehabilitative potential (*see* subsection (b)(5) of this rule) provide additional avenues for presenting relevant information to the court-martial. The accused retains the right to present matters in extenuation and mitigation (*see* subsection (c) of this rule).

In addition to Fed. R. Crim. P. 32(c), several other subsections in Fed. R. Crim. P. 32 are inapplicable to courts-martial or are covered in other rules. Fed. R. Crim. P. 32(a)(2) is covered in R.C.M. 1010. Fed. R. Crim. P. 32(b)(1) is inapposite; parallel matters are covered in R.C.M. 1114. Fed. R. Crim. P. 32(b)(2) is inapplicable as courts-martial lack power to adjudge criminal forfeiture of property. Fed. R. Crim. P. 32(d) is covered in R.C.M. 910(h). *See also* Article 45(a). As to Fed. R. Crim. P. 32(e), *see* R.C.M. 1108.

(a) *In general.* Subsection (a)(3) is based on the third sentence of paragraph 53 *h* of MCM, 1969 (Rev.) and on the second sentence of Fed. R. Crim. P. 32(a). *See also Hill v. United States*, 368 U.S. 424 (1962); *Green v. United States*, 365 U.S. 301 (1961). Subsection (a)(3) of paragraph 75 of MCM, 1969 (Rev.) is deleted as the convening authority is no longer required to examine the findings for factual sufficiency. Subsection (a)(2) is consistent with the first sentence of Fed. R. Crim. P. 32(a). *See* Article 53. As to the last sentence of Fed. R. Crim. P. 32(a), *see* subsection (g) of this rule.

(b) *Matter to be presented by the prosecution.* Subsections (3) and (4) are modifications of paragraph 75 *b*(3) and (4) of MCM, 1969 (Rev.), and subsection (5) is new.

1986 Amendment: The word "age" in subsection (1) was deleted to correct error in MCM, 1984.

The fourth sentence of subsection (2) is modified by substituting "a particular document" for "the information." This is intended to avoid the result reached in *United States v. Morgan*, 15 M.J. 128 (C.M.A. 1983). For reasons discussed above, sentencing proceedings in courts-martial are adversarial. Within the limits prescribed in the Manual, each side should have the opportunity to present, or not present, evidence. *Morgan* encourages gamesmanship and may result in less information being presented in some case because of the lack of opportunity to rebut.

1987 Amendment: The words "all those records" were changed to "any records" to implement more clearly the drafters' original intent. According to the paragraph just above, the drafters "intended to avoid the result reached in *United States v. Morgan*," *supra*, by allowing the trial counsel to offer only such records as he or she desired to offer. In *Morgan*, the court held that, when the trial counsel offered adverse documents from the accused's service record, the "rule of completeness" under Mil. R. Evid. 106 required that all documents from that record be offered.

Subsection (3) deletes the exclusion of convictions more than 6 years old. No similar restriction applies to consideration of prior convictions at sentencing proceedings in Federal civilian courts. There is no reason to forbid their consideration by courts-martial, subject to Mil. R. Evid. 403.

Subsection (3) also eliminates the requirement that a conviction be final before it may be considered by the court-martial on sentencing. No similar restriction applies in Federal civilian courts. This subsection parallels Mil. R. Evid. 609. An exception is provided for summary courts-martial and special courts-martial without a military judge. *See* Analysis, Mil. R. Evid. 609. Whether the adjudication of guilt in a civilian forum is a conviction will depend on the law in that jurisdiction.

1986 Amendment: The reference to "Article 65(c)" was changed to "Article 64" to correct an error in MCM, 1984.

Subsection (4) makes clear that evidence in aggravation may be introduced whether the accused pleaded guilty or not guilty, and whether or not it would be admissible on the merits. This is consistent with the interpretation of paragraph 75 *b*(3) (later amended to be paragraph 75 *b*(4) of MCM, 1969 (Rev.) by Exec. Order No. 12315 (July 29, 1981)) in *United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982). *See also* U.S. Dep't of Justice, Attorney General's Task Force on Violent Crime, Final Report Recommendation 14 (1981); Fed. R. Crim. P. 32(c)(2)(B) and (C). This subsection does not authorize introduction in general of evidence of bad character or uncharged misconduct. The evidence must be of circumstances directly relating to or resulting from an offense of which the accused has been found guilty. *See United States v. Rose*, 6 M.J. 754 (N.C.M.R. 1978), *pet. denied*, 7 M.J. 56 (C.M.A. 1979); *United States v. Taliaferro*, 2 M.J. 397 (A.C.M.R. 1975); *United States v. Peace*, 49 C.M.R. 172 (A.C.M.R. 1974).

1999 Amendment: R.C.M. 1001(b)(4) was amended by elevating to the Rule language that heretofore appeared in the Discussion to the Rule. The Rule was further amended to recognize that evidence that the offense was a *hate crime* may also be presented to the sentencing authority. The additional *hate crime* language was derived in part from section 3A1.1 of the Federal Sentencing Guidelines, in which hate crime motivation results in an upward adjustment in the level of the offense for which the defendant is sentenced. Courts-martial sentences are not awarded upon the basis of guidelines, such as the Federal Sentencing Guidelines, but rather upon broad considerations of the needs of the service and the accused and on the premise that each sentence is individ-

ually tailored to the offender and offense. The upward adjustment used in the Federal Sentencing Guidelines does not directly translate to the court-martial presentencing procedure. Therefore, in order to adapt this concept to the court-martial process, this amendment was made to recognize that ''hate crime'' motivation is admissible in the court-martial presentencing procedure. This amendment also differs from the Federal Sentencing Guideline in that the amendment does not specify the burden of proof required regarding evidence of ''hate crime'' motivation. No burden of proof is customarily specified regarding aggravating evidence admitted in the presentencing procedure, with the notable exception of aggravating factors under R.C.M. 1004 in capital cases.

Subsection (5) is new. (Paragraph 75b(5) of MCM, 1969 (Rev.) is deleted here, as it is now covered in R.C.M. 701(a)(5). *Cf.* Fed. R. Crim. P. 32(c)(3).) Subsection (5) authorizes the trial counsel to present, in the form of opinion testimony (*see* Mil. R. Evid., Section VII), evidence of the accused's character as a servicemember and rehabilitative potential. Note that inquiry into specific instances of conduct is not permitted on direct examination, but may be made on cross-examination. Subsection (5) will allow a more complete presentation of information about the accused to the court-martial. The accused's character is in issue as part of the sentencing decision, since the sentence must be tailored to the offender. *Cf. United States v. Lania*, 9 M.J. 100 (C.M.A. 1980). Therefore, introduction of evidence of this nature should not be contingent solely upon the election of the defense. Information of a similar nature, from the accused's employer or neighbors, is often included in civilian presentencing reports. *See, e.g.,* Fed. R. Crim. P. 32(c)(2). Subsection (5) guards against unreliable information by guaranteeing that the accused will have the right to confront and cross-examine such witnesses.

1994 Amendment: The amendment is based on decisional law interpreting subsection (b)(5), including *United States v. Pompey*, 33 M.J. 266 (C.M.A. 1991), *United States v. Claxton*, 32 M.J. 159 (C.M.A. 1991), *United States v. Aurich*, 31 M.J. 95 (C.M.A. 1990), *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989), and *United States v. Horner*, 22 M.J. 294 (C.M.A. 1986).

(e) *Production of witnesses.* The language of subsection (2)(C) has been modified to clarify that only a stipulation of fact permits nonproduction. *See United States v. Gonzalez*, 16 M.J. 58 (C.M.A. 1983).

(f) *Additional matters to be considered.* This subsection is based on the third and fourth sentences of paragraph 76 *a*(2) of MCM, 1969 (Rev.) and on the first sentence of paragraph 123 of MCM 1969 (Rev.). The discussion is based on the last two sentences of paragraph 123 of MCM, 1969 (Rev.).

(g) *Argument.* The last paragraph is new. *See Analysis*, R.C.M. 919(c). As to the second sentence, *see United States v. Grady*, 15 M.J. 275 (C.M.A. 1983).

Rule 1002. Sentence determination

This rule is based on the first sentence in paragraph 76 *a*(1) of MCM, 1969 (Rev.).

Rule 1003. Punishments

Introduction. This rule lists the punishments a court-martial is authorized to impose, and presents general limitations on punishments not provided in specific rules elsewhere. Limitations based on jurisdiction (*see* R.C.M. 201(f)); rehearings, other and new trials (*see* R.C.M. 810(d)); and on referral instructions (*see* R.C.M. 601(e)(1)) are contained elsewhere, but are referred to this rule. *See* subsection (c)(3) and discussion. The maximum punishments for each offense are listed in Part IV. The automatic suspension of limitations at paragraph of paragraph 127 *c*(5) of MCM, 1969 (Rev.) is deleted since the maximum punishments now include appropriate adjustments in the maximum authorized punishment in time of war or under other circumstances.

(a) *In general.* This subsection provides express authority for adjudging any authorized punishment in the case of any person tried by court-martial, subject only to specific limitations prescribed elsewhere. It does not change current law.

(b) *Authorized punishments.* This subsection lists those punishments which are authorized, rather than some which are prohibited. This approach is simpler and should eliminate questions about what punishments a court-martial may adjudge.

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

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

1990 Amendment: Subsection (b)(2) was amended to incorporate the statutory expansion of jurisdiction over inactive-duty reserve component personnel provided in the Military Justice Amendments of 1986, tit. VIII, § 804, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, 100 Stat. 3905 (1986).

1994 Amendment: The references to "retired" and "retainer" pay was added to make clear that those forms of pay are subject to computation of forfeiture in the same way as basic pay. Articles 17, 18, and 19, UCMJ, do not distinguish between these types of pay. Sentences including forfeiture of these types of pay were affirmed in *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958) (retired pay), and *United States v. Overton*, 24 M.J. 309 (C.M.A. 1987) (retainer pay).

Subsection (3) is based on paragraph 126 *h*(3) of MCM, 1969 (Rev.). *See* R.C.M. 1113(d)(4) and Analysis concerning possible issues raised by enforcing a fine through confinement.

Detention of pay (paragraph 126 *h*(4) of MCM, 1969 (Rev.)) has been deleted. This punishment has been used very seldom and is administratively cumbersome.

Subsection (4) is based on paragraph 126 *i* of MCM, 1969 (Rev.).

Subsection (5) is based on the second paragraph of paragraph 126 *e* of MCM, 1969 (Rev.). The first sentence in the discussion is based on the same paragraph. The second sentence in the discussion is based on the last sentence in the first paragraph of paragraph 126 *e* of MCM, 1969 (Rev.).

Subsection (6) is based on paragraph 126 *g* and on the ninth sentence of the second paragraph 127 *c*(2) of MCM, 1969 (Rev.). The equivalency of restriction and confinement has been incorporated here and is based on the table of equivalencies at paragraph 127 *c*(2) of MCM, 1969 (rev.). *See also* Article 20.

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

Subsection (8) is based on paragraph 126 *j* of MCM, 1969

(Rev.). Matters in the second paragraph of paragraph 126 *j* of MCM, 1969 (Rev.) are now covered in R.C.M. 1113(d)(2)(A).

Subsection (9) is based on the last paragraph of paragraph 125 of MCM, 1969 (Rev.). The last sentence is new and is based on the table of equivalent punishments at paragraph 127 *c*(2) of MCM, 1969 (Rev.).

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

1986 Amendment: Under R.C.M. 1003(c)(2)(A)(iv), a warrant officer who is not commissioned can be punished by a dishonorable discharge when convicted at general court-martial of any offense. This continued the rule of paragraph 126 *d* of MCM, 1969 (Rev.). The second sentence of subsection (10)(B), added in 1985, does not make any substantive change, but merely restates the provision in subsection (10)(B) to maintain the parallelism with subsection (10)(A), which governs dismissal of commissioned officers, commissioned warrant officers, cadets, and midshipmen.

As to subsection (11), *see* R.C.M. 1004.

Subsection (12) is based on Article 18.

Subsections (6), (7), and (9) incorporate equivalencies for restriction, hard labor without confinement, confinement, and confinement on bread and water or diminished rations. This makes the table of equivalent punishments at paragraph 127 *c*(2) of MCM, 1969 (Rev.) unnecessary and it had been deleted. That table was confusing and subject to different interpretations. For example, the table and the accompanying discussion suggested that if the maximum punishment for an offense was confinement for 3 months and forfeiture of two-thirds pay per month, for 3 months, a court-martial could elect to adjudge confinement for 6 months and no forfeitures. The deletion of the table and inclusion of specific equivalencies where they apply eliminates the possibility of such a result.

1999 Amendment: Loss of numbers, lineal position, or seniority has been deleted. Although loss of numbers had the effect of lowering precedence for some purposes, *e.g.*, quarters priority, board and court seniority, and actual date of promotion, loss of numbers did not affect the officer's original position for purposes of consideration for retention or promotion. Accordingly, this punishment was deleted because of its negligible consequences and the misconception that it was a meaningful punishment.

(c) *Limits on punishments.* Subsections (1)(A) and (B) are based on paragraph 127 *c*(1) of MCM, 1969 (Rev.). Subsection (1)(C) is based on the first 3 sentences and the last sentence of paragraph 76 *a*(5) of MCM, 1969 (Rev.). *See Blockburger v. United States*, 284 U.S. 299 (1932); *United States v. Washington*, 1 M.J. 473 (C.M.A. 1976). *See also Missouri v. Hunter*, 459 U.S. 359 (1983); *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983). The discussion is based on paragraph 76 *a*(5) of MCM, 1969 (Rev.). As to the third paragraph in the discussion, *see e.g., United States v. Posnick*, 8 U.S.C.M.A. 201, 24 C.M.R. 11 (1957). *Cf. United States v. Stegall*, 6 M.J. 176 (C.M.A. 1979). As to the fourth paragraph in the discussion, *see United States v. Harrison*, 4 M.J. 332 (C.M.A. 1978); *United States v. Irving*, 3 M.J. 6 (C.M.A. 1977); *United States v. Hughes*, 1 M.J. 346 (C.M.A. 1976); *United States v. Burney*, 21 U.S.C.M.A. 71, 44 C.M.R. 125 (1971).

Subsection (2)(A) is based on paragraph 126 *d* of MCM, 1969 (Rev.). Paragraph 127 *a* of MCM, 1969 (Rev.) provided that the maximum punishments were "not binding" in cases of officers, but could "be used as a guide." Read in conjunction with paragraph 126 *d* of MCM, 1969 (Rev.) these provisions had the practical effect of prescribing no limits on forfeitures when the accused is an officer. This distinction has now been deleted. The maximum limits on forfeitures are the same for officers and enlisted persons.

Subsection (3) is based on paragraph 127 *b* of MCM, 1969 (Rev.). It serves as a reminder that the limits on punishments may be affected by other rules, which are referred to in the discussion.

The last sentence in subsections (1) and (2) is new. Under R.C.M. 1001(b)(3), a court-martial conviction may now be considered by the sentencing body whether or not it is final. Allowing such a conviction to affect the maximum punishment may cause later problems, however. The subsequent reversal of a conviction would seldom affect a sentence of another court-martial where that conviction was merely a factor which was considered, especially when the pendency of an appeal may also have been considered. However, reversal would always affect the validity of any later discharge or confinement for which it provided the basis.

1986 Amendment: Subsection (c)(3) was redesignated as subsection (c)(4) and new subsection (c)(3) was added to reflect the legislative restrictions placed upon punishment of reserve component personnel in certain circumstances in the amendment to Article 2, UCMJ, contained in the "Military Justice Amendments of 1986," tit. VIII, § 804, National Defense Authorization Act for Fiscal Year 1987, Pub.L. No. 99-661, 100 Stat. 3905 (1986).

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

1995 Amendment: Punishment of confinement on bread and water or diminished rations (R.C.M. 1003(d)(9)), as a punishment imposable by a court-martial, was deleted. Confinement on bread and water or diminished rations was originally intended as an immediate, remedial punishment. While this is still the case with nonjudicial punishment (Article 15), it is not effective as a court-martial punishment. Subsections (d)(10) through (d)(12) were redesignated (d)(9) through (d)(11), respectively.

Rule 1004. Capital cases

Introduction. This rule is new. It provides additional standards and procedures governing determination of a sentence in capital cases. It is based on the President's authority under Articles 18, 36, and 56. *See also* U.S. Const. Art. II, sec. 2, cl. 1.

This rule and the analysis were drafted before the Court of Military Appeals issued its decision in *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) on October 11, 1983. There the court reversed the sentence of death because of the absence of a requirement for the members to specifically find aggravating cir-

cumstances on which the sentence was based. When this rule was drafted, the procedures for capital cases were the subject of litigation in *Matthews* and other cases. *See e.g., United States v. Matthews,* 13 M.J. 501 (A.C.M.R. 1982), *rev'd, United States v. Matthews, supra; United States v. Rojas,* 15 M.J. 902 (N.M.C.M.R. 1983). *See also United States v. Gay,* 16 M.J. 586 (A.F.C.M.R. 1982), *a'ffd* 18 M.J. 104 (1984) (decided after draft MCM was circulated for comment). The rule was drafted in recognition that, as a matter of policy, procedures for the sentence determination in capital cases should be revised, regardless of the outcome of such litigation, in order to better protect the rights of servicemembers.

While the draft Manual was under review following public comment on it (*see* 48 Fed. Reg. 23688 (1983)), the *Matthews* decision was issued. The holding in *Matthews* generated a necessity to revise procedures in capital cases. However, *Matthews* did not require substantive revision of the proposed R.C.M. 1004. The several modifications made in the rule since it was circulated for comment were based on suggestions from other sources. They are unrelated to any of the issues involved in *Matthews*.

Capital punishment is not unconstitutional *per se. Gregg v. Georgia,* 428 U.S. 153 (1976); *United States v. Matthews, supra.* Capital punishment does not violate Article 55. *Compare* Article 55 with Articles 85, 90, 94, 99-102, 104, 106, 110, 113, 118, and 120. *See United States v. Matthews, supra.* But *cf. Id.* at 382 (Fletcher, J., concurring in result) (absent additional procedural requirements, sentence of death violated Article 55). The Supreme Court has established that capital punishment does not violate the Eighth Amendment (U.S. Const. amend. VIII) unless it: "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than a purposeless and needless imposition of pain and suffering"; "is grossly out of proportion to the crime" (*Coker v. Georgia,* 433 U.S. 584, 592 (1977)); or is adjudged under procedures which do not adequately protect against the arbitrary or capricious exercise of discretion in determining a sentence. *Furman v. Georgia,* 408 U.S. 238 (1972). *Cf. Barclay v. Florida,* 463 U.S. 939 (1983); *Zant v. Stephens,* 462 U.S. 862 (1983); *Godfrey v. Georgia,* 446 U.S. 420 (1980); *Jurek v. Texas,* 428 U.S. 262 (1976); *Proffitt v. Florida,* 428 U.S. 242 (1976); *Gregg v. Georgia, supra. See United States v. Matthews, supra.* Furthermore, while the procedures under which death may be adjudged must adequately protect against the unrestrained exercise of discretion, they may not completely foreclose discretion (at least in most cases, *see* subsection (e), *infra*) or the consideration of extenuating or mitigating circumstances. *See Eddings v. Oklahoma,* 455 U.S. 104 (1982); *Lockett v. Ohio,* 438 U.S. 586 (1978); *Roberts (Harry) v. Louisiana,* 431 U.S. 633 (1977); *Roberts (Stanislaus) v. Louisiana,* 428 U.S. 325 (1976); *Woodson v. North Carolina,* 428 U.S. 280 (1976). In *Matthews* the Court of Military Appeals suggested that similar considerations apply with respect to Article 55's prohibitions against cruel and unusual punishment. *United States v. Matthews, supra* at 368–69, 379–80.

The Court of Military Appeals listed several requirements for adjudication of the death penalty, based on Supreme Court decisions: (1) a separate sentencing procedure must follow the finding of guilt of a potential capital offense; (2) specific aggravating circumstances must be identified to the sentencing authority; (3) the sentencing authority must select and make findings on the particular aggravating circumstances used as a basis for imposing the death sentence; (4) the defendant must have an unrestricted opportunity to present mitigating and extenuating evidence; and (5) mandatory appellate review must be required to consider the propriety of the sentence as to the individual offense and individual defendant and to compare the sentence to similar cases within the jurisdiction. *See United States v. Matthews, supra* at 369–77 and cases cited therein.

The Supreme Court has not decided whether *Furman v. Georgia, supra,* and subsequent decisions concerning capital punishment apply to courts-martial. *See Schick v. Reed,* 419 U.S. 256 (1974). *But see Furman v. Georgia, supra* at 412 (Blackmun, J., dissenting); *id.* at 417–18 (Powell, J., dissenting). *See generally* Pfau and Milhizer, *The Military Death Penalty and the Constitution: There is Life After Furman,* 97 Mil.L.Rev. 35 (1982); Pavlick, *The Constitutionality of the UCMJ Death Penalty Provisions,* 97 Mil.L.Rev. 81 (1982); Comment, *The Death Penalty in Military Courts: Constitutionally Imposed?* 30 UCLA L. Rev. 366 (1982); Dawson, *Is the Death Penalty in the Military Cruel and Unusual?* 31 JAG J. (Navy) 53 (1980); English, *The Constitutionality of the Court-Martial Death Sentence,* 21 A.F.L. Rev. 552 (1979).

The Court of Military Appeals held in *United States v. Matthews, supra,* that the requirements established by the Supreme Court for civilian cases apply in courts-martial, at least in the absence of circumstances calling for different rules, such as combat conditions or wartime spying. *United States v. Matthews, supra* at 368. The court added that current military capital sentencing procedures are constitutionally adequate in the following respects: (1) there is a separate sentencing process in which the members are instructed by the military judge as to their duties; (2) certain aggravating factors (*e.g.,* premeditation) must be found by the members during findings, and evidence of other aggravating circumstances may be submitted during sentencing; (3) the accused has an unlimited opportunity to present relevant evidence in extenuation and mitigation; and (4) mandatory review is required by a Court of Military Review, and the Court of Military Appeals, with further consideration by the President. *United States v. Matthews, supra* at 377–78. The court held that the procedure is defective, however, in that the members are not required to "specifically identify the aggravating factors upon which they have relied in choosing to impose the death penalty," *id.* at 379, at least with respect to a peacetime murder case. *See id.* at 368.

The Court of Military Appeals stated in *Matthews* that constitutionally adequate procedures for capital cases may be promulgated by the President. *Id.* at 380–81. The President's unique authority over military justice, particularly its procedure and punishments is well established. *See* U.S. Const. Art. II, § 2, cl. 1; Articles 18, 36, and 56. Congress recently reaffirmed the broad scope of this Presidential authority. *See* Pub.L. No. 96-107, Title VIII, § 801(b), 93 Stat. 811 (Nov. 9, 1979); S.Rep. No. 107, 96th Cong., 1st Sess. 123–125 (1979); *Hearings on S.428 Before the Military Personnel Subcomm. of the House Comm. on Armed Services,* 96th Cong., 1st Sess. 5–6, 14, 17–18, 20–21, 52, 106 (1979). *See also United States v. Ezell,* 6 M.J. 307, 316–17 (C.M.A. 1978); W. Winthrop, *Military Law and Precedents* 27–33 (2d ed. 1920 reprint). *Cf. Jurek v. Texas, supra* (judicial construction may save an otherwise defective death penalty provi-

sion). The changes made in this rule are procedural. *See Dobbert v. Florida*, 432 U.S. 282 (1977).

R.C.M. 1004 is based on the recognition that, in courts-martial, as in civilian prosecution, death should be adjudged only under carefully tailored procedures designed to ensure that all relevant matters are thoroughly considered and that such punishment is appropriate.

At the same time, R.C.M. 1004 rests on the conclusion that the death penalty remains a necessary sanction in courts-martial and that it is an appropriate punishment under a broader range of circumstances than may be the case in civilian jurisdictions. This is because of the unique purpose and organization of the military, and its composition and the circumstances in which it operates. *Cf. Parker v. Levy*, 417 U.S. 733 (1974). *See also United States v. Matthews*, *supra* at 368.

1986 Amendment: The Rule was amended to substitute the word "factor" for the word "circumstance" with respect to the aggravating factors under R.C.M. 1004(c). This will more clearly distinguish such factors from the aggravating circumstances applicable to any sentencing proceeding under R.C.M. 1001(b)(4), which may be considered in the balancing process in capital cases under R.C.M. 1004(b)(4)(B).

(a) *In general.* Subsection (1) is based on the code and reflects the first of two "thresholds" before death may be adjudged; the accused must have been found guilty of an offense for which death is authorized.

1986 Amendment: Subsection (2), referred to below in the original Analysis, was redesignated as subsection (3), and a new subsection (2) was added. The new subsection requires a unanimous verdict on findings before the death penalty may be considered. Nothing in this provision changes existing law under which a finding of guilty may be based upon a vote of two-thirds of the members, and a finding based upon a two-thirds vote will continue to provide the basis for sentencing proceedings in which any sentence other than death may be imposed. This is an exercise of the President's powers as commander-in-chief, and is not intended to cast doubt upon the validity of the sentence in any capital case tried before the effective date of the amendments.

Subsection (2) refers to the remaining tests in subsections (b) and (c) of the rule; the prosecution must prove, beyond a reasonable doubt, the existence of one or more aggravating circumstances listed in subsection (c) of the rule. Only if this second threshold is passed may the members consider death. If the members reach this point, their sentencing deliberations and procedures would be like those in any other case, except that the members must apply an additional specific standard before they may adjudge death. *See* subsection (b)(3) of this rule.

This rule thus combines two preliminary tests which must be met before death may be adjudged with a standard which must be applied before death may be adjudged. *Cf. Barclay v. Florida* and *Zant v. Stephens, both supra.* The Working Group considered the capital punishment provisions of those states which now authorize capital punishment, as well as the *ALI Model Penal Code* § 201.6(3), (4) (Tent. Draft No. 9, 1959) (quoted at *Gregg. v. Georgia*, *supra* at 193 n.44). The ABA Standards do not include specific provisions for capital punishment. *See ABA Standards, Sentencing Alternatives and Procedures* § 18–1.1 (1979). This rule is not based on any specific state statue. It should be noted, however, that this rule provides a greater measure of guidance for members than does the Georgia procedure which has been upheld by the Supreme Court. In Georgia, once a statutory aggravating factor has been proved, the statute leaves the decision whether to adjudge death entirely to the jury. *See* Ga. Code Ann. §§ 17–10–30, 17–10–31 (1982). (In Georgia, once an aggravating factor has been proved, the burden may effectively be on the defendant to show why death should not be adjudged. *See Coker v. Georgia*, *supra* at 590-91.) Subsection (b)(4)(B) of this rule supplies a standard for that decision. Many state statutes adopt a similar balancing test, although the specific standard to be applied varies. *See e.g.*, Ark. Stat. Ann. § 41–1302 (1977). *Cf. Barclay v. Florida*, *supra. See also* Analysis, subsection (b)(4)(B), *infra.*

(b) *Procedure.* Subsection (1) is intended to avoid surprise and trial delays. *Cf.* Ga. Code Ann. § 17–10 2(a)(1982). Consistent with R.C.M. 701, its purpose is to put the defense on notice of issues in the case. This permits thorough preparation, and makes possible early submission of requests to produce witnesses or evidence. At the same time, this subsection affords some latitude to the prosecution to provide later notice, recognizing that the exigencies of proof may prevent early notice in some cases. This is permissible as long as the defense is not harmed; ordinarily a continuance or recess will prevent such prejudice.

There is no requirement to plead the aggravating circumstances under subsection (c). (Statutory aggravating circumstances are elements of the offense, and must be pleaded and proved; *see e.g.*, Article 85 (time of war); Article 118(1) (premeditation)). Notice of the aggravating circumstances under this subsection may be accomplished like any other notice in these rules. Note that under R.C.M. 701(a)(5) trial counsel is required to inform the defense of evidence the prosecution intends to introduce at sentencing.

Subsection (2) makes clear that the prosecution may introduce evidence in aggravation under R.C.M. 1001(b)(4). Note that depositions are not admissible for this purpose. *See* Article 49(d).

Subsection (3) is based on *Eddings v. Oklahoma* and *Lockett v. Ohio*, both *supra*, *Cf. Jurek v. Texas*, *supra.* The accused in courts-martial generally has broad latitude to introduce matters in extenuation and mitigation (*see* R.C.M. 1001(c)) although the form in which they are introduced may depend on several circumstances (*see* R.C.M. 1001(e)). This subsection reemphasizes that latitude. The rule is not intended to strip the military judge of authority to control the proceedings. *Eddings* and *Lockett* should not be read so broadly as to divest the military judge of the power to determine what is relevant (*see* Mil. R. Evid. 401, 403) or so decide when a witness must be produced (*see* R.C.M. 1001(e)). Those cases, and this subsection, stand for the proposition that the defense may not be prevented from presenting any relevant circumstances in extenuation or mitigation.

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

Subsection (4)(B) establishes guidance for the members in de-

termining whether to adjudge death, once one or more aggravating factors have been found.

Note that under this subsection any aggravating matter may be considered in determining whether death or some other punishment is appropriate. Thus, while some factors may alone not be sufficient to authorize death they may be relevant considerations to weigh against extenuating or mitigating evidence. *See Barclay v. Florida* and *Zant v. Stephens, both supra. See generally* R.C.M. 1001(b)(4).

The rule does not list extenuating or mitigating circumstances as do some states. Some mitigating circumstances are listed in R.C.M. 1001(c)(1) and (f)(1). *See also* R.C.M. 1001(f)(2)(B). No list of extenuating or mitigating circumstances can safely be considered exhaustive. *See Eddings v. Oklahoma* and *Lockett v. Ohio, both supra;* cf. *Jurek v. Texas, supra.* Moreover, in many cases, whether a matter is either extenuating or mitigating depends on other factors. For example, the fact that the accused was under the influence of alcohol or drugs at the time of the offense could be viewed as an aggravating or an extenuating circumstance. Whether a matter is extenuating or mitigating is to be determined by each member, unless the military judge finds that a matter is extenuating or mitigating as a matter of law *(see e.g.,* R.C.M. 1001(c)(1) and (f)(1)) and so instructs the members. In contrast to subsection (b)(4)(A) there is no requirement that the members agree on all aggravating, extenuating, and mitigating circumstances under subsection (4)(B) in order to adjudge death. Each member must be satisfied that any aggravating circumstances, including those found under subsection (4)(A) substantially outweigh any extenuating or mitigating circumstances, before voting to adjudge death.

The test is not a mechanical one. *Cf. Zant v. Stephens, supra.* The latitude to introduce evidence in extenuation and mitigation, the requirement that the military judge direct the members' attention to evidence in extenuating and mitigation and instruct them that they must consider it, and the freedom of each member to independently find and weigh extenuating and mitigating circumstances all ensure that the members treat the accused "with that degree of uniqueness of the individual" necessary in a capital case. *See Lockett v. Ohio, supra* at 605. Thus each member may place on the scales any circumstance " [which in fairness and mercy, may be considered as extenuating or reducing the degree] of moral culpability or punishment." *Coker v. Georgia, supra* at 591 (1977) (quoting instructions by the trial judge). *See also Witherspoon v. Illinois,* 391 U.S. 510 (1968) (concerning disqualifications of jurors in capital cases based on attitude toward the death penalty).

1986 Amendment: The following stylistic changes were made in R.C.M. 1004(b)(4): first, subparagraph (a) was rewritten to provide that the members must find "at least" one factor under subsection (c); second, a new subparagraph (b) was added to underscore the notice and unanimity requirements with respect to the aggravating factors and to clarify that all members concur in the same factor or factors; and third, former subparagraph (B) was redesignated as subparagraph (C), with an express cross-reference to R.C.M. 1001(b)(4), the general rule governing aggravating circumstances in sentencing proceedings.

Subsection (5) makes clear the evidence introduced on the merits, as well as during sentencing proceedings, may be considered in determining the sentence.

Subsection (6) requires additional instructions in capital cases. *See also* R.C.M. 1005. In determining which aggravating circumstances on which to instruct, the military judge would refer to those of which the trial counsel provided notice. Even if such notice had been given, a failure to introduce some evidence from which the members could find an aggravating circumstance would result in no instruction being given on that circumstance. *Cf.* R.C.M. 917 The last sentence in this subsection is based on *Eddings v. Oklahoma* and *Lockett v. Ohio,* both *supra.*

Subsection (7) is based on Article 52(b)(1). The requirement for a separate specific finding of one or more aggravating circumstances is new, and is designed to help ensure that death will not be adjudged in an inappropriate case. Subsection (8) operates as a check on this procedure.

(c) *Aggravating circumstances.* The lists of aggravating circumstances under the laws of the states retaining capital punishment were examined and used as guidance for formulating the aggravating circumstances listed here. Those jurisdictions do not include certain military capital offenses, of course, such as desertion, mutiny, misbehavior as a guard, nor do they address some of the unique concerns or problems of military life. Therefore, several circumstances here are unique to the military. These circumstances, which apply to rape and murder, except as specifically noted, are based on the determination that death is not grossly disproportionate for a capital offense under the code when such circumstances exist, and that the death penalty contributes to accepted goals of punishment in such cases. As to proportionality, the aggravating circumstances together ensure that death will not be adjudged except in the most serious capital offenses against other individuals or against the nation or the military order which protects it. As to goals of punishment, in addition to specifically preventing the most dangerous offenders from posing a continuing danger to society, the aggravating circumstances recognize the role of general deterrence, especially in combat setting. *See United States v. Matthews, supra* at 368,; *United States v. Gay, supra* at 605–06 (Hodgson, C.J., concurring).

In a combat setting, the potentiality of the death penalty may be the only effective deterrent to offenses such as disobedience, desertion, or misbehavior. The threat of even very lengthy confinement may be insufficient to induce some persons to undergo the substantial risk of death in combat. At the same time, the rule ensures that even a servicemember convicted of such very serious offenses in wartime will not be sentenced to death in the absence of one or more of the aggravating circumstances.

In some cases proof of the offense will also prove an aggravating circumstance. *See e.g.,* Article 99 and subsection(c)(1) of this rule. Note, however, that the members would have to return a specific finding under this rule of such an aggravating circumstance before a sentence of death could be based on it. This ensures a unanimous finding as to that circumstance. A finding of not guilty does not ensure such unanimity. *See* Article 52(a)(2); *United States v. Matthews, supra* at 379–80; *United States v. Gay, supra* at 600. The prosecution is not precluded from presenting evidence of additional aggravating circumstances.

Subsection (1) reflects the serious effect of a capital offense committed before or in the presence of the enemy. "Before or in the presence of the enemy" is defined in paragraph 23, Part IV.

Note that one may be "before or in the presence of the enemy" even when in friendly territory. This distinguishes this subsection from subsection (6).

Subsection (2) and (3) are based on the military's purpose: protection of national security. That this interest may be basis for the death penalty is well established. *See e.g., United States v. Rosenberg*, 195 F.2d 583 (2d Cir. 1952), *cert. denied*, 344 U.S. 838 (1952). The definition of national security, which appears at the end of subsection (c), is based on Exec. Order No. 12065 § 6–104 (June 28, 1978), 43 Fed.Reg. 28949, as amended by Exec. Order No. 12148 (July 19, 1979), 44 Fed.Reg. 43239, and Exec. Order No. 12163 (Sept. 29, 1979), 44 Fed.Reg. 56673, *reprinted at* 50 U.S.C.A. § 401 (West Supp 1982). The second ("includes") phrase is based on Joint Chiefs of Staff Publication 1. Dictionary of Military and Associated Terms 228 (1 July 79). Note that not all harm to national security will authorize death. Virtually all military activities affect national security in some way. *Cf. Cole v. Young*, 351 U.S. 536 (1956); *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980). Substantial damage is required to authorize death. The discussion provides examples of substantial damage. Rape and murder may be aggravated under subsection (2) because the offender intended to harm national security or a mission, system, or function affecting national security, by the capital offense. Intent to harm the mission, system, or function will suffice. It must be shown, however, that regardless of whether the accused intended to affect national security, the mission, system, or function must have been such that had the intended damage been effected, substantial damage to national security would have resulted.

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

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

1986 Amendment: R.C.M. 1004(c)(4) was amended by adding a reference to Article 106a to distinguish this factor from the new aggravating factor in R.C.M. 1004(c)(12). It was also considered appropriate to exclude 104 from this aggravating factor. *See* R.C.M. 1004(c)(11).

1994 Amendment: R.C.M. 1004(c)(4) was amended to clarify that only one person other than the victim need be endangered by the inherently dangerous act to qualify as an aggravating factor. *See United States v. Berg*, 31 M.J. 38 (C.M.A. 1990); *United States v. McMonagle*, 38 M.J. 53 (C.M.A. 1993).

Subsection (5) reflects the special need to deter the offender who would desert or commit any other capital offense to avoid hazardous duty. Moreover, the effect such conduct has on the safety of others (including the offender's replacement) and the success of the mission justified authorizing death. Note that this circumstance applies to all capital offenses, including rape and murder. The person who murders or rapes in order to avoid hazardous duty is hardly less culpable than one who "only" runs away.

Subsection (6) is based on the special needs and unique difficulties for maintaining discipline in combat zones and occupied territories. History has demonstrated that in such an environment rape and murder become more tempting. At the same time the need for order in the force, in order not to encourage resistance by the enemy and to pacify the populace, dictates that the sanctions for such offenses be severe. Once again, in a combat environment, confinement, even of a prolonged nature, may be an inadequate deterrent.

Subsections (7) and (8) are based generally on examination of the aggravating circumstances for murder in various states. Subsection (7)(A) is intended to apply whether the sentence is adjudged, approved, or ordered executed, as long as, at the time of the offense, the term of confinement is at least 30 years or for life. The possibility of parole or early release because of "good time" or similar reasons does not affect the determination. Subsection (7)(F) is based on 18 U.S.C. §§ 351, 1114, and 11751. Subsection (7)(G) is modified to include certain categories of military persons. Subsection (7)(1) uses a more objective standard that the Georgia provision found wanting in *Godfrey v. Georgia, supra.*

1994 Amendment: Subsection (7)(B) was amended by adding an additional aggravating factor for premeditated murder--the fact that the murder was drug-related. This change reflects a growing awareness of the fact that the business of trafficking in controlled substances has become increasingly deadly in recent years. Current federal statutes provide for a maximum punishment including the death penalty for certain drug-related killings. *See* 21 U.S.C. § 848(e) (Pub. L. 100-690, §7001(a)(2)).

1986 Amendment: Three changes were made in R.C.M. 1004(c)(7)(F); first, the provision involving Members of Congress was expanded to include Delegates and Resident commissioners; second, the word "justice" was added to ensure that justices of the Supreme Court were covered; and third, the provision was extended to include foreign leaders in specified circumstances. These changes are similar to legislation approved by the Senate in S. 1765, 98th Cong., 1st Sess. (1983).

1994 Amendment: The amendment to subsection (c)(7)(I) of this rule defines "substantial physical harm" and was added to clarify the type of injury that would qualify as an aggravating factor under the subsection. The definition of "substantial physical harm" is synonymous with "great bodily harm" and "grievous bodily harm". *See* Part IV, paragraph 43(c). With respect to the term "substantial mental or physical pain and suffering", *see United States v. Murphy*, 30 M.J. 1040, 1056-1058 (ACMR 1990).

1999 Amendment: R.C.M. 1004(c)(7)(K) was added to afford greater protection to victims who are especially vulnerable due to their age.

1991 Amendment: Subsection (c)(8) was based on the Supreme Court's decision in *Enmund v. Florida*, 458 U.S. 782, 797 (1982), that the cruel and unusual punishment clause of the Eighth Amendment prohibits imposition of the death penalty on a defendant convicted of felony-murder [who] d[id] not himself kill, attempt to kill, or intend that a killing take place or that lethal force ... be employed. The amendment to subsection (c)(8) is based on the Supreme Court's decision in *Tison v. Arizona*, 481 U.S. 137 (1987) distinguishing *Enmund*. In *Tison*, the Court held that the *Enmund* culpability requirement is satisfied when a defendant convicted of felony-murder was a major participant in the felony committed and manifested a reckless indifference to human life.

Subsection (9) is based on the holding in *Coker v. Georgia*,

supra, that the death penalty is unconstitutional for the rape of an adult woman, at least where she is not otherwise harmed.

Subsection (10) is based on Article 18. *See also Trial of the Major War Criminals Before the International Military Tribunal* (International Military Tribunal, Nurenberg, 1974); *Trials of War Criminals Before the Nurenberg Military Tribunals,* (U.S. Gov't Printing Off., 1950–51); *In re Yamashita*, 327 U.S. 1 (1946).

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

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

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

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

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

Rule 1005. Instructions on sentence

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

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

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

(c) *Requests for instructions. See* Fed. R. Crim. P. 30 and *United States v. Neal*, 17 U.S.C.M.A. 363, 38 C.M.R. 161 (1968). The discussion is based on Fed. R. Crim. P. 30 and paragraph 73 *d* of MCM, 1969 (Rev.).

(d) *How given. See* Analysis, R.C.M. 921(d).

(e) *Required instructions.* The reference in the fourth sentence of the discussion of subsection (1) to rehearing or new or other trial is based on paragraph 81 *d*(1) of MCM, 1969 (Rev.). The second sentence of the first paragraph and the second paragraph of the discussion to (1) are based on *United States v. Henderson*, 11 M.J. 395 (C.M.A. 1981). The last clause of subsection (3) is based on *United States v. Givens*, 11 M.J. 694, 696 (N.M.C.M.R. 1981). The discussion under subsection (4) is based on the third sentence of paragraph 76 *b*(1) of MCM, 1969 (Rev.) and on *United States v. Davidson*, 14 M.J. 81 (C.M.A. 1982).

1998 Amendment: The requirement to instruct members on the effect a sentence including a punitive discharge and confinement, or confinement exceeding six months, may have on adjudged forfeitures was made necessary by the creation of Article 58b, UCMJ, in section 1122, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 463 (1996).

(f) *Waived.* This subsection is based on Fed. R. Crim. P. 30.

Rule 1006. Deliberations and voting on sentence

Introduction. Except as noted below, this rule and the discussion are based on Articles 51 and 52 and on paragraphs 76 *b*(2) and (3) of MCM, 1969 (Rev.).

(a) *In general.* The first sentence is based on the first sentence of paragraph 76 *b*(1) of MCM, 1969 (Rev.).

(b) *Deliberations. See* Analysis, R.C.M. 921(b) concerning the second, third, and fourth sentences of this subsection. *See also United States v. Lampani*, 14 M.J. 22 (C.M.A. 1982).

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

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

As to subsection (d)(5), the second sentence of the third paragraph of paragraph 76 *b*(2) of MCM, 1969 (Rev.) has been limited to Article 118 offenses because, unlike Article 106, findings on an Article 118 offense do not automatically determine the sentence and do not require a unanimous vote. *See* Articles 52(a)(1) and (2). Thus a separate vote on sentence for an Article 105 offense is unnecessary.

As to subsection (d)(6) *see United States v. Jones*, 14 U.S.C.M.A. 177, 33 C.M.R. 389 (1963). The reference to no punishment was added to recognize this added alternative.

(e) *Action after sentence is reached. See United States v. Justice*, 3 M.J. 451, 453 (C.M.A. 1977). The second paragraph of the discussion is based on the second sentence of paragraph 76 *c*.

Rule 1007. Announcement of sentence

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

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

The requirement that the sentence announcement include a reference to the percentage of agreement or an affirmation that voting was by secret written ballot has been deleted. Article 53 does not require such an announcement, and when instructions incorporating such matters are given, the court-martial "is presumed to have complied with the instructions given them by the judge." *United States v. Ricketts*, 1 M.J.. 78, 82 (C.M.A. 1975). *See United States v. Jenkins*, 12 M.J. 222 (C.M.A. 1982). *Cf. United States v. Hendon*, 6 M.J. 171, 173–74 (C.M.A. 1979).

(c) *Polling prohibited. See* Analysis, Rule 923(e).

Rule 1008. Impeachment of sentence

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

Rule 1009. Reconsideration of sentence

Introduction. Except as noted below, this rule and discussion are based on Articles 52(c) and 62 and paragraphs 76 *c* and *d* of MCM, 1969 (Rev.).

(c) *Initiation of reconsideration.* Subsection (2)(A) was added to remedy the situation addressed in *United States v. Taylor*, 9 M.J. 848 (N.C.M.R. 1980). It is intended that the military judge have the authority to reduce a sentence imposed by that judge based on changed circumstances, as long as the case remained under that judge's jurisdiction. Since this action "undercuts the review powers" (*Id.* at 850) only to the extent that it reduces the upper limits available to reviewing authorities, there is no reason to prevent the military judge from considering additional matters before finalizing the sentence with authentication. Furthermore, granting the military judge power to reconsider an announced sentence recognizes that when sitting without members, the judge performs the same functions as the members. *See* Article 16.

The procedures in subsection (2)(B) are necessary corollaries of those set out in the fifth and sixth sentences of paragraph 76 *c*, MCM, 1969 (Rev.) adapted to the rules for reconsideration. This clarifies that a formal vote to reconsider is necessary when reconsideration is initiated by the military judge. MCM, 1969 (Rev.) was unclear in this regard. *See United States v. King*, 13 M.J. 838 (A.C.M.R.), *pet. denied*, 14 M.J. 232 (1982).

Subsection (3) is based on Article 62(b) and *United States v. Jones*, 3 M.J. 348 (C.M.A. 1977).

(d) *Procedure with members.* Subsection (1) is based on the general requirement for instructions on voting procedure. *See United States v. Johnson*, 18 U.S.C.M.A. 436, 40 C.M.R. 148 (1969). It applies whether reconsideration is initiated by the military judge or a member, since R.C.M. 1006(d)(3)(A) does not permit further voting after a sentence is adopted and there is no authority for the military judge to suspend that provision.

1995 Amendment: This rule was changed to prevent a sentencing authority from reconsidering a sentence announced in open session. Subsection (b) was amended to allow reconsideration if the sentence was less than the mandatory maximum prescribed for the offense or the sentence exceeds the maximum permissible punishment for the offense or the jurisdictional limitation of the court-martial. Subsection (c) is new and provides for the military judge to clarify an announced sentence that is ambiguous. Subsection (d) provides for the convening authority to exercise discretionary authority to return an ambiguous sentence for clarification, or take action consistent with R.C.M. 1107.

Rule 1010. Advice concerning post-trial and appellate rights

This rule is based on S.Rep. No. 53, 98th Cong., 1st Sess. 18 (1983). *See also* Articles 60, 61, 64, 66, 67, and 69. It is similar to Fed.R.Crim. P. 32(a)(2), but is broader in that it applies whether or not the accused pleaded guilty. This is because the accused's post-trial and appellate rights are the same, regardless of the pleas, and because the powers of the convening authority and the Court of Criminal Appeals to reduce the sentence are important even if the accused has pleaded guilty.

1986 Amendment: This rule was changed to delete subsection-(b) which required an inquiry by the military judge. The Senate Report addresses only advice; inquiry to determine the accused's understanding is deemed unnecessary in view of the defense counsel's responsibility in this area.

1991 Amendment: This rule was changed to place the responsibility for informing the accused of post-trial and appellate rights on the defense counsel rather than the military judge. Counsel is better suited to give this advisement in an atmosphere in which the accused is more likely to comprehend the complexities of the rights.

Rule 1011. Adjournment

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

CHAPTER XI. POST-TRIAL PROCEDURE

Rule 1101. Report of result of trial; post-trial restraint; deferment of confinement

(A) *Report of the result of trial.* This subsection is based on the first two sentences of paragraph 44 *e* of MCM, 1969 (Rev.).

(B) *Post-trial confinement.* Subsection (1) is based on Article 57(b) and on the last sentence of paragraph 44 *e* of MCM, 1969 (Rev.). Subsection (1) makes clear that confinement is authorized when death is adjudged, even if confinement is not also adjudged. *See United States v. Matthews*, 13 M.J. 501 (A.C.M.R.), *rev'd on other grounds*, 16 M.J. 354 (C.M.A. 1983). *See also* R.C.M. 1004(e) and Analysis.

Subsection (2) is based on Article 57 and on paragraph 21 *d* of MCM, 1969 (Rev.). The person who orders the accused into confinement need not be the convening authority. *See Reed v. Ohman*, 19 U.S.C.M.A. 110, 41 C.M.R. 110 (1969); *Levy v. Resor*, 17 U.S.C.M.A. 135, 37 C.M.R. 399 (1967). The convening authority may withhold such authority from subordinates.

Article 57(b) provides that a sentence to confinement begins to run as soon as the sentence is adjudged. The mechanism for an accused to seek release from confinement pending appellate review is to request deferment of confinement under Article 57(d).

See S.Rep. No. 1601, 90th Cong., 2d Sess. 13-14 (1968); *Pearson v. Cox*, 10 M.J. 317 (C.M.A. 1981). *See* subsection (c) of this rule.

The purpose of subsection (2) is to provide a prompt, convenient means for the command to exercise its prerogative whether to confine an accused when the sentence of the court-martial authorizes it. The commander may decide that, despite the sentence of the court-martial, the accused should not be immediately confined because of operational requirements or other reasons. A decision not to confine is for the convenience of the command and does not constitute deferment of confinement. *See* Article 57(d). An accused dissatisfied with the decision of the commander may request deferment in accordance with subsection (c) of this rule.

The first sentence of the second paragraph of paragraph 20 *d*(1) of MCM, 1969 (Rev.) has been deleted. That sentence provided for post-trial "arrest, restriction, or confinement to insure the presence of an accused for impending execution of a punitive discharge." The authority for such restraint was based on Article 13 which authorized arrest or confinement for persons awaiting the result of trial. *See Reed v. Ohman, supra; United States v. Teague*, 3 U.S.C.M.A. 317, 12 C.M.R. 73 (1953). The Military Justice Amendments of 1981 Pub. L. No. 97–81, § 3, 95 Stat. 1087 (1981), deleted the language concerning such detention pending the result of trial.

(c) *Deferment of confinement.* Subsection (1) is based on the first sentence of paragraph 88 *f* of MCM, 1969 (Rev.). The discussion is based on the second and third sentences of paragraph 88 *f* of MCM, 1969 (Rev.).

Subsection (2) is based on the first sentence in Article 57(d) and the third sentence of paragraph 88 *f* of MCM, 1969 (Rev.). The requirement that the request be written is based on the third paragraph of paragraph 88 *f* of MCM, 1969 (Rev.).

Subsection (3) is based on Article 57(d) and *United States v. Brownd*, 6 M.J. 338 (C.M.A. 1978). *See also ABA Standards, Criminal Appeals*, § 21–2.5 (1978); *Trotman v. Haebel*, 12 M.J. 27 (C.M.A. 1981); *Pearson v. Cox, supra; Stokes v. United States*, 8 M.J. 819 (A.F.C.M.R. 1979), *pet. denied*, 9 M.J. 33 (1980). *See also* the first paragraph of paragraph 88 *f* of MCM, 1969 (Rev.). The penultimate sentence recognized the standard of review exercised by the Courts of Criminal Appeals, the Court of Appeals for the Armed Forces, and other reviewing authorities. *See United States v. Brownd, supra.* Because the decision to deny a request for deferment is subject to judicial review, the basis for denial should be included in the record.

Subsection (4) is based on the fourth paragraph of paragraph 88 *f* of MCM, 1969 (Rev.).

Subsection (5) is based on the fifth paragraph of paragraph 88 *f* of MCM, 1969 (Rev.) and on *Pearson v. Cox, supra.*

Subsection (6) modifies the last two paragraphs of paragraph 88 *f* of MCM, 1969 (Rev.) to conform to the amendment of Article 71(c), *see* Pub. L. No. 98–209, § 5(e), 97 Stat. 1393 (1983). The amendment of Article 71(c) permits confinement to be ordered executed in the convening authority's initial action in all cases. Article 57(d) is intended to permit deferment after this point, however. *See* S. Rep. No. 1601, 90th Cong., 2d Sess. 13–14 (1968). Therefore subsection (6) specifically describes four ways in which deferment may be terminated. The result is consistent with paragraph 88 *f* of MCM, 1969 (Rev.) and with *Collier v. United States*, 19 U.S.C.M.A. 511, 42 C.M.R. 113 (1970). Under subsection (A) the convening authority must specify in the initial action whether approved confinement is ordered executed, suspended, or deferred. *See* R.C.M. 1107(f)(4)(B), (E). Under subsection (B), deferment may be terminated at any time by suspending the confinement. This is because suspension is more favorable to the accused than deferment. Subsections (C) and (D) provide other specific points at which deferment may be terminated. Deferment may be granted for a specified period (e.g., to permit the accused to take care of personal matters), or for an indefinite period (e.g., completion of appellate review). Even if confinement is deferred for an indefinite period, it may be rescinded under subsection (D). When deferment is terminated after the initial action, it will be either suspended or executed. *See* subsection (7). The first sentence in the discussion is based on Article 57(d). The second, third, and fourth sentences are based on the last two paragraphs of paragraph 88 *f* of MCM, 1969 (Rev.).

Subsection (7) is based on the last sentence of Article 57(d) and on *Collier v. United States, supra.* Note that the information on which the rescission is based need not be new information, but only information which was not earlier presented to the authority granting deferment. *Cf. Collier v. United States, supra.* Note also that the deferment may be rescinded and the accused confined before the accused has an opportunity to submit matters to the rescinding authority. *See United States v. Daniels*, 19 U.S.C.M.A. 518, 42 C.M.R. 120 (1970).

Subsection (7)(C) is added based on the amendment of Article 71(c). Confinement after the initial action is not "served." It is deferred, suspended, or executed. Therefore, after deferment is rescinded, it is ordered executed (if not suspended). Subsection (7)(C) permits the accused an opportunity to submit matters before the order of execution, which precludes deferment under Article 57(d), is issued.

1991 Amendment: The Discussion accompanying this subsection was amended to provide for the inclusion of the written basis for any denial of deferment in the record of trial. Although written reasons for denials are not mandatory, and their absence from the record of trial will not per se invalidate a denial decision, their use is strongly encouraged. *See Longhofer v. Hilbert*, 23 M.J. 755 (A.C.M.R. 1986).

1998 Amendment: In enacting section 1121 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 462, 464 (1996), Congress amended Article 57(a) to make forfeitures of pay and allowances and reductions in grade effective either 14 days after being adjudged by a court-martial, or when the convening authority takes action in the case, whichever was earlier in time. Until this change, any forfeiture or reduction in grade adjudged by the court did not take effect until convening authority action, which meant the accused often retained the privileges of his or her rank and pay for up to several months. The intent of the amendment of Article 57(a) was to change this situation so that the desired punitive and rehabilitative impact on the accused occurred more quickly.

Congress, however, desired that a deserving accused be permitted to request a deferment of any adjudged forfeitures or reduction in grade, so that a convening authority, in appropriate situations, might mitigate the effect of Article 57(a).

This change to R.C.M. 1101 is in addition to the change to R.C.M. 1203. The latter implements Congress' creation of Article 57(a), giving the Service Secretary concerned the authority to

defer a sentence to confinement pending review under Article 67(a)(2).

(d) *Waiving forfeitures resulting from a sentence to confinement to provide for dependent support.*

1998 Amendment: This new subsection implements Article 58b, UCMJ, created by section 1122, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 463 (1996). This article permits the convening authority (or other person acting under Article 60) to waive any or all of the forfeiture of pay and allowances forfeited by operation of Article 58b(a) for a period not to exceed six months. The purpose of such waiver is to provide support to some or all of the accused's dependent(s) when circumstances warrant. The convening authority directs the waiver and identifies those dependent(s) who shall receive the payment(s).

Rule 1102.

Introduction. This rule is based on Article 60(e) and on paragraphs 80 *c* and 86 *d* of MCM, 1969 (Rev.), all of which concern proceedings in revision. This rule also expressly authorizes post-trial Article 39(a) sessions to address matters not subject to proceedings in revision which may affect legality of findings of guilty or the sentence. *See United States v. Mead*, 16 M.J. 270 (C.M.A. 1983); *United States v. Brickey*, 16 M.J. 258 (C.M.A. 1983); *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983). *Cf. United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

(a) *In general.* This subsection is based on Article 60(e), on the first sentence of paragraph 80 *c* of MCM, 1969 (Rev.), which indicated that a court-martial could conduct proceedings in revision on its own motion, and on paragraph 86 *d* of MCM, 1969 (Rev.).

(b) *Purpose.* Subsection (1) is based on the second sentence of paragraph 86 *d* of MCM, 1969 (Rev.). The discussion of subsection (1) is based on the last paragraph of paragraph 80 *d* of MCM, 1969 (Rev.) and on *United States v. Steck*, 10 M.J. 412 (C.M.A. 1981); *United States v. Barnes*, 21 U.S.C.M.A. 169, 44 C.M.R. 223 (1972); *United States v. Hollis*, 11 U.S.C.M.A. 235, 29 C.M.R. 51 (1960). As to subsection (2), *see* the *Introduction*, Analysis, this rule. The discussion of subsection 21 is based on *United States v. Anderson*, *supra.*

1994 Amendment: The amendment to subsection (b)(2) of this rule clarifies that Article 39(a), UCMJ, authorizes the military judge to take such action after trial and before authenticating the record of trial as may be required in the interest of justice. *See United States v. Griffith*, 27 M.J. 42, 47 (C.M.A. 1988). The amendment to the Discussion clarifies that the military judge may take remedial action on behalf of an accused without waiting for an order from an appellate court. Under this subsection, the military judge may consider, among other things, misleading instructions, legal sufficiency of the evidence, or errors involving the misconduct of members, witnesses, or counsel. *Id.; See United States v. Scaff*, 29 M.J. 60, 65 (C.M.A. 1989).

(c) *Matters not subject to post-trial sessions.* This subsection is taken from Article 60(e)(2).

(d) *When directed.* This subsection is based on paragraph 86 *d* of MCM, 1969 (Rev.). *See also* Article 60(e); *United States v. Williamson*, 4 M.J. 708 (N.C.M.R. 1977), *pet. denied*, 5 M.J. 219 (1978). Paragraph 86 *d* indicated that a proceeding in revision could be used to "make the record show the true proceedings." A certificate of correction is the appropriate mechanism for this, so the former provision is deleted. Note that a trial session may be directed, when authorized by an appropriate reviewing authority (*e.g.*, the supervisory authority, or the Judge Advocate General), even if some or all of the sentence has been executed.

(e) *Procedure.* Subsection (1) is based on paragraph 80 *b* of MCM, 1969 (Rev.). *See also* R.C.M. 505 and 805 and Analysis. Good cause for detailing a different military judge includes unavailability due to physical disability or transfer, and circumstances in which inquiry into misconduct by a military judge is necessary.

Subsection (2) is based on paragraph 80 *c* of MCM, 1969 (Rev.). Subsection (2) is more concise than its predecessor; it leaves to the military judge responsibility to determine what specific action to take.

Subsection (3) is based on paragraph 80 *d* of MCM, 1969 (Rev.).

Rule 1102A. Post-trial hearing for person found not guilty only be reason of lack of mental responsibility.

1998 Amendment: This new Rule implements Article 76b(b), UCMJ. Created in section 1133 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 464-66 (1996), it provides for a post-trial hearing within forty days of the finding that the accused is not guilty only by reason of a lack of mental responsibility. Depending on the offense concerned, the accused has the burden of proving either by a preponderance of the evidence, or by clear and convincing evidence, that his or her release would not create a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect. The intent of the drafters is for R.C.M. 1102A to mirror the provisions of sections 4243 and 4247 of title 18, United States Code.

Rule 1103. Preparation of record of trial

(a) *In general.* This subsection is based on Article 54(c) and on the first sentence of paragraph 82 *a* of MCM, 1969 (Rev.).

(b) *General courts-martial.* Subsection (1)(A) is based on Article 38(a). In Federal civilian courts the reporter is responsible for preparing the record of trial. 28 U.S.C. § 753; Fed. R. App.P. 11 (b). The responsibility of the trial counsel for preparation of the record is established by Article 38(a), however. Subsection (1)(B) is based on the second paragraph of paragraph 82 *a* of MCM, 1969 (Rev.). *See also United States v. Anderson*, 12 M.J. 195 (C.M.A. 1982).

Subsection (2)(A) is based on Article 54(a) and the first sentence of paragraph 82 *b*(1) of MCM, 1969 (Rev.). *Cf.* Article 19.

Subsection (2)(B) is based on Article 54(c) and on the third sentence of paragraph 82 *b*(1) of MCM, 1969 (Rev.). *See* Rep. No. 53, 98th Cong., 1st Sess. 26 (1983); H.R. Rep. No.491, 81st Cong., 1st Sess. 27 (1949); S. Rep. No.486, 81st Cong., 1st Sess. 23–24 (1949). *See also* Articles 19 and 66; *United States v. Whitman*, 23 U.S.C.M.A. 48, 48 C.M.R. 519 (1974); *United States v. Thompson*, 22 U.S.C.M.A. 448, 47 C.M.R. 489 (1973); *United States v. Whitman*, 3 U.S.C.M.A. 179, 11 C.M.R. 179

(1953). The exception in the stem of subsection (2)(B) is based on Article 1(14). *See* Analysis, subsection (j) of this rule.

The first paragraph of the discussion under subsection (2)(B) is based on the third sentence of paragraph 82 *b*(1), and paragraphs 82 *b*(2) and (3) of MCM, 1969 (Rev.). *See* Analysis, R.C.M. 802 concerning the second paragraph in the discussion. The last paragraph in the discussion is based on the sixth sentence of paragraph 82 *b*(1) of MCM, 1969 (Rev.).

Subsection (2)(C) is based on the fourth sentence of paragraph 82 *b*(1) of MCM, 1969 (Rev.). *See* Article 54(c)(2). In Federal civilian courts a verbatim record is generally required in all cases (although not all portions of the record are necessarily transcribed). *See* 28 U.S.C. § 753(b); Fed. R. Crim. P. 11(g) and 12(g); and Fed. R. App. P. 10. *See also* Fed. R. Crim. P. 5.1(c). The Constitution requires a record of sufficient completeness to allow consideration of what occurred at trial, but not necessarily a verbatim transcript. *Mayer v. Chicago*, 404 U.S. 189 (1971); *Draper v. Washington*, 372 U.S. 487 (1963); *Coppedge v. United States*, 369 U.S. 438 (1962); *United States v. Thompson, supra.* A summarized record is adequate for the less severe sentences for which it is authorized.

Subsection (2)(D) is new. It lists items which are, in addition to a transcript of the proceedings, required for a complete record. *See United States v. McCullah*, 11 M.J. 234 (C.M.A. 1981).

Failure to comply with subsection (b)(2) does not necessarily require reversal. Rather, an incomplete or nonverbatim record (when required) raises a presumption of prejudice which the Government may rebut. *See United States v. Eichenlaub*, 11 M.J. 239 (C. M.A. 1981); *United States v. McCullah, supra; United States v. Boxdale*, 22 U. S.C.M.A. 414, 47 C. M.R. 35 (1973). As to whether an omission is sufficiently substantial to raise the presumption, *see United States v. Gray*, 7 M.J. 296 (C.M.A. 1979); *United States v. Sturdivant*, 1 M.J. 256 (C.M.A. 1976); *United States v. Webb*, 23 U.S.C.M.A. 333, 49 C.M.R. 667 (1975); *United States v. Boxdale, supra; United States v. Richardson*, 21 U.S.C.M.A. 383, 45 C.M.R. 157 (1972); *United States v. Weber*, 20 U.S.C.M.A. 82, 42 C.M.R. 274 (1970); *United States v. Donati*, 14 U.S.C.M.A. 235, 34 C.M.R. 15 (1963); *United States v. Nelson*, 3 U.S.C.M.A. 482, 13 C.M.R. 38 (1953).

1991 Amendment: Subsection (b)(2)(D)(iv) was redesignated as subsection (b)(2)(D)(v), and new subsection (b)(2)(D)(iv) was added. The 1984 rules omitted any requirement that the convening authority's action be included in the record of trial. This amendment corrects that omission.

Subsection (3) is based on paragraph 82 *b*(5), the last sentence of paragraph 84 *c*, paragraph 85 *d*, the third sentence of the third paragraph of paragraph 88 *f*, the penultimate sentence of paragraph 88 *g*, and the last sentence of paragraph 91 *c* of MCM, 1969 (Rev.). *See also* S. Rep. No. 53, 98th Cong., 1st Sess. 26 (1983); R.C.M. 1106(f) and Analysis; and *United States v. Lott*, 9 M.J. 70 (C.M.A. 1980).

1995 Amendment: Punishment of confinement on bread and water or diminished rations [R.C.M. 1003(d)(9)], as a punishment imposable by a court-martial, was deleted. Consequently, the requirement to attach a Medical Certificate to the record of trial [R.C.M. 1103(b)(3)(L)] was deleted. Subsections (3)(M) and (3)(N) were redesignated (3)(L) and (3)(M), respectively.

(c) *Special courts-martial.* This subsection is based on Articles 19 and 54(c) and paragraph 83 of MCM, 1969 (Rev.).

(e) *Acquittal; termination prior to findings.* This subsection is based on the fifth sentence of paragraph 82 *b*(1) and the third sentence of paragraph 83 *b* of MCM, 1969 (Rev.). The language of paragraph 82 *b*(1) which referred to termination "with prejudice to the Government" has been modified. If the court-martial terminates by reason of mistrial, withdrawal, or dismissal of charges, a limited record is authorized, whether or not the proceedings could be reinstituted at another court-martial.

(f) *Loss of notes or recordings of the proceedings.* This subsection is based on paragraph 82 *i* of MCM, 1969 (Rev.). *See also United States v. Lashley*, 14 M.J. 7 (C.M.A. 1982); *United States v. Boxdale. supra.*

(g) *Copies of the record of trial.* Subsection (1) is based on the first paragraph of paragraph 49 *b*(2) of MCM, 1969 (Rev.). The trial counsel is responsible for preparation of the record (*see* Article 38(a)), although, as paragraph 49 *b*(2) of MCM, 1969 (Rev.) indicated, ordinarily the court reporter actually prepares the record. In subsection (A), the number of copies required has been increased from two to four to conform to current practice.

1993 Amendment: Subsection (g)(1)(A) was amended by adding the phrase "and are subject to review by a Court of Criminal Appeals under Article 66" to eliminate the need to make four copies of verbatim records of trial for courts-martial which are not subject to review by a Court of Criminal Appeals. These cases are reviewed in the Office of the Judge Advocate General under Article 69 and four copies are not ordinarily necessary.

(h) *Security classification.* This subsection is based on the first sentence of paragraph 82 *d* of MCM, 1969 (Rev.). The remainder of that paragraph is deleted as unnecessary.

(i) *Examination of the record.* Subsection (1)(A) and the first paragraph of the discussion are based on the first paragraph of paragraph 82 *e* of MCM, 1969 (Rev.).

Subsection (1)(B) is based on the first sentence of the second paragraph of paragraph 82 *e* of MCM, 1969 (Rev.). The first paragraph of the discussion is based on *United States v. Anderson, supra* at 197. Examination before authentication will improve the accuracy of the record, reduce the possibility of the necessity for a certificate of correction, and obviate the problems discussed in *Anderson*. The first paragraph of the discussion is based on the fourth and fifth sentences of the second paragraph of paragraph 82 *e* of MCM, 1969 (Rev.). *See also United States v. Anderson, supra* at 197. The second paragraph of the discussion is based on *United v. Anderson, supra. See also United States v. Everett*, 3 M.J. 201, 202 (C.M.A. 1977). The third paragraph of the discussion is based on the second sentence of the second paragraph of paragraph 82 *e* of MCM, 1969 (Rev.).

(j) *Videotape and similar records.* This subsection is new and is based on Article 1(14), which is also new. *See* Military Justice Act of 1983, Pub.L. No. 98-209, § 6(a), 97 Stat. 1393 (1983). This subsection implements Article 1(14) in accordance with guidance in S.Rep. No. 53, 98th Cong., 1st Sess. 25-26 (1983). The concerns expressed in *United States v. Barton*, 6 M.J. 16 (C.M.A. 1978) were also considered.

Subsection (1) provides for recording courts-martial by videotape, audiotape, or similar means, if authorized by regulation of the Secretary concerned. Such Secretarial authorization is necessary to ensure that this procedure will be used only when appropriate equipment is available to permit its effective use, in

accordance with the requirements for this rule. Such equipment includes not only devices capable of recording the proceedings accurately, but playback equipment adequate to permit transcription by trained personnel or examination by counsel and reviewing authorities. In addition, if transcription is not contemplated, the recording method used must be subject to production of duplicates for compliance with subsection (j)(5) of this rule.

Subsection (2) requires that, ordinarily, the record will be reduced to writing, even if recorded as described in subsection (1). This preference for a written record is based on the fact that such a record is easier to use by counsel, reviewing authorities, and the accused, and is often easier to produce in multiple copies. *Cf. United States v. Barton, supra.* Note, however, that the rule permits recording proceedings and transcribing them later without using a court reporter. This adds a measure of flexibility in the face of a possible shortage of court reporters. This subsection is consistent with the already common practice of using "back-up" recordings to prepare a record when the court reporter's equipment has failed.

Subsection (3) recognizes that military exigencies may prevent transcription of the record, especially at or near the situs of the trial. In such instances, where an accurate record already exists, the convening authority's action should not be postponed for lack of transcription, subject to the provisions in subsection (3). Thus, the convening authority may take action, and transcription for appellate or other reviewing authorities may occur later. *See* subsection (4). Note that additional copies of the record need not be prepared in such case, except as required in subsection (j)(5)(A). Note also, however, that facilities must be reasonably available for use by the defense counsel (and when appropriate the staff judge advocate or legal officer, *see* R.C.M. 1106) to listen to or view and listen to the recordings to use this subsection.

Subsection (4)(A) is based on the recognition that it is impracticable for appellate courts and counsel not to have a written record. *See* S.Rep. No. 53, *supra* at 26; *United States v. Barton, supra.* Note that the transcript need not be authenticated under R.C.M. 1104. Instead, under regulations of the Secretary concerned the accuracy of the transcript can be certified by a person who has viewed and/or heard the authenticated recording.

Subsection (4)(B) provides flexibility in cases not reviewed by the Court of Criminal Appeals. Depending on regulations of the Secretary, a written record may never be prepared in some cases. Many cases not reviewed by a Court of Criminal Appeals will be reviewed only locally. *See* R.C.M. 1112. The same exigencies which weigh against preparation of a written record may also exist before such review. If a written record in not prepared, the review will have to be conducted by listening to or viewing and listening to the authenticated recording.

Subsection (5) provides alternative means for the government to comply with the requirement to serve a copy of the record of trial on the accused. Article 54(d). Note that if a recording is used, the Government must ensure that it can provide the accused reasonable opportunity to listen to or view and listen to the recording.

Rule 1104. Records of trial: authentication; service; correction; forwarding

(a) *Authentication.* Subsection (1) is new and is self-explanatory.

Subsection (2) is based on Article 54(a) and (b) and paragraph 82 *f* of MCM, 1969 (Rev.). The former rule has been changed to require that the record, or even a portion of it, may be authenticated only be a person who was present at the proceedings the record of which that person is authenticating. This means that in some cases (*e.g.*, when more than one military judge presided in a case) the record may be authenticated by more than one person. *See United States v. Credit*, 4 M.J. 118 (C.M.A. 1977); S.Rep. No. 1601, 90th Cong., 2d Sess. 12-13 (1968); H.R. Rep. No. 1481, 90th Cong., 2d Sess. 10 (1968). *See also United States v. Galloway*, 2 U.S.C.M.A. 433, 9 C.M.R. 63 (1953). This subsection also changes the former rule in that it authorizes the Secretary concerned to prescribe who will authenticate the record in special courts-martial at which no bad-conduct discharge is adjudged. *See* Article 54(b). In some services, the travel schedules of military judges often result in delays in authenticating the record. Such delays are substantial, considering the relatively less severe nature of the sentences involved in such cases. This subsection allows greater flexibility to achieve prompt authentication and action in such cases. The second paragraph of the discussion is based on *United States v. Credit, supra; United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976). *See also United States v. Lott*, 9 M.J. 70 (C.M.A. 1980); *Unites States v. Green*, 7 M.J. 687 (N.C.M.R. 1979); *United States v. Lowery*, 1 M.J. 1165 (N.C.M.R. 1977). The third paragraph of the discussion is based on *United States v. Lott, supra; United States v.Credit, supra.*

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

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

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

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

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

(d) *Correction of record after authentication; certificate of correction.* Subsection (1) and the discussion are based on paragraph 86 *c* of MCM, 1969 (Rev.). *See also* the first paragraph of

paragraph 95 of MCM, 1969 (Rev.). Subsection (2) is new and is based on *United States v. Anderson*, 12 M.J. 195 (C.M.A. 1982). *See also ABA Standards, Special Functions of the Trial Judge* § 6–1.6 (1978). The discussion is based on *United States v. Anderson, supra.* Subsection (3) is based on the second paragraph of paragraph 82 *g*(1) and paragraph 86 *c* of MCM, 1969 (Rev.).

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

Rule 1105. Matters submitted by the accused

(a) *In general.* This subsection is based on Articles 38(c) and 60(b). *See also* paragraphs 48 *k*(2) and 77 *a* of MCM, 1969 (Rev.).

(b) *Matters which may be submitted.* This subsection is based on Articles 38(c) and 60(b). The post-trial procedure as revised by the Military Justice Act of 1983, Pub.L. No. 98-209, 97 Stat. 1393 (1983) places a heavier responsibility on the defense to take steps to ensure that matters it wants considered are presented to the convening authority. Therefore this subsection provides guidance as to the types of matters which may be submitted. *See* Article 38(c). *See also* paragraph 48 *k*(3) and 77 *a* of MCM, 1969 (Rev.). Note that the matters the accused submits must be forwarded to the convening authority. *See United States v. Siders*, 15 M.J. 272 (C.M.A. 1983). As to the last paragraph in the discussion, *see also* Mil. R. Evid. 606(b) and Analysis; *United States Bishop*, 11 M.J. 7 (C.M.A. 1981); *United States v. West*, 23 U.S.C.M.A. 77, 48 C.M.R. 458 (1974); *United States v. Bourchier*, 5 U.S.C.M.A. 15, 17 C.M.R. 15 (1954).

1995 Amendment: The Discussion accompanying subsection (b)(4) was amended to reflect the new requirement, under R.C.M. 1106(d)(3)(B), that the staff judge advocate or legal advisor inform the convening authority of a recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence.

(c) *Time periods.* This subsection is based on Article 60(b). Subsection (4) clarifies the effect of post-trial sessions. A re-announcement of the same sentence would not start the time period anew. Subsection (5) is based on H.R. Rep. No. 549, 98th Cong., 1st Sess. 15 (1983).

1986 Amendment: Subsection (c) was revised to reflect amendments to Article 60, UCMJ, in the "Military Justice Amendments of 1986," tit. VIII, § 806, National Defense Authorization Act for Fiscal Year 1987, Pub.L. No. 99–661, 100 Stat, 3905, (1986). These amendments simplify post-trial submissions by setting a simple baseline for calculating the time for submissions.

1994 Amendment: Subsection (c)(1) was amended to clarify that the accused has 10 days to respond to an addendum to a recommendation of the staff judge advocate or legal officer when the addendum contains new matter. *See United States v. Thompson*, 25 M.J. 662 (A.F.C.M.R. 1987). An additional amendment permits the staff judge advocate to grant an extension of the 10-day period.

(d) *Waiver.* Subsection (1) is based on Article 60(c)(2). Subsection (2) is based on Article 60(c)(2). This subsection clarifies that the defense may submit matters in increments by reserving in writing its right to submit additional matters within the time period. In certain cases this may be advantageous to the defense as well as the Government, by permitting early consideration of such matters. Otherwise, if the defense contemplated presenting additional matters, it would have to withhold all matters until the end of the period. Subsection (3) is based on Article 60(b)(4). Subsection (4) ensures that the accused cannot, by an unauthorized absence, prevent further disposition of the case. Cf. *United States v. Schreck*, 10 M.J. 226 (C.M.A. 1983). Note that if the accused has counsel, counsel must be served a copy of the record (*see* R.C.M. 1104(b)(1)(C)) and that the defense will have at least 7 days from such service to submit matters. Note also that the unauthorized absence of the accused has no effect on the 30, 20, or 7 day period from announcement of the sentence within which the accused may submit matters (except insofar as it may weigh against any request to extend such a period). The discussion notes that the accused is not required to raise matters, such as allegations of legal error, in order to preserve them for consideration on appellate review.

Rule 1106. Recommendation of the staff judge advocate or legal officer

(a) *In general.* This subsection is based on Article 60(d), *as amended, see* Military Justice Act of 1983, Pub.L. No. 98-209, § 5(a)(1), 97 Stat. 1393 (1983). The first paragraph of paragraph 85 *a* of MCM, 1969 (Rev.) was similar.

(b) *Disqualification.* This subsection is based on Article 6(c) and on the second paragraph of paragraph 85 *a* of MCM, 1969 (Rev.). Legal officers have been included in its application based on Article 60(d). The discussion notes additional circumstances which have been held to disqualify a staff judge advocate. The first example is based on *United States v. Thompson*, 3 M.J. 966 (N.C.M.R. 1977), *rev'd on other grounds*, 6 M.J. 106 (C.M.A. 1978), *petition dismissed*, 7 M.J. 477 (C.M.A. 1979). The second example is based on *United States v. Choice*, 23 U.S.C.M.A. 329, 49 C.M.R. 663 (1975). *See also United States v. Cansdale*, 7 M.J. 143 (C.M.A. 1979); *United States v. Conn*, 6 M.J. 351 (C.M.A. 1979); *United States v. Reed*, 2 M.J. 64 (C.M.A. 1976). The third example is based on *United States v. Conn* and *United States v. Choice*, both *supra. Cf.* Articles 1(9); 6(c); 22(b); 23(b). The fourth example is based on *United States v. Collins*, 6 M.J. 256 (C.M.A. 1979); *United States v. Engle*, 1 M.J. 387 (C.M.A. 1976). *See also United States v. Newman*, 14 M.J. 474 (C.M.A. 1983) as to the disqualification of a staff judge advocate or convening authority when immunity has been granted to a witness in the case.

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

(c) *When the convening authority does not have a staff judge advocate or legal officer or that person is disqualified.* Subsection (1) is based on the third paragraph of paragraph 85 *a* of MCM, 1969 (Rev.). Legal officers have been included in its

application based on Article 60(d). Subsection (2) is new. It recognizes the advantages of having the recommendation prepared by a staff judge advocate. This flexibility should also permit more prompt disposition in some cases as well.

(d) *Form and content of recommendation.* This subsection is based on Article 60(d) and on S.Rep. No. 53, 98th Cong., 1st Sess. 20 (1983). As to the subsection (1), *see also* Article 60(c). Subsections (3), (4), and (5) conform to the specific guidance in S.Rep. No. 53, *supra.* Subsection (6) is based on S.Rep. No. 53, 98th Cong., 1st Sess. 21 (1983). The recommendation should be a concise statement of required and other matters. Summarization of the evidence and review for legal error is not required. Therefore paragraph 85 *b* of MCM, 1969 (Rev.) is deleted.

Paragraph 85 *c* of MCM, 1969 (Rev.) is also deleted. That paragraph stated that the convening authority should explain any decision not to follow the staff judge advocate's recommendation. *See also United States v. Harris*, 10 M.J. 276 (C.M.A. 1981); *United States v. Dixson*, 9 M.J. 72 (C.M.A. 1980); *United States v. Keller*, 1 M.J. 159 (C.M.A. 1976). The convening authority is no longer required to examine the record for legal or factual sufficiency. The convening authority's action is solely a matter of command prerogative. Article 60(c). Therefore the convening authority is not obligated to explain a decision not to follow the recommendation of the staff judge advocate or legal officer.

1995 Amendment: Subsection (d)(3)(B) is new. It requires that the staff judge advocate's or legal advisor's recommendation inform the convening authority of any clemency recommendation made by the sentencing authority in conjunction with the announced sentence, absent a written request by the defense to the contrary. Prior to this amendment, an accused was responsible for informing the convening authority of any such recommendation. The amendment recognizes that any clemency recommendation is so closely related to the sentence that staff judge advocates and legal advisors should be responsible for informing convening authorities of it. The accused remains responsible for informing the convening authority of other recommendations for clemency, including those made by the military judge in a trial with member sentencing and those made by individual members. *See United States v. Clear*, 34 M.J. 129 (C.M.A. 1992); R.C.M. 1105(b)(4). Subsections (d)(3)(B) - (d)(3)(E) are redesignated as (d)(3)(C) - (d)(3)(F), respectively.,

(e) *No findings of guilty.* This subsection is based on Article 60 and 63. When no findings of guilty are reached, no action by the convening authority is required. Consequently, no recommendation by the staff judge advocate or legal officer is necessary. The last paragraph of paragraph 85 *b* of MCM, 1969 (Rev.), which was based on Article 61 (before it was amended), was similar.

1990 Amendment: Subsection (e) was amended in conjunction with the implementation of findings of not guilty only by reason of lack of mental responsibility provided for in Article 50 *a*, UCMJ (Military Justice Amendments of 1986, tit. VIII, § 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, 100 Stat. 3905 (1986)).

(f) *Service of recommendation on defense counsel; defense response.* This subsection is based on Article 60(d). *See also United States v. Goode*, 1 M.J. 3 (C.M.A. 1975). Subsection (1) is based on Article 60(d). *See also United States v. Hill*, M.J. 295 (C.M.A. 1977); *United States v. Goode, supra.*

1990 Amendment: Subsection (f)(1) was added to make clear that the accused should be provided with a personal copy of the recommendation.

1994 Amendment: The Discussion to subsection (f)(l) was amended to correct a grammatical error and to clarify that the method of service of the recommendation on the accused and the accused's counsel should be reflected in the attachments to the record of trial. If it is impractical to serve the accused, the record should contain a statement justifying substitute service. Subsection (f)(1) recognizes that Congress sanctions substitute service on the accused's counsel. H.R. Rep. No. 549, 98th Cong., 1st Sess. 15 (1983). *See also United States v. Roland*, 31 M.J. 747 (A.C.M.R. 1990).

Subsection (2) makes clear who is to be served with the post-trial review. *See United States v. Robinson*, 11 M.J. 218, 223 n.2 (C.M.A. 1981). This issue has been a source of appellate litigation. *See e.g., United States v. Kincheloe*, 14 M.J. 40 (C.M.A. 1982); *United States v. Babcock*, 14 M.J. 34 (C.M.A. 1982); *United States v. Robinson, supra; United States v. Clark*, 11 M.J. 70 (C.M.A. 1981); *United States v. Elliot*, 11 M.J. 1 (C.M.A. 1981); *United States v. Marcoux*, 8 M.J. 155 (C.M.A. 1980); *United States v. Brown*, 5 M.J. 454 (C.M.A. 1978); *United States v. Davis*, 5 M.J. 451 (C.M.A. 1978); *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978); *United States v. Annis*, 5 M.J. 351 (C.M.A. 1978). The last sentence in this subsection is based on *United States v. Robinson, United States v. Brown*, and *United States v. Iverson*, all *supra.*The discussion is based on *United States v. Robinson, supra.*

Subsection (3) is based on *United States v. Babcock, supra; United States v. Cruz*, 5 M.J. 286 (C.M.A. 1978); *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976). Ordinarily the record will have been provided to the accused under R.C.M. 1104(b).

Subsections (4) and (5) are based on Article 60(d). *See also United States v. Goode, supra. See United States v. McAdoo*, 14 M.J. 60 (C.M.A. 1982).

1986 Amendment: Subsection (5) was amended to reflect amendments to Article 60, UCMJ, in the "Military Justice Amendments of 1986," tit. VIII, § 806, National Defense Authorization Act for Fiscal Year 1987, Pub.L. No. 99-661, 100 Stat. 3905 (1986). *See* Analysis to R.C.M. 1105(c).

Subsection (6) is based on Article 60(d). *See also* S. Rep. No. 53, 98th Cong., 1st Sess. 21 (1983); *United States v. Morrison, supra; United states v.Barnes*, 3 M.J. 406 (C.M.A. 1982); *United States v. Goode, supra. But see United States v. Burroughs, supra; United States v. Moles*, 10 M.J. 154 (C.M.A. 1981) (defects not waived by failure to comment).

Subsection (7) is based on *United States v. Narine*, 14 M.J. 55 (C.M.A. 1982).

1994 Amendment: Subsection (f)(7) was amended to clarify that when new matter is addressed in an addendum to a recommendation, the addendum should be served on the accused and the accused's counsel. The change also clarifies that the accused has 10 days from the date of service in which to respond to the new matter. The provision for substituted service was also added. Finally, the Discussion was amended to reflect that service of the addendum should be established by attachments to the record of trial.

Rule 1107. Action by convening authority

(a) *Who may take action.* This subsection is based on Article 60(c). It is similar to the first sentence of paragraph 84 *b* and the

first sentence of paragraph 84 *c* of MCM, 1969 (Rev.) except insofar as the amendment of Article 60 provides otherwise. *See* Military Justice Act of 1983, Pub.L. No. 98-209, § 5(a)(1), 97 Stat. 1393 (1983). The first paragraph in the discussion is based on the last two sentences of paragraph 84 *a* of MCM, 1969 (Rev.). The second paragraph of the discussion is based on the second and third sentences of paragraph 84 *c* of MCM, 1969 (Rev.); *United States v. Conn*, 6 M.J. 351 (C.M.A. 1979); *United States v. Reed*, 2 M.J. 64 (C.M.A. 1976); *United States v. Choice*, 23 U.S.C.M.A. 329, 49 C.M.R. 663 (1975). *See also United States v. James*, 12 M.J. 944 (N.M.C.M.R.), *pet. granted*, 14 M.J. 235 (1982) *rev'd* 17 M.J. 51. The reference in the third sentence of paragraph 84 *c* of MCM, 1969 (Rev.) to disqualification of a convening authority because the convening authority granted immunity to a witness has been deleted. *See United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). Note that although *Newman* held that a convening authority is not automatically disqualified from taking action by reason of having granted immunity, the Court indicated that a convening authority may be disqualified by granting immunity under some circumstances.

(b) *General considerations.* Subsection (1) and the discussion are based on Article 60(c). *See also* S.Rep. No. 53, 98th Cong., 1st Sess. 19 (1983).

Subsection (2) is based on Article 60(b) and (c).

Subsection (3)(A)(i) is based on Article 60(a). Subsection (3)(A)(ii) is based on Article 60(d). Subsection (3)(A)(iii) is based on Article 60(b) and (d). Subsection (3)(B) is based on Article 60 and on S.Rep. No. 53, 98th Cong., 1st Sess. 19–20 (1983). The second sentence in subsection (3)(B)(iii) is also based on the last sentence of paragraph 85 *b* of MCM, 1969 (Rev.). *See also United States v. Vara*, 8 U.S.C.M.A. 651, 25 C.M.R. 155 (1958); *United States v. Lanford*, 6 U.S.C.M.A. 371, 20 C.M.R. 87 (1955).

Subsection (4) is based on Article 60(c)(3). *See also* Article 60(e)(3). This subsection is consistent with paragraph 86 *b*(2) of MCM, 1969 (Rev.) except that it does not refer to examining the record for jurisdictional error.

1990 Amendment: Subsection (b)(4) was amended in conjunction with the implementation of findings of not guilty only by reason of lack of mental responsibility provided for in Article 50 *a*, UCMJ (Military Justice Amendments of 1986, tit. VIII, § 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99–661, 100 Stat. 3905 (1986)).

Subsection (5) is based on the second paragraph of paragraph 124 of MCM, 1969 (Rev.). *See also United States v. Korzeniewski*, 7 U.S.C.M.A. 314, 22 C.M.R. 104 (1956); *United States v. Washington*, 6 U.S.C.M.A.114, 19 C.M.R. 240 (1955); *United States v. Phillips*, 13 M.J. 858 (N.M.C.M.R. 1982).

1986 Amendment: The fourth sentence of subsection (b)(5) was amended to shift to the defense the burden of showing the accused's lack of mental capacity to cooperate in post-trial proceedings. This is consistent with amendments to R.C.M. 909(c)(2) and R.C.M. 916(k)(3)(A) which also shifted to the defense the burden of showing lack of mental capacity to stand trial and lack of mental responsibility. The second sentence was added to establish a presumption of capacity and the third sentence was amended to allow limitation of the scope of the sanity board's examination. The word "substantial" is used in the second and third sentences to indicate that considerable more credible evidence than merely an allegation of lack of capacity is required before further inquiry need be made. *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 2610 (1986) (Powell, J., concurring).

1998 Amendment: Congress created Article 76b, UCMJ in section 1133 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 464-66 (1996). It gives the convening authority discretion to commit an accused found not guilty only by reason of a lack of mental responsibility to the custody of the Attorney General.

(c) *Action of findings.* This subsection is based on Article 60(c)(2). Subsection (2)(B) is also based on Article 60(e)(1) and (3). The first sentence in the discussion is based on *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1182–85 (1949). The second sentence in the discussion is based on Article 60(e)(3). The remainder of the discussion is based on S.Rep. No. 53, 98th Cong., 1st Sess. 21 (1983).

(d) *Action on the sentence.* Subsection (1) is based on Article 60(c) and is similar to the first paragraph of paragraph 88 *a* of MCM, 1969 (Rev.). The first paragraph of the discussion is based on paragraph 88 *a* of MCM, 1969 (Rev.). The second paragraph of the discussion is based on *Jones v. Ignatius*, 18 U.S.C.M.A. 7, 39 C.M.R. 7 (1968); *United States v. Brown*, 13 U.S.C.M.A. 333, 32 C.M.R. 333 (1962); *United States v. Prow*, 13 U.S.C.M.A. 63, 32 C.M.R. 63 (1962); *United States v. Johnson*, 12 U.S.C.M.A. 640, 31 C.M.R. 226 (1962); *United States v. Christenson*, 12 U.S.C.M.A. 393, 30 C.M.R. 393 (1961); *United States v. Williams*, 6 M.J. 803 (N.C.M.R.), *pet. dismissed*, 7 M.J. 68 (C.M.A. 1979); *United States v. Berg*, 34 C.M.R. 684 (N.B.R. 1963). *See also United States v. McKnight*, 20 C.M.R. 520 (N.B.R. 1955).

Subsection (2) is based on Article 60(c) and S. Rep. No. 53, 98th Cong., 1st Sess. 19 (1983). The second sentence is also based on *United States v. Russo*, 11 U.S.C.M.A. 352, 29 C.M.R. 168 (1960). The second paragraph of the discussion is based on the third paragraph of paragraph 88 *b* of MCM, 1969 (Rev.).

1995 Amendment: The last sentence in the Discussion accompanying subsection (d)(2) is new. It clarifies that forfeitures adjudged at courts-martial take precedence over all debts owed by the accused. Department of Defense Military Pay and Allowances Entitlement Manual, Volume 7, Part A, paragraph 70507a (12 December 1994).

Subsection (3) is based on Articles 19 and 54(c)(1) and on the third sentence of paragraph 82 *b*(1) of MCM, 1969 (Rev.).

1995 Amendment: Subsection (d)(3) is new. It is based on the recently enacted Article 57(e). National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315, 2505 (1992). *See generally* Interstate Agreement on Detainers Act, 18 U.S.C. App. III. It permits a military sentence to be served consecutively, rather than concurrently, with a civilian or foreign sentence. The prior subsection (d)(3) is redesignated (d)(4).

1998 Amendment: All references to "postponing" service of a sentence to confinement were changed to use the more appropriate term, "defer".

(e) *Ordering rehearing or other trial.* Subsection (1)(A) is based on Article 60(e), and on paragraph 92 *a* of MCM, 1969 (Rev.). Note that the decision of the convening authority to order a rehearing is discretionary. The convening authority is not required to review the record for legal errors. Authority to order a rehear-

ing is, therefore, "designed solely to provide an expeditious means to correct errors that are identified in the course of exercising discretion under Article 60(c)." S. Rep. No. 53, 98th Cong., 1st Sess. 21 (1983). Subsection (1)(B) is based on Article 60(e). As to subsection (1)(B)(ii), *see* S. Rep. No. 53, *supra* at 22. Subsection (1)(B)(ii) is based on the second sentence of the second paragraph of paragraph 92 *a* of MCM, 1969 (Rev.). The discussion is based on the second sentence of the fourth paragraph of paragraph 92 *a* of MCM, 1969 (Rev.). Subsection (1)(C)(i) is based on Article 62(e)(3) and on the first sentence of the third paragraph of paragraph 92 *a* of MCM, 1969 (Rev.). Subsection (1)(C)(ii) and the discussion are based on Article 60(e)(3) and on the first paragraph of paragraph 92 *a* of MCM, 1969 (Rev.). Subsection (1)(C)(ii) is based on the first sentence of the tenth paragraph of paragraph 92 *a* of MCM, 1969 (Rev.). Subsection (1)(D) is based on the sixth paragraph of paragraph 92 *a* of MCM, 1969 (Rev.). Subsection (1)(E) is based on the eighth paragraph of paragraph 92 *a* of MCM, 1969 (Rev.). Because of the modification of Article 71 (*see* R.C.M. 1113) and because the convening authority may direct a rehearing after action in some circumstances (*see* subsection (e)(1)(B)(ii) of this rule), the language is modified. The remaining parts of paragraph 92 *a*, concerning procedures for a rehearing, are now covered in R.C.M. 810.

1995 Amendment: The second sentence in R.C.M. 1107(e)(1)(C)(iii) is new. It expressly recognizes that the convening authority may approve a sentence of no punishment if the convening authority determines that a rehearing on sentence is impracticable. This authority has been recognized by the appellate courts. *See e.g., United States v. Monetesinos,* 28 M.J. 38 (C.M.A. 1989); *United States v. Sala,* 30 M.J. 813 (A.C.M.R. 1990).

Subsection (2) is based on paragraph 92 *b* of MCM, 1969 (Rev.). *See also* paragraph 89 *c*(1) of MCM, 1969 (Rev.). If the accused was acquitted of a specification which is later determined to have failed to state an offense, another trial for the same offense would be barred. *United States v. Ball,* 163 U.S. 662 (1896). It is unclear whether an acquittal by a jurisdictionally defective court-martial bars retrial. *See United States v. Culver,* 22 U.S.C.M.A. 141, 46 C.M.R. 141 (1973).

(f) *Contents of action and related matters.* Subsection (1) is based on paragraph 89 *a* of MCM, 1969 (Rev.).

1991 Amendment: The 1984 rules omitted any requirement that the convening authority's action be included in the record of trial. This amendment corrects that omission.

Subsection (2) is based on paragraph 89 *b* of MCM, 1969 (Rev.). The second sentence is new. It is intended to simplify the procedure when a defect in the action is discovered in Article 65(c) review. There is no need for another authority to formally act in such cases if the convening authority can take corrective action. The accused cannot be harmed by such action. A convening authority may still be directed to take corrective action when necessary, under the third sentence. "Erroneous" means clerical error only. *See* subsection (g) of this rule. This new sentence is not intended to allow a convening authority to change a proper action because of a change of mind.

1995 Amendment: The amendment allows a convening authority to recall and modify any action after it has been published or after an accused has been officially notified, but before a record has been forwarded for review, as long as the new action is not less favorable to the accused than the prior action. A convening authority is not limited to taking only corrective action, but may also modify the approved findings or sentence provided the modification is not less favorable to the accused than the earlier action.

Subsection (3) is based on paragraph 89 *c*(2) of MCM, 1969 (Rev.). The provision in paragraph 89 *c*(2) of MCM, 1969 (Rev.) that disapproval of the sentence also constitutes disapproval of the findings unless otherwise stated is deleted. The convening authority must expressly indicate which findings, if any, are disapproved in any case. *See* Article 60(c)(3). The discussion is based on paragraph 89 *c*(2) of MCM, 1969 (Rev.). Subsection (4)(A) is based on paragraph 89 *c*(3) of MCM, 1969 (Rev.). The first sentence of paragraph 89 *c*(2)is no longer accurate. Since no action on the findings is required, any disapproval of findings must be expressed. Subsection (4)(B) is taken from paragraph 89 *c*(4) of MCM, 1969 (Rev.). Subsection (4)(D) is based on paragraph 89 *c*(6) of MCM, 1969 (Rev.). However, because that portion of the sentence which extends to confinement may now be ordered executed when the convening authority takes action (*see* Article 71(c)(2); R.C.M. 1113(b)), temporary custody is unnecessary in such cases. Therefore, this subsection applies only when death has been adjudged and approved. Subsection (4)(E) is taken from paragraph 89 *c*(7) of MCM, 1969 (Rev.). Subsection (4)(F) is new. *See* Analysis, R.C.M. 305(k). *See also United States v. Suzuki,* 14 M.J. 491 (C.M.A. 1983). Subsection (4)(G) is taken from paragraph 89 *c*(9) of MCM, 1969 (Rev.). Subsection (4)(H) is modified based on the amendment of Article 71 which permits a reprimand to be ordered executed from action, regardless of the other components of the sentence. Admonition has been deleted. *See* R.C.M. 1003(b)(1).

Subsection (5) is based on paragraph 89 *c*(8) of MCM, 1969 (Rev.). *See also* R.C.M. 810(d) and Analysis. The provision in paragraph 89 *c*(8) requiring that the accused be credited with time in confinement while awaiting a rehearing is deleted. Given the procedures for imposition and continuation of restraint while awaiting trial (*see* R.C.M. 304 and 305), there should not be a credit simply because the trial is a rehearing.

(g) *Incomplete, ambiguous, or erroneous action.* This subsection is based on paragraph 95 of MCM, 1969 (Rev.). *See generally United States v. Loft,* 10 J M.J. 266 (C.M.A. 1981); *United States v. Lower,* 10 M.J. 263 (C.M.A. 1981).

(h) *Service on accused.* This subsection is based on Article 61(a), *as amended, see* Military Justice Act of 1983, Pub.L. No. 98–209, § 5(b)(1), 97 Stat. 1393 (1983).

Rule 1108. Suspension of execution of sentence

This rule is based on Articles 71(d) and 74, and paragraphs 88 *e* and 97 *a* of MCM, 1969 (Rev.). *See also* Fed.R.Crim. P. 32(e). The second paragraph of the discussion to subsection (b) is based on *United States v. Stonesifer,* 2 M.J. 212 (C.M.A. 1977); *United States v. Williams,* 2 M.J. 74 (C.M.A. 1976); *United States v. Occhi,* 2 M.J. 60 (C.M.A. 1976). Subsection (c) is new and based on Article 71; *United States v. Lallande,* 22 U.S.C.M.A. 170, 46 C.M.R. 170 (1973); *United State v. May,* 10 U.S.C.M.A. 258, 27 C.M.R. 432 (1959). *Cf.* 18 U.S.C. § 3651 ("upon such terms and conditions as the court deems best"). The notice provisions are designed to facilitate vacation when that becomes necessary. *See* the Analysis, R.C.M. 1109. The language limiting the period of

suspension to the accused's current enlistment has been deleted. *See United States v. Thomas*, 45 C.M.R. 908 (N.C.M.R. 1972). *Cf. United States v. Clardy*, 13 M.J. 308 (C.M.A. 1982). *See also* subsection (e) of this rule.

1990 Amendment: The third sentence was amended to delete the limitation of Secretarial designation to an "officer exercising general court-martial jurisdiction over the command to which the accused is assigned" and to permit such designation to any "commanding officer." This comports with the language of Article 74(a), UCMJ and paragraphs 97 *a* of MCM, 1951 and MCM, 1969. The specific designation of inferior courts-martial convening authorities to remit or suspend unexecuted portions was not intended to limit in any other respects the Secretarial designation power. Except for a sentence which has been approved by the President, remission or suspension authority is otherwise left entirely to departmental regulations.

The last sentence was added to clarify the authority of the officials named in section (b) to grant clemency or mitigating action on those parts of the sentence that have been approved and ordered executed but that have not actually been carried out. In the case of forfeiture the "carrying out" involves the actual collection after pay accrues on a daily basis. Thus, even when a sentence to total forfeiture has been approved and ordered executed, the named officials can still grant clemency or mitigating action. Although a prisoner may be administratively placed in a nonpay status when total forfeiture has been ordered executed, the total forfeiture is collected as it would otherwise accrue during the period that the prisoner is in a nonpay status. If clemency were granted, the prisoner could be returned administratively to a pay status, pay would accrue, and any resulting partial forfeiture would be collected as it accrues. Likewise, that portion of confinement which has not been served is "unexecuted".

Rule 1109. Vacation of suspension of sentence

(a) *In general.* This subsection is based on Article 72 and paragraph 97 *b* of MCM, 1969 (Rev.).

(b) *Timeliness.* This subsection is based on the fourth paragraph of paragraph 97 *b* of MCM, 1969 (Rev.); *United States v. Pells*, 5 M.J. 380 (C.M.A. 1978); *United States v. Rozycki*, 3 M.J. 127, 129 (C.M.A. 1977).

(c) *Confinement of probationer pending vacation proceedings.* This subsection is new and based on *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *United States v. Bingham*, 3 M.J. 119 (C.M.A. 1977). It is consistent with Fed.R.Crim. P. 32.1(a)(1). Note that if the actual hearing on vacation under subsection (d)(1) or (e)(3) and (4) is completed within the specified time period, a separate probable cause hearing need not be held.

(d) *Violation of suspended general court-martial sentence or of a suspended court-martial sentence including a bad-conduct discharge.* This subsection is based on Article 72(a) and (b); the first two paragraphs of paragraph 97 *b* of MCM, 1969 (Rev.); *United States v. Bingham, supra; United States v. Rozycki*, supra. *See also* Fed.R.Crim. P. 32.1(a)(2).

(e) *Vacation of suspended special court-martial sentence not including a bad-conduct discharge or of a suspended summary court-martial sentence.* This subsection is based on Article 72(c); *United States v. Bingham, supra; United States v. Rozycki, supra.*

Fed.R.Crim. P. 32.1(b) is not adopted. That rule requires a hearing before conditions of probation may be modified. Modification is seldom used in the military. Because a probationer may be transferred or change duty assignments as a normal incident of military life, a commander should have the flexibility to make appropriate changes in conditions of probation without having to conduct a hearing. This is not intended to permit conditions of probation to be made substantially more severe without due process. At a minimum, the probationer must be notified of the changes.

1986 Amendment: Several amendments were made to R.C.M. 1109 to specify that the notice to the probationer concerning the vacation proceedings must be in writing, and to specify that the recommendations concerning vacation of the suspension provided by the hearing officer must also be in writing. *Black v. Romano*, 471 U.S. 606, 105 S.Ct. 2254 (1985). Several references to "conditions of probation" were changed to "conditions of suspension" for consistency of terminology.

1998 Amendment: The Rule is amended to clarify that "the suspension of a special court-martial sentence which as approved includes a bad-conduct discharge," permits the officer exercising special court-martial jurisdiction to vacate any suspended punishments other than an approved suspended bad-conduct discharge.

Rule 1110. Waiver or withdrawal of appellate review

Introduction. This rule is new and is based on Article 61, as amended, *see* Military Justice Act of 1983, Pub.L. No. 98–209, § 5(b)(1), 97 Stat. 1393 (1983). The rule provides procedures to ensure that a waiver or withdrawal of appellate review is a voluntary and informed choice. *See also* Appendices 19 and 20 for forms. *See* S. Rep. No. 53, 98th Cong., 1st Sess. 22-23 (1983).

(a) *In general.* This subsection is based on Article 61. The discussion is also based on Articles 64 and 69(b).

(b) *Right to counsel.* This subsection is based on Article 61(a). Although Article 61(b) does not expressly require the signature of defense counsel as does Article 61(a), the same requirements should apply. Preferably counsel who represented the accused at trial will advise the accused concerning waiver, the appellate counsel (if one has been appointed) will do so concerning withdrawal. This subsection reflects this preference. It also recognizes, however, that this may not always be practicable; for example, the accused may be confined a substantial distance from counsel who represented the accused at trial when it is time to decide whether to waive or withdraw appeal. In such cases, associate counsel may be detailed upon request by the accused. *See* R.C.M. 502(d)(1) as to the qualification of defense counsel. Associate counsel is obligated to consult with at least one of the counsel who represented the accused at trial. In this way the accused can have the benefit of the opinion of the trial defense counsel even if the defense counsel is not immediately available. Subsection (2)(C) provides for the appointment of substitute counsel when, for the limited reasons in R.C.M. 505(d)(2)(B), the accused is no longer represented by any trial defense counsel. Subsection (3) contains similar provisions concerning withdrawal of an appeal. Note that if the case is reviewed by the Judge Advocate General, there would be no appellate counsel. In such

cases, subsection (3)(C) would apply. Subsection (6) clarifies that here, as in other circumstances, a face-to-face meeting between the accused and counsel is not required. When necessary, such communication may be by telephone, radio, or similar means. *See also* Mil. R. Evid. 511(b). The rule, including the opportunity for appointment of associate counsel, is intended to permit face-to-face consultation with an attorney in all but the most unusual circumstances. Face-to-face consultation is strongly encouraged, especially if the accused wants to waive or withdraw appellate review.

(c) *Compulsion, coercion, inducement prohibited.* This subsection is intended to ensure that any waiver or withdrawal of appellate review is voluntary. *See* S. Rep. No. 53, *supra* at 22–23; *Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 1st Sess. 78, 128 (1982); *United States v. Mills*, 12 M.J. 1 (C.M.A. 1981). *See also* R.C.M. 705(c)(1)(B).

(d) *Form of waiver or withdrawal.* This subsection is based on Article 60(a) and on S. Rep. No. 53, *supra* at 23. Requiring not only the waiver but a statement, signed by the accused, that the accused has received essential advice concerning the waiver and that it is voluntary should protect the Government and the defense counsel against later attacks on the adequacy of counsel and the validity of the waiver or withdrawal.

(e) *To whom submitted.* Subsection (1) is based on Article 60(a). Article 60(b) does not establish where a withdrawal is filed. Subsection (2) establishes a procedure which should be easy for the accused to use and which ensures the withdrawal will be forwarded to the proper authority. A waiver or withdrawal of appeal is filed with the convening authority or authority exercising general court-martial jurisdiction for administrative convenience. *See* Hearings on S. 2521, *supra* at 31.

(f) *Time limit.* Subsection (1) is based on Article 60(a). Subsection (2) is based on Article 60(b). *See also* subsection (g)(3) and Analysis, below.

1991 Amendment: Language was added to clarify that, although the waiver must be filed within 10 days of receipt by the accused or defense counsel of the convening authority's action, it may be signed at any time after trial up to the filing deadline.

(g) *Effect of waiver of withdrawal, substantial compliance required.* Subsection (1) is based on Article 60(c). Subsections (2) and (3) are based on Article 64. Subsection (3) also recognizes that, once an appeal is filed (*i.e.*, not waived in a timely manner) there may be a point at which it may not be withdrawn as of right. *Cf.* Sup. Ct. R. 53; Fed.R.App. P.42; *Hammett v.Texas*, 448 U.S. 725 (1974); *Shellman v. U.S. Lines, Inc.*, 528 F. 2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936 (1976). Subsection (4) is intended to protect the integrity of the waiver or withdrawal procedure by ensuring compliance with this rule. The accused should be notified promptly if a purported waiver or withdrawal is defective.

Rule 1111. Disposition of the record of trial after action

This rule is based generally on paragraph 91 of MCM, 1969 (Rev.), but is modified to conform to the accused's right to waive or withdraw appellate review and to the elimination of supervisory review and of automatic review of cases affecting general and flag officers. *See* Articles 61, 64, 65, 66(b). Some matters in paragraph 91 of MCM, 1969 (Rev.) are covered in other rules. *See* R.C.M. 1103(b)(3)(F); 1104(b)(1)(B).

Rule 1112. Review by a judge advocate

This rule is based on Articles 64 and 65(b), *as amended, see* Military Justice Act of 1983, Pub.L. No. 98-209, §§ 6(d)(1), (7)(a)(1), 97 Stat. 1393 (1983).

1986 Amendment: The last paragraph of R.C.M. 1112(d) was added to clarify the requirement that a copy of the judge advocate's review be attached to the original and each copy of the record of trial. The last paragraph of R.C.M. 1112(e), which previously contained an equivalent but ambiguous requirement, was deleted.

1990 Amendment: Subsection (b) was amended in conjunction with the implementation of findings of not guilty only by reason of lack of mental responsibility provided for in Article 50 *a*, UCMJ (Military Justice Amendments of 1986, tit. VIII, § 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99–661, 100 Stat. 3905 (1986)).

Rule 1113. Execution of sentences

Introduction. Fed.R.Crim. P. 38 is inapplicable. The execution of sentence in the military is governed by the code. *See* Articles 57 and 71. *See also* Articles 60, 61, 64, 65, 66, and 69.

(a) *In general.* This subsection is based on Article 71(c)(2) and the first paragraph of paragraph 98 of MCM, 1969 (Rev.). *See also* Articles 60, 61, 64, 65, 66, and 67.

1991 Amendment: The discussion was amended by adding a reference to subsection (5) of R.C.M. 1113(d). This brings the discussion into accord with the general rule of R.C.M. 1113(d)(2)(A) that any court-martial sentence to confinement begins to run from the date it is adjudged.

(b) *Punishments which the convening authority may order executed in the initial action.* This subsection is based on Article 71(d). *See also* the first paragraph of paragraph 88 *d*(1) of MCM, 1969 (Rev.). Note that under the amendment of Article 71 (*see* Pub. L. No. 98-209, § 5(e), 97 Stat. 1393 (1983)), the convening authority may order parts of a sentence executed in the initial action, even if the sentence includes other parts (*e.g.*, a punitive discharge) which cannot be ordered executed until the conviction is final.

(c) *Punishments which the convening authority may not order executed in the initial action.* This subsection is based on the sources noted below. The structure has been revised to provide clearer guidance as to who may order the various types of punishments executed. Applicable service regulations should be consulted, because the Secretary concerned may supplement this rule, and may under Article 74(a) designate certain officials who may remit unexecuted portions of sentences. *See also* R.C.M. 1206.

Subsection (1) is based on Article 71(c). *See also*Article 64(c)(3). The last two sentences of this subsection are based on S.Rep.No. 53, 98th Cong., 1st Sess. 25 (1983).

1991 Amendment: Language was added to the second sentence of the paragraph following subsection (c)(1)(B) to specify that a staff judge advocate's advice is required only when the servicemember is not on appellate leave on the date of final judgment and more than six months have elapsed since the convening authority's approval of the sentence. The third sentence was mod-

ified to reflect this change. The subsection was not intended to grant an additional clemency entitlement to a servicemember. Significant duty performance since the initial approval is relevant to the convening authority's determination of the best interest of the service. Since a member on appellate leave is performing no military duty, an additional staff judge advocate's advice would serve no useful purpose.

Subsection (2) is based on Article 71(b).

Subsection (3) is based on Articles 66(b), 67(b)(1), and 71(a).

(d) *Other considerations concerning execution of sentences.* Subsection (1) is based on the third paragraph of paragraph 126 *a* of MCM, 1969 (Rev.). The second paragraph of paragraph 88 *d*(1) of MCM, 1969 (Rev.) is deleted as unnecessary.

1986 Amendment: Subsection (d)(1)(B) was added to incorporate the holding in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595 (1986). The plurality in *Ford* held that the Constitution precludes executing a person who lacks the mental capacity to understand either that he will be executed or why he will be executed. *See also United States v. Washington*, 6 U.S.C.M.A. 114, 119, 19 C.M.R. 240, 245 (1955). The Court also criticized the procedures specified by Florida law used to determine whether a person lacks such capacity because the accused was provided no opportunity to submit matters on the issue of capacity, but the case is unclear as to what procedures would suffice.

Because of this ambiguity, the drafters elected to provide for a judicial hearing, with representation for the government and the accused. This is more than adequate to meet the due process requirements of *Ford v. Wainwright.*

The word "substantial" is used in the third sentence to indicate that considerably more credible evidence than merely an allegation of lack of capacity is required before further inquiry need be made. *Ford v. Wainwright*,447 U.S. 399, 426, 106 S.Ct. 2595, 2610 (1986) (Powell, J., concurring). The burden of showing the accused's lack of capacity is on the defense when the issue is before the court for adjudication. This is consistent with amendments to R.C.M. 909(c)(2) and R.C.M. 916(k)(3)(A) which shifted to the defense the burden of showing lack of mental capacity to stand trial and lack of mental responsibility. The rule also establishes a presumption of capacity and allows limits on the scope of the sanity board's examination.

Subsection (2)(A) is based on Articles 14 and 57(b) and paragraph 97 *c* of MCM, 1969 (Rev.). *See also* paragraph 126 *j* of MCM, 1969 (Rev.). Subsection (2)(B) is based on Article 58(b) and the third paragraph of paragraph 126 *j* of MCM, 1969 (Rev.). Subsection (2)(C) is based on Article 58(a) and paragraph 93 of MCM, 1969 (Rev.). Note that if the Secretary concerned so prescribes, the convening authority need not designate the place of confinement. Because the place of confinement is determined by regulations in some services, the convening authority's designation is a pro forma matter in such cases.The penultimate sentence in subsection (2)(C) is based on Article 12 and on paragraph 125 of MCM, 1969 (Rev.). The last sentence in subsection (2)(C) is based on 10 U.S.C. § 951. *See* the second paragraph of paragraph 18 *b*(3) of MCM, 1969 (Rev.).

1995 Amendment: Subsection (d)(2)(A)(iii) is new. It is based on the recently enacted Article 57(e). National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315,2505 (1992). *See generally* Interstate Agreement on Detainers Act, 18 U.S.C. App. III. It permits a military sentence to be served consecutively, rather than concurrently, with a civilian or foreign sentence.The prior subsections (d)(2)(A)(iii) - (iv) are redesignated (d)(2)(A)(iv) - (v), respectively.

Subsection (3) is based on paragraph 126 *h*(3) of MCM, 1969 (Rev.), but it is modified to avoid constitutional problems. *See Bearden v. Georgia*, 461 U.S. 660 (1983); *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970). *See also United States v. Slubowski*, 5 M.J. 882 (N.C.M.R. 1978), aff'd, 7 M.J. 461 (1979); *United States v. Vinyard*, 3 M.J. 551 (A.C.M.R.), *pet. denied*, 3 M.J. 207 (1977); *United States v. Donaldson*, 2 M.J. 605 (N.C.M.R. 1977), *aff'd*, 5 M.J. 212 (1978); *United States v. Martinez*, 2 M.J. 1123 (C.G. C.M.R. 1976); *United States v. Kehrli*, 44 C.M.R. 582 (A.F.C.M.R. 1971), *pet. denied*, 44 C.M.R. 940 (1972); ABA Standards, Sentencing Alternatives and Procedures § 18–2.7 (1979).

Subsection (4) is new. *See* Article 57(c).

Subsection (5) is based on the last paragraph of paragraph 125 MCM, 1969 (Rev.).

Paragraph 88 *d*(3) of MCM, 1969 (Rev.) is deleted based on the amendment of Articles 57(a) and 71(c)(2) which eliminated the necessity for application or deferment of forfeitures. Forfeitures always may be ordered executed in the initial action.

*1995 Amendment:*Subsection (5) was deleted when the punishment of confinement on bread and water or diminished rations [R.C.M. 1113(d)(9)], as a punishment imposable by a court-martial, was deleted. Subsection (6) was redesignated (5).

Rule 1114. Promulgating orders

(a) *In general.* Subsections (1) and (2) are based on the first paragraph of paragraph 90 *a* of MCM, 1969 (Rev.). Subsection (3) is based on paragraph 90 *e* of MCM, 1969 (Rev.). This rule is consistent in purpose with Fed.R.Crim. P. 32(b)(1).

(b) *By whom issued.* Subsection (1) is based on paragraph 90 *b*(1) of MCM, 1969 (Rev.) except that the requirement that the supervisory authority, rather than the convening authority, issue the promulgating order in certain special courts-martial has been deleted, since action by the supervisory authority is no longer required. *See* Article 65. The convening authority now issues the promulgating order in all cases. *See generally United States v. Schulthise*, 14 U.S.C.M.A. 31, 33 C.M.R. 243 (1963) (actions equivalent to publication). Subsection (2) is based on paragraphs 90 *b*(2) and 107 of MCM, 1969 (Rev.).

(c) *Contents.* Subsection (1) is based on Appendix 15 of MCM, 1969 (Rev.) but modifies it insofar as the only item which must be recited verbatim in the order is the convening authority's action. The charges and specifications should be summarized to adequately describe each offense, including allegations which affect the maximum authorized punishments. *Cf.* Fed. R. Crim. P. 32(b)(1). *See also* Form 25, Appendix of Forms, Fed.R.Crim. P. Subsection (2) is based on the third, fourth, and fifth paragraph of paragraph 90 *a* of MCM, 1969 (Rev.) except that reference is no longer made to action by the supervisory authority. *See* Article 65. *See United States v. Veilleux*, 1 M.J. 811, 815 (A.F.C.M.R. 1976); *United States v. Hurlburt*, 1 M.J. 742, 744 (A.F.C.M.R. 1975), rev'd on other grounds, 3 M.J. 387 (C.M.A. 1977).

Subsection (3) is based on the first sentence of the second paragraph of paragraph 90 *a* of MCM, 1969 (Rev.).

1986 Amendment: Reference to "subsequent actions" was

changed to "subsequent orders" to correct an error in MCM, 1984.

1990 Amendment: Subsection (c)(2) was amended in conjunction with the implementation of findings of not guilty only by reason of lack of mental responsibility provided for in Article 50 *a*, UCMJ (Military Justice Amendments of 1986, tit. VIII, 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, 100 Stat. 3905 (1986)).

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

(e) *Authentication.* This subsection is based on forms at Appendix 15 of MCM, 1969 (Rev.) and clarifies the authentication of promulgating orders. *See* Mil. R. Evid. 902(10). Note that this subsection addresses authentication of the order, not authentication of copies.

(f) *Distribution.* This subsection is based on paragraph 90 *d* of MCM, 1969 (Rev.). The matters in paragraph 96 of MCM, 1969 (Rev.) are deleted. These are administrative matters better left to service regulations.

1986 Amendment: Subsection (b)(2) was amended to clarify that actions taken subsequent to the initial action may also comprise the supplementary order. Section (c) was amended to simplify and shorten court-martial orders. *See* revisions to Appendix 17.

CHAPTER XII. APPEALS AND REVIEW

Rule 1201. Action by the Judge Advocate General

(a) *Cases required to be referred to a Court of Criminal Appeals.* This subsection is based on Article 66(b).

(b) *Cases reviewed by the Judge Advocate General.* Subsection (1) is based on Article 69(a). Subsection (2) is based on Article 64(b)(3) and Article 69(b). Subsection (3) is based on Article 69(b). Subsection (4) is based on Article 69(c). Subsection (b) is similar to paragraph 103 and the first two paragraphs of paragraph 110A of MCM, 1969 (Rev.) except insofar as the amendments of Articles 61, 64, and 69 dictate otherwise. *See* Military Justice Act of 1983, Pub.L. No. 98-209, §§ 4(b), 7(a), (e), 97 Stat. 1393 (1983). The last paragraph of paragraph 110A of MCM, 1969 (Rev.) was deleted as unnecessary.

1986 Amendment: Subsection (b)(3)(A) was changed to conform to the language of Article 69(b), as enacted by the Military Justice Act of 1983, which precludes review of cases previously reviewed under Article 69(a).

1990 Amendment: The discussion to subsection (b)(3)(A) was amended in conjunction with the implementation of Article 50 *a*, UCMJ (Military Justice Amendments of 1986, tit. VIII, § 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99–661, 100 Stat. 3905 (1986)). To find an accused not guilty only by reason of lack of mental responsibility, the fact-finder made a determination that the accused was guilty of the elements of the offense charged or of a lesser included offense but also determined that, because he lacked mental responsibility at the time of the offense, he could not be punished for his actions. *See* R.C.M. 921(c)(4). Although the finding does not subject the accused to punishment by court-martial, the underlying finding of guilt is reviewable under this rule. Review, however, does not extend to the determination of lack of mental responsibility. Since the accused voluntarily raised the issue and has the burden of proving lack of mental responsibility by clear and convincing evidence, he has waived any later review of the propriety of that determination.

1990 Amendment: The date from which the two year period to file an application under R.C.M. 1201(b)(3) begins to run was amended to account for cases resulting in a finding of not guilty only by reason of lack of mental responsibility. Such cases would not proceed to sentencing but could be the subject of an application under this rule. As amended, the accused would have two years from the date findings were announced in which to file an application for review.

*1995 Amendment:*The Discussion accompanying subsection (1) was amended to conform with the language of Article 69(a), as enacted by the Military Justice Amendments of 1989, tit. XIII, sec. 1302(a)(2), National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101–189, 103 Stat. 1352, 1576 (1989).

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

Rule 1202. Appellate counsel

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

(b) *Duties.* This subsection is based on Article 70(b) and (c). *See also* the first two paragraphs of paragraph 102 *b* of MCM, 1969 (Rev.). The penultimate sentence in the rule is based on the penultimate sentence in the fourth paragraph of paragraph 102 *b* of MCM, 1969 (Rev.). The last sentence in the fourth paragraph of paragraph 102 *b* of MCM, 1969 (Rev.) is deleted as unnecessary. The last sentence in the rule is new. It is based on practice in Federal civilian courts. *See Rapp. v. Van Dusen*, 350 F. 2d 806 (3d Cir. 1965); Fed.R. App. P.21(b). *See also* Rule 27, Revised Rules of the Supreme Court of the United States (Supp. IV 1980); *United States v. Haldeman*, 599 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977). *See generally* 9 J. Moore, B. Ward, and J. Lucas, Moore's Federal Practice Para. 221.03 (2d ed. 1982).

The first two paragraphs in the discussion modify the third and fourth paragraphs of paragraph 102 *b* of MCM, 1969 (Rev.). The Court of Appeals for the Armed Forces has held that appellate defense counsel is obligated to assign as error before the Court of Criminal Appeals all arguable issues unless such issues are, in counsel's professional opinion, clearly frivolous. In addition, appellate defense counsel must invite the attention of the court to issues specified by the accused, unless the accused expressly withdraws such issues, if these are not otherwise assigned as errors. Also, in a petition for review by the Court of Appeals for the Armed Forces, counsel must, in addition to errors counsel believes have merit, identify issues which the accused wants raised. *See United States v. Hullum*, 15 M.J. 261 (C.M.A. 1983); *United States v. Knight*, 15 M.J. 195 (C.M.A. 1982); *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See also United*

States v. Dupas, 14 M.J. 28 (C.M.A. 1982); *United States v. Rainey*, 13 M.J. 462, 463 n. 1 (C.M.A. 1982) (Everett, C.J., dissenting). *But see Jones v. Barnes*, 463 U.S. 745 (1983) (no constitutional requirement for appointed counsel to raise every nonfrivolous issue requested by client). The third paragraph in the discussion is based on Article 70(d) and paragraph 102 of MCM, 1969 (Rev.). The fourth paragraph in the discussion is based on the establishment of review by the Supreme Court of certain decisions of the Court of Appeals for the Armed Forces. *See* Article 67(h) and 28 U.S.C. § 1259; Military Justice Act of 1983, Pub.L. No. 98–209, § 10, 97 Stat. 1393 (1983). The fifth paragraph in the discussion is based on *United States v. Patterson*, 22 U.S.C.M.A. 157, 46 C.M.R. 157 (1973). *See also United States v. Kelker*, 4 M.J. 323 (C.M.A. 1978); *United States v. Bell*, 11 U.S.C.M.A. 306, 29 C.M.R. 122 (1960).

Rule 1203. Review by a Court of Criminal Appeals

(a) *In general.* This subsection is based on Article 66(a). The discussion is based on Article 66(a), (f), (g), and (h). *See also* the first paragraph of paragraph 100 *a* and paragraph 100 *d* of MCM, 1969 (Rev.).

(b) *Cases reviewed by a Court of Criminal Appeals.* This subsection is based on Article 66(b) and the third sentence of Article 69(a). Interlocutory appeals by the Government are treated in R.C.M. 908. The third through the fifth paragraphs in the discussion are based on Articles 59 and 66(c) and (d) and are taken from the second and third paragraphs of paragraph 100 *a* and the first paragraph of paragraph 100 *b* of MCM, 1969 (Rev.). *See also United States v. Darville*, 5 M.J. 1 (C.M.A. 1978). The last sentence in the first paragraph is based on *United States v. Brownd*, 6 M.J. 338 (C.M.A. 1979); *United States v. Yoakum*, 8 M.J. 763 (A.C.M.R.), *aff'd*, 9 M.J. 417 (C.M.A. 1980). *See also Corley v. Thurman*, 3 M.J. 192 (C.M.A. 1977). The sixth paragraph in the discussion is based on *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979); 28 U.S.C. § 1651(a). *See also United States v. LaBella*, 15 M.J. 228 (C.M.A. 1983); *United States v. Caprio*, 12 M.J. 30 (C.M.A. 1981); *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981); *United States v. Bogan*, 13 M.J. 768 (A.C.M.R. 1982). The establishment of a statutory right of the Government to appeal certain rulings at trial might affect some of these precedents. *See United States v. Weinstein*, 411 F.2d 622 (2d. Cir. 1975), *cert. denied*, 422 U.S. 1042 (1976).

(c) *Action on cases reviewed by a Court of Criminal Appeals.* Subsection (1) is based on Article 67(b)(2). *See also* paragraph 100 *b*(2) and the first sentence of paragraph 100 *c*(1)(a) of MCM, 1969 (Rev.). *See also United States v. Leslie*, 11 M.J. 131 (C.M.A. 1981); *United States v. Clay*, 10 M.J. 269 (C.M.A. 1981).

Subsection (2) is based on Article 66(e). *See also United States v. Best*, 4 U.S.C.M.A. 581, 16 C.M.R. 155 (1954). The discussion is consistent with paragraph 100 *b*(3) of MCM, 1969 (Rev.).

Subsection (3) modifies paragraph 100 *c*(1)(a) of MCM, 1969 (Rev.). It allows each service to prescribe specific procedures for service of Court of Criminal Appeals decisions appropriate to its own organization and needs, in accordance with the increased flexibility allowed under the amendment of Article 67(c). *See* Military Justice Amendments of 1981, Pub.L. 97–81, 95 Stat. 1090.

Subsection (4) is based on the first paragraph of paragraph 105 *b* of MCM, 1969 (Rev.). *See also* Article 74.

Because R.C.M. 1203 is organized somewhat differently than paragraph 100 of MCM, 1969 (Rev.), the actions described in subsection (c) of this rule apply to cases referred by the Judge Advocate General to the Court of Criminal Appeals under Article 69 as well as Article 66. The actions described are appropriate for both types of cases, to the extent that they are applicable.

1986 Amendment: Subsection 5 is based on the second paragraph of paragraph 124 of MCM, 1969 (Rev.). The fourth sentence is based, in part, on *United States v. Williams*, 18 M.J. 533 (A.F.C.M.R. 1984). *See also United States v. Korzeniewski*, 7 U.S.C.M.A. 314, 22 C.M.R.104(1956); *United States v. Bledsoe*, 16 M.J. 977 (A.F.C.M.R. 1983). The provision assigning the burden of proof is consistent with amendments to R.C.M. 909(c)(2) and R.C.M. 916(k)(3)(A) which shifted to the defense the burden of showing lack of mental capacity to stand trial and lack of mental responsibility.

1998 Amendment: The change to the rule implements the creation of Article 57a, UCMJ, contained in section 1123 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 463-64 (1996). A sentence to confinement may be deferred by the Secretary concerned when it has been set aside by a Court of Criminal Appeals and a Judge Advocate General certifies the case to the Court of Appeals for the Armed Forces for further review under Article 67(a)(2). Unless it can be shown that the accused is a flight risk or a potential threat to the community, the accused should be released from confinement pending the appeal. *See Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990).

(d) *Notification to accused.* This subsection is based on Article 67(c) (as amended, *see* Military Justice Amendments of 1981, Pub.L. 97–81, § 5, 95 Stat. 1088-89) and on the first paragraph of paragraph 100 *c*(1)(a) of MCM, 1969 (Rev.) (*see* Exec. Order No. 12340 (Jan. 20, 1982)). The discussion is based on Article 67(b) and on the second paragraph of paragraph 100 *c*(1)(a) of MCM, 1969 (Rev.).

(e) *Cases not reviewed by the Court of Appeals for the Armed Forces.* Subsection (1) is based on the first sentence of paragraph 100 *c*(1)(b) of MCM, 1969 (Rev.). *See* Article 71(b). Subsection (2) is based on the last sentence of paragraph 100c(1)(a) of MCM, 1969 (Rev.). *See* Article 66(e).

(f) *Scope.* This subsection clarifies that the procedures for Government appeals of interlocutory rulings at trial are governed by R.C.M. 908.

Rule 1204. Review by the Court of Appeals for the Armed Forces

(a) *Cases reviewed by the Court of Appeals for the Armed Forces.* This subsection is based on the ninth sentence of Article 67(a)(1), on Article 67(b), and on the second sentence in Article 69. It generally repeats the first paragraph of paragraph 101 of MCM, 1969 (Rev.) except insofar as that paragraph provided for mandatory review by the Court of Appeals for the Armed Forces of cases affecting general and flag officers. *See* Article 67(b)(1), as amended by the Military Justice Act of 1983, Pub.L. No. 98–209, § 7(d), 97 Stat. 1393 (1983). The first paragraph in the discussion is based on Article 67(a), (d), and (e), which were repeated in the second and third paragraphs of paragraph 101 of MCM, 1969 (Rev.). The second paragraph in the discussion is

based on *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966); 28 U.S.C. § 1651(a). *See also Noyd v. Bond*, 395 U.S. 683, 695 n. 7 (1969); *United States v. Augenblick*, 393 U.S. 348 (1969); *Dobzynski v. Green* 16 M.J. 84 (C.M.A. 1983); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Labella*, 15 M.J. 228 (C.M.A. 1983); *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982); *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981); *Cooke v. Ellis*, 12 M.J. 17 (C.M.A. 1981); *Vorbeck v. Commanding Officer*, 11 M.J. 480 (C.M.A. 1981); *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981); *United States v. Strow*, 11 M.J. 75 (C.M.A. 1981); *Stewart v. Stevens*, 5 M.J. 220 (C.M.A. 1978); *Corley v. Thurman*, 3 M.J. 192 (C.M.A. 1977); *McPhail v. United States*, 1 M.J. 457 (C.M.A. 1976); *Brookins v. Cullins*, 23 U.S.C.M.A. 216, 49 C.M.R. 5 (1974); *Chenoweth v. Van Arsdall*, 22 U.S.C.M.A. 183, 46 C.M.R. 5 (1970); *United States v. Snyder*, 18 U.S.C.M.A. 480, 40 C.M.R. 192 (1969); *United States v. Bevilacqua*, 18 U.S.C.M.A. 10, 39 C.M.R. 10 (1968); *Gale v. United States*, 17 U.S.C.M.A. 40, 37 C.M.R. 304 (1967).

(b) *Petition by the accused for review by the Court of Appeals for the Armed Forces.* Subsection (1) is based on the last paragraph of paragraph 102 *b* of MCM, 1969 (Rev.). Note that if the case reached the Court of Criminal Appeals by an appeal by the Government under R.C.M. 908, the accused would already have detailed defense counsel. Subsection (2) is based on C.M.A.R. 19(a)(3).

(c) *Action on decision by the Court of Appeals for the Armed Forces.* Subsection (1) substantially repeats Article 67(f) as did its predecessor, the fourth paragraph of paragraph 101 of MCM, 1969 (Rev.) except that paragraph did not address possible review by the Supreme Court. *See* Article 67(h); 28 U.S.C. § 1259. Subsections (2) and (3) are based on Article 71(a) and (b) and on the last paragraph of paragraph 101 of MCM, 1969 (Rev.). Subsection (4) is new and reflects the possibility of review by the Supreme Court. *See* Article 67(h); 28 U.S.C. § 1259. *See also* Article 71.

Rule 1205. Review by the Supreme Court

This rule is new and is based on Article 67(h); 28 U.S.C. §§ 1259, 2101. *See* Military Justice Act of 1983, Pub.L. No. 98–209, § 10, 97 Stat. 1393 (1983).

Rule 1206. Powers and responsibilities of the Secretary

(a) *Sentences requiring approval by the Secretary.* This subsection is based on the first sentence of Article 71(b).

(b) *Remission and suspension.* Subsection (1) is based on Article 74(a). Subsection (2) is based on Article 74(b). Subsection (3) is based on the second paragraph of paragraph 105 *b* of MCM, 1969 (Rev.). *See* Exec. Order No. 10498 (Nov. 4, 1953), 18 Fed.Reg. 7003. The reference in paragraph 105 *a* of MCM, 1969 (Rev.) to Secretarial authority to commute sentences in deleted here as unnecessary. *See* Article 71(b).

Rule 1207. Sentences requiring approval by the President

This rule is based on the first sentence of Article 71(a). Paragraph 105 *a* of MCM, 1969 (Rev.), which stated the President's power to commute sentences, is deleted. Such a statement is unnecessary. *See also* U.S. Const. art. II, § 2, cl. 1; *Schick v. Reed*, 419 U.S. 256 (1974).

Rule 1208. Restoration

Introduction. This rule is based on Article 75.

(a) *New trial.* This subsection is based on paragraph 110 *d* of MCM, 1969 (Rev.). It has been modified based on the modification of the procedure for executing sentences in new trials. *See* Analysis, R.C.M. 1209. The last two paragraphs in paragraph 110 *d* are omitted here. They repeated Article 75(b) and (c), which are referred to in the discussion.

(b) *Other cases.* This subsection is based on paragraph 106 of MCM, 1969 (Rev.).

Rule 1209. Finality of courts-martial

(a) *When a conviction is final.* This subsection is based on Article 71(c), as amended, *see* Military Justice Act of 1983, Pub.L. No. 98–209, § 5(e)(1), 97 Stat. 1393 (1983). *See also* Article 64. Note that subsection (2)(B) qualifies (2)(A) even if the officer exercising general court-martial jurisdiction over the accused (or that officer's successor) approves the findings and sentence, the conviction is not final if review by the Judge Advocate General is required. *See* Article 64(c)(3); R.C.M. 1201(b)(2). As to the finality of an acquittal or disposition not amounting to findings of guilty, *see* Article 44; R.C.M. 905(g). *See also Grafton v. United States*, 206U.S. 333 (1907).

(b) *Effect of finality.* This subsection is taken from Article 76 and paragraph 108 of MCM, 1969 (Rev.). *See also* Article 69(b).

Rule 1210. New trial

This rule is based on Article 73 and is based on paragraphs 109 and 110 of MCM, 1969 (Rev.). Some matters in those paragraphs (*e.g.*, paragraphs 110 *a*(2) and 109 *d*) are covered in other rules. *See* R.C.M. 810; 1209. The second sentence of paragraph 109 *d*(1) has been deleted as unnecessary and potentially confusing. Subsections (f)(2) and (3) adequately describe the standards for a new trial. The rule is generally consistent with Fed.R.Crim. P. 33, except insofar as Article 73 provides otherwise. As to subsection (f), *see also United States v. Bacon*, 12 M.J. 489 (C.M.A. 1982); *United States v. Thomas*, 11 M.J. 135 (C.M.A. 1981). With respect to the second example under subsection (f)(3) of this rule, it should be noted that if the information concealed by the prosecution was specifically requested by the defense, a different standard may apply. *See United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963). *See also United States v. Horsey*, 6 M.J. 112 (C.M.A. 1979). The second sentence of paragraph 110 *f* of MCM, 1969 (Rev.) has been deleted. *See* Analysis, R.C.M. 1107(f)(3)(D)(i).

Subsections (h)(3), (4), and (5) have been modified to permit the convening authority of a new trial to take action in the same way as in a rehearing; i.e., the convening authority may, when otherwise authorized to do so (see R.C.M. 1113), order the sentence executed. Forwarding a new trial to the Judge Advocate General is not required just because the case was a new trial. The special circumstances of a new trial do not necessitate such different treatment in post-trial action.

1998 Amendment: R.C.M. 1210(a) was amended to clarify its application consistent with interpretations of Fed. R. Crim. P. 33

that newly discovered evidence is never a basis for a new trial of the facts when the accused has pled guilty. *See United States v. Lambert*, 603 F.2d 808, 809 (10th Cir. 1979); *see also United States v. Gordon*, 4 F.3d 1567, 1572 n.3 (10th Cir. 1993), *cert. denied*, 510 U.S. 1184 (1994); *United States v. Collins*, 898 F.2d 103 (9th Cir. 1990)(per curiam); *United States v. Prince*, 533 F.2d 205 (5th Cir. 1976); *Williams v. United States*, 290 F.2d 217 (5th Cir. 1961). *But see United States v. Brown*, 11 U.S.C.M.A. 207, 211, 29 C.M.R. 23, 27 (1960)(per Latimer, J.)(newly discovered evidence could be used to attack guilty plea on appeal in era prior to the guilty plea examination mandated by *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969) and R.C.M. 910(e)). Article 73 authorizes a petition for a new trial of the facts when there has been a trial. When there is a guilty plea, there is no trial. See R.C.M. 910(j). The amendment is made in recognition of the fact that it is difficult, if not impossible, to determine whether newly discovered evidence would have an impact on the trier of fact when there has been no trier of fact and no previous trial of the facts at which other pertinent evidence has been adduced. Additionally, a new trial may not be granted on the basis of newly discovered evidence unless "[t]he newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused." R.C.M. 1210(f)(2)(C).

CHAPTER XIII. SUMMARY COURTS-MARTIAL

Rule 1301. Summary courts-martial generally

(a) *Composition.* The first sentence is based on Article 16(3). In the second sentence the express authority for the Secretary concerned to provide for the summary court-martial to be from a different service than the accused is new. Paragraph 4 *g*(2) of MCM, 1969 (Rev.) included this statement: "However, a summary court-martial will be a member of the same armed force as the accused." The fact that this statement was included in a subparagraph entitled "Joint command or joint task force" left unclear what rule applied in other commands. The Working Group elected to clarify the situation by stating a general prohibition against detailing a summary court-martial from a service different from that of the accused, but allowing the service Secretaries to provide exceptions. This is based on the desirability of having the summary court-martial be from the same service as the accused, but recognizes that under some circumstances, as where a small unit of one service is collocated with another service, greater flexibility is needed, especially in order to comply with the policy in the third sentence of this subsection. The expression of policy in the third sentence is based on paragraph 4 *c* of MCM, 1969 (Rev.). The fourth sentence is based on Article 24(b) and the fifth sentence of the first paragraph of paragraph 5 *c* of MCM, 1969 (Rev.). The last sentence is based on the last sentence of the first paragraph of paragraph 5 cof MCM, 1969 (Rev.), but has been modified to clarify that the summary court-martial may be from outside the command of the summary court-martial convening authority.

(b) *Function.* This subsection is based on paragraph 79 *a* of MCM, 1969 (Rev.). The rule does not restrict other lawful functions which a summary court-martial may perform under the Code. *See, e.g.,* Article 136. A summary court-martial appointed to dispose of decedent's effects under 10 U.S.C. § 4712 or 10 U.S.C. § 9712 is not affected by these rules. *See also* R.C.M. 101 and 201(a).

(c) *Jurisdiction.* This subsection is based on the first sentence of Article 20 and the first sentence of paragraph 16 *a* of MCM, 1969 (Rev.). The reference to Chapter II was added to bring attention to other jurisdictional standards which may apply to summary courts-martial.

(d) *Punishments.* This subsection is based on paragraph 16 *b* of MCM, 1969 (Rev.), and Article 20.

(e) *Counsel.* The code does not provide a right to counsel at a summary court-martial (Articles 27 and 38.). The Supreme Court of the United States held in *Middendorf v. Henry*, 425 U.S. 25 (1976), that an accused is not entitled to counsel in summary courts-martial, and that confinement may be adjudged notwithstanding the failure to provide the accused with counsel. In so holding, the Court distinguished summary courts-martial from civilian criminal proceedings at which counsel is required. *See Argersigner v. Hamlin*, 407 U.S. 25 (1972). Although the issue in *Middendorf v. Henry, supra*, was whether counsel must be provided to an accused at a summary court-martial, the Court's opinion clearly indicates that there is no right to any counsel (including retained counsel) at summary courts-martial. It is within the discretion of the convening authority to detail, or otherwise make available, a military attorney to represent the accused at a summary court-martial.

This rule does not provide a right to consult with counsel prior to a summary court-martial. There is no constitutional or statutory basis for such a right. *United States v. Mack*, 9 M.J. 300, 320-21 (C.M.A. 1980). A requirement for such consultation, although desirable under some circumstances, is unfeasible under others wherein it impedes the purposes of summary courts-martial by significantly delaying the proceedings. At present, the admissibility of a summary court-martial without a prior opportunity to consult with counsel in subsequent courts-martial has not been fully resolved. *United States v. Mack, supra; United States v. Booker*, 5 M.J. 238 (C.M.A. 1977). *See United States v. Kuehl*, 11 M.J. 126 (C.M.A. 1981).

(f) *Power to obtain witnesses and evidence.* This subsection is based on Article 46 and 47 and paragraphs 79 *b* and 115 of the MCM, 1969 (Rev.).

(g) *Secretarial limitations.* This subsection is new and recognizes the implicit authority of the service secretaries to provide additional rules, such as those governing the exercise of summary court-martial jurisdiction.

Rule 1302. Convening a summary court-martial

(a) *Who may convene summary courts-martial.* This subsection is based on Article 24(a) and paragraph 5 *c* of MCM, 1969 (Rev.).

(b) *When convening authority is the accuser.* This subsection is based on the second paragraph of paragraph 5 *c* of MCM, 1969 (Rev.).

(c) *Procedure.* This subsection clarifies that a separate written order is not necessary to convene a summary court-martial; this may be done directly on the charge sheet. Because there is little difference between summary, special, and general courts-martial with respect to the initiation and forwarding of charges, these procedures are simply referred to in the rule.

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

This rule is based on Article 20 and the second and third sentences of paragraph 16 *a* of MCM, 1969 (Rev.). Arraignment ends the right to object because arraignment is the point at which the accused is "brought to trial" within the meaning of Article 20.

Rule 1304. Trial procedure

(a) *Pretrial duties.* This subsection is based on paragraphs 79 *c* and 33 *d* of MCM, 1969 (Rev.).

(b) *Summary court-martial procedure.* Paragraph 79 *a* of MCM, 1969 (Rev.), suggested that the summary court-martial use the general court-martial trial guide. However, the general court-martial trial guide is inadequate for the person who ordinarily conducts the summary court-martial. The trial guide in Appendix 9 of this Manual was drafted to assist the lay presiding officer at summary courts-martial and incorporate the rules prescribed in this chapter.

Subsection (1) is based on paragraph 79 *d*(1) of MCM, 1969 (Rev.). The requirement to inform the accused of the date of referral was added to subsection (1)(B) to assist the accused in making motions to dismiss or for other relief. Subsection (1)(E) is intended to more fully inform the accused of the scope of the evidence (testimonial, documentary, and physical) expected to be introduced. Subsection (1)(F) is new and is designed to assist the accused in making motions and presenting evidence in defense and in extenuation and mitigation. Subsection (1)(G) is new and is designed to assure the accused that no evidence, including statements previously made to the officer detailed to conduct the summary court-martial, will be considered unless admitted in accordance with the Military Rules of Evidence. Subsection (1)(H) is new. Subsection (1)(L) is expanded to assure the accused that the exercise of rights guaranteed under the Fifth Amendment and Article 31 will not be held against the accused.

Subsection (2)(A) is based on Article 20 and the second paragraph of paragraph 79 *d*(1) of MCM, 1969 (Rev.).

Subsection (2)(B) is based on paragraph 79 *d*(2) of MCM, 1969 (Rev.).

Subsection (2)(C) is new. MCM, 1969 (Rev.) did not clarify the timing of motions in summary courts-martial.

Subsection (2)(D)(ii) is new and designed to standardize the guilty plea inquiry by referring the summary court-martial to R.C.M. 909 which prescribed the inquiry for summary, special, and general courts-martial. Subsections (2)(D)(i) and (iii) through (v) are based on paragraph 79 *d*(2) of MCM, 1969 (Rev.). The provision in paragraph 79 *d*(2) which provided for hearing evidence on the offense(s) in a guilty plea case is omitted here because this procedure is covered in R.C.M. 1001(b)(4).

Subsection (2)(E)(i) is based on Mil. R. Evid. 101 and 1101. Subsections (2)(E)(ii) through (iv) are based on paragraph 79 *d*(3) of MCM, 1969 (Rev.).

Subsections (2)(F)(i) through (iii) are based on paragraph 79 *d*(4) of MCM, 1969 (Rev.). Note that the summary court-martial may consider otherwise admissible records from the accused's personnel file under R.C.M. 1001(b)(2). This was not permitted under MCM, 1969 (Rev.) before the amendment of paragraph 75 on 1 August 1981. *See* Exec. Order No. 12315 (July 29, 1981). Subsection (2)(F)(iv) is new and fulfills the summary court-martial's post-trial responsibility to protect the interests of the accused by informing the accused of post-trial rights.

Subsection (2)(F)(v) is new and designed to inform the convening authority of any suspension recommendation and deferment request before receipt of the record of trial. Subsection (2)(F)(vi) modifies paragraph 79 *d*(4) of MCM, 1969 (Rev.). It recognizes the custodial responsibility of the summary court-martial over an accused sentenced to confinement until the accused is delivered to the commander or the commander's designee. It does not address the subsequent disposition of the accused, as this is a prerogative of the commander.

Rule 1305. Record of trial

(a) *In general.* This rule is based on paragraphs 79 *e* and 91 *c* of MCM, 1969 (Rev.) insofar as they prescribed that the record of trial of a summary court-martial will consist of a notation of key events at trial and insofar as they permitted the convening or higher authority to require additional matters in the record. Additional requirements may be established by the Secretary concerned, the convening authority, or other competent authority. The modification of the format of the charge sheet (*see* Appendix 4) eliminated it as the form for the record of trial of a summary court-martial. A separate format is now provided at Appendix 15.

(b) *Contents.* This subsection is based on paragraphs 79*e* and 91*c* of MCM, 1969 (Rev.).

1986 Amendment: R.C.M. 1305(b)(2) was amended to delete the requirement that the record of trial in summary courts-martial reflect the number of previous convictions considered. The Committee concluded that this requirement had only slight utility and also noted that DD Form 2329, which serves as the record of trial in summary courts-martial, has no entry for this information. The Committee also noted that the Services each have requirements for retaining documents introduced at summary courts-martial with the record of trial.

(c) *Authentication.* This subsection is based on paragraph 79*e* of MCM, 1969 (Rev.).

(d) *Medical Certificate.* This subsection is based on paragraphs 91*c* and 125 of MCM, 1969 (Rev.).

(e) *Forwarding copies of the record.* Subsection (1) is based on Article 60(b)(2). Subsection (2) is based on the third paragraph of paragraph 91*c* of MCM, 1969 (Rev.). Subsection (3) is self-explanatory.

Rule 1306. Post-trial procedure

(a) *Accused's post-trial petition.* This subsection is based on Article 60(b). *Cf.* Article 38(c).

(b) *Convening authority's action.* Subsection (1) refers to the detailed provisions concerning the convening authority's initial review and action in R.C.M. 1107. The time period is based on Article 60(b)(1). Subsections (2) through (4) are based on paragraph 90*e* of the MCM, 1969 (Rev.). Subsection (2) is modified to reflect that the accused ordinarily will receive a copy of the record before action is taken. *See* Article 60(b)(2).

(c) *Review by a judge advocate.* This subsection is based on Article 64.

(d) *Review by the Judge Advocate General.* This subsection is based on Article 69 and refers to the detailed provisions governing such requests for review in R.C.M. 1201.

APPENDIX 22
ANALYSIS OF THE MILITARY RULES OF EVIDENCE

SECTION I
General Provisions

The Military Rules of Evidence, promulgated in 1980 as Chapter XXVII of the Manual for Courts-Martial, United States, 1969 (Rev. ed.), were the product of a two year effort participated in by the General Counsel of the Department of Defense, the United States Court of Military Appeals, the Military Departments, and the Department of Transportation. The Rules were drafted by the Evidence Working Group of the Joint Service Committee on Military Justice, which consisted of Commander James Pinnell, JAGC, U.S. Navy, then Major John Bozeman, JAGC, U.S. Army (from April 1978 until July 1978), Major Fredric Lederer, JAGC, U.S. Army (from August 1978), Major James Potuk, U.S. Air Force, Lieutenant Commander Tom Snook, U.S. Coast Guard, and Mr. Robert Mueller and Ms. Carol Wild Scott of the United States Court of Military Appeals. Mr. Andrew Effron represented the Office of the General Counsel of the Department of Defense on the Committee. The draft rules were reviewed and, as modified, approved by the Joint Service Committee on Military Justice. Aspects of the Rules were reviewed by the Code Committee as well. *See* Article 67(g). The Rules were approved by the General Counsel of the Department of Defense and forwarded to the White House via the Office of Management and Budget which circulated the Rules to the Departments of Justice and Transportation.

The original Analysis was prepared primarily by Major Fredric Lederer, U.S. Army, of the Evidence Working Group of the Joint Service Committee on Military Justice and was approved by the Joint Service Committee on Military Justice and reviewed in the Office of the General Counsel of the Department of Defense. The Analysis presents the intent of the drafting committee; seeks to indicate the source of the various changes to the Manual, and generally notes when substantial changes to military law result from the amendments. This Analysis is not, however, part of the Executive Order modifying the present Manual nor does it constitute the official views of the Department of Defense, the Department of Transportation, the Military Departments, or of the United States Court of Military Appeals.

The Analysis does not identify technical changes made to adapt the Federal Rules of Evidence to military use. Accordingly, the Analysis does not identify changes made to make the Rules gender neutral or to adapt the Federal Rules to military terminology by substituting, for example, "court members" for "jury" and "military judge" for "court". References within the Analysis to "the 1969 Manual" and "MCM, 1969 (Rev.)" refer to the Manual for Courts-Martial, 1969 (Rev. ed.) (Executive Order 11,476, as amended by Executive Order 11,835 and Executive Order 12,018) as it existed prior to the effective date of the 1980 amendments. References to "the prior law" and "the prior rule" refer to the state of the law as it existed prior to the effective date of the 1980 amendments. References to the "Federal Rules of Evidence Advisory Committee" refer to the Advisory Committee on the Rules of Evidence appointed by the Supreme Court, which prepared the original draft of the Federal Rules of Evidence.

During the Manual revision project that culminated in promulgation of the Manual for Courts-Martial, 1984 (Executive Order 12473), several changes were made in the Military Rules of Evidence, and the analysis of those changes was placed in Appendix 21. Thus, it was intended that this Appendix would remain static. In 1985, however, it was decided that changes in the analysis of the Military Rules of Evidence would be incorporated into this Appendix as those changes are made so that the reader need consult only one document to determine the drafters' intent regarding the current rules. Changes are made to the Analysis only when a rule is amended. Changes to the Analysis are clearly marked, but the original Analysis is not changed. Consequently, the Analysis of some rules contains analysis of language subsequently deleted or amended.

In addition, because this Analysis expresses the intent of the drafters, certain legal doctrines stated in this Analysis may have been overturned by subsequent case law. This Analysis does not substitute for research about current legal rules.

Several changes were made for uniformity of style with the remainder of the Manual. Only the first word in the title of a rule is capitalized. The word "rule" when used in text to refer to another rule, was changed to "Mil. R. Evid." to avoid confusion with the Rules for Courts-Martial. "Code" is used in place of Uniform Code of Military Justice. "Commander" is substituted for "commanding officer" and "officer in charge." *See* R.C.M. 103(5). Citations to the United States Code were changed to conform to the style used elsewhere. "Government" is capitalized when used as a noun to refer to the United States Government. In addition, several cross-references to paragraphs in MCM, 1969 (Rev.) were changed to indicate appropriate provisions in this Manual.

With these exceptions, however, the Military Rules of Evidence were not redrafted. Consequently, there are minor variations in style or terminology between the Military Rules of Evidence and other parts of the Manual. Where the same subject is treated in similar but not identical terms in the Military Rules of Evidence and elsewhere, a different meaning or purpose should not be inferred in the absence of a clear indication in the text or the analysis that this was intended.

Rule 101. Scope

(a) *Applicability.* Rule 101(a) is taken generally from Federal Rule of Evidence 101. It emphasizes that these Rules are applicable to summary as well as to special and general courts-martial. *See* "Rule of Construction." Rule 101(c), *infra.* Rule 1101 expressly indicates that the rules of evidence are inapplicable to investigative hearings under Article 32, proceedings for pretrial advice, search authorization proceedings, vacation proceedings, and certain other proceedings. Although the Rules apply to sentencing, they may be "relaxed" under Rule 1101(c) and R.C.M. 1001(c)(3).

The limitation in subdivision (a) applying the Rules to courts-martial is intended expressly to recognize that these Rules are not applicable to military commissions, provost courts, and courts of

inquiry unless otherwise required by competent authority. *See* Part I, Para. 2 of the Manual. The Rules, however, serve as a "guide" for such tribunals. *Id.*

The Military Rules of Evidence are inapplicable to proceedings conducted pursuant to Article 15 of the Uniform Code of Military Justice.

The decisions of the United States Court of Appeals for the Armed Forces and of the Courts of Criminal Appeals must be utilized in interpreting these Rules. While specific decisions of the Article III courts involving rules which are common both to the Military Rules and the Federal Rules should be considered very persuasive, they are not binding; *see* Article 36 of the Uniform Code of Military Justice. It should be noted, however, that a significant policy consideration in adopting the Federal Rules of Evidence was to ensure, where possible, common evidentiary law.

(b) *Secondary sources.* Rule 101(b) is taken from Para. 137 of MCM, 1969 (Rev.) which had its origins in Article 36 of the Uniform Code of Military Justice. Rule 101(a) makes it clear that the Military Rules of Evidence are the primary source of evidentiary law for military practice. Notwithstanding their wide scope, however, Rule 101(b) recognizes that recourse to secondary sources may occasionally be necessary. Rule 101(b) prescribes the sequence in which such sources shall be utilized.

Rule 101(b)(1) requires that the first such source be the "rules of evidence generally recognized in the trial of criminal cases in the United States District courts." To the extent that a Military Rule of Evidence reflects an express modification of a Federal Rule of Evidence or a federal evidentiary procedure, the President has determined that the unmodified Federal Rule or procedure is, within the meaning of Article 36(a), either not "practicable" or is "contrary to or inconsistent with" the Uniform Code of Military Justice. Consequently, to the extent to which the Military Rules do not dispose of an issue, the Article III Federal practice when practicable and not inconsistent or contrary to the Military Rules shall be applied. In determining whether there is a rule of evidence "generally recognized", it is anticipated that ordinary legal research shall be involved with primary emphasis being placed upon the published decisions of the three levels of the Article III courts.

Under Rule 1102, which concerns amendments to the Federal Rules of Evidence, no amendment to the Federal Rules shall be applicable to courts-martial until 180 days after the amendment's effective date unless the President shall direct its earlier adoption. Thus, such an amendment cannot be utilized as a secondary source until 180 days has passed since its effective date or until the President had directed its adoption, whichever occurs first. An amendment will not be applicable at any time if the President so directs.

It is the intent of the Committee that the expression, "common law" found within Rule 101(b)(2) be construed in its broadest possible sense. It should include the federal common law and what may be denominated military common law. Prior military cases may be cited as authority under Rule 101(b)(2) to the extent that they are based upon a present Manual provision which has been retained in the Military Rules of Evidence or to the extent that they are not inconsistent with the "rules of evidence generally recognized in the trial of criminal cases in the United States District courts," deal with matters "not otherwise prescribed in this Manual or these rules," and are "practicable and not inconsistent with or contrary to the Uniform Code of Military justice or this Manual."

(c) *Rule of construction.* Rule 101(c) is intended to avoid unnecessary repetition of the expressions, "president of a special court-martial without a military judge" and "summary court-martial officer". "Summary court-martial officer" is used instead of "summary court-martial" for purposes of clarity. A summary court-martial is considered to function in the same role as a military judge notwithstanding possible lack of legal training. As previously noted in Para. 137, MCM, 1969 (Rev.), "a summary court-martial has the same discretionary power as a military judge concerning the reception of evidence." Where the application of these Rules in a summary court-martial or a special court-martial without a military judge is different from the application of the Rules in a court-martial with a military judge, specific reference has been made.

Disposition of present Manual. That part of Para. 137, MCM, 1969 (Rev.), not reflected in Rule 101 is found in other rules, *see, e.g.,* Rules 104, 401, 403. The reference in Para. 137 to privileges arising out of treaty or executive agreement was deleted as being unnecessary. *See generally* Rule 501.

Rule 102. Purpose and construction

Rule 102 is taken without change from Federal Rule of Evidence 102 and is without counterpart in MCM, 1969 (Rev.). It provides a set of general guidelines to be used in construing the Military Rules of Evidence. It is, however, only a rule of construction and not a license to disregard the Rules in order to reach a desired result.

Rule 103. Rulings on evidence

(a) *Effect of erroneous ruling.* Rule 103(a) is taken from the Federal Rule with a number of changes. The first, the use of the language, "the ruling materially prejudices a substantial right of a party" in place of the Federal Rule's "a substantial right of party is affected" is required by Article 59(a) of the Uniform Code of Military Justice. Rule 103(a) comports with present military practice.

The second significant change is the addition of material relating to constitutional requirements and explicitly states that errors of constitutional magnitude may require a higher standard than the general one required by Rule 103(a). For example, the harmless error rule, when applicable to an error of constitutional dimensions, prevails over the general rule of Rule 103(a). Because Section III of these Rules embodies constitutional rights, two standards of error may be at issue; one involving the Military Rules of Evidence, and one involving the underlying constitutional rule. In such a case, the standard of error more advantageous to the accused will apply.

Rule 103(a)(1) requires that a timely motion or objection generally be made in order to preserve a claim of error. This is similar to but more specific than prior practice. In making such a motion or objection, the party has a right to state the specific grounds of the objection to the evidence. Failure to make a timely and sufficiently specific objection may waive the objection for purposes of both trial and appeal. In applying Federal Rule 103(a), the Article III courts have interpreted the Rule strictly and held the defense to an extremely high level of specificity. *See, e.g., United States v. Rubin,* 609 F.2d 51, 61-63 (2d Cir. 1979)

(objection to form of witness's testimony did not raise or preserve an appropriate hearsay objection); *United States v. O'Brien*, 601 F.2d 1067 (9th Cir. 1979) (objection that prosecution witness was testifying from material not in evidence held inadequate to raise or preserve an objection under Rule 1006). As indicated in the Analysis of Rule 802, Rule 103 significantly changed military law insofar as hearsay is concerned. Unlike present law under which hearsay is absolutely incompetent, the Military Rules of Evidence simply treat hearsay as being inadmissible upon adequate objection; *see* Rules 803, 103(a). Note in the context of Rule 103(a) that R.C.M. 801(a)(3) (Discussion) states: "The parties are entitled to reasonable opportunity to properly present and support their contentions on any relevant matter."

An "offer of proof" is a concise statement by counsel setting forth the substance of the expected testimony or other evidence.

Rule 103(a) prescribes a standard by which errors will be tested on appeal. Although counsel at trial need not indicate how an alleged error will "materially prejudice a substantial right" in order to preserve error, such a showing, during or after the objection or offer, may be advisable as a matter of trial practice to further illuminate the issue for both the trial and appellate bench.

(b) *Record of offer*, and (c) *Hearing of members*— Rule 103(b) and (c) are taken from the Federal Rules with minor changes in terminology to adapt them to military procedure.

(d) *Plain error*— Rule 103(d) is taken from the Federal Rule with a minor change of terminology to adapt it to military practice and the substitution of "materially prejudices" substantial rights of "affecting" substantial rights to conform it to Article 59(a) of the Uniform Code of Military Justice.

Rule 104. Preliminary questions

(a) *Questions of admissibility generally*. Rule 104(a) is taken generally from the Federal Rule. Language in the Federal Rule requiring that admissibility shall be determined by the "court, subject to the provisions of subdivision (b)" has been struck to ensure that, subject to Rule 1008, questions of admissibility are solely for the military judge and not for the court-members. The deletion of the language is not intended, however, to negate the general interrelationship between subdivisions (a) and (b). When relevancy is conditioned on the fulfillment of a condition of fact, the military judge shall "admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

Pursuant to language taken from Federal Rule of Evidence 104(a), the rules of evidence, other than those with respect to privileges, are inapplicable to "preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence...." These exceptions are new to military law and may substantially change military practice. The Federal Rule has been modified, however, by inserting language relating to applications for continuances and determinations of witness availability. The change, taken from MCM, 1969 (Rev.), Para. 137, is required by the worldwide disposition of the armed forces which makes matters relating to continuances and witness availability particularly difficult, if not impossible, to resolve under the normal rules of evidence— particularly the hearsay rule.

A significant and unresolved issue stemming from the language of Rule 104(a) is whether the rules of evidence shall be applicable to evidentiary questions involving constitutional or statutory issues such as those arising under Article 31. Thus it is unclear, for example, whether the rules of evidence are applicable to a determination of the voluntariness of an accused's statement. While the Rule strongly suggests that rules of evidence are not applicable to admissibility determinations involving constitutional issues, the issue is unresolved at present.

(b) *Relevancy conditioned on fact.* Rule 104(b) is taken from the Federal Rule except that the following language had been added: "A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge." This material was added in order to clarify the rule and to explicitly preserve contemporary military procedure, Para. 57, MCM, 1969 (Rev.). Under the Federal Rule, it is unclear whether and to what extent evidentiary questions are to be submitted to the jury as questions of admissibility. Rule 104(b) has thus been clarified to eliminate any possibility, except as required by Rule 1008, that the court members will make an admissibility determination. Failure to clarify the rule would produce unnecessary confusion in the minds of the court members and unnecessarily prolong trials. Accordingly, adoption of the language of the Federal Rules without modification is impracticable in the armed forces.

(c) *Hearing of members.* Rule 104(c) is taken generally from the Federal Rule. Introductory material has been added because of the impossibility of conducting a hearing out of the presence of the members in a special court-martial without a military judge. "Statements of an accused" has been used in lieu of "confessions" because of the phrasing of Article 31 of the Uniform Code of Military Justice, which has been followed in Rules 301–306.

(d) *Testimony by accused.* Rule 104(d) is taken without change from the Federal Rule. Application of this rule in specific circumstances is set forth in Rule 304(f), 311(f) and 321(e).

(e) *Weight and credibility.* Rule 104(e) is taken without change from the Federal Rule.

Rule 105. Limited admissibility

Rule 105 is taken without change from the Federal Rule. In view of its requirement that the military judge restrict evidence to its proper scope "upon request," it overrules *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977) (holding that the military judge must *sua sponte* instruct the members as to use of evidence of uncharged misconduct) and related cases insofar as they *require* the military judge to *sua sponte* instruct the members. *See e.g.,* S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 50 (2d ed. 1977); *United States v. Sangrey*, 586 F.2d 1315 (9th Cir. 1978); *United States v. Barnes*, 586 F.2d 1052 (5th Cir. 1978); *United States v. Bridwell*, 583 F.2d 1135 (10th Cir. 1978); *but see United States v. Ragghianti*, 560 F.2d 1376 (9th Cir. 1977). This is compatible with the general intent of both the Federal and Military Rules in that they place primary if not full responsibility upon counsel for objecting to or limiting evidence. Note that the Rule 306, dealing with statements of co-accused, is more restrictive and protective than Rule 105. The military judge may, of course, choose to instruct *sua sponte* but need not do so. Failure to instruct *sua sponte* could potentially require a reversal only if such failure could be considered "plain error" within the meaning of Rule 103(d). Most

failures to instruct *sua sponte*, or to instruct, cannot be so considered in light of current case law.

Rule 106. Remainder of or related writings or recorded statements

Rule 106 is taken from the Federal Rule without change. In view of the tendency of fact-finders to give considerable evidentiary weight to written matters, the Rule is intended to preclude the misleading situation that can occur if a party presents only part of a writing or recorded statement. In contrast to Para. 140 *a*, MCM, 1969 (Rev.), which applies only to statements by an accused, the new Rule is far more expansive and permits a party to require the opposing party to introduce evidence. That aspect of Para. 140 *a*(b) survives as Rule 304(h)(2) and allows the defense to complete an alleged confession or admission offered by the prosecution. When a confession or admission is involved, the defense may employ both Rules 106 and 304(h)(2), as appropriate.

SECTION II

Judicial Notice

Rule 201. Judicial notice of adjudicative facts

(a) *Scope of Rule.* Rule 201(a) provides that Rule 201 governs judicial notice of adjudicative facts. In so doing, the Rule replaced MCM, 1969 (Rev.), Para. 147 *a*. The Federal Rules of Evidence Advisory Committee defined adjudicative facts as "simply the facts of the particular case" and distinguished them from legislative facts which it defined as "those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body," reprinted in S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 63 (2d ed. 1977). The distinction between the two types of facts, originated by Professor Kenneth Davis, can on occasion be highly confusing in practice and resort to any of the usual treatises may be helpful.

(b) *Kinds of facts.* Rule 201(b) was taken generally from the Federal Rule. The limitation with FED. R. EVID. 201(b)(1) to facts known "within the territorial jurisdiction of the trial court" was replaced, however, by the expression, "generally known universally, locally, or in the area, pertinent to the event." The worldwide disposition of the armed forces rendered the original language inapplicable and impracticable within the military environment. Notice of signatures, appropriate under Para. 147 *a*, MCM, 1969 (Rev.), will normally be inappropriate under this Rule. Rule 902(4) & (10) will, however, usually yield the same result as under Para. 147 *a*.

When they qualify as adjudicative facts under Rule 201, the following are examples of matters of which judicial notice may be taken:

The ordinary division of time into years, months, weeks and other periods; general facts and laws of nature, including their ordinary operations and effects; general facts of history; generally known geographical facts; such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute; such facts as are so generally known or are of such common notoriety in the area in which the trial is held that they cannot reasonably be the subject of dispute; and specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of reasonable indisputable accuracy.

(c) *When discretionary.* While the first sentence of the subdivision is taken from the Federal Rule, the second sentence is new and is included as a result of the clear implication of subdivision (e) and of the holding in *Garner v. Louisiana*, 368 U.S. 157, 173-74 (1961). In *Garner*, the Supreme Court rejected the contention of the State of Louisiana that the trial judge had taken judicial notice of certain evidence stating that:

There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice ... would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be to turn the doctrine into a pretext for dispensing with a trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon. 368 U.S. at 173

(d) *When mandatory.* Rule 201(d) provides that the military judge shall take notice when requested to do so by a party who supplies the military judge with the necessary information. The military judge must take judicial notice only when the evidence is properly within this Rule, is relevant under Rule 401, and is not inadmissible under these Rules.

(e) *Opportunity to be heard; Time of taking notice; Instructing Members.* Subdivisions (e), (f) and (g) of Rule 201 are taken from the Federal Rule without change.

Rule 201A. Judicial notice of law

In general. Rule 201A is new. Not addressed by the Federal Rules of Evidence, the subject matter of the Rule is treated as a procedural matter in the Article III courts; *see e.g.*, FED R. CRIM. P. 26.1. Adoption of a new evidentiary rule was thus required. Rule 201A is generally consistent in principle with Para. 147 *a*, MCM, 1969 (Rev.).

Domestic law. Rule 201A(a) recognizes that law may constitute the adjudicative fact within the meaning of Rule 201(a) and requires that when that is the case, *i.e.*, insofar as a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Rule 201 must be applied. When domestic law constitutes only a legislative fact, *see* the Analysis to Rule 201(a), the procedural requirements of Rule 201 may be utilized as a matter of discretion. For purposes of this Rule, it is intended that "domestic law" include: treaties of the United States; executive agreements between the United States and any State thereof, foreign country or international organization or agency; the laws and regulations pursuant thereto of the United States, of the District of Columbia, and of a State, Commonwealth, or possession; international law, including the laws of war, general maritime law and the law of air and space; and the common law. This definition is taken without change from Para. 147 *a* except that references to the law of space have been added.

"Regulations" of the United States include regulations of the armed forces.

When a party requests that domestic law be noticed, or when the military judge *sua sponte* takes such notice, a copy of the applicable law should be attached to the record of trial unless the law in question can reasonably be anticipated to be easily available to any possible reviewing authority.

1984 Amendment: Subsection (a) was modified in 1984 to clarify that the requirements of Mil. R. Evid. 201(g) do not apply when judicial notice of domestic law is taken. Without this clarification, Mil. R. Evid. 201A could be construed to require the military judge to instruct the members that they could disregard a law which had been judicially noticed. This problem was discussed in *United States v. Mead*, 16 M.J. 270 (C.M.A.1983).

Foreign law. Rule 201A(b) is taken without significant change from FED R. CRIM. P 26.1 and recognizes that notice of foreign law may require recourse to additional evidence including testimony of witnesses. For purposes of this Rule, it is intended that "foreign law" include the laws and regulations of foreign countries and their political subdivisions and of international organizations and agencies. Any material or source received by the military judge for use in determining foreign law, or pertinent extracts therefrom, should be included in the record of trial as an exhibit.

SECTION III

Exclusionary Rules and Related Matters Concerning Self-Incrimination, Search and Seizure, and Eyewitness Identification

Military Rules of Evidence 301–306, 311–317, and 321 were new in 1980 and have no equivalent in the Federal Rules of Evidence. They represent a partial codification of the law relating to self-incrimination, confessions and admissions, search and seizure, and eye-witness identification. They are often rules of criminal procedure as well as evidence and have been located in this section due to their evidentiary significance. They replace Federal Rules of Evidence 301 and 302 which deal with civil matters exclusively.

The Committee believed it imperative to codify the material treated in Section III because of the large numbers of lay personnel who hold important roles within the military criminal legal system. Non-lawyer legal officers aboard ship, for example, do not have access to attorneys and law libraries. In all cases, the Rules represent a judgement that it would be impracticable to operate without them. *See* Article 36. The Rules represent a compromise between specificity, intended to ensure stability and uniformity with the armed forces, and generality, intended usually to allow change via case law. In some instances they significantly change present procedure. *See, e.g.*,Rule 304(d) (procedure for suppression motions relating to confessions and admissions).

Rule 301. Privilege concerning compulsory self-incrimination

(a) *General rule.* Rule 301(a) is consistent with the rule expressed in the first paragraph, Para. 150 *b* of MCM, 1969 (Rev.), but omits the phrasing of the privileges and explicitly states that, as both variations apply, the accused or witness receives the protection of whichever privilege may be the more beneficial. The fact that the privilege extends to a witness as well as an accused is inherent within the new phrasing which does not distinguish between the two.

The Rule states that the privileges are applicable only "to evidence of a testimonial or communicative nature," *Schmerber v. California*, 384 U.S. 757, 761 (1966). The meaning of "testimonial or communicative" for the purpose of Article 31 of the Uniform Code of Military Justice is not fully settled. Past decisions of the Court of Military Appeals have extended the Article 31 privilege against self-incrimination to voice and handwriting exemplars and perhaps under certain conditions to bodily fluids. *United States v. Ruiz*, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974). Because of the unsettled law in the area of bodily fluids, it is not the intent of the Committee to adopt any particular definition of "testimonial or communicative." It is believed, however, that the decisions of the United States Supreme Court construing the Fifth Amendment, *e.g., Schmerber v. California*, 384 U.S. 757 (1966), should be persuasive in this area. Although the right against self-incrimination has a number of varied justifications, its primary purposes are to shield the individual's thought processes from Government inquiry and to permit an individual to refuse to *create* evidence to be used against him. Taking a bodily fluid sample from the person of an individual fails to involve either concern. The fluid in question already exists; the individual's actions are irrelevant to its seizure except insofar as the health and privacy of the individual can be further protected through his or her cooperation. No persuasive reason exists for Article 31 to be extended to bodily fluids. To the extent that due process issues are involved in bodily fluid extractions, Rule 312 provides adequate protections.

The privilege against self-incrimination does not protect a person from being compelled by an order or forced to exhibit his or her body or other physical characteristics as evidence. Similarly, the privilege is not violated by taking the fingerprints of an individual, in exhibiting or requiring that a scar on the body be exhibited, in placing an individual's feet in tracks, or by trying shoes or clothing on a person or in requiring the person to do so, or by compelling a person to place a hand, arm, or other part of the body under the ultra-violet light for identification or other purposes.

The privilege is not violated by the use of compulsion in requiring a person to produce a record or writing under his or her control containing or disclosing incriminating matter when the record or writing is under control in a representative rather than a personal capacity as, for example, when it is in his or her control as the custodian for a non-appropriated fund. *See, e.g.,* Para. 150 *b* of MCM, 1969 (Rev.); *United States v. Sellers*, 12 U.S.C.M.A. 262, 30 C.M.R. 262 (1961); *United States v. Haskins*, 11 U.S.C.M.A. 365, 29 C.M.R. 181 (1960).

(b) *Standing.*

(1) *In general.* Rule 301(b)(1) recites the first part of the third paragraph of Para. 150 *b*, MCM, 1969 (Rev.) without change except that the present language indicating that neither counsel nor the court may object to a self-incriminating question put to the witness has been deleted as being unnecessary.

(2) *Judicial advice.* A clarified version of the military judge's responsibility under Para. 150 *b* of MCM, 1969 (Rev.) to warn an uninformed witness of the right against self-incrimination has

been placed in Rule 301(b)(2). The revised procedure precludes counsel asking in open court that a witness be advised of his or her rights, a practice which the Committee deemed of doubtful propriety.

(c) *Exercise of the privilege.* The first sentence of Rule 301(c) restates generally the first sentence of the second paragraph of Para. 150 *b*, MCM, 1969 (Rev.). The language "unless it clearly appears to the military judge" was deleted. The test involved is purely objective.

The second sentence of Rule 301(c) is similar to the second and third sentences of the second paragraph of Para. 150 *b* but the language has been rephrased. The present Manual's language states that the witness can be required to answer if for "any other reason, he can successfully object to being tried for any offense as to which the answer may supply information to incriminate him..." Rule 301(c) provides: "A witness may not assert the privilege if the witness is not subject to criminal penalty as a result of an answer by reason of immunity, running of the statute of limitations, or similar reason." It is believed that the new language is simpler and more accurate as the privilege is properly defined in terms of consequence rather than in terms of "being tried." In the absence of a possible criminal penalty, to include the mere fact of conviction, there is no risk of self-incrimination. It is not the intent of the Committee to adopt any particular definition of "criminal penalty." It should be noted, however, that the courts have occasionally found that certain consequences that are technically non-criminal are so similar in effect that the privilege should be construed to apply. *See e.g., Spevack v. Klein*, 385 U.S. 511 (1967); *United States v. Ruiz*, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974). Thus, the definition of "criminal penalty" may depend upon the facts of a given case as well as the applicable case law.

It should be emphasized that an accused, unlike a witness, need not take the stand to claim the privilege.

(1) *Immunity generally.* Rule 301(c)(1) recognizes that "testimonial" or "use plus fruits" immunity is sufficient to overcome the privilege against self-incrimination, *cf., United States v. Rivera*, 1 M.J. 107 (C.M.A. 1975), *reversing on other grounds*, 49 C.M.R. 259 (A.C.M.R. 1974), and declares that such immunity is adequate for purposes of the Manual. The Rule recognizes that immunity may be granted under federal statutes as well as under provisions of the Manual.

(2) *Notification of immunity or leniency.* The basic disclosure provision of Rule 301(c)(2) is taken from *United States v. Webster*, 1 M.J. 216 (C.M.A. 1975). Disclosure should take place prior to arraignment in order to conform with the timing requirements of Rule 304 and to ensure efficient trial procedure.

(d) *Waiver by a witness.* The first sentence of Rule 301(d) repeats without change the third sentence of the third paragraph of Para. 150 *b* of MCM, 1969 (Rev.).

The second sentence of the Rule restates the second section of the present subparagraph but with a minor change of wording. The present text reads: "The witness may be considered to have waived the privilege to this extent by having made the answer, but such a waiver will not extend to a rehearing or new or other trial," while the new language is: "This limited waiver of the privilege applies only at the trial at which the answer is given, does not extend to a rehearing or new or other trial, and is subject to Rule 608(b)."

(e) *Waiver by the accused.* Except for the reference to Rule 608(b), Rule 301 (e) generally restates the fourth sentence of the third subparagraph of Para. 149 *b*(1), MCM, 1969 (Rev.). "Matters" was substituted for "issues" for purposes of clarity.

The mere act of taking the stand does not waive the privilege. If an accused testifies on direct examination only as to matters not bearing upon the issue of guilt or innocence of any offense for which the accused is being tried, as in Rule 304 (f), the accused may not be cross-examined on the issue of guilt or innocence at all. *See* Para. 149 *b*(1), MCM, 1969 (Rev.) and Rule 608(b).

The last sentence of the third subparagraph of Para. 149 *b*(1), MCM, 1969 (Rev.) has been deleted as unnecessary. The Analysis statement above, "The mere act of taking the stand does not waive the privilege," reinforces the fact that waiver depends upon the actual content of the accused's testimony.

The last sentence of Rule 301(e) restates without significant change the sixth sentence of the third subparagraph of Para. 149 *b*(1), MCM, 1969 (Rev.).

(f) *Effect of claiming the privilege.*

(1) *Generally.* Rule 301(f)(1) is taken without change from the fourth subparagraph of Para. 150 *b*, MCM, 1969 (Rev.). It should be noted that it is ethically improper to call a witness with the intent of having the witness claim a valid privilege against self-incrimination in open court, *see, e.g.*, ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Prosecution Standard 3–5.7(c); Defense Standard 4–7.6(c) (Approved draft 1979).

Whether and to what extent a military judge may permit comment on the refusal of a witness to testify after his or her claimed reliance on the privilege against self-incrimination has been determined by the judge to be invalid is a question not dealt with by the Rule and one which is left to future decisions for resolution.

(2) *On cross-examination.* This provision is new and is intended to clarify the situation in which a witness who has testified fully on direct examination asserts the privilege against self-incrimination on cross-examination. It incorporates the prevailing civilian rule, which has also been discussed in military cases. *See e.g., United States v. Colon-Atienza*, 22 U.S.C.M.A. 399, 47 C.M.R. 336 (1973); *United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977). Where the assertion shields only "collateral" matters—*i.e.*, evidence of minimal importance (usually dealing with a rather distant fact solicited for impeachment purposes)—it is not appropriate to strike direct testimony. A matter is collateral when sheltering it would create little danger of prejudice to the accused. Where the privilege reaches the core of the direct testimony or prevents a full inquiry into the credibility of the witness, however, striking of the direct testimony would appear mandated. Cross-examination includes for the purpose of Rule 301 the testimony of a hostile witness called as if on cross-examination. *See* Rule 607. Depending upon the circumstances of the case, a refusal to strike the testimony of a Government witness who refuses to answer defense questions calculated to impeach the credibility of the witness may constitute prejudicial limitation of the accused's right to cross-examine the witness.

(3) *Pretrial.* Rule 301(f)(3) is taken generally from Para. 140 *a*(4), MCM, 1969 (Rev.) and follows the decisions of the United States Supreme Court in *United States v. Hale*, 422 U.S. 171 (1975) and *Doyle v. Ohio*, 426 U.S. 610 (1976). *See also United States v. Brooks*, 12 U.S.C.M.A. 423, 31 C.M.R. 9 (1961); *United States v. McBride*, 50 C.M.R. 126 (A.F.C.M.R. 1975). The prior Manual provision has been expanded to include a request to terminate questioning.

(g) *Instructions.* Rule 301(g) has no counterpart in the 1969 Manual. It is designed to address the potential for prejudice that may occur when an accused exercises his or her right to remain silent. Traditionally, the court members have been instructed to disregard the accused's silence and not to draw any adverse inference from it. However, counsel for the accused may determine that this very instruction may emphasize the accused's silence, creating a prejudicial effect. Although the Supreme Court has held that it is not unconstitutional for a judge to instruct a jury over the objection of the accused to disregard the accused's silence, it has also stated: "It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection." *Lakeside v. Oregon*, 435 U.S. 333, 340-41 (1978). Rule 301(g) recognizes that the decision to ask for a cautionary instruction is one of great tactical importance for the defense and generally leaves that decision solely within the hands of the defense. Although the military judge may give the instruction when it is necessary in the interests of justice, the intent of the Committee is to leave the decision in the hands of the defense in all but the most unusual cases. *See also* Rule 105. The military judge may determine the content of any instruction that is requested to be given.

(h) *Miscellaneous.* The last portion of paragraph 150 *b*, MCM, 1969 (Rev.), dealing with exclusion of evidence obtained in violation of due process has been deleted and its content placed in the new Rules on search and seizure. *See e.g.,* Rule 312, Bodily Views and Intrusions. The exclusionary rule previously found in the last subparagraph of Para. 150 *b* was deleted as being unnecessary in view of the general exclusionary rule in Rule 304.

Rule 302. Privilege concerning mental examination of an accused

Introduction. The difficulty giving rise to Rule 302 and its conforming changes is a natural consequence of the tension between the right against self-incrimination and the favored position occupied by the insanity defense. If an accused could place a defense expert on the stand to testify to his lack of mental responsibility and yet refuse to cooperate with a Government expert, it would place the prosecution in a disadvantageous position. The courts have attempted to balance the competing needs and have arrived at what is usually, although not always, an adequate compromise; when an accused has raised a defense of insanity through expert testimony, the prosecution may compel the accused to submit to Government psychiatric examination on pain of being prevented from presenting any defense expert testimony (or of striking what expert testimony has already presented). However, at trial the expert may testify *only* as to his or her conclusions and their basis and not as to the contents of any statements made by the accused during the examination. *See e.g., United States v. Albright*, 388 F.2d 719 (4th Cir. 1968); *United States v. Babbidge*, 18 U.S.C.M.A. 327, 40 C.M.R. 39 (1969). *See generally*, Lederer, *Rights Warnings in the Armed Services*, 72 Mil.L.Rev. 1 (1976); Holladay, *Pretrial Mental Examinations Under Military Law: A Re-Examination*, 16 A.F.L. Rev. 14 (1974). This compromise, which originally was a product of case law, is based on the premise that raising an insanity defense is an implied partial waiver of the privilege against self-incrimination and has since been codified in the Federal Rules of Criminal Procedure, FED. R. CRIM. P. 12-2, and MCM, 1969 (Rev.). Para. 140 *a*, 122 *b*, 150 *b*. The compromise, however, does not fully deal with the problem in the military.

In contrast to the civilian accused who is more likely to have access to a civilian doctor as an expert witness for the defense—a witness with no governmental status— the military accused normally must rely upon the military doctors assigned to the local installation. In the absence of a doctor-patient privilege, anything said can be expected to enter usual Government medical channels. Once in those channels there is nothing in the present Manual that prevents the actual psychiatric report from reaching the prosecution and release of such information appears to be common in contemporary practice. As a result, even when the actual communications made by the accused are not revealed by the expert witness in open court, under the 1969 Manual they may be studied by the prosecution and could be used to discover other evidence later admitted against the accused. This raises significant derivative evidence problems, *cf. United States v. Rivera*, 23 U.S.C.M.A. 430, 50 C.M.R. 389 (1975). One military judge's attempt to deal with this problem by issuing a protective order was commended by the Court of Military Appeals in an opinion that contained a caveat from Judge Duncan that the trial judge may have exceeded his authority in issuing the order, *United States v. Johnson*, 22 U.S.C.M.A. 424, 47 C.M.R. 401 (1973).

Further complicating this picture is the literal language of Article 31(b) which states, in part, that "No person subject to this chapter may ... request a statement from, an accused or a person suspected of an offense without first informing him ..." [of his rights].Accordingly, a psychiatrist who complies with the literal meaning of Article 31(b) may effectively and inappropriately destroy the very protections created by *Babbidge* and related cases, while hindering the examination itself. At the same time, the validity of warnings and any consequent "waiver" under such circumstances is most questionable because *Babbidge* never considered the case of an accused forced to choose between a waiver and a prohibited or limited insanity defense. Also left open by the present compromise is the question of what circumstances, if any, will permit a prosecutor to solicit the actual statements made by the suspect during the mental examination. In *United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977), the Court of Military Appeals held that the defense counsel had opened the door via his questioning of the witness and thus allowed the prosecution a broader examination of the expert witness than would otherwise have been allowed. At present, what constitutes "opening the door" is unclear. An informed defense counsel must proceed with the greatest of caution being always concerned that what may be an innocent question may be considered to be an "open sesame."

Under the 1969 Manual interpretation of *Babbidge*, *supra*, the accused could refuse to submit to a Government examination until after the actual presentation of defense expert testimony on the insanity issue. Thus, trial might have to be adjourned for a

substantial period in the midst of the defense case. This was conducive to neither justice nor efficiency.

A twofold solution to these problems was developed. Rule 302 provides a form of testimonial immunity intended to protect an accused from use of anything he might say during a mental examination ordered pursuant to Para. 121, MCM, 1969 (Rev.) (now R.C.M. 706, MCM, 1984). Paragraph 121 was modified to sharply limit actual disclosure of information obtained from the accused during the examination. Together, these provisions would adequately protect the accused from disclosure of any statements made during the examination. This would encourage the accused to cooperate fully in the examination while protecting the Fifth Amendment and Article 31 rights of the accused.

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

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

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

What is the accused's intelligence level?

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

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

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

Although Rule 302(c) does not apply to determinations of the competency of the accused to stand trial, paragraph 121 did prohibit access to the sanity board report by the trial counsel except as specifically authorized. In the event that the competency of an accused to stand trial was at issue, the trial counsel could request, pursuant to paragraph 121, that the military judge disclose the sanity board report to the prosecution. In such a case, the trial counsel who had read the report would be disqualified from prosecuting the case in chief if Rule 302(a) were applicable.

As indicated above, paragraph 121 required that the sanity board report be kept within medical channels except insofar as it would be released to the defense and, upon request, to the commanding officer of the accused. The paragraph expressly prohibited any person from supplying the trial counsel with information relating to the contents of the report. Care should be taken not to misconstrue the intent of the provision. The trial counsel is dealt with specifically because in the normal case it is only the trial counsel who is involved in the preparation of the case at the stage at which a sanity inquiry is likely to take place. Exclusion of evidence will result, however, even if the information is provided to persons other than trial counsel if such information is the source of derivative evidence. Rule 302 explicitly allows suppression of any evidence resulting from the accused's statement to the sanity board, and evidence derivative thereof, with limited exceptions as found in Rule 302. This is consistent with the theory behind the revisions which treats the accused's communication to the sanity board as a form of coerced statement required under a form of testimonial immunity. For example, a commander who has obtained the sanity board's report may obtain legal advice from a judge advocate, including the staff judge advocate, concerning the content of the sanity board's report. If the judge advocate uses the information in order to obtain evidence against the accused or provides it to another person who used it to obtain evidence to be used in the case, Rule 302 authorizes exclusion. Commanders must take great care when discussing the sanity board report with others, and judge advocates exposed to the report must also take great care to operate within the Rule.

(a) *General Rule.* Rule 302(a) provides that, absent defense offer, neither a statement made by the accused at a mental examination ordered under paragraph 121 nor derivative evidence thereof shall be received into evidence against the accused at trial on the merits or during sentencing when the Rule is applicable. This should be treated as a question of testimonial immunity for the purpose of determining the applicability of the exclusionary rule in the area. The Committee does not express an opinion as to whether statements made at such a mental examination or derivative evidence thereof may be used in making an adverse determination as to the disposition of the charges against the accused.

Subject to Rule 302(b), Rule 302(a) makes statements made by an accused at a paragraph 121 examination (now in R.C.M. 706(c), MCM 1984) inadmissible even if Article 31 (b) and counsel warnings have been given. This is intended to resolve problems arising from the literal interpretation of Article 31 discussed above. It protects the accused and enhances the validity of the examination.

(b) *Exceptions.* Rule 301(b) is taken from prior law; *see* Para. 122 *b*, MCM 1969 (Rev.). The waiver provision of Rule

302(b)(1) applies only when the defense makes explicit use of statements made by the accused to a sanity board or derivative evidence thereof. The use of lay testimony to present an insanity defense is not derivative evidence when the witness has not read the report.

(c) *Release of evidence.* Rule 302(c) is new and is intended to provide the trial counsel with sufficient information to reply to an insanity defense raised via expert testimony. The Rule is so structured as to permit the defense to choose how much information will be available to the prosecution by determining the nature of the defense to be made. If the accused fails to present an insanity defense or does so only through lay testimony, for example, the trial counsel will not receive access to the report. If the accused presents a defense, however, which includes specific incriminating statements made by the accused to the sanity board, the military judge may order disclosure to the trial counsel of "such statement ... as may be necessary in the interest of justice."

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

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

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

Rule 303. Degrading questions

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

A specific application of Rule 303 is in the area of sexual offenses. Under prior law, the victims of such offenses were often subjected to a probing and degrading cross-examination related to past sexual history— an examination usually of limited relevance at best. Rule 412 of the Military Rules of Evidence now prohibits such questioning, but Rule 412 is, however, not applicable to Article 32 hearings as it is only a rule of evidence; *see* Rule 1101. Rule 303 and Article 31(c) on the other hand, are rules of privilege applicable to all persons, military or civilian, and are thus fully applicable to Article 32 proceedings. Although Rule 303 (Article 31(c)) applies only to "military tribunals," it is apparent that Article 31(c) was intended to apply to courts-of-inquiry, and implicitly to Article 32 hearings. *The Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 975 (1949). The Committee intends that the expression "military tribunals" in Rule 303 includes Article 32 hearings.

Congress found the information now safeguarded by Rule 412 to be degrading. *See e.g.,* Cong. Rec. H119944-45 (Daily ed. Oct. 10, 1978) (Remarks of Rep. Mann). As the material within the constitutional scope of Rule 412 is inadmissible at trial, it is thus not relevant let alone "material." Consequently that data within the lawful coverage of Rule 412 is both immaterial and degrading and thus is within the ambit of Rule 303 (Article 31(c)).

Rule 303 is therefore the means by which the substance of Rule 412 applies to Article 32 proceedings, and no person may be compelled to answer a question that would be prohibited by Rule 412. As Rule 412 permits a victim to refuse to supply irrelevant and misleading sexual information at trial, so too does the substance of Rule 412 through Rule 303 permit the victim to refuse to supply such degrading information at an Article 32 for use by the defense or the convening authority. *See generally* Rule 412 and the Analysis thereto. It should also be noted that it would clearly be unreasonable to suggest that Congress in protecting the victims of sexual offenses from the degrading and irrelevant cross-examination formerly typical of sexual cases would have intended to permit the identical examination at a military preliminary hearing that is not even presided over by a legally trained individual. Thus public policy fully supports the application of Article 31(c) in this case.

1993 Amendment: R.C.M. 405(i) and Mil. R. Evid. 1101(d) were amended to make the provisions of Mil. R. Evid. 412 applicable at pretrial investigations. These changes ensure that the same protections afforded victims of nonconsensual sex offenses at trial are available at pretrial hearings. *See* Criminal Justice Subcommittee of House Judiciary Committee Report, 94th Cong., 2d Session, July 29, 1976. Pursuant to these amendments, Mil. R. Evid. 412 should be applied in conjunction with Mil. R. Evid. 303. As such, no witness may be compelled to answer a question calling for a personally degrading response prohibited by Rule 303. Mil. R. Evid. 412, however, protects the victim even if the victim does not testify. Accordingly, Rule 412 will prevent questioning of the victim or other witness if the questions call for responses prohibited by Rule 412.

Rule 304. Confessions and admissions

(a) *General rule.* The exclusionary rule found in Rule 304(a) is applicable to Rules 301–305, and basically restates prior law which appeared in paragraphs 140 *a*(6) and 150 *b*, MCM, 1969 (Rev.). Rule 304(b) does permit, however, limited impeachment use of evidence that is excludable on the merits. A statement that is not involuntary within the meaning of Rule 304(c)(3), Rule 305(a) or Rule 302(a) is voluntary and will not be excluded under this Rule.

The seventh paragraph of Para. 150 *b* of the 1969 Manual attempts to limit the derivative evidence rule to *statements* obtained through *compulsion* that is "applied by, or at the instigation or with the participation of, an *official or agent of the United States, or any State thereof or political subdivision of either, who was acting in a governmental capacity ...*" (emphasis added). Rule 304, however, makes all derivative evidence inadmissible. Although some support for the 1969 Manual limitations can be found in the literal phrasing of Article 31(d), the intent of the Article as indicated in the commentary presented during the

House hearings, *The Uniform Code of Military Justice, Hearing on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*,81st Cong., 1st Sess. 984 (1949), was to exclude "evidence" rather than just "statements." Attempting to allow admission of evidence obtained from statements which were the product of coercion, unlawful influence, or unlawful inducement would appear to be both against public policy and unnecessarily complicated. Similarly, the 1969 Manual's attempt to limit the exclusion of derivative evidence to that obtained through compulsion caused by "Government agents" has been deleted in favor of the simpler exclusion of all derivative evidence. This change, however, does not affect the limitation, as expressed in current case law, that the warning requirements apply only when the interrogating individual is either a civilian law enforcement officer or an individual subject to the Uniform Code of Military Justice acting in an official disciplinary capacity or in a position of authority over a suspect or accused. The House hearings indicate that all evidence obtained in violation of Article 31 was to be excluded and all persons subject to the Uniform Code of Military Justice may violate Article 31(a). Consequently, the attempted 1969 Manual restriction could affect at most only derivative evidence obtained from involuntary statements compelled by private citizens. Public policy demands that private citizens not be encouraged to take the law into their own hands and that law enforcement agents not be encouraged to attempt to circumvent an accused's rights via proxy interrogation.

It is clear that truly spontaneous statements are admissible as they are not "obtained" from an accused or suspect. An apparently volunteered statement which is actually the result of coercive circumstances intentionally created or used by interrogators will be involuntary. *Cf. Brewer v. Williams*, 430 U.S. 387 (1977), Rule 305(b)(2). Manual language dealing with this area has been deleted as being unnecessary.

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

1986 Amendment: Rule 304(b)(2) was added to incorporate the "inevitable discovery" exception to the exclusionary rule based on *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501 (1984); *see also United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982); Analysis of Rule 311(b)(2).

1990 Amendment: Subsection (b)(1) was amended by adding "the requirements of Mil. R. Evid. 305(c) and 305(f), or." This language expands the scope of the exception and thereby permits statements obtained in violation of Article 31(b), UCMJ, and Mil. R. Evid. 305(c) and (f) to be used for impeachment purposes or at a later trial for perjury, false swearing, or the making of a false official statement. *See Harris v. New York*, 401 U.S. 222 (1971); *cf. United States v. Williams*, 23 M.J. 362 (C.M.A. 1987). An accused cannot pervert the procedural safeguards of Article 31(b) into a license to testify perjuriously in reliance on the Government's disability to challenge credibility utilizing the traditional truth-testing devices of the adversary process. *See Walder v. United States*, 347 U.S. 62 (1954); *United States v. Knox*, 396 U.S. 77 (1969). Similarly, when the procedural protections of Mil. R. Evid. 305(f) and *Edwards v. Arizona*, 451 U.S. 477 (1981), are violated, the deterrent effect of excluding the unlawfully obtained evidence is fully vindicated by preventing its use in the Government's case-in-chief, but permitting its collateral use to impeach an accused who testifies inconsistently or perjuriously. *See Oregon v. Hass*, 420 U.S. 714 (1975). Statements which are not the product of free and rational choice, *Greenwald v. Wisconsin*, 390 U.S. 519 (1968), or are the result of coercion, unlawful influence, or unlawful inducements are involuntary and thus inadmissible, because of their untrustworthiness, even as impeachment evidence. *See Mincey v. Arizona*, 437 U.S. 385 (1978).

1994 Amendment: Rule 304(b)(1) adopts *Harris v. New York*, 401 U.S. 222 (1971), insofar as it would allow use for impeachment or at a later trial for perjury, false swearing, or the making of a false official statement, statements taken in violation of the counsel warnings required under Mil R. Evid. 305(d)-(e). Under paragraphs 140a(2) and 153b, MCM, 1969 (Rev.), use of such statements was not permissible. *United States v. Girard*, 23 U.S.C.M.A. 263, 49 C.M.R. 438 (1975); *United States v. Jordan*, 20 U.S.C.M.A. 614, 44 C.M.R. 44 (1971). The Court of Military Appeals has recognized expressly the authority of the President to adopt the holding in *Harris* on impeachment. *Jordan*, 20 U.S.C.M.A. at 617, 44 C.M.R. at 47, and Mil R. Evid. 304(b) adopts *Harris* in military law. Subsequently, in *Michigan v. Harvey*, 494 U.S. 344 (1990), the Supreme Court held that statements taken in violation of *Michigan v. Jackson*, 475 U.S. 625 (1986), could also be used to impeach a defendant's false and inconsistent testimony. In so doing, the Court extended the Fifth Amendment rationale of *Harris* to Sixth Amendment violations of the right to counsel.

(c) *Definitions.*

(1) *Confession and admission.* Rules 304(c)(1) and (2) express without change the definitions found in Para. 140 *a*(1), MCM, 1969 (Rev.). Silence may constitute an admission when it does not involve a reliance on the privilege against self-incrimination or related rights. Rule 301(f)(3). For example, if an imputation against a person comes to his or her attention under circumstances that would reasonably call for a denial of its accuracy if the imputation were not true, a failure to utter such a denial could possibly constitute an admission by silence. Note, however, in this regard, Rule 304(h)(3), and Rule 801(a)(2).

(2) *Involuntary.* The definition of "involuntary" in Rule 304(c)(3) summarizes the prior definition of "not voluntary" as found in Para. 140 *a*(2), MCM, 1969 (Rev.). The examples in Para. 140 *a*(2) are set forth in this paragraph. A statement ob-

tained in violation of the warning and waiver requirements of Rule 305 is "involuntary." Rule 305(a).

The language governing statements obtained through the use of "coercion, unlawful influence, and unlawful inducement," found in Article 31(d) makes it clear that a statement obtained by any person, regardless of status, that is the product of such conduct is involuntary. Although it is unlikely that a private citizen may run afoul of the prohibition of unlawful influence or inducement, such a person clearly may coerce a statement and such coercion will yield an involuntary statement.

A statement made by the accused during a mental examination ordered under Para. 121, MCM, 1969 (Rev.) (now R.C.M. 706, MCM, 1984) is treated as an involuntary statement under Rule 304. *See* Rule 302(a). The basis for this rule is that Para. 121 and Rule 302 compel the accused to participate in the Government examination or face a judicial order prohibiting the accused from presenting any expert testimony on the issue of mental responsibility.

Insofar as Rule 304(c)(3) is concerned, some examples which may by themselves or in conjunction with others constitute coercion, unlawful influence, or unlawful inducement in obtaining a confession or admission are:

Infliction of bodily harm including questioning accompanied by deprivation of the necessities of life such as food, sleep, or adequate clothing;

Threats of bodily harm;

Imposition of confinement or deprivation of privileges or necessities because a statement was not made by the accused, or threats thereof if a statement is not made;

Promises of immunity or clemency as to any offense allegedly committed by the accused;

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

There is no change in the principle, set forth in the fifth paragraph of Para. 140 *a*(2), MCM, 1969 (Rev.), that a statement obtained "in an interrogation conducted in accordance with all applicable rules is not involuntary because the interrogation was preceded by one that was not so conducted, if it clearly appears that all improper influences of the preceding interrogations had ceased to operate on the mind of the accused or suspect at the time that he or she made the statement." In such a case, the effect of the involuntary statement is sufficiently attenuated to permit a determination that the latter statement was not " *obtained* in violation of" the rights and privileges found in Rule 304(c)(3) and 305(a) (emphasis added).

(d) *Procedure.* Rule 304(d) makes a significant change in prior procedure. Under Para. 140 *a*(2), MCM, 1969 (Rev.), the prosecution was required to prove a statement to be voluntary before it could be admitted in evidence absent explicit defense waiver. Rule 304(d) is intended to reduce the number of unnecessary objections to evidence on voluntariness grounds and to narrow what litigation remains by requiring the defense to move to suppress or to object to evidence covered by this Rule. Failure to so move or object constitutes a waiver of the motion or objection. This follows civilian procedure in which the accused is provided an opportunity to assert privilege against self-incrimination and related rights but may waive any objection to evidence obtained in violation of the privilege through failure to object.

(1) *Disclosure.* Prior procedure (Para. 121, MCM, 1969 (Rev.)) is changed to assist the defense in formulating its challenges. The prosecution is required to disclose prior to arraignment all statements by the accused known to the prosecution which are relevant to the case (including matters likely to be relevant in rebuttal and sentencing) and within military control. Disclosure should be made in writing in order to prove compliance with the Rule and to prevent misunderstandings. As a general matter, the trial counsel is not authorized to obtain statements made by the accused at a sanity board, with limited exceptions. If the trial counsel has knowledge of such statements, they must be disclosed. Regardless of trial counsel's knowledge, the defense is entitled to receive the full report of the sanity board.

(2) *Motions and objections.* The defense is required under Rule 304(d)(2) to challenge evidence disclosed prior to arraignment under Rule 304(d)(1) prior to submission of plea. In the absence of a motion or objection prior to plea, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to challenge disclosed evidence waives the objection. This is a change from prior law under which objection traditionally has been made after plea but may be made, at the discretion of the military judge, prior to plea. This change brings military law into line with civilian federal procedure and resolves what is presently a variable and uncertain procedure.

Litigation of a defense motion to suppress or an objection to a statement made by the accused or to any derivative evidence should take place at a hearing held outside the presence of the court members. *See, e.g.,* Rule 104(c).

(3) *Specificity.* Rule 304(d)(3) permits the military judge to require the defense to specify the grounds for an objection under Rule 304, but if the defense has not had adequate opportunity to interview those persons present at the taking of a statement, the military judge may issue an appropriate order including granting a continuance for purposes of interview or permitting a general objection. In view of the waiver that results in the event of failure to object, defense counsel must have sufficient information in order to decide whether to object to the admissibility of a statement by the accused. Although telephone or other long distance communications may be sufficient to allow a counsel to make an informed decision, counsel may consider a personal interview to be essential in this area and in such a case counsel is entitled to personally interview the witnesses to the taking of a statement before specificity can be required. When such an interview is desired but despite due diligence counsel has been unable to interview adequately those persons included in the taking of a statement, the military judge has authority to resolve the situation. Normally this would include the granting of a continuance for interviews, or other appropriate relief. If an adequate opportunity to interview is absent, even if this results solely from the witness' unwillingness to speak to the defense, then the specificity requirement does not apply. Lacking adequate opportunity to interview, the defense may be authorized to enter a general objection to the evidence. If a general objection has been authorized, the prosecution must present evidence to show affirmatively that the statement was voluntary in the same manner as it would be required to do under prior law. Defense counsel is not required to meet the requirements of Para. 115, MCM, 1969 (Rev.), in order to demonstrate "due diligence" under the Rule. Nor shall the defense be required to present evidence to raise a matter under the Rule. The

defense shall present its motion by offer of proof, but it may be required to present evidence in support of the motion should the prosecution first present evidence in opposition to the motion.

If a general objection to the prosecution evidence is not authorized, the defense may be required by Rule 304(d)(3) to make specific objection to prosecution evidence. It is not the intent of the Committee to require extremely technical pleading, but enough specificity to reasonably narrow the issue is desirable. Examples of defense objections include but are not limited to one or more of the following non-exclusive examples:

That the accused was a suspect but not given Article 31(b) or Rule 305(c) warnings prior to interrogation.

That although 31(b) or Rule 305(c) warnings were given, counsel warnings under Rule 305(d) were necessary and not given (or given improperly). (Rule 305(d); *United States v. Tempia,* 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).)

That despite the accused's express refusal to make a statement, she was questioned and made an admission. (*see e.g.,* Rule 305(f); *Michigan v. Mosely,* 423 U.S. 96 (1975); *United States v. Westmore,* 17 U.S.C.M.A. 406, 38 C.M.R. 204 (1968).)

That the accused requested counsel but was interrogated by the military police without having seen counsel. (*see e.g.,* Rule 305(a) and (d); *United States v. Gaines,* 21 U.S.C.M.A. 236, 45 C.M.R. 10 (1972).)

That the accused was induced to make a statement by a promise of leniency by his squadron commander. (*see e.g.,* Rule 304(b)(3), Manual for Courts-Martial, United States, 1969 (Rev. ed.), Para 140a(2); *People v. Pineda,* 182 Colo. 388, 513 P.2d 452 (1973).)

That an accused was threatened with prosecution of her husband if she failed to make a statement. (*see e.g.,* Rule 304(b)(3), *Jarriel v. State,* 317 So. 2d 141 (Fla. App. 1975).)

That the accused was held incommunicado and beaten until she confessed. (*see e.g.,* Rule 304(b)(3); *Payne v. Arkansas,* 356 U.S. 560 (1958).)

That the accused made the statement in question only because he had previously given a statement to his division officer which was involuntary because he was improperly warned. (*see e.g.,* Rule 304(b)(3); *United States v. Seay,* 1 M.J. 201 (C.M.A. 1978).)

Although the prosecution retains at all times the burden of proof in this area, a specific defense objection under this Rule must include enough facts to enable the military judge to determine whether the objection is appropriate. These facts will be brought before the court via recital by counsel; the defense will not be required to offer evidence in order to raise the issue. If the prosecution concurs with the defense recital, the facts involved will be taken as true for purposes of the motion and evidence need not be presented. If the prosecution does not concur and the defense facts would justify relief if taken as true, the prosecution will present its evidence and the defense will then present its evidence. The general intent of this provision is to narrow the litigation as much as may be possible without affecting the prosecution's burden.

In view of the Committee's intent to narrow litigation in this area, it has adopted a basic structure in which the defense, when required by the military judge to object with specificity, has total responsibility in terms of what objection, if any, to raise under this Rule.

(4) *Rulings.* Rule 304(d)(4) is taken without significant change from Federal Rule of Criminal Procedure 12(e). As a plea of guilty waives all self-incrimination or voluntariness objections, Rule 304(d)(5), it is contemplated that litigation of confession issues raised before the plea will be fully concluded prior to plea. Cases involving trials by military judge alone in which the accused will enter a plea of not guilty are likely to be the only ones in which deferral of ruling is even theoretically possible. If the prosecution does not intend to use against the accused a statement challenged by the accused under this Rule but is unwilling to abandon any potential use of such statement, two options exist. First, the matter can be litigated before plea, or second, if the accused clearly intends to plead not guilty regardless of the military judge's ruling as to the admissibility of the statements in question, the matter may be deferred until such time as the prosecution indicates a desire to use the statements.

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

(e) *Burden of proof.* Rule 304(e) substantially changes military law. Under the prior system, the armed forces did not follow the rule applied in the civilian federal courts. Instead, MCM, 1969 (Rev.) utilized the minority "Massachusetts Rule," sometimes known as the "Two Bite Rule." Under this procedure the defense first raises a confession or admission issue before the military judge who determines it on a preponderance basis: if the judge determines the issue adversely to the accused, the defense may raise the issue again before the members. In such a case, the members must be instructed not to consider the evidence in question unless they find it to have been voluntary beyond a reasonable doubt. The Committee determined that this bifurcated system unnecessarily complicated the final instructions to the members to such an extent as to substantially confuse the important matters before them. In view of the preference expressed in Article 36 for the procedure used in the trial of criminal cases in the United States district courts, the Committee adopted the majority "Orthodox Rule" as used in Article III courts. Pursuant to this procedure, the military judge determines the admissibility of confessions or admissions using a preponderance basis. No recourse exists to the court members on the question of admissibility. In the event of a ruling on admissibility adverse to the accused, the accused may present evidence to the members as to voluntariness for their consideration in determining what weight to give to the statements in question.

It should be noted that under the Rules the prosecution's burden extends only to the specific issue raised by the defense under Rule 304(d), should specificity have been required pursuant to Rule 304(d)(3).

(1) *In general.* Rule 304(e)(1) requires that the military judge find by a preponderance that a statement challenged under this rule was made voluntarily. When a trial is before a special court-martial without a military judge, the ruling of the President of the court is subject to objection by any member. The President's decision may be overruled. The Committee authorized use of this procedure in view of the importance of the issue and the absence of a legally trained presiding officer.

(2) *Weight of the evidence.* Rule 304(e)(2) allows the defense to present evidence with respect to voluntariness to the members for the purpose of determining what weight to give the statement.

When trial is by judge alone, the evidence received by the military judge on the question of admissibility also shall be considered by the military judge on the question of weight without the necessity of a formal request to do so by counsel. Additional evidence may, however, be presented to the military judge on the matter of weight if counsel chooses to do so.

(3) *Derivative evidence.* Rule 304(e)(3) recognizes that derivative evidence is distinct from the primary evidence dealt with by Rule 304, *i.e.,*statements. The prosecution may prove that notwithstanding an involuntary statement, the evidence in question was not "obtained by use of" it and is not derivative.

February 1986 Amendment: Because of the 1986 addition of Rule 304(b)(2), the prosecution may prove that, notwithstanding an involuntary statement, derivative evidence is admissible under the "inevitable discovery" exception. The standard of proof is a preponderance of the evidence (*Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501 (1984)).

(f) *Defense evidence.* Rule 304(f) generally restates prior law as found in Para. 140 *a*(3) & (6), MCM, 1969 (Rev.). Under this Rule, the defense must specify that the accused plans to take the stand under this subdivision. This is already normal practice and is intended to prevent confusion. Testimony given under this subdivision may not be used at the same trial at which it is given for any other purpose to include impeachment. The language, "the accused may be cross-examined only as to matter on which he or she so testifies" permits otherwise proper and relevant impeachment of the accused. *See, e.g.,* Rule 607–609; 613.

(g) *Corroboration.* Rule 304(g) restates the prior law of corroboration with one major procedural change. Previously, no instruction on the requirement of corroboration was required unless the evidence was substantially conflicting, self-contradictory, uncertain, or improbable and there was a defense request for such an instruction. *United States v. Seigle*, 22 U.S.C.M.A. 403, 47 C.M.R. 340 (1973). The holding in *Seigle* in consistent with the 1969 Manual's view that the issue of admissibility may be decided by the members, but it is inconsistent with the position taken in Rule 304(d) that admissibility is the sole responsibility of the military judge. Inasmuch as the Rule requires corroborating evidence as a condition precedent to admission of the statement, submission of the issue to the members would seem to be both unnecessary and confusing. Consequently, the Rule does not follow *Seigle* insofar as the case allows the issue to be submitted to the members. The members must still weigh the evidence when determining the guilt or innocence of the accused, and the nature of any corroborating evidence is an appropriate matter for the members to consider when weighing the statement before them.

The corroboration rule requires only that evidence be admitted which would support an inference that the essential facts admitted in the statement are true. For example, presume that an accused charged with premeditated murder has voluntarily confessed that, intending to kill the alleged victim, she concealed herself so that she might surprise the victim at a certain place and that when the victim passed by, she plunged a knife in his back. At trial, the prosecution introduces independent evidence that the victim was found dead as a result of a knife wound in his back at the place where, according to the confession, the incident occurred. This fact would corroborate the confession because it would support an inference of the truth of the essential facts admitted in the confession.

(h) *Miscellaneous.*

(1) *Oral statements.* Rule 304(h)(1) is taken verbatim from 1969 Manual paragraph 140 *a*(6). It recognizes that although an oral statement may be transcribed, the oral statement is separate and distinct from the transcription and that accordingly the oral statement may be received into evidence without violation of the best evidence rule unless the specific writing is in question, *see* Rule 1002. So long as the oral statement is complete, no specific rule would require the prosecution to offer the transcription. The defense could of course offer the writing when it would constitute impeachment.

(2) *Completeness.* Rule 304(h)(2) is taken without significant change from 1969 Manual paragraph 140 *a*(6). Although Rule 106 allows a party to require an adverse party to complete an otherwise incomplete written statement in an appropriate case, Rule 304(h)(2) allows the defense to complete an incomplete statement regardless of whether the statement is oral or in writing. As Rule 304(h)(2) does not by its terms deal only with oral statements, it provides the defense in this area with the option of using Rule 106 or 304(h)(2) to complete a written statement.

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

1986 Amendment: Mil. R. Evid. 304(h)(4) was added to make clear that evidence of a refusal to obey a lawful order to submit to a chemical analysis of body substances is admissible evidence when relevant either to a violation of such order or an offense which the test results would have been offered to prove. The Supreme Court in *South Dakota v. Neville*, 459 U.S. 553 (1983) held that where the government may compel an individual to submit to a test of a body substance, evidence of a refusal to submit to the test is constitutionally admissible. Since the results of tests of body substances are non-testimonial, a servicemember has no Fifth Amendment or Article 31 right to refuse to submit to such a test. *United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980); *Schmerber v. State of California*, 384 U.S. 757 (1966). A test of body substances in various circumstances, such as search incident to arrest, probable cause and exigent circumstances, and inspection or random testing programs, among others, is a reasonable search and seizure in the military. *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); Mil. R. Evid. 312; Mil. R. Evid. 313. Under the Uniform Code of Military Justice, a military order is a valid means to compel a servicemember to submit to a test of a body substance. *Murray v. Haldeman, supra.* Evidence of a refusal to obey such an order may be relevant as evidence of consciousness of guilt. *People v. Ellis*, 65 Cal.2d 529, 421 P.2d 393 (1966). *See also State v. Anderson*, Or.App., 631 P.2d 822 (1981); *Newhouse v. Misterly*, 415 F.2d 514 (9th Cir. 1969), *cert. denied* 397 U.S. 966 (1970).

This Rule creates no right to refuse a lawful order. A servicemember may still be compelled to submit to the test. *See, e.g.,* Mil. R. Evid. 312. Any such refusal may be prosecuted separately for violation of an order.

Rule 305. Warnings About Rights

(a) *General Rule.* Rule 305(a) makes statements obtained in violation of Rule 305, *e.g.*, statements obtained in violation of Article 31(b) and the right to counsel, involuntary within the meaning of Rule 304. This approach eliminates any distinction between statements obtained in violation of the common law voluntariness doctrine (which is, in any event, included within Article 31(d) and those statements obtained in violation, for example, of *Miranda* (*Miranda v. Arizona*, 384 U.S. 435 (1966) warning requirements. This is consistent with the approach taken in the 1969 Manual, *e.g.*, Para. 140 *a*(2).

(b) *Definitions.*

(1) *Persons subject to the Uniform Code of Military Justice.* Rule 305(b)(1) makes it clear that under certain conditions a civilian may be a "person subject to the Uniform Code of Military Justice" for purposes of warning requirements, and would be required to give Article 31(b) (Rule 305(c)) warnings. *See, generally, United States v. Penn*, 18 U.S.C.M.A. 194, 39 C.M.R. 194 (1969). Consequently civilian members of the law enforcement agencies of the Armed Forces, *e.g.*, the Naval Investigative Service and the Air Force Office of Special Investigations, will have to give Article 31 (Rule 305(c)) warnings. This provision is taken in substance from Para. 140 *a*(2) of the 1969 Manual.

(2) *Interrogation.* Rule 305(b)(2) defines interrogation to include the situation in which an incriminating response is either sought or is a reasonable consequence of such questioning. The definition is expressly not a limited one and interrogation thus includes more than the putting of questions to an individual. *See e.g., Brewer v. Williams*, 430 U.S. 387 (1977).

The Rule does not specifically deal with the situation in which an "innocent" question is addressed to a suspect and results unexpectedly in an incriminating response which could not have been foreseen. This legislative history and the cases are unclear as to whether Article 31 allows nonincriminating questioning. *See Lederer, Rights, Warnings in the Armed Services*, 72 Mil. L. Rev. 1, 32-33 (1976), and the issue is left open for further development.

(c) *Warnings concerning the accusation, right to remain silent, and use of statement.* Rule 305(c) basically requires that those persons who are required by statute to give Article 31(b) warnings give such warnings. The Rule refrains from specifying who must give such warnings in view of the unsettled nature of the case law in the area.

It was not the intent of the Committee to adopt any particular interpretation of Article 31(b) insofar as who must give warnings except as provided in Rule 305(b)(1) and the Rule explicitly defers to Article 31 for the purpose of determining who must give warnings. The Committee recognized that numerous decisions of the Court of Military Appeals and its subordinate courts have dealt with this issue. These courts have rejected literal application of Article 31(b), but have not arrived at a conclusive rule. *See e.g., United States v. Dohle*, 1 M.J. 223 (C.M.A. 1975). The Committee was of the opinion, however, that both Rule 305(c) and Article 31(b) should be construed at a minimum, and in compliance with numerous cases, as requiring warnings by those personnel acting in an official disciplinary or law enforcement capacity. Decisions such as *United States v. French*, 25 C.M.R. 851 (A.F.B.R. 1958), *aff'd in relevant part*, 10 U.S.C.M.A. 171, 27 C.M.R. 245 (1959) (undercover agent) are not affected by the Rule.

Spontaneous or volunteered statements do not require warnings under Rule 305. The fact that a person may have known of his or her rights under the Rule is of no importance if warnings were required but not given.

Normally, neither a witness nor an accused need to be warned under any part of this Rule when taking the stand to testify at a trial by court-martial. *See*, however, Rule 801(b)(2).

The Rule requires in Rule 305(c)(2) that the accused or suspect be advised that he or she has the "right to remain silent" rather than the statutory Article 31(b) warning which is limited to silence on matters relevant to the underlying offense. The new language was inserted upon the suggestion of the Department of Justice in order to provide clear advice to the accused as to the absolute right to remain silent. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

(d) *Counsel rights and warnings.* Rule 305(d) provides the basic right to counsel at interrogations and requires that an accused or suspect entitled to counsel at an interrogation be warned of that fact. The Rule restates the basic counsel entitlement for custodial interrogations found in both Para. 140 *c*(2), MCM, 1969 (Rev.), and *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), and recognizes that the right to counsel attaches after certain procedural steps have taken place.

(1) *General rule.* Rule 305(d)(1) makes it clear that the right to counsel only attaches to an interrogation in which an individual's Fifth Amendment privilege against self-incrimination is involved. This is a direct result of the different coverages of the statutory and constitutional privileges. The Fifth Amendment to the Constitution of the United States is the underpinning of the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966) which is in turn the origin of the military right to counsel at an interrogation. *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). Article 31, on the other hand, does not provide any right to counsel at an interrogation; *but see United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976). Consequently, interrogations which involve only the Article 31 privilege against self-incrimination do not include a right to counsel. Under present law such interrogations include requests for voice and handwriting samples and perhaps request for bodily fluids. *Compare United States v.Dionivio*, 410 U.S. 1 (1973); *United States v. Mara*, 410 U.S. 19 (1973); and *Schmerber v. California*, 384 U.S. 757 (1967) with *United States v. White*, 17 U.S.C.M.A. 211, 38 C.M.R. 9 (1967); *United States v. Greer*, 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953); and *United States v. Ruiz*, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974). Rule 305(d)(1) requires that an individual who is entitled to counsel under the Rule be advised of the nature of that right before an interrogation involving evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment (an interrogation as defined in Rule 305(d)(2) and modified in this case by Rule 305(d)(1)) may lawfully proceed. Although the Rule does not specifically require any particular wording or format for the right to counsel warning, reasonable specificity is required. At a minimum, the right to counsel warning must include the following substantive matter:

(1) That the accused or suspect has the right to be represented by a lawyer at the interrogation if he or she so desires;

(2) That the right to have counsel at the interrogation in-

cludes the right to consult with counsel and to have counsel at the interrogation;

(3) That if the accused or suspect so desires, he or she will have a military lawyer appointed to represent the accused or suspect at the interrogation at no expense to the individual, and the accused or suspect may obtain civilian counsel at no expense to the Government in addition to or instead of free military counsel.

It is important to note that those warnings are in addition to such other warnings and waiver questions as may be required by Rule 305.

Rule 305(d)(1)(A) follows the plurality of civilian jurisdiction by utilizing an objective test in defining "custodial" interrogation. *See also United States v. Temperley*, 22 U.S.C.M.A. 383, 47 C.M.R. 235 (1978). Unfortunately, there is no national consensus as to the exact nature of the test that should be used. The language used in the Rule results from an analysis of *Miranda v. Arizona*, 384 U.S. 436 (1966) which leads to the conclusion that *Miranda* is predominately a voluntariness decision concerned with the effects of the psychological coercion inherent in official questioning. *See e.g., Lederer, Miranda v. Arizona—The Law Today*, 78 Mil. L. Rev. 107, 130 (1977).

The variant chosen adopts an objective test that complies with *Miranda's* intent by using the viewpoint of the suspect. The objective nature of the test, however, makes it improbable that a suspect would be able to claim a custodial status not recognized by the interrogator. The test makes the actual belief of the suspect irrelevant because of the belief that it adds nothing in practice and would unnecessarily lengthen trial.

Rule 305(d)(1)(B) codifies the Supreme Court's decisions in *Brewer v. Williams*, 480 U.S. 387 (1977) and *Massiah v. United States*, 377 U.S. 201 (1964). As modified by *Brewer, Massiah* requires that an accused or suspect be advised of his or her right to counsel prior to interrogation, whether open or surreptitious, if that interrogation takes place after either arraignment or indictment. As the Armed Forces lack any equivalent to those civilian procedural points, the initiation of the formal military criminal process has been utilized as the functional equivalent. Accordingly, the right to counsel attaches if an individual is interrogated after preferral of charges or imposition of pretrial arrest, restriction, or confinement. The right is not triggered by apprehension or temporary detention. Undercover investigation prior to the formal beginning of the criminal process will not be affected by this, but jailhouse interrogations will generally be prohibited. *Compare* Rule 305(d)(1)(B) with *United States v. Hinkson*, 17 U.S.C.M.A. 126, 37 C.M.R. 390 (1967) and *United States v. Gibson*, 3 U.S.C.M.A. 746, 14 C.M.R. 164 (1954).

1994 Amendment: Subdivision (d) was amended to conform military practice with the Supreme Court's decision in *McNeil v. Wisconsin*, 501 U.S. 171 (1991). In *McNeil*, the Court clarified the distinction between the Sixth Amendment right to counsel and the Fifth Amendment right to counsel. The court reiterated that the Sixth Amendment right to counsel does not attach until the initiation of adversary proceedings. In the military, the initiation of adversary proceedings normally occurs at preferral of charges. *See United States v. Jordan*, 29 M.J. 177, 187 (C.M.A. 1989); *See United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985), *cert. denied*, 477 U.S. 904 (1986). However, it is possible that, under unusual circumstances, the courts may find that the Sixth Amendment right attaches prior to preferral. *See Wattenbarger*, 21 M.J. at 43-44. Since the imposition of conditions on liberty, restriction, arrest, or confinement does not trigger the Sixth Amendment right to counsel, references to these events were eliminated from the rule. These events may, however, be offered as evidence that the government has initiated adversary proceedings in a particular case.

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

Rule 305(d)(2) clarifies prior practice insofar as it explicitly indicates that no right to individual military counsel of the suspect's or accused's choice exists. *See e.g., United States v. Wilcox*, 3 M.J. 803 (A.C.M.R. 1977).

(e) *Notice to Counsel.* Rule 305(e) is taken from *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976). The holding of that case bas been expanded slightly to clarify the situation in which an interrogator does not have actual knowledge that an attorney has been appointed for or retained by the accused or suspect with respect to the offenses, but reasonably should be so aware. In the absence of the expansion, present law places a premium on law enforcement ignorance and has the potential for encouraging perjury. The change rejects the view expressed in *United States v. Roy*, 4 M.J. 840 (A.C.M.R. 1978) which held that in the absence of bad faith a criminal investigator who interviewed the accused one day before the scheduled Article 32 investigation was not in violation of *McOmber* because he was unaware of the appointment of counsel.

Factors which may be considered in determining whether an interrogator should have reasonably known that an individual had counsel for purposes of this Rule include:

Whether the interrogator knew that the person to be questioned had requested counsel;

Whether the interrogator knew that the person to be questioned had already been involved in a pretrial proceeding at which he would ordinarily be represented by counsel;

Any regulations governing the appointment of counsel;

Local standard operating procedures;

The interrogator's military assignment and training; and

The interrogator's experience in the area of military criminal procedure.

The standard involved is purely an objective one.

1994 Amendment: Subdivision (e) was amended to conform military practice with the Supreme Court's decisions in *Minnick v. Mississippi*, 498 U.S. 146 (1990), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991). Subdivision (e) was divided into two subparagraphs to distinguish between the right to counsel rules under the Fifth and Sixth Amendments and to make reference to the new waiver provisions of subdivision (g)(2). Subdivision (e)(1) applies an accused's Fifth Amendment right to counsel to the military and conforms military practice with the Supreme Court's decision in *Minnick*. In that case, the Court determined that the Fifth Amendment right to counsel protected by *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477

(1981), as interpreted in *Arizona v. Roberson*, 486 U.S. 675 (1988), requires that when a suspect in custody requests counsel, interrogation shall not proceed unless counsel is *present*. Government officials may not reinitiate custodial *interrogation* in the absence of counsel whether or not the accused has consulted with his attorney. *Minnick*, 498 U.S. at 150-152. This rule does not apply, however, when the accused or suspect initiates reinterrogation regardless of whether the accused is in custody. *Minnick*, 498 U.S. at 154-155; *Roberson*, 486 U.S. at 677. The impact of a waiver of counsel rights upon the *Minnick* rule is discussed in the analysis to subdivision (g)(2) of this rule. Subdivision (e)(2) follows *McNeil* and applies the Sixth Amendment right to counsel to military practice. Under the Sixth Amendment, an accused is entitled to representation at critical confrontations with the government after the initiation of adversary proceedings. In accordance with *McNeil*, the amendment recognizes that this right is offense-specific and, in the context of military law, that it normally attaches when charges are preferred. *See United States v. Jordan*, 29 M.J. 177, 187 (C.M.A. 1989); *United States v. Wattenbarger*, 21 M.J. 41 (C.M.A. 1985), *cert. denied*, 477 U.S. 904 (1986). Subdivision (e)(2) supersedes the prior notice to counsel rule. The prior rule, based on *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976), is not consistent with *Minnick* and *McNeil*. Despite the fact that *McOmber* was decided on the basis of Article 27, U.C.M.J., the case involved a Sixth Amendment claim by the defense, an analysis of the Fifth Amendment decisions of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967), and the Sixth Amendment decision of *Massiah v. United States*, 377 U.S. 201 (1964). Moreover, the *McOmber* rule has been applied to claims based on violations of both the Fifth and Sixth Amendments. *See, e.g. United States v. Fassler*, 29 M.J. 193 (C.M.A. 1989). *Minnick* and *McNeil* reexamine the Fifth and Sixth Amendment decisions central to the *McOmber* decision; the amendments to subdivision (e) are the result of that reexamination.

(f) *Exercise of rights.* Rule 305(f) restates prior law in that it requires all questioning to cease immediately upon the exercise of either the privilege against self-incrimination or the right to counsel. *See Michigan v. Mosely*, 423 U.S. 96 (1975). The Rule expressly does not deal with the question of whether or when questioning may be resumed following an exercise of a suspect's rights and does not necessarily prohibit it. The Committee notes that both the Supreme Court, *see e.g., Brewer v. Williams*, 480 U.S. 387 (1977); *Michigan v. Mosely*, 423 U.S. 96 (1975), and the Court of Military Appeals, *see, e.g., United States v. Hill*, 5 M.J. 114 (C.M.A. 1978); *United States v. Collier*, 1 M.J. 358 (C.M.A. 1976) have yet to fully resolve this matter.

1994 Amendment: The amendment to subdivision (f) clarifies the distinction between the rules applicable to the exercise of the privilege against self-incrimination and the right to counsel. *Michigan v. Mosley*, 423 U.S. 96 (1975). *See also United States v. Hsu*, 852 F.2d 407, 411, n.3 (9th Cir. 1988). The added language, contained in (f)(2), is based on *Minnick v. Mississippi*, 498 U.S. 146 (1990), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991). Consequently, when a suspect or an accused undergoing interrogation exercises the right to counsel under circumstances provided for under subdivision (d)(l) of this rule, (f)(2) applies the rationale of *Minnick* and *McNeil* requiring that questioning must cease until counsel is present.

(g) *Waiver*. The waiver provision of Rule 305(g) restates current military practice and is taken in part from Para. 140 *a*(2) of the 1969 Manual.

Rule 305(g)(1) sets forth the general rule for waiver and follows *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). The Rule requires that an affirmative acknowledgment of the right be made before an adequate waiver may be found. Thus, three waiver questions are required under Rule 305(g):

(1) *Do you understand your rights?*

(2) *Do you want a lawyer?*

(3) *Are you willing to make a statement?* The specific wording of the questions is not detailed by the Rule and any format may be used so long as the substantive content is present.

Notwithstanding the above, Rule 305(g)(2), following *North Carolina v. Butler*, 441 U.S. 369 (1979), recognizes that the right to counsel, and only the right to counsel, may be waived even absent an affirmative declination. The burden of proof is on the prosecution in such a case to prove by a preponderance that the accused waived the right to counsel.

The second portion of Rule 305(g)(2) dealing with notice to counsel is new. The intent behind the basic notice provision, Rule 305(e), is to give meaning to the right to counsel by preventing interrogators who know or reasonably should know an individual has counsel from circumventing the right to counsel by obtaining a waiver from that person without counsel present. Permitting a Miranda type waiver in such a situation clearly would defeat the purpose of the Rule. Rule 305(g)(2) thus permits a waiver of the right to counsel when notice to counsel is required only if it can be demonstrated either that the counsel, after reasonable efforts, could not be notified, or that the counsel did not attend the interrogation which was scheduled within a reasonable period of time after notice was given.

A statement given by an accused or suspect who can be shown to have his rights as set forth in this Rule and who intentionally frustrated the diligent attempt of the interrogator to comply with this Rule shall not be involuntary solely for failure to comply with the rights warning requirements of this Rule or of the waiver requirements. *United States v. Sikorski*, 21 U.S.C.M.A. 345, 45 C.M.R. 119 (1972).

1994 Amendment: The amendment divided subdivision (2) into three sections. Subsection (2)(A) remains unchanged from the first sentence of the previous rule. Subsection (2)(B) is new and conforms military practice with the Supreme Court's decision in *Minnick v. Mississippi*, 498 U.S. 146 (1990). In that case, the Court provided that an accused or suspect can validly waive his Fifth Amendment right to counsel, after having previously exercised that right at an earlier custodial interrogation, by initiating the subsequent interrogation leading to the waiver. Id. at 156. This is reflected in subsection (2)(B)(i). Subsection (2)(B)(ii) establishes a presumption that a coercive atmosphere exists that invalidates a subsequent waiver of counsel rights when the request for counsel and subsequent waiver occur while the accused or suspect is in continuous custody. *See McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Arizona v. Roberson*, 486 U.S. 675 (1991). The presumption can be overcome when it is shown that there occurred a break in custody which sufficiently dissipated the coercive environment. *See United States v. Schake*, 30 M.J. 314 (C.M.A. 1990).

Subsection (2)(C) is also new and conforms military practice

with the Supreme Court's decision in *Michigan v. Jackson*, 475 U.S. 625, 636 (1986). In *Jackson*, the Court provided that the accused or suspect can validly waive his or her Sixth Amendment right to counsel, after having previously asserted that right, by initiating the subsequent interrogation leading to the waiver. The Court differentiated between assertions of the Fifth and Sixth Amendment right to counsel by holding that, while exercise of the former barred further interrogation concerning the same or other offenses in the absence of counsel, the Sixth Amendment protection only attaches to those offenses as to which the right was originally asserted. In addition, while continuous custody would serve to invalidate a subsequent waiver of a Fifth Amendment right to counsel, the existence or lack of continuous custody is irrelevant to Sixth Amendment rights. The latter vest once formal proceedings are instituted by the State and the accused asserts his right to counsel, and they serve to insure that the accused is afforded the right to counsel to serve as a buffer between the accused and the State.

(h) *Non-military interrogations.* Para. 140 *a*(2) of the 1969 Manual, which governed civilian interrogations of military personnel basically restated the holding of *Miranda v. Arizona*, 384 U.S. 436 (1966). Recognizing that the Supreme Court may modify the Miranda rule, the Committee has used the language in Rule 305(h)(1) to make practice in this area dependent upon the way the Federal district courts would handle such interrogations. *See* Article 36.

Rule 305(h)(2) clarifies the law of interrogations as it relates to interrogations conducted abroad by officials of a foreign government or their agents when the interrogation is not conducted, instigated, or participated in by military personnel or their agents. Such an interrogation does not require rights warnings under subdivisions (c) or (d) or notice to counsel under subdivision (e). The only test to be applied in such a case is that of common law voluntariness: whether a statement obtained during such an interrogation was obtained through the use of "coercion, unlawful influence, or unlawful inducement." Article 31(d).

Whether an interrogation has been "conducted, instigated, or participated in by military personnel or their agents" is a question of fact depending on the circumstances of the case. The Rule makes it clear that a United States personnel do not participate in an interrogation merely by being present at the scene of the interrogation, *see United States v. Jones*, 6 M.J. 226 (C.M.A. 1979) and the Analysis to Rule 311(c), or by taking steps which are in the best interests of the accused. Also, an interrogation is not "participated in" by military personnel or their agents who act as interpreters during the interrogation if there is no other participation. *See* Rule 311(c). The omission of express reference to interpreters in Rule 305(h)(2) was inadvertent.

Rule 306. Statements by one of several accused

Rule 306 is taken from the fifth subparagraph Para. 140 *b* of the 1969 Manual and states the holding of *Bruton v. United States*, 391 U.S. 123 (1968). The remainder of the associated material in the Manual is primarily concerned with the co-conspirator's exception to the hearsay rule and has been superseded by adoption of the Federal Rules of Evidence. *See* Rule 801.

When it is impossible to effectively delete all references to a co-accused, alternative steps must be taken to protect the co-accused. This may include the granting of a severance.

The Committee was aware of the Supreme Court's decision in *Parker v. Randolph*, 442 U.S. 62 (1979) dealing with interlocking confessions. In view of the lack of a consensus in Parker, however, the Committee determined that the case did not provide a sufficiently precise basis for drafting a rule, and decided instead to apply Bruton to interlocking confessions.

Rule 311. Evidence obtained from unlawful searches and seizures

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

(a) *General rule.* Rule 311(a) restates the basic exclusionary rule for evidence obtained from an unlawful search or seizure and is taken generally from Para. 152 of the 1969 Manual although much of the language of Para. 152 has been deleted for purposes of both clarity and brevity. The Rule requires suppression of derivative as well as primary evidence and follows the 1969 Manual rule by expressly limiting exclusion of evidence to that resulting from unlawful searches and seizures involving governmental activity. Those persons whose actions may thus give rise to exclusion are listed in Rule 311(c) and are taken generally from Para. 152 with some expansion for purposes of clarity. Rule 311 recognizes that discovery of evidence may be so unrelated to an unlawful search or seizure as to escape exclusion because it was not "obtained as a result" of that search or seizure.

The Rule recognizes that searches and seizures are distinct acts the legality of which must be determined independently. Although a seizure will usually be unlawful if it follows an unlawful search, a seizure may be unlawful even if preceded by a lawful search. Thus, adequate cause to seize may be distinct from legality of the search or observations which preceded it. Note in this respect Rule 316(d)(4)(C), Plain View.

(1) *Objection.* Rule 311(a)(1) requires that a motion to suppress or, as appropriate, an objection be made before evidence can be suppressed. Absent such motion or objection, the issue is waived. Rule 311(i).

(2) *Adequate interest.* Rule 311(a)(2) represents a complete redrafting of the standing requirements found in Para. 152 of the 1969 Manual. The Committee viewed the Supreme Court decision in *Rakas v. Illinois*, 439 U.S. 128 (1978), as substantially modifying the Manual language. Indeed, the very use of the term "standing" was considered obsolete by a majority of the Committee. The Rule distinguishes between searches and seizure. To have sufficient interest to challenge a search, a person must have "a reasonable expectation of privacy in the person, place, or property searched." "Reasonable expectation of privacy" was used in lieu of "legitimate expectation of privacy," often used in *Rakas, supra*, as the Committee believed the two expressions to be identical. The Committee also considered that the expression "reasonable expectation" has a more settled meaning. Unlike the case of a search, an individual must have an interest distinct from an expectation of privacy to challenge a seizure. When a seizure is involved rather than a search the only invasion of one's rights is the removal of the property in question. Thus, there must be some recognizable right to the property seized. Consequently, the Rule requires a "legitimate interest in the property or evidence

seized." This will normally mean some form of possessory interest. Adequate interest to challenge a seizure does not *per se* give adequate interest to challenge a prior search that may have resulted in the seizure.

The Rule also recognizes an accused's rights to challenge a search or seizure when the right to do so would exist under the Constitution. Among other reasons, this provision was included because of the Supreme Court's decision in *Jones v. United States*, 302 U.S. 257 (1960), which created what has been termed the "automatic standing rule." The viability of *Jones* after *Rakas* and other cases is unclear, and the Rule will apply *Jones* only to the extent that *Jones* is constitutionally mandated.

1986 Amendment: The words "including seizures of the person" were added to expressly apply the exclusionary rule to unlawful apprehensions and arrests, that is, seizures of the person. Procedures governing apprehensions and arrests are contained in R.C.M. 302. *See also* Mil. R. Evid. 316(c).

(b) *Exceptions:* Rule 311(b) states the holding of *Walder v. United States*, 347 U.S. 62 (1954), and restates with minor change the rule as found in Para. 152 of the 1969 Manual.

1986 Amendment: Rule 311(b)(2) was added to incorporate the "inevitable discovery" exception to the exclusionary rule of *Nix v. Williams*, 467 U.S. 431 (1984). There is authority for the proposition that this exception applies to the primary evidence tainted by an illegal search or seizure, as well as to evidence derived secondarily from a prior illegal search or seizure. *United States v. Romero*, 692 F.2d 699 (10th Cir. 1982), *cited with approval in Nix v. Williams, supra*, 467 U.S. 431, n.2. *See also United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982); *United States v. Yandell*, 13 M.J. 616 (A.F.C.M.R. 1982). *Contra, United States v. Ward*, 19 M.J. 505 (A.F.C.M.R. 1984). There is also authority for the proposition that the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the investigative authority and were being actively pursued prior to the occurrence of the illegal conduct which results in discovery of the evidence (*United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984)).

As a logical extension of the holdings in *Nix* and *United States v. Kozak, supra*, the leading military case, the inevitable discovery exception should also apply to evidence derived from apprehensions and arrests determined to be illegal under R.C.M. 302 (*State v. Nagel*, 308 N.W.2d 539 (N.D. 1981) (alternative holding)). The prosecution may prove that, notwithstanding the illegality of the apprehension or arrest, evidence derived therefrom is admissible under the inevitable discovery exception.

Rule 311(b)(3) was added in 1986 to incorporate the "good faith" exception to the exclusionary rule based on *United States v. Leon*, 468 U.S. 897 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). The exception applies to search warrants and authorizations to search or seize issued by competent civilian authority, military judges, military magistrates, and commanders. The test for determining whether the applicant acted in good faith is whether a reasonably well-trained law enforcement officer would have known the search or seizure was illegal despite the authorization. In *Leon* and *Sheppard*, the applicant's good faith was enhanced by their prior consultation with attorneys.

The rationale articulated in *Leon* and *Sheppard* that the deterrence basis of the exclusionary rule does not apply to magistrates extends with equal force to search or seizure authorizations issued by commanders who are neutral and detached, as defined in *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979). The United States Court of Military Appeals demonstrated in *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981), that commanders cannot be equated constitutionally to magistrates. As a result, commanders' authorizations may be closely scrutinized for evidence of neutrality in deciding whether this exception will apply. In a particular case, evidence that the commander received the advice of a judge advocate prior to authorizing the search or seizure may be an important consideration. Other considerations may include those enumerated in *Ezell* and: the level of command of the authorizing commander; whether the commander had training in the rules relating to search and seizure; whether the rule governing the search or seizure being litigated was clear; whether the evidence supporting the authorization was given under oath; whether the authorization was reduced to writing; and whether the defect in the authorization was one of form or substance.

As a logical extension of the holdings in *Leon* and *Sheppard*, the good faith exception also applies to evidence derived from apprehensions and arrests which are effected pursuant to an authorization or warrant, but which are subsequently determined to have been defective under R.C.M. 302 (*United States v. Mahoney*, 712 F.2d 956 (5th Cir. 1983); *United States v. Beck*, 729 F.2d 1329 (11th Cir. 1984)). The authorization or warrant must, however, meet the conditions set forth in Rule 311(b)(3).

It is intended that the good faith exception will apply to both primary and derivative evidence.

(c) *Nature of search or seizure.* Rule 311(c) defines "unlawful" searches and seizures and makes it clear that the treatment of a search or seizure varies depending on the status of the individual or group conducting the search or seizure.

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

(2) *Other officials.* Rule 311(c)(2) requires that the legality of a search or seizure performed by officials of the United States, of the District of Columbia, or of a state, commonwealth, or possession or political subdivision thereof, be determined by the principles of law applied by the United States district courts when resolving the legality of such a search or seizure.

(3) *Officials of a foreign government or their agents.* This provision is taken in part from *United States v. Jordan*, 1 M.J. 334 (C.M.A. 1976). After careful analysis, a majority of the Committee concluded that portion of the *Jordan* opinion which purported to require that such foreign searches be shown to have complied with foreign law is dicta and lacks any specific legal authority to support it. Further the Committee noted the fact that most foreign nations lack any law of search and seizure and that in some cases, *e.g.*, Germany, such law as may exist is purely theoretical and not subject to determination. The *Jordan* requirement thus unduly complicates trial without supplying any protection to the accused. Consequently, the Rule omits the requirement in favor of a basic due process test. In determining which version of the various due process phrasings to utilize, a majority of the Committee chose to use the language found in Para. 150 *b* of the

1969 Manual rather than the language found in *Jordan* (which requires that the evidence not shock the conscience of the court) believing the Manual language is more appropriate to the circumstances involved.

Rule 311(c) also indicates that persons who are present at a foreign search or seizure conducted in a foreign nation have "not participated in" that search or seizure due either to their mere presence or because of any actions taken to mitigate possible damage to property or person. The Rule thus clarifies *United States v. Jordan*, 1 M.J. 334 (C.M.A. 1976) which stated that the Fourth Amendment would be applicable to searches and seizures conducted abroad by foreign police when United States personnel participate in them. The Court's intent in *Jordan* was to prevent American authorities from sidestepping Constitutional protections by using foreign personnel to conduct a search or seizure that would have been unlawful if conducted by Americans. This intention is safeguarded by the Rule, which applies the Rules and the Fourth Amendment when military personnel or their agents conduct, instigate, or participate in a search or seizure. The Rule only clarifies the circumstances in which a United States official will be deemed to have participated in a foreign search or seizure. This follows dicta in *United States v. Jones*, 6 M.J. 226, 230 (C.M.A. 1979), which would require an "element of causation," rather than mere presence. It seems apparent that an American servicemember is far more likely to be well served by United States presence— which might mitigate foreign conduct— than by its absence. Further, international treaties frequently require United States cooperation with foreign law enforcement. Thus, the Rule serves all purposes by prohibiting conduct by United States officials which might improperly support a search or seizure which would be unlawful if conducted in the United States while protecting both the accused and international relations.

The Rule also permits use of United States personnel as interpreters viewing such action as a neutral activity normally of potential advantage to the accused. Similarly the Rule permits personnel to take steps to protect the person or property of the accused because such actions are clearly in the best interests of the accused.

(d) *Motion to suppress and objections.* Rule 311(d) provides for challenging evidence obtained as a result of an allegedly unlawful search or seizure. The procedure, normally that of a motion to suppress, is intended with a small difference in the disclosure requirements to duplicate that required by Rule 304(d) for confessions and admissions, the Analysis of which is equally applicable here.

Rule 311(d)(1) differs from Rule 304(c)(1) in that it is applicable only to evidence that the prosecution intends to offer against the accused. The broader disclosure provision for statements by the accused was considered unnecessary. Like Rule 304(d)(2)(C), Rule 311(d)(2)(C) provides expressly for derivative evidence disclosure of which is not mandatory as it may be unclear to the prosecution exactly what is derivative of a search or seizure. The Rule thus clarifies the situation.

(e) *Burden of proof.* Rule 311(e) requires that a preponderance of the evidence standard be used in determining search and seizure questions. *Lego v. Twomey*, 404 U.S. 477 (1972). Where the validity of a consent to search or seize is involved, a higher standard of "clear and convincing," is applied by Rule 314(e). This restates prior law.

February 1986 Amendment: Subparagraphs (e)(1) and (2) were amended to state the burden of proof for the inevitable discovery and good faith exceptions to the exclusionary rule, as prescribed in *Nix v. Williams*, 467 U.S. 431 (1984) and *United States v. Leon*, 468 U.S. 897 (1984), respectively.

1993 Amendment: The amendment to Mil. R. Evid. 311(e)(2) was made to conform Rule 311 to the rule of *New York v. Harris*, 495 U.S. 14 (1990). The purpose behind the exclusion of derivative evidence found during the course of an unlawful apprehension in a dwelling is to protect the physical integrity of the dwelling not to protect suspects from subsequent lawful police interrogation. *See id.* A suspect's subsequent statement made at another location that is the product of lawful police interrogation is not the fruit of the unlawful apprehension. The amendment also contains language added to reflect the "good faith" exception to the exclusionary role set forth in *United States v. Leon*, 468 U.S. 897 (1984), and the "inevitable discovery" exception set forth in *Nix v. Williams*, 467 U.S. 431 (1984).

(f) *Defense evidence.* Rule 311(f) restates prior law and makes it clear that although an accused is sheltered from any use at trial of a statement made while challenging a search or seizure, such statement may be used in a subsequent "prosecution for perjury, false swearing or the making of a false official statement."

(g) *Scope of motions and objections challenging probable cause.* Rule 311(g)(2) follows the Supreme Court decision in *Franks v. Delaware*, 422 U.S. 928 (1978), *see also United States v. Turck*, 49 C.M.R. 49, 53 (A.F.C.M.R. 1974), with minor modifications made to adopt the decision to military procedures. Although Franks involved perjured affidavits by police, Rule 311(a) is made applicable to information given by government agents because of the governmental status of members of the armed services. The Rule is not intended to reach misrepresentations made by informants without any official connection.

1995 Amendment: Subsection (g)(2) was amended to clarify that in order for the defense to prevail on an objection or motion under this rule, it must establish, *inter alia*, that the falsity of the evidence was "knowing and intentional" or in reckless disregard for the truth. *Accord Franks v. Delaware*, 438 U.S. 154 (1978).

(h) *Objections to evidence seized unlawfully.* Rule 311(h) is new and is included for reasons of clarity.

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

Rule 312. Body views and intrusions

1984 Amendment: "Body" was substituted for "bodily" in the title and where appropriate in text. *See United States v. Armstrong*, 9 M.J. 374, 378 n.5 (C.M.A. 1980).

(a) *General rule.* Rule 312(a) limits all nonconsensual inspections, searches, or seizures by providing standards for examinations of the naked body and bodily intrusions. An inspection, search, or seizure that would be lawful but for noncompliance with this Rule is unlawful within the meaning of Rule 311.

(b) *Visual examination of the body.* Rule 312(b) governs searches and examinations of the naked body and thus controls what has often been loosely termed "strip searches." Rule 312(b) permits

visual examination of the naked body in a wide but finite range of circumstances. In doing so, the Rule strictly distinguishes between visual examination of body cavities and actual intrusion into them. Intrusion is governed by Rule 312(c) and (e). Visual examination of the male genitals is permitted when a visual examination is permissible under this subdivision. Examination of cavities may include, when otherwise proper under the Rule, requiring the individual being viewed to assist in the examination.

Examination of body cavities within the prison setting has been vexatious. *See, e.g., Hanley v. Ward*, 584 F.2d 609 (2d Cir. 1978); *Wolfish v. Levi*, 573 F.2d 118, 131 (2d Cir. 1978), *reversed sub nom Bell v. Wolfish*, 441 U.S. 520 (1979); *Daughtry v. Harris*, 476 F.2d 292 (10th Cir. 1973), *cert. denied*, 414 U.S. 872 (1973); *Frazier v. Ward*, 426 F.Supp. 1354, 1362–67 (N.D.N.Y. 1977); *Hodges v. Klein*, 412 F.Supp. 896 (D.N.J. 1976). Institutional security must be protected while at the same time only privacy intrusions necessary should be imposed on the individual. The problem is particularly acute in this area of inspection of body cavities as such strong social taboos are involved. Rule 312(b)(2) allows examination of body cavities when reasonably necessary to maintain the security of the institution or its personnel. *See*, *Bell v. Wolfish*, 441 U.S. 520 (1979). Examinations likely to be reasonably necessary include examination upon entry or exit from the institution, examination subsequent to a personal visit, or examination pursuant to a reasonably clear indication that the individual is concealing property within a body cavity. *Frazier v. Ward*, 426 F.Supp. 1354 (N.D.N.Y. 1977); *Hodges v. Klein*, 412 F.Supp. 896 (D.N.J. 1976). Great deference should be given to the decisions of the commanders and staff of military confinement facilities. The concerns voiced by the Court of Appeals for the Tenth Circuit in *Daughtry v. Harris*, 476 F.2d 292 (10th Cir. 1973) about escape and related risks are likely to be particularly applicable to military prisoners because of their training in weapons and escape and evasion tactics.

As required throughout Rule 312, examination of body cavities must be accomplished in a reasonable fashion. This incorporates *Rochin v. California*, 342 U.S. 165 (1952), and recognizes society's particularly sensitive attitude in this area. Where possible, examination should be made in private and by members of the same sex as the person being examined.

1984 Amendment: In subsection (b)(2) and (c), "reasonable" replaced "real"before "suspicion." A majority of Circuit Courts of Appeal have adopted a "reasonable suspicion" test over a "real suspicion" test. *See United States v. Klein*, 592 F.2d 909 (5th Cir. 1979); *United States v. Asbury*, 586 F.2d 973 (2d Cir. 1978); *United States v. Wardlaw*, 576 F.2d 932 (1st Cir. 1978); *United States v. Himmelwright*, 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977). *But see United States v. Aman*, 624 F.2d 911 (9th Cir. 1980). In practice, the distinction may be minimal. *But see Perel v. Vanderford*, 547 F.2d 278, 280 n.1 (5th Cir. 1977). However, the real suspicion formulation has been criticized as potentially confusing. *United States v. Asbury*, *supra* at 976.

(c) *Intrusion into body cavities.* Actual intrusion into body cavities, *e.g.*, the anus and vagina, may represent both a significant invasion of the individual's privacy and a possible risk to the health of the individual. Rule 312(c) allows seizure of property discovered in accordance with Rules 312(b), 312(c)(2), or 316(d)(4)(C) but requires that intrusion into such cavities be accomplished by personnel with appropriate medical qualifications. The Rule thus does not specifically require that the intrusion be made by a doctor, nurse, or other similar medical personnel although Rule 312(g) allows the Secretary concerned to prescribe who may perform such procedures. It is presumed that an object easily located by sight can normally be easily extracted. The requirements for appropriate medical qualifications, however, recognize that circumstances may require more qualified personnel. This may be particularly true, for example, for extraction of foreign matter from a pregnant woman's vagina. Intrusion should normally be made either by medical personnel or by persons with appropriate medical qualifications who are members of the same sex as the person involved.

The Rule distinguishes between seizure of property previously located and intrusive searches of body cavities by requiring in Rule 312(c)(2) that such searches be made only pursuant to a search warrant or authorization, based upon probable cause, and conducted by persons with appropriate medical qualifications. Exigencies do not permit such searches without warrant or authorization unless Rule 312(f) is applicable. In the absence of express regulations issued by the Secretary concerned pursuant to Rule 312(g), the determination as to which personnel are qualified to conduct an intrusion should be made in accordance with normal procedures of the applicable medical facility.

Recognizing the peculiar needs of confinement facilities and related institutions, *see, e.g., Bell v. Wolfish*, 441 U.S. 520 (1979), Rule 312(c) authorizes body cavity searches without prior search warrant or authorization when there is a "real suspicion that the individual is concealing weapons, contraband, or evidence of crime."

(d) *Extraction of body fluids.* Seizure of fluids from the body may involve self-incrimination questions pursuant to Article 31 of the Uniform Code of Military Justice, and appropriate case law should be consulted prior to involuntary seizure. *See generally* Rule 301(a) and its Analysis. The Committee does not intend an individual's expelled breath to be within the definition of "body fluids."

The 1969 Manual Para. 152 authorization for seizure of bodily fluids when there has been inadequate time to obtain a warrant or authorization has been slightly modified. The prior language that there be "clear indication that evidence of crime will be found and that there is reason to believe that delay will threaten the destruction of evidence" has been modified to authorize such a seizure if there is reason to believe that the delay "could result in the destruction of the evidence." Personnel involuntarily extracting bodily fluids must have appropriate medical qualifications.

Rule 312 does not prohibit compulsory urinalysis, whether random or not, made for appropriate medical purposes, *see* Rule 312(f), and the product of such a procedure if otherwise admissible may be used in evidence at a court-martial.

1984 Amendment: The first word in the caption of subsection (d) was changed from " *Seizure*" to " *Extraction*." This is consistent with the text of subsection (d) and should avoid possible confusion about the scope of the subsection. Subsection (d) does not apply to compulsory production of body fluids (*e.g.*, being ordered to void urine), but rather to physical extraction of body fluids (e.g., catheterization or withdrawal of blood). *See Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983). *See also* Analysis, Mil. R. Evid. 313(b).

(e) *Other intrusive searches.* The intrusive searches governed by

Rule 312(e) will normally involve significant medical procedures including surgery and include any intrusion into the body including x-rays. Applicable civilian cases lack a unified approach to surgical intrusions, *see, e.g., United States v. Crowder*, 513 F.2d 395 (D.C. Cir. 1976); *Adams v. State*, 299 N.E.2d 834 (Ind. 1973); *Creamer v. State*, 299 Ga. 511, 192 S.E.2d 350 (1972), Note, *Search and Seizure: Compelled Surgical Intrusion*, 27 Baylor L.Rev. 305 (1975), and cases cited therein, other than to rule out those intrusions which are clearly health threatening. Rule 312(e) balances the Government's need for evidence with the individual's privacy interest by allowing intrusion into the body of an accused or suspect upon search authorization or warrant when conducted by person with "appropriate medical qualification," and by prohibiting intrusion when it will endanger the health of the individual. This allows, however, considerable flexibility and leaves the ultimate issue to be determined under a due process standard of reasonableness. As the public's interest in obtaining evidence from an individual other than an accused or suspect is substantially less than the person's right to privacy in his or her body, the Rule prohibits the involuntary intrusion altogether if its purpose is to obtain evidence of crime.

(f) *Intrusions for valid medical purposes.* Rule 312(f) makes it clear that the Armed Forces retain their power to ensure the health of their members. A procedure conducted for valid medical purposes may yield admissible evidence. Similarly, Rule 312 does not affect in any way any procedure necessary for diagnostic or treatment purposes.

(g) *Medical qualifications.* Rule 312(g) permits but does not require the Secretaries concerned to prescribe the medical qualifications necessary for persons to conduct the procedures and examinations specified in the Rule.

Rule 313. Inspections and inventories in the armed forces

Although inspections have long been recognized as being necessary and legitimate exercises of a commander's powers and responsibilities, *see, e.g., United States v. Gebhart*, 10 U.S.C.M.A. 606, 610 .2, 28 C.M.R. 172, 176 n.2 (1959), the 1969 Manual for Courts-Martial omitted discussion of inspections except to note that the Para. 152 restrictions on seizures were not applicable to "administrative inspections." The reason for the omission is likely that military inspections *per se* have traditionally been considered administrative in nature and free of probable cause requirements. *Cf. Frank v. Maryland*, 359 .S. 360 (1959). Inspections that have been utilized as subterfuge searches have been condemned. *See, e.g., United States v. Lange*, 15 U.S.C.M.A. 486, 35C.M.R. 458 (1965). Recent decisions of the United States Court of Military Appeals have attempted, generally without success, to define "inspection" for Fourth Amendment evidentiary purposes, *see, e.g., United States v. Thomas*, 1 M.J. 397 (C.M.A. 1976) (*three separate opinions*), and have been concerned with the intent, scope, and method of conducting inspections. *See e.g., United States v. Harris*, 5 M.J. 44 (C.M.A. 1978).

(a) *General rule.*

Rule 313 codifies the law of military inspections and inventories. Traditional terms used to describe various inspections, *e.g.* "shakedown inspection" or "gate search," have been abandoned as being conducive to confusion.

Rule 313 does not govern inspections or inventories not conducted within the armed forces. These civilian procedures must be evaluated under Rule 311(c)(2). In general, this means that such inspections and inventories need only be permissible under the Fourth Amendment in order to yield evidence admissible at a court-martial.

Seizure of property located pursuant to a proper inspection or inventory must meet the requirements of Rule 316.

(b) *Inspections.* Rule 313(b) defines "inspection" as an "examination … conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle." Thus, an inspection is conducted for the primary function of ensuring mission readiness, and is a function of the inherent duties and responsibilities of those in the military chain of command. Because inspections are intended to discover, correct, and deter conditions detrimental to military efficiency and safety, they must be considered as a condition precedent to the existence of any effective armed force and inherent in the very concept of a military unit. Inspections as a general legal concept have their constitutional origins in the very provisions of the Constitution which authorize the armed forces of the United States. Explicit authorization for inspections has thus been viewed in the past as unnecessary, but in light of the present ambiguous state of the law; *see, e.g. United States v. Thomas, supra; United States v. Roberts*, 2 M.J. 31 (C.M.A. 1976), such authorization appears desirable. Rule 313 is thus, in addition to its status as a rule of evidence authorized by Congress under Article 36, an express Presidential authorization for inspections with such authorization being grounded in the President's powers as Commander-in-Chief.

The interrelationship of inspections and the Fourth Amendment is complex. The constitutionality of inspections is apparent and has been well recognized; *see e.g., United States v. Gebhart*, 10 C.M.A. 606, 610 n.2, 28 C.M.R. 172, 176 n.2. (1959). There are three distinct rationales which support the constitutionality of inspections.

The first such rationale is that inspections are not technically "searches"within the meaning of the Fourth Amendment. *Cf. Air Pollution Variance Board v. Western Alfalfa Corps*, 416 U.S. 861 (1974); *Hester v. United States*, 265 U.S. 57 (1924). The intent of the framers, the language of the amendment itself, and the nature of military life render the application of the Fourth Amendment to a normal inspection questionable. As the Supreme Court has often recognized, the "Military is, [by necessity, a specialized society separate from civilian society.]" *Brown v. Glines*, 444 U.S. 348, 354 (1980) *citing Parker v. Levy*, 417 U.S. 733, 734 (1974). As the Supreme Court noted in *Glines, supra*, Military personnel must be ready to perform their duty whenever the occasion arises. To ensure that they always are capable of performing their mission promptly and reliably, the military services "must insist upon a respect for duty and a discipline without counterpart in civilian life." 444 U.S. at 354 (citations omitted). An effective armed force without inspections is impossible— a fact amply illustrated by the unfettered right to inspect vested in commanders throughout the armed forces of the world. As recognized in *Glines, supra*, and *Greer v. Spock*, 424 U.S. 828 (1976), the *way* that the

Bill of Rights applies to military personnel may be different from the way it applies to civilians. Consequently, although the Fourth Amendment is applicable to members of the armed forces, inspections may well not be "searches" within the meaning of the Fourth Amendment by reason of history, necessity, and constitutional interpretation. If they are "searches," they are surely reasonable ones, and are constitutional on either or both of two rationales.

As recognized by the Supreme Court, highly regulated industries are subject to inspection without warrant, *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), both because of the necessity for such inspections and because of the "limited threats to ... justifiable expectation of privacy." *United States v. Biswell, supra*, at 316. The court in *Biswell, supra*, found that regulations of firearms traffic involved "large interests," that "inspection is a crucial part of the regulatory scheme," and that when a firearms dealer enters the business "he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection," 406 U.S. 315, 316. It is clear that inspections within the armed forces are at least as important as regulation of firearms; that without such inspections effective regulation of the armed forces is impossible; and that all personnel entering the armed forces can be presumed to know that the reasonable expectation of privacy within the armed forces is exceedingly limited by comparison with civilian expectations. *See e.g., Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975). Under *Colonnade Catering, supra, and Bisell, supra*, inspections are thus reasonable searches and may be made without warrant.

An additional rationale for military inspection is found within the Supreme Court's other administrative inspection cases. *See Marshall v. Barlow's, Inc.*, 436 U.S. 397 (1978); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See City of Seattle*, 387 U.S. 541 (1967). Under these precedents an administrative inspection is constitutionally acceptable for health and safety purposes so long as such an inspection is first authorized by warrant. The warrant involved, however, need not be upon probable cause in the traditional sense, rather the warrant may be issued "if reasonable legislative or administrative standards for conducting an area inspection are satisfied …" *Camara, supra*, 387 U.S. at 538. Military inspections are intended for health and safety reasons in a twofold sense: they protect the health and safety of the personnel in peacetime in a fashion somewhat analogous to that which protects the health of those in a civilian environment, and, by ensuring the presence and proper condition of armed forces personnel, equipment, and environment, they protect those personnel from becoming unnecessary casualties in the event of combat. Although *Marshall v. Barlow's Inc., Camara*, and *See, supra*, require warrants, the intent behind the warrant requirement is to ensure that the person whose property is inspected is adequately notified that local law requires inspection, that the person is notified of the limits of the inspection, and that the person is adequately notified that the inspector is acting with proper authority. *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967). Within the armed forces, the warrant requirement is met automatically if an inspection is ordered by a commander, as commanders are empowered to grant warrants. *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979). More importantly, the concerns voiced by the court are met automatically within the military environment in any event as the rank and assignment of those inspecting and their right to do so are known to all. To the extent that the search warrant requirements are intended to prohibit inspectors from utilizing inspections as subterfuge searches, a normal inspection fully meets the concern, and Rule 313(b) expressly prevents such subterfuges. The fact that an inspection that is primarily administrative in nature may result in a criminal prosecution is unimportant. *Camara v. Municipal Court*, 387 U.S. 523, 530–531 (1967). Indeed, administrative inspections may inherently result in prosecutions because such inspections are often intended to discover health and safety defects the presence of which are criminal offenses. *Id.* at 531. What is important, to the extent that the Fourth Amendment is applicable, is protection from unreasonable violations of privacy. Consequently, Rule 313(b) makes it clear that an otherwise valid inspection is not rendered invalid solely because the inspector has as his or her purpose a *secondary* "purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings …" An examination made, however, with a *primary* purpose of prosecution is no longer an administrative inspection. Inspections are, as has been previously discussed, lawful acceptable measures to ensure the survival of the American armed forces and the accomplishment of their mission. They do not infringe upon the limited reasonable expectation of privacy held by service personnel. It should be noted, however, that it is possible for military personnel to be granted a reasonable expectation of privacy greater than the minimum inherently recognized by the Constitution. An installation commander might, for example, declare a BOQ sacrosanct and off limits to inspections. In such a rare case the reasonable expectation of privacy held by the relevant personnel could prevent or substantially limit the power to inspect under the Rule. *See* Rule 311(c). Such extended expectations of privacy may, however, be negated with adequate notice.

An inspection "may be made'of the whole or part' of a unit, organization, installation, vessel, aircraft, or vehicle ... (and is) conducted as an incident of command." Inspections are usually quantitative examinations insofar as they do not normally single out specific individuals or small groups of individuals. There is, however, no requirement that the entirety of a unit or organization be inspected. Unless authority to do so has been withheld by competent superior authority, any individual placed in a command or appropriate supervisory position may inspect the personnel and property within his or her control.

Inspections for contraband such as drugs have posed a major problem. Initially, such inspections were viewed simply as a form of health and welfare inspection, *see, e.g., United States v. Unrue*, 22 C.M.A. 466, 47 C.M.R. 556 (1973). More recently, however, the Court of Military Appeals has tended to view them solely as searches for evidence of crime. *See e.g. United States v. Roberts*, 2 M.J. 31 (C.M.A. 1976); *but see United States v. Harris*, 5 M.J. 44, 58 (C.M.A. 1978). Illicit drugs, like unlawful weapons, represent, however, a potential threat to military efficiency of disastrous proportions. Consequently, it is entirely appropriate to treat inspections intended to rid units of contraband that would adversely affect military fitness as being health and welfare inspections, *see, e.g., Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975), and the Rule does so.

A careful analysis of the applicable case law, military and civilian, easily supports this conclusion. Military cases have long

recognized the legitimacy of "health and welfare" inspections and have defined those inspections as examinations intended to ascertain and ensure the readiness of personnel and equipment. *See, e.g., United States v. Gebhart*, 10 C.M.A. 606, 610 n.2, 28 C.M.R. 172, 176 n.2 (1959); "(these) types of searches are not to be confused with inspections of military personnel … conducted by a commander in furtherance of the security of his command"; *United States v. Brashears*, 45 C.M.R. 438 (A.C.M.R. 1972), *rev'd on other grounds*, 21 C.M.A. 522, 45 C.M.R. 326 (1972). Among the legitimate intents of a proper inspection is the location and confiscation of unauthorized weapons. *See, e.g., United States v. Grace*, 19 C.M.A. 409, 410, 42 C.M.R. 11, 12 (1970). The justification for this conclusion is clear: unauthorized weapons are a serious danger to the health of military personnel and therefore to mission readiness. Contraband that "would affect adversely the security, military fitness, or good order and discipline" is thus identical with unauthorized weapons insofar as their effects can be predicted. Rule 313(b) authorizes inspections for contraband, and is expressly intended to authorize inspections for unlawful drugs. As recognized by the Court of Military Appeals in *United States v. Unrue*, 22 C.M.A. 466, 469–70, 47 C.M.R. 556, 559–60 (1973), unlawful drugs pose unique problems. If uncontrolled, they may create an "epidemic," 47 C.M.R. at 559. Their use is not only contagious as peer pressure in barracks, aboard ship, and in units, tends to impel the spread of improper drug use, but the effects are known to render units unfit to accomplish their missions. Viewed in this light, it is apparent that inspection for those drugs which would "affect adversely the security, military fitness, or good order and discipline of the command" is a proper administrative intent well within the decisions of the United States Supreme Court. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523 (1967); *United States v. Unrue*, 22 C.M.A. 446, 471, 47 C.M.R. 556, 561 (1973) (Judge Duncan dissenting). This conclusion is buttressed by the fact that members of the military have a diminished expectation of privacy, and that inspections for such contraband are "reasonable" within the meaning of the Fourth Amendment. *See, e.g., Committee for G.I. Rights v. Callaway*, 518 F.2d 466 (D.C. Cir. 1975). Although there are a number of decisions of the Court of Military Appeals that have called the legality of inspections for unlawful drugs into question, *see United States v. Thomas, supra; United States v. Roberts*, 2 M.J. 31 (C.M.A. 1977), those decisions with their multiple opinions are not dispositive. Particularly important to this conclusion is the opinion of Judge Perry in *United States v. Roberts, supra.* Three significant themes are present in the opinion: lack of express authority for such inspections, the perception that unlawful drugs are merely evidence of crime, and the high risk that inspections may be used for subterfuge searches. The new Rule is intended to resolve these matters fully. The Rule, as part of an express Executive Order, supplies the explicit authorization for inspections then lacking. Secondly, the Rule is intended to make plain the fact that an inspection that has as its object the prevention and correction of conditions harmful to readiness is far more than a hunt for evidence. Indeed, it is the express judgment of the Committee that the uncontrolled use of unlawful drugs within the armed forces creates a readiness crisis and that continued use of such drugs is totally incompatible with the possibility of effectively fielding military forces capable of accomplishing their assigned mission. Thirdly, Rule 313(b) specifically deals with the subterfuge question in order to prevent improper use of inspections.

Rule 313(b) requires that before an inspection intended "to locate and confiscate unlawful weapons or other contraband, that would affect adversely the ... command" may take place, there must be either "a reasonable suspicion that such property is present in the command" or the inspection must be "a previously scheduled examination of the command." The former requirement requires that an inspection not previously scheduled be justified by "reasonable suspicion that such property is present in the command." This standard is intentionally minimal and requires only that the person ordering the inspection have a suspicion that is, under the circumstances, reasonable in nature. Probable cause is not required. Under the latter requirement, an inspection shall be scheduled sufficiently far enough in advance as to eliminate any reasonable probability that the inspection is being used as a subterfuge, *i.e.*, that it is being used to search a given individual for evidence of crime when probable cause is lacking. Such scheduling may be made as a matter of date or event. In other words, inspections may be scheduled to take place on any specific date, *e.g.*, a commander may decide on the first of a month to inspect on the 7th, 9th, and 21st, or on the occurrence of a specific event beyond the usual control of the commander, *e.g.*, whenever an alert is ordered, forces are deployed, a ship sails, the stock market reaches a certain level of activity, etc. It should be noted that "previously scheduled" inspections that vest discretion in the inspector are permissible when otherwise lawful. So long as the examination, *e.g.*, an entrance gate inspection, has been previously scheduled, the fact that reasonable exercise of discretion is involved in singling out individuals to be inspected is not improper; such inspection must not be in violation of the Equal Protection clause of the 5th Amendment or be used as a subterfuge intended to allow search of certain specific individuals.

The Rule applies special restrictions to contraband inspections because of the inherent possibility that such inspection may be used as subterfuge searches. Although a lawful inspection may be conducted with a secondary motive to prosecute those found in possession of contraband, the primary motive must be administrative in nature. The Rule recognizes the fact that commanders are ordinarily more concerned with removal of contraband from units— thereby eliminating its negative effects on unit readiness— than with prosecution of those found in possession of it. The fact that possession of contraband is itself unlawful renders the probability that an inspection may be a subterfuge somewhat higher than that for an inspection not intended to locate such material.

An inspection which has as its intent, or one of its intents, in whole or in part, the discovery of contraband, however slight, must comply with the specific requirements set out in the Rule for inspections for contraband. An inspection which does not have such an intent need not so comply and will yield admissible evidence if contraband is found incidentally by the inspection. Contraband is defined as material the possession of which is by its very nature unlawful. Material may be declared to be unlawful by appropriate statute, regulation, or order. For example, if liquor is prohibited aboard ship, a shipboard inspection for liquor must comply with the rules for inspections for contraband.

Before unlawful weapons or other contraband may be the subject of an inspection under Rule 313(b), there must be a determi-

nation that "such property would affect adversely the security, military fitness, or good order and discipline of the command." In the event of an adequate defense challenge under Rule 311 to an inspection for contraband, the prosecution must establish by a preponderance that such property would in fact so adversely affect the command. Although the question is an objective one, its resolution depends heavily on factors unique to the personnel or location inspected. If such contraband would adversely affect the ability of the command to complete its assigned mission in any significant way, the burden is met. The nature of the assigned mission is unimportant, for that is a matter within the prerogative of the chain of command only. The expert testimony of those within the chain of command of a given unit is worthy of great weight as the only purpose for permitting such an inspection is to ensure military readiness. The physiological or psychological effects of a given drug on an individual are normally irrelevant except insofar as such evidence is relevant to the question of the user's ability to perform duties without impaired efficiency. As inspections are generally quantitative examinations, the nature and amount of contraband sought is relevant to the question of the government's burden. The existence of five unlawful drug users in an Army division, for example, is unlikely to meet the Rule's test involving adverse effect, but five users in an Army platoon may well do so.

The Rule does not require that personnel to be inspected be given preliminary notice of the inspection although such advance notice may well be desirable as a matter of policy or in the interests, as perhaps in gate inspections, of establishing an alternative basis, such as consent, for the examination.

Rule 313(b) requires that inspections be conducted in a "reasonable fashion." The timing of an inspection and its nature may be of importance. Inspections conducted at a highly unusual time are not inherently unreasonable— especially when a legitimate reason of such timing is present. However, a 0200 inspection, for example, may be unreasonable depending upon the surrounding circumstances.

The Rule expressly permits the use of "any reasonable or natural technological aid." Thus, dogs may be used to detect contraband in an otherwise valid inspection for contraband. This conclusion follows directly from the fact that inspections for contraband conducted in compliance with Rule 313 are lawful. Consequently, the technique of inspection is generally unimportant under the new rules. The Committee did, however, as a matter of policy require that the natural or technological aid be "reasonable."

Rule 313(b) recognizes and affirms the commander's power to conduct administrative examinations which are primarily nonprosecutorial in purpose. Personnel directing inspections for contraband must take special care to ensure that such inspections comply with Rule 313(b) and thus do not constitute improper general searches or subterfuges.

1984 Amendment: Much of the foregoing Analysis was rendered obsolete by amendments made in 1984. The third sentence of Rule 313(b) was modified and the fourth and sixth sentences are new.

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

Despite the absence in the rules of express authority for compulsory production of body fluids, it apparently was the intent of the drafters to permit such production as part of inspections, relying at least in part on the medical purpose exception in Mil. R. Evid. 312(f). Mil. R. Evid. 312(d) applies only to nonconsensual extraction (*e.g.*, catheterization, drawing blood) of body fluids. This was noted in the Analysis, Mil. R. Evid. 312(d), which went on to state that "compulsory urinalysis, whether random or not, made for appropriate medical purposes, *see* Rule 312(f), and the product of such a procedure if otherwise admissible may be used at a court-martial."

There is considerable overlap between production of body fluid for a medical purpose under Mil. R. Evid. 312(f) and for determining and ensuring military fitness in a unit, organization, installation, vessel, aircraft, or vehicle. Frequently the two purposes are coterminous. Ultimately, the overall health of members of the organization is indivisible from the ability of the organization to perform the mission. To the extent that a "medical purpose" embraces anything relating to the physical or mental state of a person and that person's ability to perform assigned duties, then the two purposes may be identical. Such a construction of "medical purpose" would seem to swallow up the specific rules and limitations in Mil. R. Evid. 312(f), however. Therefore, a distinction may be drawn between a medical purpose— at least to the extent that term is construed to concern primarily the health of the individual— and the goal of ensuring the overall fitness of the organization. For example, it may be appropriate to test— by compulsory production of urine— persons whose duties entail highly dangerous or sensitive duties. The primary purpose of such tests is to ensure that the mission will be performed safely and properly. Preserving the health of the individual is an incident— albeit a very important one— of that purpose. A person whose urine is found to contain dangerous drugs is relieved from duty during gunnery practice, for example, not so much to preserve that person's health as to protect the safety of others. On the other hand, a soldier who is extremely ill may be compelled to produce urine (or even have it extracted) not so much so that soldier can return to duty— although the military has an interest in this— as for that soldier's immediate health needs.

Therefore, Mil. R. Evid. 313(b) provides an independent, although often closely related basis for compulsory production of body fluids, with Mil. R. Evid. 312(f). By expressly providing for both, possible confusion or an unnecessarily narrow construction under Mil. R. Evid. 312(f) will be avoided. Note that all of the requirements of Mil. R. Evid. 313(b) apply to an order to produce body fluids under that rule. This includes the requirement that the inspection be done in a reasonable fashion. This rule does not prohibit, as part of an otherwise lawful inspection, compelling a person to drink a reasonable amount of water in order to facilitate production of a urine sample. *See United States v. Mitchell*, 16 M.J. 654 (N.M.C.M.R. 1983).

The sixth sentence is based on *United States v. Middleton*,

supra. Middleton was not decided on the basis of Mil.R. Evid. 313, as the inspection in *Middleton* occurred before the effective date of the Military Rules of Evidence. The Court discussed Mil. R. Evid. 313(b), but "did not now decide on the legality of this Rule (or) bless its application." *United States v. Middleton, supra* at 131. However, the reasoning and the holding in *Middleton* suggest that the former language in Mil. R. Evid. 313(b) may have established unnecessary burdens for the prosecution, yet still have been inadequate to protect against subterfuge inspections, under some circumstances.

The former language allowed an inspection for "unlawful weapons and other contraband when such property would affect adversely the security, military fitness, or good order and discipline of the command and when (1) there is a reasonable suspicion that such property is present in the command or (2) the examination is a previously scheduled examination of the command." This required a case-by-case showing of the adverse effects of the weapons or contraband (including controlled substances) in the particular unit, organization, installation, aircraft, or vehicle examined. *See* Analysis, Mil. R. Evid. 313(b). In addition, the examination had to be based on a reasonable suspicion such items were present, or be previously scheduled.

Middleton upheld an inspection which had as one of its purposes the discovery of contraband—i.e., drugs. Significantly, there is no indication in *Middleton* that a specific showing of the adverse effects of such contraband in the unit or organization is necessary. The court expressly recognized (*see United States v. Middleton, supra* at 129; *cf. United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980)) the adverse effect of drugs on the ability of the armed services to perform the mission without requiring evidence on the point. Indeed, it may generally be assumed that if it is illegal to possess an item under a statute or lawful regulation, the adverse effect of such item on security, military fitness, or good order and discipline is established by such illegality, without requiring the commander to personally analyze its effects on a case-by-case basis and the submission of evidence at trial. The defense may challenge the constitutionality of the statute or the legality of the regulation (*cf. United States v. Wilson*, 12 U.S.C.M.A. 165, 30 C.M.R. 165 (1961); *United States v. Nation*, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958)) but this burden falls on the defense. Thus, this part of the former test is deleted as unnecessary. Note, however, that it may be necessary to demonstrate a valid military purpose to inspect for some noncontraband items. *See United States v. Brown*, 12 M.J. 420 (C.M.A. 1982).

Middleton upheld broad authority in the commander to inspect for contraband, as well as other things, "when adequate safeguards are present which assure that the'inspection' was really intended to determine and assure the readiness of the unit inspected, rather than merely to provide a subterfuge for avoiding limitations that apply to a search and seizure in a criminal investigation." As noted above, the Court in *Middleton* expressly reserved judgment whether Mil. R. Evid. 313(b) as then written satisfied this test.

The two prongs of the second part of the former test were intended to prevent subterfuge. However, they did not necessarily do so. Indeed, the "reasonable suspicion" test could be read to expressly authorize a subterfuge search. *See, e.g., United States v. Lange*, 15 U.S.C.M.A. 486, 35 C.M.R. 458 (1965). The "previously scheduled" test is an excellent way to prove that an inspection was not directed as the result of a reported offense, and the new formulation so retains it. However, it alone does not ensure absence of prosecutorial motive when specific individuals are singled out, albeit well in advance, for special treatment.

At the same time, the former test could invalidate a genuine inspection which had no prosecutorial purpose. For example, a commander whose unit was suddenly alerted for a special mission might find it necessary, even though the commander had no actual suspicion contraband is present, to promptly inspect for contraband, just to be certain none was present. A commander in such a position should not be prohibited from inspecting.

The new language removes these problems and is more compatible with *Middleton*. It does not establish unnecessary hurdles for the prosecution. A commander may inspect for contraband just as for any other deficiencies, problems, or conditions, without having to show any particular justification for doing so. As the fifth sentence in the rule indicates, any examination made primarily for the purpose of prosecution is not a valid inspection under the rule. The sixth sentence identifies those situations which, objectively, raise a strong likelihood of subterfuge. These situations are based on *United States v. Lange, supra* and *United States v. Hay*, 3 M.J. 654, 655–56 (A.C.M.R. 1977) (*quoted in United States v. Middleton, supra* at 127–28 n.7; *see also United States v. Brown, supra*). "Specific individuals" means persons named or identified on the basis of individual characteristics, rather than by duty assignment or membership in a subdivision of the unit, organization, installation, vessel, aircraft, or vehicle, such as a platoon or squad, or on a random basis. *See United States v. Harris*, 5 M.J. 44 (C.M.A. 1978). The first sentence of subsection (b) makes clear that a part of one of the listed categories may be inspected. *Cf. United States v. King*, 2 M.J. 4 (C.M.A. 1976).

The existence of one or more of the three circumstances identified in the fifth sentence does not mean that the examination is, *per se*, not an inspection. The prosecution may still prove, by clear and convincing evidence, that the purpose of the examination was to determine and ensure security, military fitness, and good order and discipline, and not for the primary purpose of prosecution. For example, when an examination is ordered immediately following a report of a specific offense in the unit, the prosecution might prove the absence of subterfuge by showing that the evidence of the particular offense had already been recovered when the inspection was ordered and that general concern about the welfare of the unit was the motivation for the inspection. Also, if a commander received a report that a highly dangerous item (*e.g.*, an explosive) was present in the command, it might be proved that the commander's concern about safety was the primary purpose for the examination, not prosecution. In the case in which specific individuals are examined, or subjected to more intrusive examinations than others, these indicia of subterfuge might be overcome by proof that these persons were not chosen with a view of prosecution, but on neutral ground or for an independent purpose— *e.g.*, individuals were selected because they were new to the unit and had not been thoroughly examined previously. These examples are not exclusive.

The absence of any of the three circumstances in the fifth sentence, while indicative of a proper inspection, does not necessarily preclude a finding of subterfuge. However, the prosecution need not meet the higher burden of persuasion when the issue is

whether the commander's purpose was prosecutorial, in the absence of these circumstances.

The new language provides objective criteria by which to measure a subjective standard, *i.e.,* the commander's purpose. Because the standard is ultimately subjective, however, the objective criteria are not conclusive. Rather they provide concrete and realistic guidance for commanders to use in the exercise of their inspection power, and for judicial authorities to apply in reviewing the exercise of that power.

(c) *Inventories.* Rule 313(c) codifies prior law by recognizing the admissibility of evidence seized via bona fide inventory. The rationale behind this exception to the usual probable cause requirement is that such an inventory is not prosecutorial in nature and is a reasonable intrusion. *See, e.g., South Dakota v. Opperman*, 428 U.S. 364 (1976).

An inventory may not be used as subterfuge search, *United States v. Mossbauer*, 20 C.M.A. 584, 44 C.M.R. 14 (1971), and the basis for an inventory and the procedure utilized may be subject to challenge in any specific case.Inventories of the property of detained individuals have usually been sustained. *See, e.g., United States v. Brashears*, 21 C.M.A. 552, 45 C.M.R. 326 (1972).

The committee does not, however, express an opinion as to the lawful scope of an inventory. *See, e.g., South Dakota v. Opperman*, 428 U.S. 364 (1976), in which the court did not determine the propriety of opening the locked trunk or glove box during the inventory of a properly impounded automobile.

Inventories will often be governed by regulation.

Rule 314. Searches not requiring probable cause

The list of non-probable cause searches contained within Rule 314 is intended to encompass most of the non-probable cause searches common in the military environment. The term "search" is used in Rule 314in its broadest non-technical sense. Consequently, a "search" for purposes of Rule 314 may include examinations that are not "searches" within the narrow technical sense of the Fourth Amendment. *See, e.g.*, Rule 314(j).

Insofar as Rule 314 expressly deals with a given type of search, the Rule preempts the area in that the Rule must be followed even should the Supreme Court issue a decision more favorable to the Government. If such a decision involves a non-probable cause search of a *type* not addressed in Rule 314, it will be fully applicable to the Armed Forces under Rule 314(k) unless other authority prohibits such application.

(a) *General Rule.* Rule 314(a) provides that evidence obtained from a search conducted pursuant to Rule 314 and not in violation of another Rule, *e.g.*, Rule 312, Bodily Views and Intrusions, is admissible when relevant and not otherwise inadmissible.

(b) *Border Searches.* Rule 314(b) recognizes that military personnel may perform border searches when authorized to do so by Congress.

(c) *Searches upon entry to United States installations, aircraft, and vessels abroad.* Rule 314(c) follows the opinion of Chief Judge Fletcher in *United States v. Rivera*, 4 M.J. 215 (C.M.A. 1978), in which he applied, 4 M.J. 215, 216 n.2, the border search doctrine, to entry searches of United States installations or enclaves on foreign soil. The search must be reasonable and its intent, in line with all border searches, must be primarily prophylactic. This authority is additional to any other powers to search or inspect that a commander may hold.

Although Rule 314(c) is similar to Rule 313(b), it is distinct in terms of its legal basis. Consequently, a search performed pursuant to Rule 314(c) need not comply with the burden of proof requirement found in Rule 313(b) for contraband inspections even though the purpose of the 314(c) examination is to prevent introduction of contraband into the installation, aircraft or vessel.

A Rule 314(c) examination must, however, be for a purpose denominated in the rule and must be rationally related to such purpose. A search pursuant to Rule 314(c) is possible only upon entry to the installation, aircraft, or vessel, and an individual who chooses not to enter removes any basis for search pursuant to Rule 314(c). The Rule does not indicate whether discretion may be vested in the person conducting a properly authorized Rule 314(c) search. It was the opinion of members of the Committee, however, that such discretion is proper considering the Rule's underlying basis.

1984 Amendment: Subsection (c) was amended by adding "or exit from" based on *United States v. Alleyne*, 13 M.J. 331 (C.M.A. 1982).

(d) *Searches of government property.* Rule 314(d) restates prior law, *see, e.g., United States v. Weshenfelder*, 20 C.M.A. 416, 43 C.M.R. 256 (1971), and recognizes that personnel normally do not have sufficient interest in government property to have a reasonable expectation of privacy in it. Although the rule could be equally well denominated as a lack of adequate interest, *see,* Rule 311(a)(2), it is more usually expressed as a non-probable cause search. The Rule recognizes that certain government property may take on aspects of private property allowing an individual to develop a reasonable expectation of privacy surrounding it. Wall or floor lockers in living quarters issued for the purpose of storing personal property will normally, although not necessarily, involve a reasonable expectation of privacy. It was the intent of the Committee that such lockers give rise to a rebuttable presumption that they do have an expectation of privacy, and that insofar as other government property is concerned such property gives rise to a rebuttable presumption that such an expectation is absent.

Public property, such as streets, parade grounds, parks, and office buildings rarely if ever involves any limitations upon the ability to search.

(e) *Consent Searches.*

(1) *General rule.* The rule in force before 1980 was found in Para. 152, MCM, 1969 (Rev.), the relevant sections of which state:

A search of one's person with his freely given consent, or of property with the freely given consent of a person entitled in the situation involved to waive the right to immunity from an unreasonable search, such as an owner, bailee, tenant, or occupant as the case may be under the circumstances [is lawful].

If the justification for using evidence obtained as a result of a search is that there was a freely given consent to the search, that consent must be shown by clear and positive evidence.

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

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

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

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

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

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

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

The Rule recognizes the necessity for assisting police or law enforcement personnel in their investigations but specifically does not address the issue of the lawful duration of a stop nor of the nature of the questioning, if any, that may be involuntarily addressed to the individual stopped. *See Brown v. Texas*, 440 U.S. 903 (1979), generally prohibiting such questioning in civilian life. Generally, it would appear that any individual who can be lawfully stopped is likely to be a suspect for the purposes of Article 31(b). Whether identification can be demanded of a military suspect without Article 31(b) warnings is an open question and may be dependent upon whether the identification of the suspect is relevant to the offense possibly involved. *See* Lederer, *Rights Warnings in the Armed Services*, 72 Mil.L.Rev. 1,40–41 (1976).

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

(g) *Searches incident to a lawful apprehension.* The 1969 Manual rule was found in Para. 152 and stated:

A search conducted as an incident of lawfully apprehending a person, which may include a search of his person, of the clothing he is wearing, and of property which, at time of apprehension, is in his immediate possession or control, or of an area from within which he might gain possession of weapons or destructible evidence; and a search of the place where the apprehension is made [is lawful].

Rule 314(g) restates the principle found within the Manual text but utilizes new and clarifying language. The Rule expressly requires that an apprehension be lawful.

(1) *General Rule.* Rule 314(g)(1) expressly authorizes the search of a person of a lawfully apprehended individual without further justification.

(2) *Search for weapons and destructible evidence.* Rule 314(g)(2) delimits the area that can be searched pursuant to an apprehension and specifies that the purpose of the search is only to locate weapons and destructible evidence. This is a variation of the authority presently in the Manual and is based upon the Supreme Court's decision in *Chimel v. California*, 395 U.S. 752 (1969). It is clear from the Court's decision in *United States v. Chadwick*, 438 U.S. 1 (1977), that the scope of a search pursuant to a lawful apprehension must be limited to those areas which an individual could reasonably reach and utilize. The search of the area within the immediate control of the person apprehended is thus properly viewed as a search based upon necessity— whether one based upon the safety of those persons apprehending or upon the necessity to safeguard evidence. *Chadwick*, holding that police could not search a sealed footlocker pursuant to an arrest, stands for the proposition that the *Chimel* search must be limited by its rationale.

That portion of the 1969 Manual subparagraph dealing with intrusive body searches has been incorporated into Rule 312. Similarly that portion of the Manual dealing with search incident to hot pursuit of a person has been incorporated into that portion of Rule 315 dealing with exceptions to the need for search warrants or authorizations.

1984 Amendment: Subsection (g)(2) was amended by adding language to clarify the permissible scope of a search incident to apprehension of the occupant of an automobile based on *New York v. Belton*, 453 U.S. 454 (1981). The holding of the Court used the term "automobile" so that word is used in the rule. It is intended that the term "automobile" have the broadest possible meaning.

(3) *Examination for other persons.* Rule 314(g)(3) is intended to protect personnel performing apprehensions. Consequently, it is extremely limited in scope and requires a good faith and reasonable belief that persons may be present who might interfere with

the apprehension of individuals. Any search must be directed towards the finding of such persons and not evidence.

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

1994 Amendment. The amendment to Mil. R. Evid. 314(g)(3), based on *Maryland v. Buie*, 494 U.S. 325 (1990), specifies the circumstances permitting the search for other persons and distinguishes between protective sweeps and searches of the attack area.

Subsection (A) permits protective sweeps in the military. The last sentence of this subsection clarifies that an examination under the rule need not be based on probable cause. Rather, this subsection adopts the standard articulated in *Terry v. Ohio*, 392 U.S. 1 (1968) and *Michigan v. Long*, 463 U.S. 1032 (1983). As such, there must be articulable facts that, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing the area harbors individuals posing a danger to those at the site of apprehension. The previous language referring to those "who might interfere" was deleted to conform to the standards set forth in *Buie*. An examination under this rule is limited to a cursory visual inspection of those places in which a person might be hiding.

A new subsection (B) was also added as a result of *Buie, supra*. The amendment clarifies that apprehending officials may examine the "attack area" for persons who might pose a danger to apprehending officials. *See Buie*, 494 U.S. at 334. The attack area is that area immediately adjoining the place of apprehension from which an attack could be immediately launched. This amendment makes it clear that apprehending officials do not need any suspicion to examine the attack area.

(h) *Searches within jails, confinement facilities, or similar facilities.* Personnel confined in a military confinement facility or housed in a facility serving a generally similar purpose will normally yield any normal Fourth Amendment protections to the reasonable needs of the facility. *See, United States v. Maglito*,20 C.M.A. 456, 43 C.M.R. 296 (1971). *See also* Rule 312.

(i) *Emergency searches to save life or for related purpose.* This type of search is not found within the 1969 Manual provision but is in accord with prevailing civilian and military case law. *See, United States v. Yarborough*, 50 C.M.R. 149, 155 (A.F.C.M.R. 1975). Such a search must be conducted in good faith and may not be a subterfuge in order to circumvent an individual's Fourth Amendment protections.

(j) *Searches of open fields or woodlands.* This type of search is taken from 1969 Manual paragraph 152. Originally recognized in *Hester v. United States*, 265 U.S. 57 (1924), this doctrine was revived by the Supreme Court in *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974). Arguably, such a search is not a search within the meaning of the Fourth Amendment. In *Hester*, Mr. Justice Holmes simply concluded that "the special protection accorded by the 4th Amendment to the people in their [persons, houses, papers, and effects] is not extended to the open fields." 265 U.S. at 59. In relying on *Hester*, the Court in *Air Pollution Variance Board* noted that it was "not advised that he [the air pollution investigator] was on premises from which the public was excluded." 416 U.S. at 865. This suggests that the doctrine of open fields is subject to the caveat that a reasonable expectation of privacy may result in application of the Fourth Amendment to open fields.

(k) *Other searches.* Rule 314(k) recognizes that searches of a *type* not specified within the Rule but proper under the Constitution are also lawful.

Rule 315. Probable cause searches

(a) *General Rule*— Rule 315 states that evidence obtained pursuant to the Rule is admissible when relevant and not otherwise admissible under the Rules.

(b) *Definitions.*

(1) *Authorization to search.* Rule 315(b)(1) defines an "authorization to search" as an express permission to search issued by proper military authority whether commander or judge. As such, it replaces the term "search warrant" which is used in the Rules only when referring to a permission to search given by proper civilian authority. The change in terminology reflects the unique nature of the armed forces and of the role played by commanders.

(2) *Search warrant.* The expression "search warrant" refers only to the authority to search issued by proper civilian authority.

(c) *Scope of authorization.*— Rule 315(c) is taken generally from Para. 152(1)–(3) of the 1969 Manual except that military jurisdiction to search upon military installations or in military aircraft, vessels, or vehicles has been clarified. Although civilians and civilian institutions on military installations are subject to search pursuant to a proper search authorization, the effect of any applicable federal statute or regulation must be considered. *E.g.*, the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401–3422, and DOD Directive 5400.12 (Obtaining Information From Financial Institutions).

Rule 315(c)(4) is a modification of prior law. Subdivision (c)(4)(A) is intended to ensure cooperation between Department of Defense agencies and other government agencies by requiring prior consent to DOD searches involving such other agencies. Although Rule 315(c)(4)(B) follows the 1969 Manual in permitting searches of "other property in a foreign country" to be authorized pursuant to subdivision (d), subdivision (c) requires that all applicable treaties be complied with or that prior concurrence with an appropriate representative of the foreign nation be obtained if no treaty or agreement exists. The Rule is intended to foster cooperation with host nations and compliance with all existing international agreements. The rule does not require specific approval by foreign authority of each search (unless, of course, applicable treaty requires such approval); rather the Rule permits prior blanket or categorical approvals. Because Rule 315(c)(4) is designed to govern intragovernmental and international relationships rather than relationships between the United States and its citizens, a violation of these provisions does not render a search unlawful.

(d) *Power to authorize*—Rule 315(d) grants power to authorize searches to impartial individuals of the included classifications. The closing portion of the subdivision clarifies the decision of the Court of Military Appeals in *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979), by stating that the mere presence of an authorizing officer at a search does not deprive the individual of an otherwise neutral character. This is in conformity with the decision of the United States Supreme Court in *Lo-Ji Sales v. New*

York, 442 U.S. 319 (1979), from which the first portion of the language has been taken. The subdivision also recognizes the propriety of a commander granting a search authorization after taking a pretrial action equivalent to that which may be taken by a federal district judge. For example, a commander might authorize use of a drug detector dog, an action arguably similar to the granting of wiretap order by a federal judge, without necessarily depriving himself or herself of the ability to later issue a search authorization. The question would be whether the commander has acted in the first instance in an impartial judicial capacity.

(1) *Commander*— Rule 315(d)(1) restates the prior rule by recognizing the power of commanders to issue search authorizations upon probable cause. The Rule explicitly allows non-officers serving in a position designated by the Secretary concerned as a position of command to issue search authorizations. If a non-officer assumes command of a unit, vessel, or aircraft, and the command position is one recognized by regulations issued by the Secretary concerned, *e.g.*, command of a company, squadron, vessel, or aircraft, the non-officer commander is empowered to grant search authorizations under this subdivision whether the assumption of command is pursuant to express appointment or devolution of command. The power to do so is thus a function of position rather than rank.

The Rule also allows a person serving as officer-in-charge or in a position designated by the Secretary as a position analogous to an officer-in-charge to grant search authorizations. The term "officer-in-charge" is statutorily defined, Article 1(4), as pertaining only to the Navy, Coast Guard, and Marine Corps, and the change will allow the Army and Air Force to establish an analogous position should they desire to do so in which case the power to authorize searches would exist although such individuals would not be "officers-in-charge" as that term is used in the U.C.M.J.

(2) *Delegee*— Former subsection (2), which purported to allow delegation of the authority to authorize searches, was deleted in 1984, based on *United States v. Kalscheuer*, 11 M.J. 373 (C.M.A. 1981). Subsection (3) was renumbered as subsection (2).

(3) *Military judge*— Rule 315(d)(2) permits military judges to issue search authorizations when authorized to do so by the Secretary concerned. MILITARY MAGISTRATES MAY ALSO BE EMPOWERED TO GRANT SEARCH AUTHORIZATIONS. This recognizes the practice now in use in the Army but makes such practice discretionary with the specific Service involved.

(e) *Power to search.* Rule 315(e) specifically denominates those persons who may conduct or authorize a search upon probable cause either pursuant to a search authorization or when such an authorization is not required for reasons of exigencies. The Rule recognizes, for example, that all officers and non-commissioned officers have inherent power to perform a probable cause search without obtaining of a search authorization under the circumstances set forth in Rule 315(g). The expression "criminal investigator" within Rule 315(e) includes members of the Army Criminal Investigation Command, the Marine Corps Criminal Investigation Division, the Naval Criminal Investigative Service, the Air Force Office of Special Investigations, and Coast Guard special agents.

(f) *Basis for search authorizations.* Rule 315(f) requires that probable cause be present before a search can be conducted under the Rule and utilizes the basic definition of probable cause found in 1969 Manual Para. 152.

For reasons of clarity the Rule sets forth a simple and general test to be used in all probable cause determinations: probable cause can exist only if the authorizing individual has a "reasonable belief that the information giving rise to the intent to search is believable and has a factual basis." This test is taken from the "two prong test" of *Aguilar v. Texas*, 378 U.S. 108 (1964), which was incorporated in Para. 152 of the 1969 Manual. The Rule expands the test beyond the hearsay and informant area. The "factual basis" requirement is satisfied when an individual reasonably concludes that the information, if reliable, adequately apprises the individual that the property in question is what it is alleged to be and is where it is alleged to be. Information is "believable" when an individual reasonably concludes that it is sufficiently reliable to be believed.

The twin test of "believability" and "basis in fact" must be met in all probable cause situations. The method of application of the test will differ, however, depending upon circumstances. The following examples are illustrative:

(1) An individual making a probable cause determination who observes an incident first hand is only required to determine if the observation is reliable and that the property is likely to be what it appears to be.

For example, an officer who believes that she sees an individual in possession of heroin must first conclude that the observation was reliable (*i.e.*, if her eyesight was adequate—should glasses have been worn—and if there was sufficient time for adequate observation) and that she has sufficient knowledge and experience to be able to reasonably believe that the substance in question was in fact heroin.

(2) An individual making a probable cause determination who relies upon the in person report of an informant must determine both that the informant is believable and that the property observed is likely to be what the observer believes it to be. The determining individual may rely upon the demeanor of the informant in order to determine whether the observer is believable. An individual known to have a "clean record" and no bias against the individual to be affected by the search is likely to be credible.

(3) An individual making a probable cause determination who relies upon the report of an informant not present before the authorizing individual must determine both that the informant is credible and that the property observed is likely to be what the informant believed it to be. The determining individual may utilize one or more of the following factors, among others, in order to determine whether the informant is believable:

(A) *Prior record as a reliable informant*— Has the informant given information in the past which proved to be accurate?

(B) *Corroborating detail*— Has enough detail of the informant's information been verified to imply that the remainder can reasonably be presumed to be accurate?

(C) *Statement against interest*— Is the information given by the informant sufficiently adverse to the fiscal or penal interest of the informant to imply that the information may reasonably be presumed to be accurate?

(D) *Good citizen*— Is the character of the informant, as known by the individual making the probable cause determina-

tion, such as to make it reasonable to presume that the information is accurate?

Mere allegations may not be relied upon. For example, an individual may not reasonably conclude that an informant is reliable simply because the informant is so named by a law enforcement agent. The individual making the probable cause determination must be supplied with specific details of the informant's past actions to allow that individual to personally and reasonably conclude that the informant is reliable.

Information transmitted through law enforcement or command channels is presumed to have been reliably transmitted. This presumption may be rebutted by an affirmative showing that the information was transmitted with intentional error.

The Rule permits a search authorization to be issued based upon information transmitted by telephone or other means of communication.

The Rule also permits the Secretaries concerned to impose additional procedural requirements for the issuance of search authorizations.

1984 Amendment: The second sentence of subsection (f)(1) was deleted based on *Illinois v. Gates*, 462 U.S.213 (1983), which overturned the mandatory two-prong test of *Aguilar v. Texas, supra.* Although the second sentence may be technically compatible with *Gates*, it could be construed as requiring strict application of the standards of *Aguilar*. The former language remains good advice for those deciding the existence of probable cause, especially for uncorroborated tips, but is not an exclusive test. *See also Massachusetts v. Upton*, 466 U.S. 767 (1984).

(g) *Exigencies.* Rule 315(g) restates prior law and delimits those circumstances in which a search warrant or authorization is unnecessary despite the ordinary requirement for one. In all such cases probable cause is required.

Rule 315(g)(1) deals with the case in which the time necessary to obtain a proper authorization would threaten the destruction or concealment of the property or evidence sought.

Rule 315(g)(2) recognizes that military necessity may make it tactically impossible to attempt to communicate with a person who could grant a search authorization. Should a nuclear submarine on radio silence, for example, lack a proper authorizing individual, (perhaps for reasons of disqualification), no search could be conducted if the Rule were otherwise unless the ship broke radio silence and imperiled the vessel or its mission. Under the Rule this would constitute an "exigency." "Military operational necessity" includes similar necessity incident to the Coast Guard's performance of its maritime police mission.

The Rule also recognizes in subdivision (g)(3) the "automobile exception" created by the Supreme Court. *See, e.g., United States v. Chadwick*, 433 U.S. 1 (1977); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Texas v. White*, 423 U.S. 67 (1975), and, subject to the constraints of the Constitution, the Manual, or the Rules, applies it to all vehicles. While the exception will thus apply to vessels and aircraft as well as to automobiles, trucks, *et al*, it must be applied with great care. In view of the Supreme Court's reasoning that vehicles are both mobile and involve a diminished expectation of privacy, the larger a vehicle is, the more unlikely it is that the exception will apply. The exception has no application to government vehicles as they may be searched without formal warrant or authorization under Rule 314(d).

1984 Amendment: The last sentence of subsection (g) was amended by deleting "presumed to be." The former language could be construed to permit the accused to prove that the vehicle was in fact inoperable (that is, to rebut the presumption of operability) thereby negating the exception, even though a reasonable person would have believed the vehicle inoperable. The fact of inoperability is irrelevant; the test is whether the official(s) searching knew or should have known that the vehicle was inoperable.

(h) *Execution.* Rule 314(h)(1) provides for service of a search warrant or search authorization upon a person whose property is to be searched when possible. Noncompliance with the Rule does not, however, result in exclusion of the evidence. Similarly, Rule 314(h)(2) provides for the inventory of seized property and provisions of a copy of the inventory to the person from whom the property was seized. Noncompliance with the subdivision does not, however, make the search or seizure unlawful. Under Rule 315(h)(3) compliance with foreign law is required when executing a search authorization outside the United States, but noncompliance does not trigger the exclusionary rule.

Rule 316. Seizures

(a) *General Rule.* Rule 316(a) provides that evidence obtained pursuant to the Rule is admissible when relevant and not otherwise inadmissible under the Rules. Rule 316 recognizes that searches are distinct from seizures. Although rare, a seizure need not be proceeded by a search. Property may, for example, be seized after being located pursuant to plain view, *see* subdivision (d)(4)(C). Consequently, the propriety of a seizure must be considered independently of any preceding search.

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

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

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

(d) *Seizure of property or evidence.*

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

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

(3) *Government property.* Rule 316(d)(3) permits seizure of government property without probable cause unless the person to whom the property is issued or assigned has a reasonable expecta-

tion of privacy therein at the time of seizure. In this regard note Rule 314(d) and its analysis.

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

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

Although most plain view seizures are inadvertent, there is no necessity that a plain view discovery be inadvertent— notwithstanding dicta, in some court cases; *see, Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The Rule allows a seizure pursuant to probable cause when made as a result of plain view. The language used in Rule 316(d)(4)(C) is taken from the ALI MODEL CODE OF PREARRAIGNMENT PROCEDURES § 260.6 (1975). The Rule requires that the observation making up the alleged plain view be "reasonable." Whether intentional observation from outside a window, via flashlight or binocular, for example, is observation in a "reasonable fashion" is a question to be considered on a case by case basis. Whether a person may properly enter upon private property in order to effect a seizure of matter located via plain view is not resolved by the Rule and is left to future case development.

1984 Amendment: Subsection (d)(5) was added based on *United States v. Place*, 462 U.S. 696 (1983).

(e) *Power to seize.* Rule 316(e) conforms with Rule 315(e) and has its origin in Para. 19, MCM, 1969 (Rev.).

Rule 317. Interception of wire and oral communication

(a) *General Rule.* The area of interception of wire and oral communications is unusually complex and fluid. At present, the area is governed by the Fourth Amendment, applicable federal statute, DOD directive, and regulations prescribed by the Service Secretaries. In view of this situation, it is preferable to refrain from codification and to vest authority for the area primarily in the Department of Defense or Secretary concerned. Rule 317(c) thus prohibits interception of wire and oral communications for law enforcement purposes by members of the armed forces except as authorized by 18 U.S.C. § 2516, Rule 317(b), and when applicable, by regulations issued by the Secretary of Defense or the Secretary concerned. Rule 317(a), however, specifically requires exclusion of evidence resulting form noncompliance with Rule 317(c) only when exclusion is required by the Constitution or by an applicable statute. Insofar as a violation of a regulation is concerned, *compare United States v. Dillard*, 8 M.J. 213 (C.M.A. 1980) with *United States v. Caceres*, 440 U.S. 741 (1979).

(b) *Authorization for Judicial Applications in the United States.* Rule 317(b) is intended to clarify the scope of 18 U.S.C. § 2516 by expressly recognizing the Attorney General's authority to authorize applications to a federal court by the Department of Defense, Department of Transportation, or the military departments for authority to intercept wire or oral communications.

(c) *Regulations.* Rule 317(c) requires interception of wire or oral communications in the United States be first authorized by statute, *see* Rule 317(b), and interceptions abroad by appropriate regulations. *See* the Analysis to Rule 317(a), *supra*. The Committee intends 317(c) to limit only in interceptions that are non consensual under Chapter 119 of Title 18 of the United States Code.

Rule 321. Eyewitness identification

(a) *General Rule*

(1) *Admissibility.* The first sentence of Rule 321(a)(1) is the basic rule of admissibility of eyewitness identification and provides that evidence of a relevant out-of-court identification is admissible when otherwise admissible under the Rules. The intent of the provision is to allow any relevant out-of-court identification without any need to comply with the condition precedent such as in-court identification, significant change from the prior rule as found in Para. 153 *a*, MCM, 1969 (Rev.).

The language "if such testimony is otherwise admissible under these rules" is primarily intended to ensure compliance with the hearsay rule. Rule 802. It should be noted that Rule 801(d)(1)(C) states that a statement of "identification of a person made after perceiving the person" is not hearsay when "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement." An eyewitness identification normally will be admissible if the declarant testifies. The Rule's statement, "the witness making the identification and any person who has observed the previous identification may testify concerning it," is not an express exception authorizing the witness to testify to an out-of-court identification notwithstanding the hearsay rule, rather it is simply an indication that in appropriate circumstances, *see* Rules 803 and 804, a witness to an out-of-court identification may testify concerning it.

The last sentence of subdivision (a)(1) is intended to clarify procedure by emphasizing that an in-court identification may be bolstered by an out-of-court identification notwithstanding the fact that the in-court identification has not been attacked.

(2) *Exclusionary rule.* Rule 321(a)(2) provides the basic exclusionary rule for eyewitness identification testimony. The substance of the Rule is taken from prior Manual paragraph 153 *a* as modified by the new procedure for suppression motions. *See* Rules 304 and 311. Subdivision (a)(2)(A) provides that evidence of an identification will be excluded if it was obtained as a result of an "unlawful identification process conducted by the United States or other domestic authorities" while subdivision (a)(2)(B) excludes evidence of an identification if exclusion would be required by the due process clause of the Fifth Amendment to the Constitution. Under the burden of proof, subdivision (d)(2), an identification is not inadmissible if the prosecution proves by a preponderance of the evidence that the identification process was not so unnecessarily suggestive, in light of the totality of the circumstances, as to create a very substantial likelihood of irreparable mistaken identity. It is the unreliability of the evidence which is determinative. *Manson v. Brathwaite*, 432 U.S. 98

(1977). "United States or other domestic authorities" includes military personnel.

Although it is clear that an unlawful identification may taint a later identification, it is unclear at present whether an unlawful identification requires suppression of evidence other than identification of the accused. Consequently, the Rule requires exclusion of nonidentification derivative evidence only when the Constitution would so require.

(b) *Definition of "unlawful."*

(1) *Lineups and other identification processes.* Rule 321(b) defines "unlawful lineup or other identification processes." When such a procedure is conducted by persons subject to the Uniform Code of Military Justice or their agents, it will be unlawful if it is "unnecessarily suggestive or otherwise in violation of the due process clause of the Fifth Amendment of the Constitution of the United States as applied to members of the armed forces." The expression, "unnecessarily suggestive" itself is a technical one and refers to an identification that is in violation of the due process clause because it is unreliable. *See Manson v. Brathwaite, supra; Stovall v. Denno*, 338 U.S. 292 (1967); *Neil v. Biggers*, 409 U.S. 188 (1972). *See also Foster v. California*, 394 U.S. 440 (1969). An identification is not unnecessarily suggestive in violation of the due process clause if the identification process was not so unnecessarily suggestive, in light of the totality of the circumstances, as to create a very substantial likelihood of irreparable mistaken identity. *See Manson v. Brathwaite, supra*, and subdivision (d)(2).

Subdivision (1)(A) differs from subdivision (1)(B) only in that it recognizes that the Constitution may apply differently to members of the armed forces than it does to civilians.

Rule 321(b)(1) is applicable to all forms of identification processes including showups and lineups.

1984 Amendment: Subsections (b)(1) and (d)(2) were modified to make clear that the test for admissibility of an out-of-court identification is reliability. *See Manson v. Brathwaite, supra.* This was apparently the intent of the drafters of the former rule. *See* Analysis, Mil. R. Evid. 321. The language actually used in subsection (b)(1) and (d)(2) was subject to a different interpretation, however. *See* S. Salzburg, L. Schinasi, and D. Schlueter, MILITARY RULES OF EVIDENCE MANUAL at 165–167 (1981); Gasperini, *Eyewitness Identification Under the Military Rules of Evidence*, The Army Lawyer at 42 (May 1980).

In determining whether an identification is reliable, the military judge should weigh all the circumstances, including: the opportunity of the witness to view the accused at the time of the offense; the degree of attention paid by the witness; the accuracy of any prior descriptions of the accused by the witness; the level of certainty shown by the witness in the identification; and the time between the crime and the confrontation. Against these factors should be weighed the corrupting effect of a suggestive and unnecessary identification. *See Manson v. Brathwaite, supra; Neil v. Biggers, supra*.

Note that the modification of subsection (b)(1) eliminates the distinction between identification processes conducted by persons subject to the code and other officials. Because the test is the reliability of the identification, and not a prophylactic standard, there is no basis to distinguish between identification processes conducted by each group. *See Manson v. Brathwaite, supra.*

(2) *Lineups: right to counsel.* Rule 321(b)(2) deals only with lineups. The Rule does declare that a lineup is "unlawful" if it is conducted in violation of the right to counsel. Like Rule 305 and 311, Rule 321(b)(2) distinguishes between lineups conducted by persons subject to the Uniform Code of Military Justice or their agents and those conducted by others.

Subdivision (b)(2)(A) is the basic right to counsel for personnel participating in military lineups. A lineup participant is entitled to counsel only if that participant is in pretrial restraint (pretrial arrest, restriction, or confinement) under paragraph 20 of the Manual or has had charges preferred against him or her. Mere apprehension or temporary detention does not trigger the right to counsel under the Rule. This portion of the Rule substantially changes military law and adapts the Supreme Court's decision in *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (holding that the right to counsel attached only when "adversary judicial criminal proceedings" have been initiated or "the government has committed itself to prosecute") to unique military criminal procedure. *See also* Rule 305(d)(1)(B).

Note that *interrogation* of a suspect will require rights warnings, perhaps including a warning of a right to counsel, even if counsel is unnecessary under Rule 321. *See* Rule 305.

As previously noted, the Rule does not define "lineup" and recourse to case law is necessary. Intentional exposure of the suspect to one or more individuals for purpose of identification is likely to be a lineup. *Stovall v. Denno*, 388 U.S. 293, 297 (1967), although in rare cases of emergency (*e.g.*, a dying victim) such an identification may be considered a permissible "showup" rather than a "lineup." Truly accidental confrontations between victims and suspects leading to an identification by the victim are not generally considered "lineups"; *cf. United State ex rel Ragazzin v. Brierley*, 321 F.Supp. 440 (W.D. Pa. 1970). Photographic identifications are not "lineups" for purposes of the right to counsel. *United States v. Ash*, 413 U.S. 300, 301 n.2 (1973). If a photographic identification is used, however, the photographs employed should be preserved for use at trial in the event that the defense should claim that the identification was "unnecessarily suggestive." *See subdivision* (b)(1) *supra.*

A lineup participant who is entitled to counsel is entitled to only one lawyer under the Rule and is specifically entitled to free military counsel without regard to the indigency or lack thereof of the participant. No right to civilian counsel or military counsel of the participant's own selection exists under the Rule, *United States v. Wade*, 388 U.S. 218, n.27 (1967). A lineup participant may waive any applicable right to counsel so long as the participant is aware of the right to counsel and the waiver is made "freely, knowingly, and intelligently." Normally a warning of the right to counsel will be necessary for the prosecution to prove an adequate waiver should the defense adequately challenge the waiver. *See, e.g., United States v. Avers*, 426 F.2d 524 (2d Cir. 1970). *See also* Model Rules for Law Enforcement, Eye Witness Identification, Rule 404 (1974) cited in E. Imwinkelried, P. Giannelli, F. Gilligan, & F. Lederer, CRIMINAL EVIDENCE 366 (1979).

1984 Amendment: In subsection (b)(2)(A), the words "or law specialist within the meaning of Article 1" were deleted as unnecessary. *See* R.C.M. 103(26).

Subdivision (b)(2)(B) grants a right to counsel at non-military lineups within the United States only when such a right to counsel is recognized by "the principles of law generally recognized in the trial of criminal cases in the United States district courts

involving similar lineups." The Rule presumes that an individual participating in a foreign lineup conducted by officials of a foreign nation without American participation has no right to counsel at such a lineup.

(c) *Motions to suppress and objections.* Rule 321(c) is identical in application to Rule 311(d). *See* the Analysis to Rules 304 and 311.

(d) *Burden of proof.* Rule 321(d) makes it clear that when an eyewitness identification is challenged by the defense, the prosecution need reply only to the specific cognizable defense complaint. *See also* Rules 304 and 311. The subdivision distinguishes between defense challenges involving alleged violation of the right to counsel and those involving the alleged unnecessarily suggestive identifications.

(1) *Right to counsel.* Subdivision (d)(1) requires that when an alleged violation of the right to counsel has been raised the prosecution must either demonstrate by preponderance of the evidence that counsel was present or that the right to counsel was waived voluntarily and intelligently. The Rule also declares that if the right to counsel is violated at a lineup that results in an identification of the accused any later identification is considered a result of the prior lineup as a matter of law unless the military judge determines by clear and convincing evidence that the latter identification is not the result of the first lineup. Subdivision (d)(1) is taken in substance from 1969 Manual Para. 153 *a*.

(2) *Unnecessarily suggestive identification.* Rule 321(d)(2) deals with an alleged unnecessarily suggestive identification or with any other alleged violation of due process. The subdivision makes it clear that the prosecution must show, when the defense has raised the issue, that the identification in question was not based upon a preponderance of the evidence, "so unnecessarily suggestive in light of the totality of the circumstances, as to create a very substantial likelihood of irreparable mistaken identity." This rule is taken from the Supreme Court's decisions of *Neil v. Biggers*, 409 U.S. 188 (1972) and *Stovall v. Denno*, 388 U.S. 293 (1967), and unlike subdivision (d)(1), applies to all identification processes whether lineups or not. The Rule recognizes that the nature of the identification process itself may well be critical to the reliability of the identification and provides for exclusion of unreliable evidence regardless of its source. If the prosecution meets its burden, the mere fact that the identification process was unnecessary or suggestive does not require exclusion of the evidence, *Manson v. Brathwaite, supra.*

If the identification in question is subsequent to an earlier, unnecessarily suggestive identification, the later identification is admissible if the prosecution can show by clear and convincing evidence that the later identification is not the result of the earlier improper examination. This portion of the Rule is consistent both with 1969 Manual Para. 153 *a* and *Kirby v. Illinois*, 406 U.S. 682 (1972).

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

(f) *Rulings.* Rule 321(f) is identical with the analogous provisions in Rules 304 and 321 and substantially changes prior law. *See* the Analysis to Rule 304(d)(4).

(g) *Effect of guilty plea.* Rule 321(g) is identical with the analogous provisions in Rules 304 and 311 and restates prior law.

SECTION IV

Relevancy and its Limits

Rule 401. Definition of "relevant evidence"

The definition of "relevant evidence" found within Rule 401 is taken without change from the Federal Rule and is substantially similar in effect to that used by Para. 137, MCM, 1969 (Rev.). The Rule's definition may be somewhat broader than the 1969 Manual's, as the Rule defines as relevant any evidence that has "any tendency to make the existence of any fact ... more probable or less probable than it would be without the evidence" while the 1969 Manual defines as "not relevant" evidence "too remote to have any appreciable probative value ..." To the extent that the 1969 Manual's definition includes considerations of "legal relevance," those considerations are adequately addressed by such other Rules as Rules 403 and 609. *See*, E. IMWINKELRIED, P. GIANNELLI, F. GILLIGAN & F. LEDERER, CRIMINAL EVIDENCE 62–65 (1979) (which, after defining "logical relevance" as involving only probative value, states at 63 that "under the rubric of [legal relevance,] the courts have imposed an additional requirement that the item's probative value outweighs any attendant probative dangers.") The Rule is similar to the 1969 Manual in that it abandons any reference to "materiality"in favor of a single standard of "relevance." Notwithstanding the specific terminology used, however, the concept of materiality survives in the Rule's condition that to be relevant evidence must involve a fact "which is of consequence to the determination of the action."

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

Rule 402 is taken without significant change from the Federal Rule. The Federal Rule's language relating to limitations imposed by "the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority" has been replaced by material tailored to the unique nature of the Military Rules of Evidence. Rule 402 recognizes that the Constitution may apply somewhat differently to members of the armed forces than to civilians, and the Rule deletes the Federal Rule's reference to "other rules prescribed by the Supreme Court" because such Rules do not apply directly in courts-martial. *See* Rule 101(b)(2).

Rule 402 provides a general standard by which irrelevant evidence is always inadmissible and by which relevant evidence is generally admissible. Qualified admissibility of relevant evidence is required by the limitations in Sections III and V and by such other Rules as 403 and 609 which intentionally utilize matters such as degree of probative value and judicial efficiency in determining whether relevant evidence should be admitted.

Rule 402 is not significantly different in its effect from Para. 137 of the 1969 Manual which it replaces, and procedures used under the 1969 Manual in determining relevance generally remain valid. Offers of proof are encouraged when items of doubtful relevance are proffered, and it remains possible, subject to the discretion of the military judge, to offer evidence "subject to later connection." Use of the latter technique, however, must be made with great care to avoid the possibility of bringing inadmissible evidence before the members of the court.

It should be noted that Rule 402 is potentially the most important of the new rules. Neither the Federal Rules of Evidence nor

the Military Rules of Evidence resolve all evidentiary matters; *see* Rule 101(b). When specific authority to resolve an evidentiary issue is absent, Rule 402's clear result is to make relevant evidence admissible.

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

Rule 403 is taken without change from the Federal Rule of Evidence. The Rule incorporates the concept often known as "legal relevance", *see* the Analysis to Rule 401, and provides that evidence may be excluded for the reasons stated notwithstanding its character as relevant evidence. The Rule vests the military judge with wide discretion in determining the admissibility of evidence that comes within the Rule.

If a party views specific evidence as being highly prejudicial, it may be possible to stipulate to the evidence and thus avoid its presentation to the court members. *United States v. Grassi*, 602 F.2d 1192 (5th Cir. 1979), a prosecution for interstate transportation of obscene materials, illustrates this point. The defense offered to stipulate that certain films were obscene in order to prevent the jury from viewing the films, but the prosecution declined to join in the stipulation. The trial judge sustained the prosecution's rejection of the stipulation and the Fifth Circuit upheld the judge's decision. In its opinion, however, the Court of Appeals adopted a case by case balancing approach recognizing both the importance of allowing probative evidence to be presented and the use of stipulations as a tool to implement the policies inherent in Rule 403. Insofar as the latter is concerned, the court expressly recognized the power of a Federal district judge to compel the prosecution to accept a defense tendered stipulation.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

(a) *Character evidence generally.* Rule 404(a) replaces 1969 Manual Para. 138 *f* and is taken without substantial change from the Federal Rule. Rule 404(a) provides, subject to three exceptions, that character evidence is not admissible to show that a person acted in conformity therewith.

Rule 404(a)(1) allows only evidence of a pertinent trait of character of the accused to be offered in evidence by the defense. This is a significant change from Para. 138 *f* of the 1969 Manual which also allows evidence of "general good character" of the accused to be received in order to demonstrate that the accused is less likely to have committed a criminal act. Under the new rule, evidence of general good character is inadmissible because only evidence of a specific trait is acceptable. It is the intention of the Committee, however, to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders. The prosecution may present evidence of a character trait only in rebuttal to receipt in evidence of defense character evidence. This is consistent with prior military law.

Rule 404(a)(2) is taken from the Federal Rule with minor changes. The Federal Rule allows the prosecution to present evidence of the character trait of peacefulness of the victim "in a homicide case to rebut evidence that the victim was the first aggressor." Thus, the Federal Rule allows prosecutorial use of character evidence in a homicide case in which self-defense has been raised. The limitation to homicide cases appeared to be inappropriate and impracticable in the military environment. All too often, assaults involving claims of self-defense take place in the densely populated living quarters common to military life. Whether aboard ship or within barracks, it is considered essential to allow evidence of the character trait of peacefulness of the victim. Otherwise, a substantial risk would exist of allowing unlawful assaults to go undeterred. The Federal Rule's use of the expression "first aggressor" was modified to read "an aggressor," as substantive military law recognizes that even an individual who is properly exercising the right of self-defense may overstep and become an aggressor. The remainder of Rule 404(a)(2) allows the defense to offer evidence of a pertinent trait of character of the victim of a crime and restricts the prosecution to rebuttal of that trait.

Rule 404(a)(3) allows character evidence to be used to impeach or support the credibility of a witness pursuant to Rules 607–609.

(b) *Other crimes, wrongs, or acts.* Rule 404(b) is taken without change from the Federal Rule, and is substantially similar to the 1969 Manual rule found in Para. 138 *g*. While providing that evidence of other crimes, wrongs, or acts is not admissible to prove a predisposition to commit a crime, the Rule expressly permits use of such evidence on the merits when relevant to another specific purpose. Rule 404(b) provides examples rather than a list of justifications for admission of evidence of other misconduct. Other justifications, such as the tendency of such evidence to show the accused's consciousness of guilt of the offense charged, expressly permitted in Manual Para. 138 *g*(4), remain effective. Such a purpose would, for example, be an acceptable one. Rule 404(b), like Manual Para. 138 *g*, expressly allows use of evidence of misconduct not amounting to conviction. Like Para. 138 *g*, the Rule does not, however, deal with use of evidence of other misconduct for purposes of impeachment. *See* Rules 608-609. Evidence offered under Rule 404(b) is subject to Rule 403.

1994 Amendment. The amendment to Mil. R. Evid. 04(b) was based on the 1991 amendment to Fed. R. Evid. 404(b). The previous version of Mil. R. Evid. 404(b) was based on the now superseded version of the Federal Rule. This amendment adds the requirement that the prosecution, upon request by the accused, provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. Minor technical changes were made to the language of the Federal Rule so that it conforms to military practice.

Rule 405. Methods of proving character

(a) *Reputation or opinion.* Rule 405(a) is taken without change from the Federal Rule. The first portion of the Rule is identical in effect with the prior military rule found in Para. 138 *f*(1) of the 1969 Manual. An individual testifying under the Rule must have an adequate relationship with the community (*see* Rule 405(c)), in the case of reputation, or with the given individual in the case of opinion, in order to testify. The remainder of Rule 405(a) expressly permits inquiry or cross-examination "into relevant specific instances of conduct." This is at variance with prior military practice under which such an inquiry was prohibited. *See*, Para.

138 *f*(2), MCM, 1969 (Rev.) (character of the accused). Reputation evidence is exempted from the hearsay rule, Rule 803(21).

(b) *Specific instances of conduct.* Rule 405(b) is taken without significant change from the Federal Rule. Reference to "charge, claim, or defense" has been replaced with "offense or defense" in order to adapt the rule to military procedure and terminology.

(c) *Affidavits.* Rule 405(c) is not found within the Federal Rules and is taken verbatim from material found in Para. 146 *b* of the 1969 Manual. Use of affidavits or other written statements is required due to the world wide disposition of the armed forces which makes it difficult if not impossible to obtain witnesses—particularly when the sole testimony of a witness is to be a brief statement relating to the character of the accused. This is particularly important for offenses committed abroad or in a combat zone, in which case the only witnesses likely to be necessary from the United States are those likely to be character witnesses. The Rule exempts statements used under it from the hearsay rule insofar as the mere use of an affidavit or other written statement is subject to that rule.

(d) *Definitions.* Rule 405(d) is not found within the Federal Rules of Evidence and has been included because of the unique nature of the armed forces. The definition of "reputation" is taken generally from 1969 Manual Para. 138 *f*(1) and the definition of "community" is an expansion of that now found in the same paragraph. The definition of "community" has been broadened to add "regardless of size" to indicate that a party may proffer evidence of reputation within any specific military organization, whether a squad, company, division, ship, fleet, group, or wing, branch, or staff corps, for example. Rule 405(d) makes it clear that evidence may be offered of an individual's reputation in either the civilian or military community or both.

Rule 406. Habit; routine practice

Rule 406 is taken without change from the Federal Rule. It is similar in effect to Para. 138 *h* of the 1969 Manual. It is the intent of the Committee to include within Rule 406's use of the word, "organization," military organizations regardless of size. *See* Rule 405 and the Analysis to that Rule.

Rule 407. Subsequent remedial measures

Rule 407 is taken from the Federal Rules without change, and has no express equivalent in the 1969 Manual.

Rule 408. Compromise and offer to compromise

Rule 408 is taken from the Federal Rules without change, and has no express equivalent in the 1969 Manual.

Rule 409. Payment of medical and similar expenses

Rule 409 is taken from the Federal Rules without change. It has no present military equivalent and is intended to be applicable to courts-martial to the same extent that is applicable to civilian criminal cases. Unlike Rules 407 and 408 which although primarily applicable to civil cases are clearly applicable to criminal cases, it is arguable that Rule 409 may not apply to criminal cases as it deals only with questions of "liability"—normally only a civil matter. The Rule has been included in the Military Rules to ensure its availability should it, in fact, apply to criminal cases.

Rule 410. Inadmissibility of pleas, discussions, and related statements

Rule 410 as modified effective 1 August 1981 is generally taken from the Federal Rule as modified on 1 December 1980. It extends to plea bargaining as well as to statements made during a providency inquiry, civilian or military. *E.g., United States v. Care,* 18 C.M.A. 535 (1969). Subsection (b) was added to the Rule in recognition of the unique possibility of administrative disposition, usually separation, in lieu of court-martial. Denominated differently within the various armed forces, this administrative procedure often requires a confession as a prerequisite. As modified, Rule 410 protects an individual against later use of a statement submitted in furtherance of such a request for administrative disposition. The definition of "on the record" was required because no "record" in the judicial sense exists insofar as request for administrative disposition is concerned. It is the belief of the Committee that a copy of the written statement of the accused in such a case is, however, the functional equivalent of such a record.

Although the expression "false statement" was retained in the Rule, it is the Committee's intent that it be construed to include all related or similar military offenses.

Rule 411. Liability Insurance

Rule 411 is taken from the Federal Rule without change. Although it would appear to have potential impact upon some criminal cases, *e.g.,* some negligent homicide cases, its actual application to criminal cases is uncertain. It is the Committee's intent that Rule 411 be applicable to courts-martial only to the extent that it is applicable to criminal cases.

Rule 412. Nonconsensual sexual offenses; relevance of victim's past behavior

Rule 412 is taken from the Federal Rules. Although substantially similar in substantive scope to Federal Rule of Evidence 412, the application of the Rule has been somewhat broadened and the procedural aspects of the Federal Rule have been modified to adapt them to military practice.

Rule 412 is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to prosecutions of such offenses. In so doing, it recognizes that the prior rule, which it replaces, often yields evidence of at best minimal probative value with great potential for distraction and incidentally discourages both the reporting and prosecution of many sexual assaults. In replacing the unusually extensive rule found in Para. 153 *b*(2)(b), MCM, 1969 (Rev.), which permits evidence of the victim's "unchaste" character regardless of whether he or she has testified, the Rule will significantly change prior military practice and will restrict defense evidence. The Rule recognizes, however, in Rule 412(b)(1), the fundamental right of the defense under the Fifth Amendment of the Constitution of the United States to present relevant defense evidence by admitting evidence that is "constitutionally required to be admitted."Further, it is the Committee's intent that the Rule not be interpreted as a rule of absolute

privilege. Evidence that is constitutionally required to be admitted on behalf of the defense remains admissible notwithstanding the absence of express authorization in Rule 412(a). It is unclear whether reputation or opinion evidence in this area will rise to a level of constitutional magnitude, and great care should be taken with respect to such evidence.

Rule 412 applies to a "nonconsensual sexual offense" rather than only to "rape or assault with intent to commit rape" as prescribed by the Federal Rule. The definition of "nonconsensual sexual offense" is set forth in Rule 412(e) and "includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses." This modification to the Federal Rule resulted from a desire to apply the social policies behind the Federal Rule to the unique military environment. Military life requires that large numbers of young men and women live and work together in close quarters which are often highly isolated. The deterrence of sexual offenses in such circumstances is critical to military efficiency. There is thus no justification for limiting the scope of the Rule, intended to protect human dignity and to ultimately encourage the reporting and prosecution of sexual offenses, only to rape and/or assault with intent to commit rape.

Rule 412(a) generally prohibits reputation or opinion evidence of an alleged victim of a nonconsensual sexual offense.

Rule 412(b)(1) recognizes that evidence of a victim's past sexual behavior may be constitutionally required to be admitted. Although there are a number of circumstances in which this language may be applicable, *see*, S. Saltzburg & K. Redden, FEDERAL RULES OF EVIDENCE MANUAL 92–93 (2d ed. Supp. 1979) (giving example of potential constitutional problems offered by the American Civil Liberties Union during the House hearings on Rule 412), one may be of particular interest. If an individual has contracted for the sexual services of a prostitute and subsequent to the performance of the act the prostitute demands increased payment on pain of claiming rape, for example, the past history of that person will likely be constitutionally required to be admitted in a subsequent prosecution in which the defense claims consent to the extent that such history is relevant and otherwise admissible to corroborate the defense position. Absent such peculiar circumstances, however, the past sexual behavior of the alleged victim, not within the scope of Rule 412(b)(2), is unlikely to be admissible regardless of the past sexual history. The mere fact that an individual is a prostitute is not normally admissible under Rule 412.

Evidence of past false complaints of sexual offenses by an alleged victim of a sexual offense is not within the scope of this rule and is not objectionable when otherwise admissible.

Rule 412(c) provides the procedural mechanism by which evidence of past sexual behavior of a victim may be offered. The Rule has been substantially modified from the Federal Rule in order to adapt it to military practice. The requirement that notice be given not later than fifteen days before trial has been deleted as being impracticable in view of the necessity for speedy disposition of military cases. For similar reasons, the requirement for a written motion has been omitted in favor of an offer of proof, which could, of course, be made in writing, at the discretion of the military judge. Reference to hearings in chambers has been deleted as inapplicable; a hearing under Article 39(a), which may be without spectators, has been substituted. The propriety of holding a hearing without spectators is dependent upon its constitutionality which is in turn dependent upon the facts of any specific case.

Although Rule 412 is not *per se* applicable to such pretrial procedures as Article 32 and Court of Inquiry hearings, it may be applicable via Rule 303 and Article 31(c). *See* the Analysis to Rule 303.

It should be noted as a matter related to Rule 412 that the 1969 Manual's prohibition in Para. 153 *a* of convictions for sexual offenses that rest on the uncorroborated testimony of the alleged victim has been deleted. Similarly, an express hearsay exception for fresh complaint has been deleted as being unnecessary. Consequently, evidence of fresh complaint will be admissible under the Military Rule only to the extent that it is either nonhearsay, *see*, Rule 801(d)(1)(B), or fits within an exception to the hearsay rule. *See*, subdivisions (1), (2), (3), (4), and (24) of Rule 803.

1993 Amendment. R.C.M. 405(i) and Mil. R. Evid. 1101(d) were amended to make the provisions of Rule 412 applicable at pretrial investigations. Congress intended to protect the victims of nonconsensual sex crimes at preliminary hearings as well as at trial when it passed Fed. R. Evid. 412. *See* Criminal Justice Subcommittee of the House Judiciary \ Committee Report, 94th Cong., 2d Session, July 1976.

1998 Amendment. The revisions to Rule 412 reflect changes made to Federal Rule of Evidence 412 by section 40141 of the Violent Crime Control and Law Enforcement Act of 1994, Pub L. No. 103-322, 108 Stat. 1796, 1918-19 (1994). The purpose of the amendments is to safeguard the alleged victim against the invasion of privacy and potential embarrassment that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether the sexual misconduct occurred. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct."

The term "sexual predisposition" is added to Rule 412 to conform military practice to changes made to the Federal Rule. The purpose of this change is to exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. It is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the accused believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless an exception under (b)(1) is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or lifestyle is inadmissible.

In drafting Rule 412, references to civil proceedings were deleted, as these are irrelevant to courts-martial practice. Otherwise, changes in procedure made to the Federal Rule were incorporated, but tailored to military practice. The Military Rule adopts a 5-day notice period, instead of the 14-day period specified in the Federal Rule. Additionally, the military judge, for good cause shown, may require a different time for such notice or permit notice during trial. The 5-day period preserves the intent of the Federal Rule that an alleged victim receive timely notice of any attempt to offer evidence protected by Rule 412, however, given the

relatively short time period between referral and trial, the 5-day period is deemed more compatible with courts-martial practice.

Similarly, a closed hearing was substituted for the in camera hearing required by the Federal Rule. Given the nature of the in camera procedure used in Military Rule of Evidence 505(i)(4), and that an in camera hearing in the district courts more closely resembles a closed hearing conducted pursuant to Article 39(a), the latter was adopted as better suited to trial by courts-martial. Any alleged victim is afforded a reasonable opportunity to attend and be heard at the closed Article 39(a) hearing. The closed hearing, combined with the new requirement to seal the motion, related papers, and the record of the hearing, fully protects an alleged victim against invasion of privacy and potential embarrassment

Rule 413. Evidence of similar crimes in sexual assault cases

1998 Amendment. This amendment is intended to provide for more liberal admissibility of character evidence in criminal cases of sexual assault where the accused has committed a prior act of sexual assault.

Rule 413 is nearly identical to its Federal Rule counterpart. A number of changes were made, however, to tailor the Rule to military practice. First, all references to Federal Rule 415 were deleted, as it applies only to civil proceedings. Second, military justice terminology was substituted where appropriate (e.g. accused for defendant, court-martial for case). Third, the 5-day notice requirement in Rule 413(b) replaced a 15-day notice requirement in the Federal Rule. A 5-day requirement is better suited to military discovery practice. This 5-day notice requirement, however, is not intended to restrict a military judge's authority to grant a continuance under R.C.M. 906(b)(1). Fourth, Rule 413(d) has been modified to include violations of the Uniform Code of Military Justice. Also, the phrase "without consent" was added to Rule 413(d)(1) to specifically exclude the introduction of evidence concerning adultery or consensual sodomy. Last, all incorporation by way of reference was removed by adding subsections (e), (f), and (g). The definitions in those subsections were taken from title 18, United States Code §§ 2246(2), 2246(3), and 513(c)(5), respectively.

Although the Rule states that the evidence "is admissible," the drafters intend that the courts apply Rule 403 balancing to such evidence. Apparently, this also was the intent of Congress. The legislative history reveals that "the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." 140 Cong. Rec. S12,990 (daily ed. Sept. 20, 1994) (Floor Statement of the Principal Senate Sponsor, Senator Bob Dole, Concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases).

When "weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider proximity in time to the charged or predicate misconduct; similarity to the charged or predicate misconduct; frequency of the other acts; surrounding circumstances; relevant intervening events; and other relevant similarities or differences." (Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases).

Rule 414. Evidence of similar crimes in child molestation cases

1998 Amendment. This amendment is intended to provide for more liberal admissibility of character evidence in criminal cases of child molestation where the accused has committed a prior act of sexual assault or child molestation.

Rule 414 is nearly identical to its Federal Rule counterpart. A number of changes were made, however, to tailor the Rule to military practice. First, all references to Federal Rule 415 were deleted, as it applies only to civil proceedings. Second, military justice terminology was substituted where appropriate (e.g. accused for defendant, court-martial for case). Third, the 5-day notice requirement in Rule 414(b) replaced a 15-day notice requirement in the Federal Rule. A 5-day requirement is better suited to military discovery practice. This 5-day notice requirement, however, is not intended to restrict a military judge's authority to grant a continuance under R.C.M. 906(b)(1). Fourth, Rule 414(d) has been modified to include violations of the Uniform Code of Military Justice. Last, all incorporation by way of reference was removed by adding subsections (e), (f), (g), and (h). The definitions in those subsections were taken from title 18, United States Code §§ 2246(2), 2246(3), 2256(2), and 513(c)(5), respectively.

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When "weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider proximity in time to the charged or predicate misconduct; similarity to the charged or predicate misconduct; frequency of the other acts; surrounding circumstances; relevant intervening events; and other relevant similarities or differences." (Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases).

SECTION V

PRIVILEGES

Rule 501. General rule

Section V contains all of the privileges applicable to military criminal law except for those privileges which are found within Rules 301, Privilege Concerning Compulsory Self-Incrimination; Rule 302, Privilege Concerning Mental Examination of an Accused; and Rule 303, Degrading Questions. Privilege rules, unlike other Military Rules of Evidence, apply in "investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence under Article 72; proceedings for search authorization;

proceedings involving pretrial restraint; and in other proceedings authorized under the Uniform Code of Military Justice of this Manual and not listed in rule 1101(a)." *See* Rule 1101(c); *see also* Rule 1101(b).

In contrast to the general acceptance of the proposed Federal Rules of Evidence by Congress, Congress did not accept the proposed privilege rules because a consensus as to the desirability of a number of specific privileges could not be achieved. *See* generally, S. Saltzburg & K. Redden, FEDERAL RULES OF EVIDENCE MANUAL 200–201 (2d ed. 1977). In an effort to expedite the Federal Rules generally, Congress adopted a general rule, Rule 501, which basically provides for the continuation of common law in the privilege area. The Committee deemed the approach taken by Congress in the Federal Rules impracticable within the armed forces. Unlike the Article III court system, which is conducted almost entirely by attorneys functioning in conjunction with permanent courts in fixed locations, the military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law. This is particularly true because of the significant number of non-lawyers involved in the military criminal legal system. Commanders, convening authorities, non-lawyer investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not.

Section V combines the flexible approach taken by Congress with respect to privileges with that provided in the 1969 Manual. Rules 502–509 set forth specific rules of privilege to provide the certainty and stability necessary for military justice. Rule 501, on the other hand, adopts those privileges recognized in common law pursuant to Federal Rules of Evidence 501 with some limitations. Specific privileges are generally taken from those proposed Federal Rules of Evidence which although not adopted by Congress were non-controversial, or from the 1969 Manual.

Rule 501 is the basic rule of privilege. In addition to recognizing privileges required by or provided for in the Constitution, an applicable Act of Congress, the Military Rules of Evidence, and the Manual for Courts-Martial, Rule 501(a) also recognizes privileges "generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by court-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual." The latter language is taken from 1969 Manual Para. 137. As a result of Rule 501(a)(4), the common law of privileges as recognized in the Article III courts will be applicable to the armed forces except as otherwise provided by the limitation indicated above. Rule 501(d) prevents the application of a doctor-patient privilege. Such a privilege was considered to be totally incompatible with the clear interest of the armed forces in ensuring the health and fitness for duty of personnel. *See* 1969 Manual Para. 151 *c*

It should be noted that the law of the forum determines the application of privilege. Consequently, even if a service member should consult with a doctor in a jurisdiction with a doctor-patient privilege for example, such a privilege is inapplicable should the doctor be called as a witness before the court-martial.

Subdivision (b) is a non-exhaustive list of actions which constitute an invocation of a privilege. The subdivision is derived from Federal Rule of Evidence 501 as originally proposed by the Supreme Court, and the four specific actions listed are also found in the Uniform Rules of Evidence. The list is intentionally non-exclusive as a privilege might be claimed in a fashion distinct from those listed.

Subdivision (c) is derived from Federal Rule of Evidence 501 and makes it clear that an appropriate representative of a political jurisdiction or other organizational entity may claim an applicable privilege. The definition is intentionally non-exhaustive.

*1999 Amendment:*The privileges expressed in Rule 513 and Rule 302 and the conforming Manual change in R.C.M. 706, are not physician-patient privileges and are not affected by Rule 501(d).

Rule 502. Lawyer-client privilege

(a) *General rule of privilege.* Rule 502(a) continues the substance of the attorney-client privilege found in Para. 151 *b*(2) of the 1969 Manual. The Rule does, however, provide additional detail. Subdivision (a) is taken verbatim from subdivision (a) of Federal Rule of Evidence 503 as proposed by the Supreme Court. The privilege is only applicable when there are "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." A mere discussion with an attorney does not invoke the privilege when the discussion is not made for the purpose of obtaining professional legal services.

(b) *Definitions—*

(1) *Client.* Rule 502(b)(1) defines a "client" as an individual or entity who receives professional legal services from a lawyer or consults a lawyer with a view to obtaining such services. The definition is taken from proposed Federal Rule 503(a)(1) as Para. 151 *b*(2) of the 1969 Manual lacked any general definition of a client.

(2) *Lawyer.* Rule 502(b)(2) defines a "lawyer." The first portion of the paragraph is taken from proposed Federal Rule of Evidence 503(a)(2) and explicitly includes any person "reasonably believed by the client to be authorized" to practice law. The second clause is taken from 1969 Manual Para. 151 *b*(2) and recognizes that a "lawyer" includes "a member of the armed forces detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding" regardless of whether that person is in fact a lawyer. *See* Article 27. Thus an accused is fully protected by the privilege even if defense counsel is not an attorney.

The second sentence of the subdivision recognizes the fact, particularly true during times of mobilization, that attorneys may serve in the armed forces in a nonlegal capacity. In such a case, the individual is not treated as an attorney under the Rule unless the individual fits within one of the three specific categories recognized by the subdivision. Subdivision (b)(2)(B) recognizes that a servicemember who knows that an individual is a lawyer in civilian life may not know that the lawyer is not functioning as such in the armed forces and may seek professional legal assistance. In such a case the privilege will be applicable so long as the individual was "reasonably believed by the client to be authorized

to render professional legal services to members of the armed forces."

(3) *Representative of a lawyer.* Rule 502(b)(3) is taken from proposed Federal Rule of Evidence 503(a)(3) but has been modified to recognize that personnel are "assigned" within the armed forces as well as employed. Depending upon the particular situation, a paraprofessional or secretary may be a "representative of a lawyer." *See* Para. 151 *b*(2) of the 1969 Manual.

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

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

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

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

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

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

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

Rule 503. Communications to clergy

(a) *General rule of privilege.* Rule 503(a) states the basic rule of privilege for communications to clergy and is taken from proposed Federal Rule of Evidence 506(b) and 1969 Manual Para. 151 *b*(2). Like the 1969 Manual, the Rule protects communications to a clergyman's assistant in specific recognition of the nature of the military chaplaincy, and deals only with communications "made either as a formal act of religion or as a matter of conscience."

(b) *Definitions.*

(1) *Clergyman.* Rule 503(b)(1) is taken from proposed Federal Rule of Evidence 506(a)(1) but has been modified to include specific reference to a chaplain. The Rule does not define "a religious organization" and leaves resolution of that question to precedent and the circumstances of the case. "Clergyman" includes individuals of either sex.

(2) *Confidential.* Rule 503(b)(2) is taken generally from proposed Federal Rule of Evidence 506(a)(2) but has been expanded to include communications to a clergyman's assistant and to explicitly protect disclosure of a privileged communication when "disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication." The Rule is thus consistent with the definition of "confidential" used in the lawyer-client privilege, Rule 502(b)(4), and recognizes that military life often requires transmission of communications through third parties. The proposed Federal Rule's limitation of the privilege to communications made "privately" was deleted in favor of the language used in the actual Military Rule for the reasons indicated. The Rule is somewhat more protective than the 1969 Manual because of its application to statements which although intended to be confidential are overheard by others. *See* Rule 502(b)(4) and 510(a) and the Analysis thereto.

(c) *Who may claim the privilege.* Rule 503(c) is derived from proposed Federal Rule of Evidence 506(c) and includes the substance of 1969 Manual Para. 151 *b*(2) which provided that the privilege may be claimed by the "penitent." The Rule supplies additional guidance as to who may actually claim the privilege and is consistent with the other Military Rules of Evidence relating to privileges. *See* Rule 502(c); 504(b)(3); 505(c); 506(c).

Rule 504. Husband-wife privilege

(a) *Spousal incapacity.* Rule 504(a) is taken generally from *Trammel v. United States*, 445 U.S. 40 (1980) and significantly changes military law in this area. Under prior law, *see* 1969 Manual Para. 148 *e*, each spouse had a privilege to prevent the use of the other spouse as an adverse witness. Under the new rule, the *witness'* spouse is the holder of the privilege and may choose to testify or not to testify as the witness' spouse sees fit. *But see* Rule 504(c) (exceptions to the privilege). Implicit in the rule is the presumption that when a spouse chooses to testify against the other spouse the marriage no longer needs the protec-

tion of the privilege. Rule 504(a) must be distinguished from Rule 504(b), *Confidential communication made during marriage*, which deals with communications rather than the ability to testify generally at trial.

Although the witness' spouse ordinarily has a privilege to refuse to testify against the accused spouse, under certain circumstances no privilege may exists, and the spouse may be compelled to testify. *See* Rule 504(c).

(b) *Confidential communication made during marriage.* Rule 504(b) deals with communications made during a marriage and is distinct from a spouse's privilege to refuse to testify pursuant to Rule 504(a). *See* 1969 Manual Para. 151 *b*(2).

(1) *General rule of privilege.* Rule 504(b)(1) sets forth the general rule of privilege for confidential spousal communications and provides that a spouse may prevent disclosure of any confidential spousal communication made during marriage even though the parties are no longer married at the time that disclosure is desired. The accused may always require that the confidential spousal communication be disclosed. Rule 504(b)(3).

No privilege exists under subdivision (b) if the communication was made when the spouses were legally separated.

(2) *Definition.* Rule 504(b)(2) defines "confidential" in a fashion similar to the definition utilized in Rules 502(b)(4) and 503(b)(2). The word "privately" has been added to emphasize that the presence of third parties is not consistent with the spousal privilege, and the reference to third parties found in Rules 502 and 503 has been omitted for the same reason. Rule 504(b)(2) extends the definition of "confidential" to statements disclosed to third parties who are "reasonably necessary for transmission of the communication." This recognizes that circumstances may arise, especially in military life, where spouses may be separated by great distances or by operational activities, in which transmission of a communication via third parties may be reasonably necessary.

(3) *Who may claim the privilege.* Rule 504(b)(3) is consistent with 1969 Manual Para. 151 *b*(2) and gives the privilege to the spouse who made the communication. The accused may, however, disclose the communication even though the communication was made to the accused.

(c) *Exceptions.*

(1) *Spouse incapacity only.* Rule 504(c)(1) provides exceptions to the spousal incapacity rule of Rule 504(a). The rule is taken from 1969 Manual Para. 148 *e* and declares that a spouse may not refuse to testify against the other spouse when the marriage has been terminated by divorce or annulment. Annulment has been added to the present military rule as being consistent with its purpose. Separation of spouses via legal separation or otherwise does not affect the privilege of a spouse to refuse to testify against the other spouse. For other circumstances in which a spouse may be compelled to testify against the other spouse, *see* Rule 504(c)(2).

Confidential communications are not affected by the termination of a marriage.

(2) *Spousal incapacity and confidential communications.* Rule 504(c)(2) prohibits application of the spousal privilege, whether in the form of spousal incapacity or in the form of a confidential communication, when the circumstances specified in paragraph (2) are applicable. Subparagraphs (A) and (C) deal with anti-marital acts, *e.g.*, acts which are against the spouse and thus the marriage. The Rule expressly provides that when such an act is involved a spouse may not refuse to testify. This provision is taken from proposed Federal Rule 505(c)(1) and reflects in part the Supreme Court's decision in *Wyatt v. United States*, 362 U.S. 525 (1960). *See also Trammel v. United States*, 445 U.S. 40 at n.7 (1980). The Rule thus recognizes society's overriding interest in prosecution of anti-marital offenses and the probability that a spouse may exercise sufficient control, psychological or otherwise, to be able to prevent the other spouse from testifying voluntarily. The Rule is similar to 1969 Manual Para. 148 *e* but has deleted the Manual's limitation of the exceptions to the privilege to matters occurring after marriage or otherwise unknown to the spouse as being inconsistent with the intent of the exceptions.

Rule 504(c)(2)(B) is derived from Para. 148 *e* and 151 *b*(2) of the 1969 Manual. The provision prevents application of the privileges as to privileged communications if the marriage was a sham at the time of the communication, and prohibits application of the spousal incapacity privilege if the marriage was begun as a sham and is a sham at the time the testimony of the witness is to be offered. Consequently, the Rule recognizes for purposes of subdivision (a) that a marriage that began as a sham may have ripened into a valid marriage at a later time. The intent of the provision is to prevent individuals from marrying witnesses in order to effectively silence them.

Rule 505. Classified information

Rule 505 is based upon H.R. 4745, 96th Cong., 1st Sess. (1979), which was proposed by the Executive Branch as a response to what is known as the "graymail" problem in which the defendant in a criminal case seeks disclosure of sensitive national security information, the release of which may force the government to discontinue the prosecution. The Rule is also based upon the Supreme Court's discussion of executive privilege in *United States v. Reynolds*, 345 U.S. 1 (1953), and *United States v. Nixon*, 418 U.S. 683 (1974). The rule attempts to balance the interests of an accused who desires classified information for his or her defense and the interests of the government in protecting that information.

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

1993 Amendment: The second sentence was added to clarify that this rule, like other rules of privilege, applies at all stages of all actions and is not relaxed during the sentencing hearing under M.R.E. 1101(c).

(b) *Definitions.*

(1) *Classified information.* Rule 505(b)(1) is derived from section 2 of H.R. 4745. The definition of "classified information" is a limited one and includes only that information protected "pursuant to an executive order, statute, or regulation," and that material which constitutes restricted data pursuant to 42 U.S.C. 2014(y) (1976).

(2) *National security.* Rule 505(b)(2) is derived from section 2 of H.R. 4745.

(c) *Who may claim the privilege.* Rule 505(c) is derived from Para. 151 of the 1969 Manual and is consistent with similar provisions in the other privilege rules. *See* Rule 501(c). The

privilege may be claimed only "by the head of the executive or military department or government agency concerned" and then only upon "a finding that the information is properly classified and that disclosure would be detrimental to the national security." Although the authority of a witness or trial counsel to claim the privilege is presumed in the absence of evidence to the contrary, neither a witness nor a trial counsel may claim the privilege without prior direction to do so by the appropriate department or agency head. Consequently, expedited coordination with senior headquarters is advised in any situation in which Rule 505 appears to be applicable.

(d) *Action prior to referral of charges.* Rule 505(d) is taken from section 4(b)(1) of H.R. 4745. The provision has been modified to reflect the fact that pretrial discovery in the armed forces, prior to referral, is officially conducted through the convening authority. The convening authority should disclose the maximum amount of requested information as appears reasonable under the circumstances.

(e) *Pretrial session.* Rule 505(e) is derived from section 3 of H.R. 4745.

(f) *Action after referral of charges.* Rule 505(f) provides the basic procedure under which the government should respond to a determination by the military judge that classified information "apparently contains evidence that is relevant and material to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence." *See generally* the Analysis to Rule 507(d).

It should be noted that the government may submit information to the military judge for *in camera* inspection pursuant to subdivision (i). If the defense requests classified information that it alleges is "relevant and material ...," and the government refuses to disclose the information to the military judge for inspection, the military judge may presume that the information is in fact "relevant and material. ..."

(g) *Disclosure of classified information to the accused.* Paragraphs (1) and (2) of Rule 505(g) are derived from section 4 of H.R. 4745. Paragraph (3) is taken from section 10 of H.R. 4745 but has been modified in view of the different application of the Jencks Act, 18 U.S.C. § 3500 (1976) in the armed forces. Paragraph (4) is taken from sections 4(b)(2) and 10 of H.R. 4745. The reference in H.R. 4745 to a recess has been deleted as being unnecessary in view of the military judge's inherent authority to call a recess.

1993 Amendment: Subsection (g)(1)(D) was amended to make clear that the military judge's authority to require security clearances extends to persons involved in the conduct of the trial as well as pretrial preparation for it. The amendment requires persons needing security clearances to submit to investigations necessary to obtain the clearance.

(h) *Notice of the accused's intention to disclose classified information.* Rule 505(h) is derived from section 5 of H.R. 4745. The intent of the provision is to prevent disclosure of classified information by the defense until the government has had an opportunity to determine what position to take concerning the possible disclosure of that information. Pursuant to Rule 505(h)(5), failure to comply with subdivision (h) may result in a prohibition on the use of the information involved.

1993 Amendment: Subsection (h)(3) was amended to require specificity in detailing the items of classified information expected to be introduced. The amendment is based on *United States v. Collins*, 720 F.2d. 1195 (11th Cir. 1983).

(i) *In camera proceedings for cases involving classified information.* Rule 505(i) is derived generally from section 5 of H.R. 4745. The " *in camera*" procedure utilized in subdivision (i) is generally new to military law. Neither the accused nor defense counsel may be excluded from the *in camera* proceeding. However, nothing within the Rule requires that the defense be provided with a copy of the classified material in question when the government submits such information to the military judge pursuant to Rule 505(i)(3) in an effort to obtain an *in camera* proceeding under this Rule. If such information has not been disclosed previously, the government may describe the information by generic category, rather than by identifying the information. Such description is subject to approval by the military judge, and if not sufficiently specific to enable the defense to proceed during the *in camera* session, the military judge may order the government to release the information for use during the proceeding or face the sanctions under subdivision (i)(4)(E).

1993 Amendment: Subsection (i)(3) was amended to clarify that the classified material and the government's affidavit are submitted only to the military judge. The word "only" was placed at the end of the sentence to make it clear that it refers to "military judge" rather than to "examination." The military judge is to examine the affidavit and the classified information without disclosing it before determining to hold an *in camera* proceeding as defined in subsection(i)(1).

The second sentence of subsection (i)(4)(B) was added to provide a standard for admission of classified information in sentencing proceedings.

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

1993 Amendment: Subsection (j)(5) was amended to provide that the military judge's authority to exclude the public extends to the presentation of any evidence that discloses classified information, and not merely to the testimony of witnesses. *See generally*, *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985), *cert. denied*, 474 U.S. 1062 (1986) (specifies factors to be considered in the trial judge's determination to close the proceedings).

(k) *Security procedures to safeguard against compromise of classified information disclosed to courts-martial.* Rule 505(k) is derived from section 9 of H.R. 4745.

Rule 506. Government information other than classified information

(a) *General rule of privilege.* Rule 506(a) states the general rule of privilege for nonclassified government information. The Rule recognizes that in certain extraordinary cases the government should be able to prohibit release of government information which is detrimental to the public interest. The Rule is modeled on Rule 505 but is more limited in its scope in view of the greater limitations applicable to nonclassified information. *Compare United States v. Nixon*, 418 U.S. 683 (1974) with *United States v. Reynolds*, 345 U.S. 1 (1953). Rule 506 addresses those similar matters found in 1969 Manual Para. 151 *b*(1) and 151 *b*(3). Under Rule 506(a) information is privileged only if its disclosure would be "detrimental to the public interest." It is important to note that

pursuant to Rule 506(c) the privilege may be claimed only "by the head of the executive or military department or government agency concerned" unless investigations of the Inspectors General are concerned.

Under Rule 506(a) there is no privilege if disclosure of the information concerned is required by an Act of Congress such as the Freedom of Information Act, 5 U.S.C. § 552 (1976). Disclosure of information will thus be broader under the Rule than under the 1969 Manual. *See United States v. Nixon*, *supra*.

(b) *Scope.* Rule 506(b) defines "Government information" in a nonexclusive fashion, and expressly states that classified information and information relating to the identity of informants are solely within the scope of other Rules.

(c) *Who may claim the privilege.* Rule 506(c) distinguishes between government information in general and investigations of the Inspectors General. While the privilege for the latter may be claimed "by the authority ordering the investigation or any superior authority," the privilege for other government information may be claimed *only* "by the head of the executive or military department or government agency concerned." *See generally* the Analysis to Rule 505(c).

1990 Amendment: Subsection (c) was amended by substituting the words "records and information" for "investigations", which is a term of art vis-a-vis Inspector General functions. Inspectors General also conduct "inspections" and "inquiries," and use of the word "records and information" is intended to cover all documents and information generated by or related to the activities of Inspectors General. "Records" includes reports of inspection, inquiry, and investigation conducted by an Inspector General and extracts, summaries, exhibits, memoranda, notes, internal correspondence, handwritten working materials, untranscribed shorthand or stenotype notes of unrecorded testimony, tape recordings and other supportive records such as automated data extracts. In conjunction with this change, the language identifying the official entitled to claim the privilege for Inspector General records was changed to maintain the previous provision which allowed the superiors of Inspector General officers, rather than the officers themselves, to claim the privilege.

(d) *Action prior to referral of charges.* Rule 506(d) specifies action to be taken prior to referral of charges in the event of a claim of privilege under the Rule. *See generally* Rule 505(d) and its Analysis. Note that disclosures can be withheld only if action under paragraph (1)–(4) of subdivision (d) cannot be made "without causing identifiable damage to the public interest." (Emphasis added).

(e) *Action after referral of charges. See generally* Rule 505(f) and its Analysis. Note that unlike Rule 505(f), however, Rule 506(e) does not require a finding that failure to disclose the information in question "would materially prejudice a substantial right of the accused." Dismissal is required when the relevant information is not disclosed in a "reasonable period of time."

1995 Amendment: It is the intent of the Committee that if classified information arises during a proceeding under Rule 506, the procedures of Rule 505 will be used.

The new subsection (e) was formerly subsection (f). The matters in the former subsection (f) were adopted without change. The former subsection (e) was amended and redesignated as subsection (f) (see below).

(f) *Pretrial session.* Rule 506(f) is taken from Rule 505(e). It is the intent of the Committee that if classified information arises during a proceeding under Rule 506, the procedures of Rule 505 will be used.

1995 Amendment: See generally Rule 505(f) and its accompanying Analysis. Note that unlike Rule 505(f), however, Rule 506(f) does not require a finding that failure to disclose the information in question "would materially prejudice a substantial right of the accused." Dismissal is not required when the relevant information is not disclosed in a "reasonable period of time."

Subsection (f) was formerly subsection (e). The subsection was amended to cover action after a defense motion for discovery, rather than action after referral of charges. The qualification that the government claim of privilege pertains to information "that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in a court-martial proceeding" was deleted as unnecessary. Action by the convening authority is required if, after referral, the defense moves for disclosure and the Government claims the information is privileged from disclosure.

(g) *Disclosure of government information to the accused.* Rule 506(g) is taken from Rule 505(g) but deletes references to classified information and clearances due to their inapplicability.

(h) *Prohibition against disclosure.* Rule 506(h) is derived from Rule 505(h)(4). The remainder of Rule 505(h)(4) and Rule 505(h) generally has been omitted as being unnecessary. No sanction for violation of the requirement has been included.

*1995 Amendment:*Subsection (h) was amended to provide that government information may not be disclosed by the accused unless authorized by the military judge.

(i) *In camera proceedings.* Rule 506(i) is taken generally from Rule 505(i), but the standard involved reflects 1969 Manual Para. 151 and the Supreme Court's decision in *United States v. Nixon*, *supra*. In line with *Nixon*, the burden is on the party claiming the privilege to demonstrate why the information involved should not be disclosed. References to classified material have been deleted as being inapplicable.

1995 Amendment: Subsection (i) was amended to clarify the procedure for in camera proceedings. The definition in subsection (i)(1) was amended to conform to the definition of in camera proceedings in M.R.E. 505(i)(1). Subsections (i)(2) and (i)(3) were unchanged. Subsection (i)(4)(B), redesignated as (i)(4)(C), was amended to include admissible evidence relevant to punishment of the accused, consistent with *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Subsection (i)(4)(C) was redesignated as (i)(4)(D), but was otherwise unchanged. The amended procedures provide for full disclosure of the government information in question to the accused for purposes of litigating the admissibility of the information in the protected environment of the in camera proceeding; *i.e.*, the Article 39(a) session is closed to the public and neither side may disclose the information outside the in camera proceeding until the military judge admits the information as evidence in the trial. Under subsection (i)(4)(E), the military judge may authorize alternatives to disclosure, consistent with a military judge's authority concerning classified information under M.R.E. 505. Subsection (i)(4)(F) allows the Government to determine whether the information ultimately will be disclosed to the accused. However, the Government's continued objection to disclosure may be at the price of letting the accused go free, in that

subsection (i)(4)(F) adopts the sanctions available to the military judge under M.R.E. 505(i)(4)(E). *See United States v. Reynolds*, 345 U.S. 1, 12 (1953).

(k) *Introduction of government information subject to a claim of privilege.* Rule 506(k) is derived from Rule 505(j) with appropriate modifications being made to reflect the nonclassified nature of the information involved.

*1995 Amendment:*Subsection (j) was added to recognize the Government's right to appeal certain rulings and orders. *See* R.C.M. 908. The former subsection (j) was redesignated as subsection (k). The subsection speaks only to government appeals; the defense still may seek extraordinary relief through interlocutory appeal of the military judge's orders and rulings. *See generally*, 28 U.S.C. § 1651(a); *Waller v. Swift*, 30 M.J. 139 (C.M.A. 1990); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979).

(l) *Procedures to safeguard against compromise of government information disclosed to courts-martial.* Rule 506(k) is derived from Rule 505(k). Such procedures should reflect the fact that material privileged under Rule 506 is not classified.

Rule 507. Identity of informant

(a) *Rule of privilege.* Rule 507(a) sets forth the basic rule of privilege for informants and contains the substance of 1969 Manual Para. 151 *b*(1). The new Rule, however, provides greater detail as to the application of the privilege than did the 1969 manual.

The privilege is that of the United States or political subdivision thereof and applies only to information relevant to the identity of an informant. An "informant" is simply an individual who has supplied "information resulting in an investigation of a possible violation of law" to a proper person and thus includes good citizen reports to command or police as well as the traditional "confidential informants" who may be consistent sources of information.

(b) *Who may claim the privilege.* Rule 507(b) provides for claiming the privilege and distinguishes between representatives of the United States and representatives of a state or subdivision thereof. Although an appropriate representative of the United States may always claim the privilege when applicable, a representative of a state or subdivision may do so only if the information in question was supplied to an officer of the state or subdivision. The Rule is taken from proposed Federal Rule of Evidence 510(b), with appropriate modifications, and is similar in substances to Para. 151 *b*(1) of the 1969 Manual which permitted "appropriate governmental authorities" to claim the privilege.

The Rule does not specify who an "appropriate representative" is. Normally, the trial counsel is an appropriate representative of the United States. The Rule leaves the question open, however, for case by case resolution. Regulations could be promulgated which could specify who could be an appropriate representative.

(c) *Exceptions.* Rule 507(c) sets forth the circumstances in which the privilege is inapplicable.

(1) *Voluntary disclosures; informant as witness.* Rule 507(c)(1) makes it clear that the privilege is inapplicable if circumstances have nullified its justification for existence. Thus, there is no reason for the privilege, and the privilege is consequently inapplicable, if the individual who would have cause to resent the informant has been made aware of the informant's identity by a holder of the privilege or by the informant's own action or when the witness testifies for the prosecution thus allowing that person to ascertain the informant's identity. This is in accord with the intent of the privilege which is to protect informants from reprisals. The Rule is taken from Para. 151 *b*(1) of the 1969 Manual.

(2) *Testimony on the issue of guilt or innocence.* Rule 507(c)(2) is taken from 1969 Manual Para. 151 *b*(1) and recognizes that in certain circumstances the accused may have a due process right under the Fifth Amendment, as well as a similar right under the Uniform Code of Military Justice, to call the informant as a witness. The subdivision intentionally does not specify what circumstances would require calling the informant and leaves resolution of the issue to each individual case.

(3) *Legality of obtaining evidence.* Rule 507(c)(3) is new. The Rule recognizes that circumstances may exist in which the Constitution may require disclosure of the identity of an informant in the context of determining the legality of obtaining evidence under Rule 311; *see, e.g., Franks v. Delaware*, 438 U.S. 154, 170 (1978); *McCray v. Illinois*, 386 U.S. 300 (1976) (both cases indicate that disclosure may be required in certain unspecified circumstances but do not in fact require such disclosure). In view of the highly unsettled nature of the issue, the Rule does not specify whether or when such disclosure is mandated and leaves the determination to the military judge in light of prevailing case law utilized in the trial of criminal cases in the Federal district courts.

(d) *Procedures.* Rule 507(d) sets forth the procedures to be followed in the event of a claim of privilege under Rule 507. If the prosecution elects not to disclose the identity of an informant when the judge has determined that disclosure is required, that matter shall be reported to the convening authority. Such a report is required so that the convening authority may determine what action, if any, should be taken. Such actions could include disclosure of the informant's identity, withdrawal of charges, or some appropriate appellate action.

Rule 508. Political vote

Rule 508 is taken from proposed Federal Rule of Evidence 507 and expresses the substance of 18 U.S.C. § 596 (1976) which is applicable to the armed forces. The privilege is considered essential for the armed forces because of the unique nature of military life.

Rule 509. Deliberation of courts and juries

Rule 509 is taken from 1969 Manual Para. 151 but has been modified to ensure conformity with Rule 606(b) which deals specifically with disclosure of deliberations in certain cases.

Rule 510. Waiver of privilege by voluntary disclosure

Rule 510 is derived from proposed Federal Rule of Evidence 511 and is similar in substance to 1969 Manual Para. 151 *a* which notes that privileges may be waived. Rule 510(a) simply provides that "disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to claim the privilege" will defeat and waive the privilege. Disclosure of privileged matter may be, however, itself privileged; *see* Rules 502(b)(4); 503(b)(2); 504(b)(2). Information disclosed in

the form of an otherwise privileged telephone call (*e.g.*, information overheard by an operator) is privileged, Rule 511(b), and information disclosed via transmission using other forms of communication may be privileged; Rule 511(b). Disclosure under certain circumstances may not be "inappropriate" and the information will retain its privileged character. Thus, disclosure of an informant's identity by one law enforcement agency to another may well be appropriate and not render Rule 507 inapplicable.

Rule 510(b) is taken from Para. 151 *b*(1) of the 1969 Manual and makes it clear that testimony pursuant to a grant of immunity does not waive the privilege. Similarly, an accused who testifies in his or her own behalf does not waive the privilege unless the accused testifies voluntarily to the privileged matter of communication.

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

Rule 511(a) is similar to proposed Federal Rule of Evidence 512. Placed in the context of the definition of "confidential" utilized in the privilege rules, *see*, Rule 502(b)(4), the Rule is substantially different from prior military law inasmuch as prior law permitted utilization of privileged information which had been gained by a third party through accident or design. *See* Para. 151 *b*(1), MCM, 1969 (Rev.). Such disclosures are generally safeguarded against via the definition "confidential" used in the new Rules. Generally, the Rules are more protective of privileged information than was the 1969 Manual.

Rule 511(b) is new and deals with electronic transmission of information. It recognizes that the nature of the armed forces today often requires such information transmission. Like 1969 Manual Para. 151 *b*(1), the new Rule does not make a non-privileged communication privileged; rather, it simply safeguards already privileged information under certain circumstances.

The first portion of subdivision (b) expressly provides that otherwise privileged information transmitted by telephone remains privileged. This is in recognition of the role played by the telephone in modern life and particularly in the armed forces where geographical separations are common. The Committee was of the opinion that legal business cannot be transacted in the 20th century without customary use of the telephone. Consequently, privileged communications transmitted by telephone are protected even though those telephone conversations are known to be monitored for whatever purpose.

Unlike telephonic communications, Rule 511(b) protects other forms of electronic communication only when such means "is necessary and in furtherance of the communication." It is irrelevant under the Rule as to whether the communication in question was in fact necessary. The only relevant question is whether, once the individual decided to communicate, the *means* of communication was necessary and in furtherance of the communication. Transmission of information by radio is a means of communication that must be tested under this standard.

Rule 512. Comment upon or inference from claim of privilege; instruction

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

Rule 512(a)(1) prohibits any inference or comment upon the exercise of a privilege by the accused and is taken generally from proposed Federal Rule of Evidence 513(a).

Rule 512(a)(2) creates a qualified prohibition with respect to any inference or comment upon the exercise of a privilege by a person not the accused. The Rule recognizes that in certain circumstances the interests of justice may require such an inference and comment. Such a situation could result, for example, when the government's exercise of a privilege has been sustained, and an inference adverse to the government is necessary to preserve the fairness of the proceeding.

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

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

Rule 513. Psychotherapist-patient privilege

1999 Amendment: Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. Rule 513 clarifies military law in light of the Supreme Court decision in *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L.Ed.2d 337 (1996). *Jaffee* interpreted Federal Rule of Evidence 501 to create a federal psychotherapist-patient privilege in civil proceedings and refers federal courts to state laws to determine the extent of privileges. In deciding to adopt this privilege for courts-martial, the committee balanced the policy of following federal law and rules, when practicable and not inconsistent with the UCMJ or MCM, with the needs of commanders for knowledge of certain types of information affecting the military. The exceptions to the rule have been developed to address the specialized society of the military and separate concerns that must be met to ensure military readiness and national security. *See Parker v. Levy*, 417 U.S. 733, 743 (1974); *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955); *Dept. of the Navy v. Egan*, 484 U.S. 518, 530 (1988). There is no intent to apply Rule 513 in any proceeding other than those authorized under the UCMJ. Rule 513 was based in part on proposed Fed. R. Evid. (not adopted) 504 and state rules of evidence. Rule 513 is not a physician-patient privilege. It is a separate rule based on the social benefit of confidential counseling recognized by Jaffee, and similar to the clergy-penitent privilege. In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces. *See* the analyses for Rule 302 and Rule 501.

(a) *General rule of privilege.* The words "under the UCMJ" in this rule mean Rule 513 applies only to UCMJ proceedings, and do not limit the availability of such information internally to the services, for appropriate purposes.

(d) *Exceptions* These exceptions are intended to emphasize that military commanders are to have access to all information that is necessary for the safety and security of military personnel, opera-

tions, installations, and equipment. Therefore, psychotherapists are to provide such information despite a claim of privilege.

SECTION VI

WITNESSES

Rule 601. General rule of competency

Rule 601 is taken without change from the first portion of Federal Rule of Evidence 601. The remainder of the Federal Rule was deleted due to its sole application to civil cases.

In declaring that subject to any other Rule, all persons are competent to be witnesses, Rule 601 supersedes Para. 148 of the 1969 Manual which required, among other factors, that an individual know the difference between truth and falsehood and understand the moral importance of telling the truth in order to testify. Under Rule 601 such matters will go only to the weight of the testimony and not to its competency. The Rule's reference to other rules includes Rules 603 (Oath or Affirmation), 605 (Competency of Military Judge as Witness), 606 (Competency of Court Member as Witness), and the rules of privilege.

The plain meaning of the Rule appears to deprive the trial judge of any discretion whatsoever to exclude testimony on grounds of competency unless the testimony is incompetent under those specific rules already cited *supra, see, United States v. Fowler,* 605 F.2d 181 (5th Cir. 1979), a conclusion bolstered by the Federal Rules of Evidence Advisory Committee's Note. S. Saltzburg & K. Redden, FEDERAL RULES OF EVIDENCE MANUAL 270 (2d ed. 1977). Whether this conclusion is accurate, especially in the light of Rule 403, is unclear. *Id.* at 269; *see also United States v. Calahan,* 442 F.Supp. 1213 (D. Minn. 1978).

Rule 602. Lack of personal knowledge

Rule 602 is taken without significant change from the Federal Rule and is similar in content to Para. 138 *d*, MCM, 1969 (Rev.). Although the 1969 Manual expressly allowed an individual to testify to his or her own age or date of birth, the Rule is silent of the issue.

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

Rule 603. Oath or affirmation

Rule 603 is taken from the Federal Rule without change. The oaths found within Chapter XXII of the Manual satisfy the requirements of Rule 603. Pursuant to Rule 1101(c), this Rule is inapplicable to the accused when he or she makes an unsworn statement.

Rule 604. Interpreters

Rule 604 is taken from the Federal Rule without change and is consistent with Para. 141, MCM, 1969 (Rev.). The oath found in Paras. 114 *e*, MCM, 1969 (Rev.) (now R.C.M. 807(b)(2) (Discussion), MCM, 1984), satisfies the oath requirements of Rule 604.

Rule 605. Competency of military judge as witness

Rule 605(a) restates the Federal Rule without significant change. Although Article 26(d) of the Uniform Code of Military Justice states in relevant part that "no person is eligible to act as a military judge if he is a witness for the prosecution ..." and is silent on whether a witness for the defense is eligible to sit, the Committee believes that the specific reference in the code was not intended to create a right and was the result only of an attempt to highlight the more grievous case. In any event, Rule 605, unlike Article 26(d), does not deal with the question of eligibility to sit as a military judge, but deals solely with the military judge's competency as a witness. The rule does not affect *voir dire.*

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

Rule 606. Competency of court member as witness

(a) *At the court-martial.* Rule 606(a) is taken from the Federal Rule without substantive change. The Rule alters prior military law only to the extent that a member of the court could testify as a defense witness under prior precedent. Rule 606(a) deals only with the competency of court members as witnesses and does not affect other Manual provisions governing the eligibility of the individuals to sit as members due to their potential status as witnesses. *See, e.g.,* Paras. 62 *f* and 63, MCM, 1969 (Rev.). The Rule does not affect *voir dire.*

(b) *Inquiry into validity of findings or sentence.* Rule 606(b) is taken from the Federal Rule with only one significant change. The rule, retitled to reflect the sentencing function of members, recognizes unlawful command influence as a legitimate subject of inquiry and permits testimony by a member on that subject. The addition is required by the need to keep proceedings free from any taint of unlawful command influence and further implements Article 37(a) of the Uniform Code of Military Justice. Use of superior rank or grade by one member of a court to sway other members would constitute unlawful command influence for purposes of this Rule under Para. 74 *d*(1), MCM, 1969 (Rev.). Rule 606 does not itself prevent otherwise lawful polling of members of the court, *see generally, United States v. Hendon,* 6 M.J. 171, 174 (C.M.A. 1979) and does not prohibit attempted lawful clarifi-

cation of an ambiguous or inconsistent verdict. Rule 606(b) is in general accord with prior military law.

Rule 607. Who may impeach

Rule 607 is taken without significant change from the Federal Rule. It supersedes Para. 153 *b*(1), MCM, 1969 (Rev.), which restricted impeachment of one's own witness to those situations in which the witness is indispensable or the testimony of the witness proves to be unexpectedly adverse.

Rule 607 thus allows a party to impeach its own witness. Indeed, when relevant, it permits a party to call a witness for the sole purpose of impeachment. It should be noted, however, that an apparent inconsistency exists when Rule 607 is compared with Rules 608(b) and 609(a). Although Rule 607 allows impeachment on direct examination, Rules 608(b) and 609(a) would by their explicit language restrict the methods of impeachment to cross-examination. The use of the expression "cross-examination" in these rules appears to be accidental and to have been intended to be synonymous with impeachment while on direct examination. *See generally*, S. Saltzburg & K. Redden, FEDERAL RULES OF EVIDENCE MANUAL 298–99 (2d ed. 1977). It is the intent of the Committee that the Rules be so interpreted unless the Article III courts should interpret the Rules in a different fashion.

Rule 608. Evidence of character, conduct, and bias of witness

(a) *Opinion and reputation evidence of character*. Rule 608(a) is taken verbatim from the Federal Rule. The Rule, which is consistent with the philosophy behind Rule 404(a), limits use of character evidence in the form of opinion or reputation evidence on the issue of credibility by restricting such evidence to matters relating to the character for truthfulness or untruthfulness of the witness. General good character is not admissible under the Rule. Rule 608(a) prohibits presenting evidence of good character until the character of the witness for truthfulness has been attacked. The Rule is similar to Para. 153 *b* of the 1969 Manual except that the Rule, unlike Para. 153 *b*, applies to all witnesses and does not distinguish between the accused and other witnesses.

(b) *Specific instances of conduct.* Rule 608(b) is taken from the Federal Rule without significant change. The Rule is somewhat similar in effect to the military practice found in Para. 153 *b*(2) of the 1969 Manual in that it allows use of specific instances of conduct of a witness to be brought out on cross-examination but prohibits use of extrinsic evidence. Unlike Para. 153 *b*(2), Rule 608(b) does not distinguish between an accused and other witnesses.

The fact that the accused is subject to impeachment by prior acts of misconduct is a significant factor to be considered by the military judge when he or she is determining whether to exercise the discretion granted by the Rule. Although the Rule expressly limits this form of impeachment to inquiry on cross-examination, it is likely that the intent of the Federal Rule was to permit inquiry on direct as well, *see* Rule 607, and the use of the term "cross-examination" was an accidental substitute for "impeachment." *See* S. Saltzburg & K. Redden, FEDERAL RULES OF EVIDENCE MANUAL 312–13 (2d ed. 1977). It is the intent of the Committee to allow use of this form of evidence on direct examination to the same extent, if any, it is so permitted in the Article III courts.

The Rule does not prohibit receipt of extrinsic evidence in the form of prior convictions, Rule 609, or to show bias. Rule 608(c). *See also* Rule 613 (Prior statements of witnesses). When the witness has testified as to the character of another witness, the witness may be cross-examined as to the character of that witness. The remainder of Rule 608(b) indicates that testimony relating only to credibility does not waive the privilege against self-incrimination. *See generally* Rule 301.

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

(c) *Evidence of bias.* Rule 608(c) is taken from 1969 Manual Para. 153 *d* and is not found within the Federal Rule. Impeachment by bias was apparently accidentally omitted from the Federal Rule, *see*, S. Saltzburg & K. Redden, FEDERAL RULES OF EVIDENCE MANUAL 313–14(2d ed. 1977), but is acceptable under the Federal Rules; *see, e.g., United States v. Leja*, 568 F.2d 493 (6th Cir. 1977); *United States v. Alvarez-Lopez*, 559 F.2d 1155 (9th Cir. 1977). Because of the critical nature of this form of impeachment and the fact that extrinsic evidence may be used to show it, the Committee believed that its omission would be impracticable.

It should be noted that the Federal Rules are not exhaustive, and that a number of different types of techniques of impeachment are not explicitly codified.

The failure to so codify them does not mean that they are no longer permissible. *See, e.g., United states v. Alvarez-Lopez*, supra 155; Rule 412. Thus, impeachment by contradiction, *see also* Rule 304(a)(2); 311(j), and impeachment via prior inconsistent statements, Rule 613, remain appropriate. To the extent that the Military Rules do not acknowledge a particular form of impeachment, it is the intent of the Committee to allow that method to the same extent it is permissible in the Article III courts. *See, e.g.,* Rules 402; 403.

Impeachment of an alleged victim of a sexual offense through evidence of the victim's past sexual history and character is dealt with in Rule 412, and evidence of fresh complaint is admissible to the extent permitted by Rules 801 and 803.

Rule 609. Impeachment by evidence of conviction of crime

(a) *General Rules.* Rule 609(a) is taken from the Federal Rule but has been slightly modified to adopt it to military law. For example, an offense for which a dishonorable discharge may be adjudged may be used for impeachment. This continues the rule as found in Para. 153 *b*(2)(b)(1) of the 1969 Manual. In determining whether a military offense may be used for purposes of impeachment under Rule 609(a)(1), recourse must be made to the maximum punishment imposable if the offense had been tried by general court-martial.

Rule 609(a) differs slightly from the prior military rule. Under Rule 609(a)(1), a civilian conviction's availability for impeachment is solely a function of its maximum punishment under "the

law in which the witness was convicted." This is different from Para. 153 *b*(2)(b)(3) of the 1969 Manual which allowed use of a non-federal conviction analogous to a federal felony or characterized by the jurisdiction as a felony or "as an offense of comparable gravity." Under the new rule, comparisons and determinations of relative gravity will be unnecessary and improper.

Convictions that "involve moral turpitude or otherwise affect ... credibility" were admissible for impeachment under Para. 153 *b*(2)(b) of the 1969 Manual. The list of potential convictions expressed in Para. 153 *b*(2)(b) was illustrative only and non-exhaustive. Unlike the 1969 Manual rule, Rule 609(a) is exhaustive.

Although a conviction technically fits within Rule 609(a)(1), its admissibility remains subject to finding by the military judge that its probative value outweighs its prejudicial effect to the accused.

Rule 609(a)(2) makes admissible convictions involving "dishonesty or false statement, regardless of punishment." This is similar to intent in Para. 153 *b*(2)(b)(4) of the 1969 Manual which makes admissible "a conviction of any offense involving fraud, deceit, larceny, wrongful appropriation, or the making of false statement." The exact meaning of "dishonesty" within the meaning of Rule 609 is unclear and has already been the subject of substantial litigation. The Congressional intent appears, however, to have been extremely restrictive with "dishonesty" being used in the sense of untruthfulness. *See generally* S. Saltzburg & K. Redden, FEDERAL RULES OF EVIDENCE MANUAL 336–45 (2d ed. 1977). Thus, a conviction for fraud, perjury, or embezzlement would come within the definition, but a conviction for simple larceny would not. Pending further case development in the Article III courts, caution would suggest close adherence to this highly limited definition.

It should be noted that admissibility of evidence within the scope of Rule 609(a)(2) is not explicitly subject to the discretion of the military judge. The application of Rule 403 is unclear.

While the language of Rule 609(a) refers only to cross-examination, it would appear that the Rule does refer to direct examination as well. *See* the Analysis to Rules 607 and 608(b).

As defined in Rule 609(f), a court-martial conviction occurs when a sentence has been adjudged.

1993 Amendment. The amendment to Mil. R. Evid. 609(a) is based on the 1990 amendment to Fed. R. Evid. 609(a). The previous version of Mil. R. Evid. 609(a) was based on the now superseded version of the Federal Rule. This amendment removes from the rule the limitation that the conviction may only be elicited during cross-examination. Additionally, the amendment clarifies the relationship between Rules 403 and 609. The amendment clarifies that the special balancing test found in Mil. R. Evid. 609(a)(1) applies to the accused's convictions. The convictions of all other witnesses are only subject to the Mil. R. Evid. 403 balancing test. *See Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989).

(b) *Time limit.* Rule 609(b) is taken verbatim from the Federal Rule. As it has already been made applicable to the armed forces, *United States v. Weaver*, 1 M.J. 111 (C.M.A. 1975), it is consistent with the present military practice.

(c) *Effect of pardon, annulment, or certificate of rehabilitation.* Rule 609(c) is taken verbatim from the Federal Rule except that convictions punishable by dishonorable discharge have been added. Rule 609(c) has no equivalent in present military practice and represents a substantial change as it will prohibit use of convictions due to evidence of rehabilitation. In the absence of a certificate of rehabilitation, the extent to which the various Armed Forces post-conviction programs, such as the Air Force's 3320th Correction and Rehabilitation Squadron and the Army's Retraining Brigade, come within Rule 609(c) is unclear, although it is probable that successful completion of such a program is "an equivalent procedure based on the finding of the rehabilitation of the persons convicted" within the meaning of the Rule.

(d) *Juvenile adjudications.* Rule 609(d) is taken from the Federal Rule without significant change. The general prohibition in the Rule is substantially different from Para. 153 *b*(2)(b) of the 1969 Manual which allowed use of juvenile adjudications other than those involving an accused. The discretionary authority vested in the military judge to admit such evidence comports with the accused's constitutional right to a fair trial, *Davis v. Alaska*, 415 U.S. 308 (1974).

(e) *Pendency of appeal.* The first portion of Rule 609(e) is taken from the Federal Rule and is substantially different from Para. 153 *b*(2)(b) of the 1969 Manual which prohibited use of convictions for impeachment purposes while they were undergoing appellate review. Under the Rule, the fact of review may be shown but does not affect admissibility. A different rule applies, however, for convictions by summary court-martial or by special court-martial without a military judge. The Committee believed that because a legally trained presiding officer is not required in these proceedings, a conviction should not be used for impeachment until review has been completed.

February 1986 Amendment: The reference in subsection (e) to "Article 65(c)" was changed to "Article 64" to correct an error in MCM, 1984.

(f) *Definition.* This definition of conviction has been added because of the unique nature of the court-martial. Because of its recognition that a conviction cannot result until at least sentencing, *cf. Lederer, Reappraising the Legality of Post-trial Interviews, The Army Lawyer*, July 1977, at 12, the Rule may modify *United States v. Mathews*, 6 M.J. 357 (C.M.A. 1979).

Rule 610. Religious beliefs or opinions

Rule 610 is taken without significant change from the Federal Rules and had no equivalent in the 1969 Manual for Courts-Martial. The Rule makes religious beliefs or opinions inadmissible for the purpose of impeaching or bolstering credibility. To the extent that such opinions may be critical to the defense of a case, however, there may be constitutional justification for overcoming the Rule's exclusion. *Cf. Davis v. Alaska*, 415 U.S. 308 (1974).

Rule 611. Mode and order of interrogation and presentation

(a) *Control by the military judge.* Rule 611(a) is taken from the Federal Rule without change. It is a basic source of the military judge's power to control proceedings and replaces 1969 Manual Para. 149 *a* and that part of Para. 137 dealing with cumulative evidence. It is within the military judge's discretion to control methods of interrogation of witnesses. The Rule does not change prior law. Although a witness may be required to limit an answer to the question asked, it will normally be improper to require that a "yes" or "no" answer be given unless it is clear that such an

answer will be a complete response to the question. A witness will ordinarily be entitled to explain his or her testimony at some time before completing this testimony. The Manual requirement that questions be asked through the military judge is now found in Rule 614.

Although the military judge has the discretion to alter the sequence of proof to the extent that the burden of proof is not affected, the usual sequence for examination of witnesses is: prosecution witnesses, defense witnesses, prosecution rebuttal witnesses, defense rebuttal witnesses, and witnesses for the court. The usual order of examination of a witness is: direct examination, cross-examination, redirect examination, recross-examination, and examination by the court, Para. 54 *a*, MCM, 1969 (Rev.).

*1995 Amendment:*When a child witness is unable to testify due to intimidation by the proceedings, fear of the accused, emotional trauma, or mental or other infirmity, alternative to live in-court testimony may be appropriate. *See Maryland v. Craig*, 497 U.S. 836 (1990); *United States v. Romey*, 32 M.J. 180 (C.M.A.), *cert. denied*, 502 U.S. 924 (1991); *United States v. Batten*, 31 M.J. 205 (C.M.A. 1990); *United States v. Thompson*, 31 M.J. 168 (C.M.A. 1990), *cert. denied*, 498 U.S.C. § 1084 (1991). This is an evolving area of law with guidance available in case law. The drafters, after specifically considering adoption of 18 U.S.C. § 3509, determined it more appropriate to allow the case law evolutionary process to continue.

(b) *Scope of cross-examination.* Rule 611(b) is taken from the Federal Rule without change and replaces Para. 149 *b*(1) of the 1969 Manual which was similar in scope. Under the Rule the military judge may allow a party to adopt a witness and proceed as if on direct examination. *See* Rule 301(b)(2) (judicial advice as to the privilege against self-incrimination for an apparently uninformed witness); Rule 301(f)(2) (effect of claiming the privilege against self-incrimination on cross-examination); Rule 303 (Degrading Questions); and Rule 608(b) (Evidence of Character, Conduct, and Bias of Witness).

(c) *Leading questions.* Rule 611(c) is taken from the Federal Rule without significant change and is similar to Para. 149 *c* of the 1969 Manual. The reference in the third sentence of the Federal Rule to an "adverse party" has been deleted as being applicable to civil cases only.

A leading question is one which suggests the answer it is desired that the witness give. Generally, a question that is susceptible to being answered by "yes" or "no" is a leading question.

The use of leading questions is discretionary with the military judge. Use of leading questions may be appropriate with respect to the following witnesses, among others: children, persons with mental or physical disabilities, the extremely elderly, hostile witnesses, and witnesses identified with the adverse party.

It is also appropriate with the military judge's consent to utilize leading questions to direct a witness's attention to a relevant area of inquiry.

1999 Amendment: Rule 611(d) is new. This amendment to Rule 611 gives substantive guidance to military judges regarding the use of alternative examination methods for child victims and witnesses in light of the U.S. Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990) and the change in Federal law in 18 U.S.C. section 3509. Although *Maryland v. Craig* dealt with child witnesses who were themselves the victims of abuse, it should be noted that 18 U.S.C. section 3509, as construed by Federal courts, has been applied to allow non-victim child witnesses to testify remotely. *See, e.g., United States v. Moses*, 137 F.3d 894 (6th Cir. 1998) (applying section 3509 to a non-victim child witness, but reversing a child sexual assault conviction on other grounds) and *United States v. Quintero*, 21 F.3d 885 (9th Cir. 1994) (affirming conviction based on remote testimony of non-victim child witness, but remanding for resentencing). This amendment recognizes that child witnesses may be particularly traumatized, even if they are not themselves the direct victims, in cases involving the abuse of other children or domestic violence. This amendment also gives the accused an election to absent himself from the courtroom to prevent remote testimony. Such a provision gives the accused a greater role in determining how this issue will be resolved.

Rule 612. Writing used to refresh memory

Rule 612 is taken generally from the Federal Rule but a number of modifications have been made to adapt the Rule to military practice. Language in the Federal Rule relating to the Jencks Act, 18 U.S.C. § 3500, which would have shielded material from disclosure to the defense under Rule 612 was discarded. Such shielding was considered to be inappropriate in view of the general military practice and policy which utilizes and encourages broad discovery on behalf of the defense.

The decision of the president of a special court-martial without a military judge under this rule is an interlocutory ruling not subject to objection by the members, Para. 57 *a*, MCM, 1969 (Rev.).

Rule 612 codifies the doctrine of past recollection refreshed and replaces that portion of Para. 146 *a* of the 1969 Manual which dealt with the issue. Although the 1969 Manual rule was similar, in that it authorized inspection by the opposing party of a memorandum used to refresh recollection and permitted it to be offered into evidence by that party to show the improbability of it refreshing recollection, the Rule is somewhat more extensive as it also deals with writings used before testifying.

Rule 612 does not affect in any way information required to be disclosed under any other rule or portion of the Manual. *See*, Rule 304(c)(1).

Rule 613. Prior statements of witnesses

(a) *Examining witness concerning prior statement.* Rule 613(a) is taken from the Federal Rule without change. It alters military practice inasmuch as it eliminates the foundation requirements found in Para. 153 *b*(2)(c) of the 1969 Manual. While it will no longer be a condition precedent to admissibility to acquaint a witness with the prior statement and to give the witness an opportunity to either change his or her testimony or to reaffirm it, such a procedure may be appropriate as a matter of trial tactics.

It appears that the drafters of Federal Rule 613 may have inadvertently omitted the word "inconsistent" from both its caption and the text of Rule 613(a). The effect of that omission, if any, is unclear.

(b) *Extrinsic evidence of prior inconsistent statement of witness.* Rule 613(b) is taken from the Federal Rule without change. It requires that the witness be given an opportunity to explain or deny a prior inconsistent statement when the party proffers extrinsic evidence of the statement. Although this foundation is not

required under Rule 613(a), it is required under Rule 613(b) if a party wishes to utilize more than the witness' own testimony as brought out on cross-examination. The Rule does not specify any particular timing for the opportunity for the witness to explain or deny the statement nor does it specify any particular method. The Rule is inapplicable to introduction of prior inconsistent statements on the merits under Rule 801.

Rule 614. Calling and interrogation of witnesses by the court-martial

(a) *Calling by the court-martial.* The first sentence of Rule 614(a) is taken from the Federal Rule but has been modified to recognize the power of the court members to call and examine witnesses. The second sentence of the subdivision is new and reflects the members' power to call or recall witnesses. Although recognizing that power, the Rule makes it clear that the calling of such witnesses is contingent upon compliance with these Rules and this Manual. Consequently, the testimony of such witnesses must be relevant and not barred by any Rule or Manual provision.

(b) *Interrogation by the court-martial.* The first sentence of Rule 614(b) is taken from the Federal Rule but modified to reflect the power under these Rules and Manual of the court-members to interrogate witnesses. The second sentence of the subdivision is new and modifies Para. 54 *a* and Para. 149 *a* of the present manual by requiring that questions of members be submitted to the military judge in writing. This change in current practice was made in order to improve efficiency and to prevent prejudice to either party. Although the Rule states that its intent is to ensure that the questions will "be in a form acceptable to the military judge," it is not the intent of the Committee to grant carte blanche to the military judge in this matter. It is the Committee's intent that the president will utilize the same procedure.

(c) *Objections.* Rule 614(c) is taken from the Federal Rule but modified to reflect the powers of the members to call and interrogate witnesses. This provision generally restates prior law but recognizes counsel's right to request an Article 39(a) session to enter an objection.

Rule 615. Exclusion of witnesses

Rule 615 is taken from the Federal Rule with only minor changes of terminology. The first portion of the Rule is in conformity with prior practice, *e.g.*, Para. 53 *f*, MCM, 1969 (Rev.). The second portion, consisting of subdivisions (2) and (3), represents a substantial departure from prior practice and will authorize the prosecution to designate another individual to sit with the trial counsel. Rule 615 thus modifies Para. 53 *f*. Under the Rule, the military judge lacks any discretion to exclude potential witnesses who come within the scope of Rule 615(2) and (3) unless the accused's constitutional right to a fair trial would be violated. Developing Article III practice recognizes the defense right, upon request, to have a prosecution witness, not excluded because of Rule 615, testify before other prosecution witnesses.

Rule 615 does not prohibit exclusion of either accused or counsel due to misbehavior when such exclusion is not prohibited by the Constitution of the United States, the Uniform Code of Military Justice, this Manual, or these Rules.

SECTION VII
OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses

Rule 701 is taken from the Federal Rule without change and supersedes that portion of Para. 138 *e*, MCM, 1969 (Rev.), which dealt with opinion evidence by lay witnesses. Unlike the prior Manual rule which prohibited lay opinion testimony except when the opinion was of a "kind which is commonly drawn and which cannot, or ordinarily cannot, be conveyed to the court by a mere recitation of the observed facts," the Rule permits opinions or inferences whenever rationally based on the perception of the witness and helpful to either a clear understanding of the testimony or the determination of a fact in issue. Consequently, the Rule is broader in scope than the Manual provision it replaces. The specific examples listed in the Manual, "the speed of an automobile, whether a voice heard was that of a man, woman or child, and whether or not a person was drunk" are all within the potential scope of Rule 701.

Rule 702. Testimony by experts

Rule 702 is taken from the Federal Rule verbatim, and replaces that portion of Para. 138 *e*, MCM, 1969 (Rev.), dealing with expert testimony. Although the Rule is similar to the prior Manual rule, it may be broader and *may* supersede *Frye v. United States*, 293 F.1013 (C.D. Cir. 1923), an issue now being extensively litigated in the Article III courts. The Rule's sole explicit test is whether the evidence in question "will assist the trier of fact to understand the evidence or to determine a fact in issue." Whether any particular piece of evidence comes within the test is normally a matter within the military judge's discretion.

Under Rule 103(a) any objection to an expert on the basis that the individual is not in fact adequately qualified under the Rule will be waived by a failure to so object.

Para. 142 *e* of the 1969 Manual, "Polygraph tests and drug-induced or hypnosis-induced interviews," has been deleted as a result of the adoption of Rule 702. Para. 142 *e* states, "The conclusions based upon or graphically represented by a polygraph test and conclusions based upon, and the statements of the person interviewed made during a drug-induced or hypnosis-induced interview are inadmissible in evidence." The deletion of the explicit prohibition on such evidence is not intended to make such evidence *per se* admissible, and is not an express authorization for such procedures. Clearly, such evidence must be approached with great care. Considerations surrounding the nature of such evidence, any possible prejudicial effect on a fact finder, and the degree of acceptance of such evidence in the Article III courts are factors to consider in determining whether it can in fact "assist the trier of fact." As of late 1979, the Committee was unaware of any significant decision by a United States Court of Appeals sustaining the admissibility of polygraph evidence in a criminal case, *see e.g., United States v. Masri*, 547 F.2d 932 (5th Cir. 1977); *United States v. Cardarella*, 570 F.2d 264 (8th Cir. 1978), although the Seventh Circuit, *see e.g., United States v. Bursten*, 560 F.2d 779 (7th Cir. 1977) (holding that polygraph admissibility is within the sound discretion of the trial judge) and perhaps the Ninth Circuit, *United States v. Benveniste*, 564 F.2d 335, 339 n.3 (9th Cir. 1977), at least recognize the possible admissibility of such evidence. There is reason to believe that evidence obtained

via hypnosis may be treated somewhat more liberally than is polygraph evidence. *See, e.g., Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975).

Rule 703. Bases of opinion testimony of experts

Rule 703 is taken from the Federal Rule without change. The Rule is similar in scope to Para. 138 *e* of the 1969 Manual, but is potentially broader as it allows reliance upon "facts or data" whereas the 1969 Manual's limitation was phrased in terms of the personal observation, personal examination or study, or examination or study "of reports of others of a kind customarily considered in the practice of the expert's specialty." Hypothetical questions of the expert are not required by the Rule.

A limiting instruction may be appropriate if the expert while expressing the basis for an opinion states facts or data that are not themselves admissible. *See* Rule 105.

Whether Rule 703 has modified or superseded the *Frye* test for scientific evidence, *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923), is unclear and is now being litigated within the Article III courts.

Rule 704. Opinion on ultimate issue

Rule 704 is taken from the Federal Rule verbatim. The 1969 Manual for Courts-Martial was silent on the issue. The Rule does not permit the witness to testify as to his or her opinion as to the guilt or innocence of the accused or to state legal opinions. Rather it simply allows testimony involving an issue which must be decided by the trier of fact. Although the two may be closely related, they are distinct as a matter of law.

February 1986 Amendment: Fed. R. Evid. 704(b), by operation of Mil. R. Evid. 1102, became effective in the military as Mil. R. Evid. 704(b) on 10 April 1985. The Joint-Service Committee on Military Justice considers Fed. R. Evid. 704(b) an integral part of the Insanity Defense Reform Act, ch. IV, Pub.L. No. 98–473, 98 Stat. 2067–68 (1984), (hereafter the Act). Because proposed legislation to implement these provisions of the Act relating to insanity as an affirmative defense had not yet been enacted in the UCMJ by the date of this Executive Order, the Committee recommended that the President rescind the application of Fed. R. Evid. 704(b) to the military. Even though in effect since 10 April 1985, this change was never published in the Manual.

1986 Amendment: While writing the Manual provisions to implement the enactment of Article 50a, UCMJ ("Military Justice Amendments of 1986," National Defense Authorization Act for fiscal year 1987, Pub.L. No. 99–661, 100 Stat. 3905 (1986)), the drafters rejected adoption of Fed.R.Evid. 704(b). The statutory qualifications for military court members reduce the risk that military court members will be unduly influenced by the presentation of ultimate opinion testimony from psychiatric experts.

Rule 705. Disclosure of facts or data underlying expert opinion

Rule 705 is taken from the Federal Rule without change and is similar in result to the requirement in Para. 138 *e* of the 1969 Manual that the "expert may be required, on direct or cross-examination, to specify the data upon which his opinion was based and to relate the details of his observation, examination, or study." Unlike the 1969 Manual, Rule 705 requires disclosure on direct examination only when the military judge so requires.

Rule 706. Court appointed experts

(a) *Appointment and compensation.* Rule 706(a) is the result of a complete redraft of subdivision (a) of the Federal Rule that was required to be consistent with Article 46 of the Uniform Code of Military Justice which was implemented in Paras. 115 and 116, MCM, 1969 (Rev.). Rule 706(a) states the basic rule that prosecution, defense, military judge, and the court members all have equal opportunity under Article 46 to obtain expert witnesses. The second sentence of the subdivision replaces subdivision (b) of the Federal Rule which is inapplicable to the armed forces in light of Para. 116, MCM, 1969 (Rev.).

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

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

Rule 707 Polygraph Examinations.

Rule 707 is new and is similar to Cal. Evid. Code 351.1 (West 1988 Supp.). The Rule prohibits the use of polygraph evidence in courts-martial and is based on several policy grounds. There is a real danger that court members will be misled by polygraph evidence that "is likely to be shrouded with an aura of near infallibility". *United States v. Alexander*, 526 F.2d 161, 168-169 (8th Cir. 1975). To the extent that the members accept polygraph evidence as unimpeachable or conclusive, despite cautionary instructions from the military judge, the members "traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted". *Id.* There is also a danger of confusion of the issues, especially when conflicting polygraph evidence diverts the members' attention from a determination of guilt or innocence to a judgment of the validity and limitations of polygraphs. This could result in the court-martial degenerating into a trial of the polygraph machine. *State v. Grier*, 300 S.E.2d 351 (N.C. 1983). Polygraph evidence also can result in a substantial waste of time when the collateral issues regarding the reliability of the particular test and qualifications of the specific polygraph examiner must be litigated in every case. Polygraph evidence places a burden on the administration of justice that outweighs the probative value of the evidence. The reliability of polygraph evidence has not been sufficiently established and its use at trial impinges upon the integrity of the judicial system. *See People v. Kegler*, 242 Cal. Rptr. 897 (Cal. Ct. App. 1987). Thus, this amendment adopts a bright-line rule that polygraph evidence is not admissible by any party to a court-martial even if stipulated to by the parties. This amendment is not intended to accept or reject *United States v. Gipson*, 24 M.J. 343 (C.M.A. 1987), concerning the standard for admissibility of other scientific evidence under Mil. R. Evid. 702 or the continued vitality of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Finally, subsection (b) of the rule ensures that any statements which are otherwise admissi-

ble are not rendered inadmissible solely because the statements were made during a polygraph examination.

SECTION VIII

HEARSAY

Rule 801. Definitions

(a) *Statement.* Rule 801(a) is taken from the Federal Rule without change and is similar to Para. 139 *a* of the 1969 Manual.

(b) *Declarant.* Rule 801(b) is taken from the Federal Rule verbatim and is the same definition used in prior military practice.

(c) *Hearsay.* Rule 801(c) is taken from the Federal Rule verbatim. It is similar to the 1969 Manual definition, found in Para. 139 *a*, which stated: "A statement which is offered in evidence to prove the truth of the matters stated therein, but which was not made by the author when a witness before the court at a hearing in which it is so offered, is hearsay." Although the two definitions are basically identical, they actually differ sharply as a result of the Rule's exceptions which are discussed *infra.*

(d) *Statements which are not hearsay.* Rule 801(d) is taken from the Federal Rule without change and removes certain categories of evidence from the definition of hearsay. In all cases, those categories represent hearsay within the meaning of the 1969 Manual definition.

(1) *Prior statement by witness.* Rule 801(d)(1) is taken from the Federal Rule without change and removes certain prior statements by the witness from the definition of hearsay. Under the 1969 Manual rule, an out-of-court statement not within an exception to the hearsay rule and unadopted by the testifying witness, is inadmissible hearsay notwithstanding the fact that the declarant is now on the stand and able to be cross-examined, Para. 139 *a*; *United States v. Burge*, 1 M.J. 408 (C.M.A. 1976) (Cook, J., concurring). The justification for the 1969 Manual rule is presumably the traditional view that out-of-court statements cannot be adequately tested by cross-examination because of the time differential between the making of the statement and the giving of the in-court testimony. The Federal Rules of Evidence Advisory Committee rejected this view in part believing both that later cross-examination is sufficient to ensure reliability and that earlier statements are usually preferable to later ones because of the possibility of memory loss. *See generally*, 4 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE Para. 801(d)(1)(01)(1978). Rule 801(d)(1) thus not only makes an important shift in the military theory of hearsay, but also makes an important change in law by making admissible a number of types of statements that were either inadmissible or likely to be inadmissible under prior military law.

Rule 801(d)(1)(A) makes admissible on the merits a statement inconsistent with the in-court testimony of the witness when the prior statement "was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." The Rule does not require that the witness have been subject to cross-examination at the earlier proceeding, but requires that the witness must have been under oath and subject to penalty of perjury. Although the definition of "trial, hearing, or other proceeding" is uncertain, it is apparent that the Rule was intended to include grand jury testimony and may be extremely broad in scope. *See*, *United States v. Castro-Ayon*, 537 F.2d 1055 (9th Cir.), *cert. denied*, 429 U.S. 983 (1976) (tape recorded statements given under oath at a Border Patrol station found to be within the Rule). It should clearly apply to Article 32 hearings. The Rule does not require as a prerequisite a statement "given under oath subject to the penalty of perjury." The mere fact that a statement was given under oath may not be sufficient. No foundation other than that indicated as a condition precedent in the Rule is apparently necessary to admit the statement under the Rule. *But see* WEINSTEIN'S EVIDENCE 801–74 (1978).

Rule 801(d)(1)(B) makes admissible on the merits a statement consistent with the in-court testimony of the witness and "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Unlike Rule 801(d)(1)(A), the earlier consistent statement need not have been made under oath or at any type of proceeding. On its face, the Rule does not require that the consistent statement offered have been made prior to the time the improper influence or motive arose or prior to the alleged recent fabrication. Notwithstanding this, at least two circuits have read such a requirement into the rule. *United States v. Quinto*, 582 F.2d 224 (2d Cir. 1978); *United States v. Scholle*, 553 F.2d 1109 (8th Cir. 1977). *See also United States v. Dominquez*, 604 F.2d 304 (4th Cir. 1979).

The propriety of this limitation is clearly open to question. *See generally United States v. Rubin*, 609 F.2d 51 (2d Cir. 1979). The limitation does not, however, prevent admission of consistent statements made after the inconsistent statement but before the improper influence or motive arose. *United States v. Scholle*, *supra.* Rule 801(d)(1)(B) provides a possible means to admit evidence of fresh complaint in prosecution of sexual offenses. Although limited to circumstances in which there is a charge, for example, of recent fabrication, the Rule, when applicable, would permit not only fact of fresh complaint, as is presently possible, but also the entire portion of the consistent statement.

Under Rule 801(d)(1)(C) a statement of identification is not hearsay. The content of the statement as well as the fact of identification is admissible. The Rule must be read in conjunction with Rule 321 which governs the admissibility of statements of pretrial identification.

(2) *Admission by party opponent.* Rule 801(d)(2) eliminates a number of categories of statements from the scope of the hearsay rule. Unlike those statements within the purview of Rule 802(d)(1), these statements would have come within the exceptions to the hearsay rule as recognized in the 1969 Manual. Consequently, their "reclassification" is a matter of academic interest only. No practical differences result. The reclassification results from a belief that the adversary system impels admissibility and that reliability is not a significant factor.

Rule 801(d)(2)(A) makes admissible against a party a statement made in either the party's individual or representative capacity. This was treated as an admission or confession under Para. 140 *a* of the 1969 Manual, and is an exception of the prior hearsay rule.

Rule 801(d)(2)(B) makes admissible "a statement of which the party has manifested the party's adoption or belief in its truth." This is an adoptive admission and was an exception to the prior hearsay rule. *Cf.* Para. 140 *a*(4) of the 1969 Manual. While silence may be treated as an admission on the facts of a given case, *see*, Rule 304(h)(3) and the analysis thereto, under Rule 801(d)(2) that silence must have been intended by the declarant to

have been an assertion. Otherwise, the statement will not be hearsay within the meaning of Rule 801(d)(2) and will presumably be admissible, if at all, as circumstantial evidence.

Rule 801(d)(2)(C) makes admissible "a statement by a person authorized by the party to make a statement concerning the subject." While this was not expressly dealt with by the 1969 Manual, it would be admissible under prior law as an admission; *Cf.* Para. 140 *b*, utilizing agency theory.

Rule 801(d)(2)(D) makes admissible "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant, made during the existence of the relationship." These statements would appear to be admissible under prior law. Statements made by interpreters, as by an individual serving as a translator for a service member in a foreign nation who is, for example, attempting to consummate a drug transaction with a non-English speaking person, should be admissible under Rule 801(d)(2)(D) or Rule 801(d)(2)(C).

Rule 801(d)(2)(E) makes admissible "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." This is similar to the military hearsay exception found in Para. 140 *b* of the 1969 Manual. Whether a conspiracy existed for purposes of this Rule is solely a matter for the military judge. Although this is the prevailing Article III rule, it is also the consequence of the Military Rules' modification to Federal Rule of Evidence 104(b). Rule 801(d)(2)(E) does not address many critical procedural matters associated with the use of co-conspirator evidence. *See* generally, Comment, Restructuring the Independent Evidence Requirement of the Coconspirator Hearsay Exception, 127 U.Pa.L.Rev. 1439 (1979). For example, the burden of proof placed on the proponent is unclear although a preponderance appears to be the developing Article III trend. Similarly, there is substantial confusion surrounding the question of whether statements of an alleged co-conspirator may themselves be considered by the military judge when determining whether the declarant was in fact a co-conspirator. This process, known as bootstrapping, was not permitted under prior military law. *See e.g., United States v. Duffy*, 49 C.M.R. 208, 210 (A.F.C.M.R. 1974); *United States v. LaBossiere*, 13 C.M.A. 337, 339, 32 C.M.R. 337, 339 (1962). A number of circuits have suggested that Rule 104(a) allows the use of such statements, but at least two circuits have held that other factors prohibit bootstrapping. *United States v. James*, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979); *United States v. Valencia*, 609 F.2d 603 (2d Cir. 1979). Until such time as the Article III practice is settled, discretion would dictate that prior military law be followed and that bootstrapping not be allowed. Other procedural factors may also prove troublesome although not to the same extent as bootstrapping. For example, it appears to be appropriate for the military judge to determine the co-conspirator question in a preliminary Article 39(a) session. Although receipt of evidence "subject to later connection" or proof is legally possible, the probability of serious error, likely requiring a mistrial, is apparent.

Rule 801(d)(2)(E) does not appear to change what may be termed the "substantive law" relating to statements made by co-conspirators. Thus, whether a statement was made by a co-conspirator in furtherance of a conspiracy is a question for the military judge, and a statement made by an individual after he or she was withdrawn from a conspiracy is not made "in furtherance of the conspiracy."

Official statements made by an officer—as by the commanding officer of a battalion, squadron, or ship, or by a staff officer, in an endorsement of other communication—are not excepted from the operation of the hearsay rule merely by reason of the official character of the communication or the rank or position of the officer making it.

The following examples of admissibility under this Rule may be helpful:

(1) *A is being tried for assaulting B.* The defense presents the testimony of C that just before the assault C heard B say to A that B was about to kill A with B's knife. The testimony of C is not hearsay, for it is offered to show that A acted in self-defense because B made the statement and not to prove the truth of B's statement.

(2) *A is being tried for rape of B.* If B testifies at trial, the testimony of B that she had previously identified A as her attacker at an identification lineup would be admissible under Rule 801(d)(1)(C) to prove that it was A who raped B.

(3) *Private A is being tried for disobedience of a certain order given him orally by Lieutenant B.* C is able to testify that he heard Lieutenant B give the order to A. This testimony, including testimony of C as to the terms of the order, would not be hearsay.

(4) *The accused is being tried for the larceny of clothes from a locker.* A is able to testify that B told A that B saw the accused leave the quarters in which the locker was located with a bundle resembling clothes about the same time the clothes were stolen. This testimony from A would not be admissible to prove that facts stated by B.

(5) *The accused is being tried for wrongfully selling government clothing.* A policeman is able to testify that while on duty he saw the accused go into a shop with a bundle under his arm; that he entered the shop and the accused ran away; that he was unable to catch the accused; and that thereafter the policeman asked the proprietor of the shop what the accused was doing there; and that the proprietor replied that the accused sold him some uniforms for which he paid the accused $30. Testimony by the policeman as to the reply of the proprietor would be hearsay if it was offered to prove the facts stated by the proprietor. The fact that the policeman was acting in the line of duty at the time the proprietor made the statement would not render the evidence admissible to prove the truth of the statement.

(6) *A defense witness in an assault case testifies on direct examination that the accused did not strike the alleged victim.* On cross-examination by the prosecution, the witness admits that at a preliminary investigation he stated that the accused had struck the alleged victim. The testimony of the witness as to this statement will be admissible if he was under oath at the time and subject to a prosecution for perjury.

Rule 802. Hearsay rule

Rule 802 is taken generally from the Federal Rule but has been modified to recognize the application of any applicable Act of Congress.

Although the basic rule of inadmissibility for hearsay is identical with that found in Para. 139 *a* of the 1969 Manual, there is a substantial change in military practice as a result of Rule 103(a).

Under the 1969 Manual, hearsay was incompetent evidence and did not require an objection to be inadmissible. Under the new Rules, however, admission of hearsay will not be error unless there is an objection to the hearsay. *See* Rule 103(a).

Rule 803. Hearsay exceptions; availability of declarant Immaterial

Rule 803 is taken generally from the Federal Rule with modifications as needed for adaptation to military practice. Overall, the Rule is similar to practice under Manual Paras. 142 and 144 of the 1969 Manual. The Rule is, however, substantially more detailed and broader in scope than the 1969 Manual.

(1) *Present sense impression.* Rule 803(1) is taken from the Federal Rule verbatim. The exception it establishes was not recognized in the 1969 Manual for Courts-Martial. It is somewhat similar to a spontaneous exclamation, but does not require a startling event. A fresh complaint by a victim of a sexual offense may come within this exception depending upon the circumstances.

(2) *Excited utterance.* Rule 803(2) is taken from the Federal Rule verbatim. Although similar to Para. 142 *b* of the 1969 Manual with respect to spontaneous exclamations, the Rule would appear to be more lenient as it does not seem to require independent evidence that the startling event occurred. An examination of the Federal Rules of Evidence Advisory Committee Note indicates some uncertainty, however. S. Saltzburg & K. Redden, FEDERAL RULES OF EVIDENCE MANUAL 540 (2d ed. 1977). A fresh complaint of a sexual offense may come within this exception depending on the circumstances.

(3) *Then existing mental, emotional, or physical condition.* Rule 803(3) is taken from the Federal Rule verbatim. The Rule is similar to that found in 1969 Manual Para. 142d but may be slightly more limited in that it may not permit statements by an individual to be offered to disclose the intent of another person. Fresh complaint by a victim of a sexual offense may come within this exception.

(4) *Statements for purposes of medical diagnosis or treatment.* Rule 803(4) is taken from the Federal Rule verbatim. It is substantially broader than the state of mind or body exception found in Para. 142 *d* of the 1969 Manual. It allows, among other matters, statements as to the cause of the medical problem presented for diagnosis or treatment. Potentially, the Rule is extremely broad and will permit statements made even to nonmedical personnel (*e.g.*, members of one's family) and on behalf of others so long as the statements are made for the purpose of diagnosis or treatment. The basis for the exception is the presumption that an individual seeking relief from a medical problem has incentive to make accurate statements. *See generally*, 4 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE Para. 804(4)(01) (1978). The admissibility under this exception of those portions of a statement not relevant to diagnosis or treatment is uncertain. Although statements made to a physician, for example, merely to enable the physician to testify, do not appear to come within the Rule, statements solicited in good faith by others in order to ensure the health of the declarant would appear to come within the Rule. Rule 803(4) may be used in an appropriate case to present evidence of fresh complaint in a sexual case.

(5) *Recorded recollection.* Rule 803(5) is taken from the Federal Rule without change, and is similar to the present exception for past recollection recorded found in Paras. 146 *a* and 149 *c*(1)(b) of the 1969 Manual except that under the Rule the memorandum may be read but not presented to the fact finder unless offered by the adverse party.

(6) *Record of regularly conducted activity.* Rule 803(6) is taken generally from the Federal Rule. Two modifications have been made, however, to adapt the rule to military practice. The definition of "business" has been expanded to explicitly include the armed forces to ensure the continued application of this hearsay exception, and a descriptive list of documents, taken generally from 1969 Manual Para. 144 *d*, has been included. Although the activities of the armed forces do not constitute a profit making business, they do constitute a business within the meaning of the hearsay exception, *see* Para. 144 *c*, of the 1969 Manual, as well as a "regularly conducted activity."

The specific types of records included within the Rule are those which are normally records of regularly conducted activity within the armed forces. They are included because of their importance and because their omission from the Rule would be impracticable. The fact that a record is of a type described within subdivision does not eliminate the need for its proponent to show that the *particular* record comes within the Rule when the record is challenged; the Rule does establish that the *types* of records listed are normally business records.

Chain of custody receipts or documents have been included to emphasize their administrative nature. Such documents perform the critical function of accounting for property obtained by the United States Government. Although they may be used as prosecution evidence, their primary purpose is simply one of property accountability. In view of the primary administrative purpose of these matters, it was necessary to provide expressly for their admissibility as an exception to the hearsay rule in order to clearly reject the interpretation of Para. 144 *d* of the 1969 Manual with respect to chain of custody forms as set forth in *United States v. Porter*, 7 M.J. 32 (C.M.A. 1979) and *United States v. Nault*, 4 M.J. 318 (C.M.A. 1978) insofar as they concerned chain of custody forms.

Laboratory reports have been included in recognition of the function of forensic laboratories as impartial examining centers. The report is simply a record of "regularly conducted" activity of the laboratory. *See, e.g., United States v. Strangstalien*, 7 M.J. 225 (C.M.A. 1979); *United States v. Evans*, 21 U.S.C.M.A. 579, 45 C.M.R. 353 (1972).

Paragraph 144 *d* prevented a record "made principally with a view to prosecution, or other disciplinary or legal action …" from being admitted as a business record. The limitation has been deleted, *but see* Rule 803(8)(B) and its Analysis. It should be noted that a record of "regularly conducted activity" is unlikely to have a prosecutorial intent in any event.

The fact that a record may fit within another exception, *e.g.*, Rule 803(8), does not generally prevent it from being admissible under this subdivision although it would appear that the exclusion found in Rule 803(8)(B) for "matters observed by police officers and other personnel acting in a law enforcement capacity" prevent any such record from being admissible as a record of regularly conducted activity. Otherwise the limitation in subdivision (8) would serve no useful purpose. *See also* Analysis to Rule 803(8)(B).

Rule 803(6) is generally similar to the 1969 Manual rule but is

potentially broader because of its use of the expression "regularly conducted" activity in addition to "business". It also permits records of opinion which were prohibited by Para. 144 *d* of the 1969 Manual. Offsetting these factors is the fact that the Rule requires that the memorandum was "made at or near the time by, or from information transmitted by a person with knowledge …", but Para. 144 *c* of the 1969 Manual rule expressly did not require such knowledge as a condition of admissibility.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* Rule 803(7) is taken verbatim from the Federal Rule. The Rule is similar to Paras. 143 *a*(2)(h) and 143 *b*(3) of the 1969 Manual.

(8) *Public records and reports.* Rule 803(8) has been taken generally from the Federal Rule but has been slightly modified to adapt it to the military environment. Rule 803(8)(B) has been redrafted to apply to "police officers and other personnel acting in a law enforcement capacity" rather the Federal Rule's "police officers and other law enforcement personnel". The change was necessitated by the fact that all military personnel may act in a disciplinary capacity. Any officer, for example, regardless of assignment, may potentially act as a military policeman. The capacity within which a member of the armed forces acts may be critical.

The Federal Rule was also modified to include a list of records that, when made pursuant to a duty required by law, will be admissible notwithstanding the fact that they may have been made as "matters observed by police officers and other personnel acting in a law enforcement capacity." Their inclusion is a direct result of the fact, discussed above, that military personnel may all function within a law enforcement capacity. The Committee determined it would be impracticable and contrary to the intent of the Rule to allow the admissibility of records which are truly administrative in nature and unrelated to the problems inherent in records prepared only for purposes of prosecution to depend upon whether the maker was at that given instant acting in a law enforcement capacity. The language involved is taken generally from Para. 144 *b* of the 1969 Manual. Admissibility depends upon whether the record is "a record of a fact or event if made by a person within the scope of his official duties and those duties included a duty to know or ascertain through appropriate and trustworthy channels of information the truth of the fact or event …" Whether any given record was obtained in such a trustworthy fashion is a question for the military judge. The explicit limitation on admissibility of records made "principally with a view to prosecution" found in Para. 144 *d* has been deleted.

The fact that a document may be admissible under another exception to the hearsay rule, *e.g.*, Rule 803(6), does not make it inadmissible under this subdivision.

Military Rule of Evidence 803(8) raises numerous significant questions. Rule 803(8)(A) extends to "records, reports, statements, or data compilations" of public offices or agencies, setting forth (A) the activities of the office or agency." The term "public office or agency" within this subdivision is defined to include any government office or agency including those of the armed forces. Within the civilian context, the definition of "public offices or agencies" is fairly clear and the line of demarcation between governmental and private action can be clearly drawn in most cases. The same may not be true within the armed forces. It is unlikely that every action taken by a servicemember is an "activity" of the department of which he or she is a member. Presumably, Rule 803(8) should be restricted to activities of formally sanctioned instrumentalities roughly similar to civilian entities. For example, the activities of a squadron headquarters or a staff section would come within the definition of "office or agency." Pursuant to this rationale, there is no need to have a military regulation or directive to make a statement of a "public office or agency" under Rule 803(8)(A). However, such regulations or directives might well be highly useful in establishing that a given administrative mechanism was indeed an "office or agency" within the meaning of the Rule.

Rule 803(8)(B) encompasses "matters observed pursuant to duty imposed by law as to which matters there was a duty to report…." This portion of Rule 803(8) is broader than subdivision (8)(A) as it extends to far more than just the normal procedures of an office or agency. Perhaps because of this extent, it requires that there be a specific duty to observe and report. This duty could take the form of a statement, general order, regulation, or any competent order.

The exclusion in the Federal Rule for "matters observed by police officers" was intended to prevent use of the exception for evaluative reports as the House Committee believed them to be unreliable. Because of the explicit language of the exclusion, normal statutory construction leads to the conclusion that reports which would be within Federal or Military Rule 803(8) but for the exclusion in (8)(B) are not otherwise admissible under Rule 803(6). Otherwise the inclusion of the limitation would serve virtually no purpose whatsoever. There is no contradiction between the exclusion in Rule 803(8)(B) and the specific documents made admissible in Rule 803(8) (and Rule 803(6)) because those documents are not matters "observed by police officers and other personnel acting in a law enforcement capacity." To the extent that they might be so considered, the specific language included by the Committee is expressly intended to reject the subdivision (8)(B) limitation. Note, however, that all forms of evidence not within the specific item listing of the Rule but within the (8)(B) exclusion will be admissible insofar as Rule 803(8) is concerned, whether the evidence is military or civilian in origin.

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

Rule 803(8)(C) makes admissible, but only against the Government, "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." This provision will make factual findings made, for example, by an Article 32 Investigating Officer or by a Court of Inquiry admissible on behalf of an accused. Because the provision

applies only to "factual findings," great care must be taken to distinguish such factual determinations from opinions, recommendations, and incidental inferences.

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

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

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

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

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

(18) *Learned treaties.* Rule 803(18) is taken from the Federal Rule without change. Unlike Para. 138 *e* of the 1969 Manual, which allowed use of such statements only for impeachment, this Rule allows substantive use on the merits of statements within treaties if relied upon in direct testimony or called to the expert's attention on cross-examination. Such statements may not, however, be given to the fact finder as exhibits.

(19-20) *Reputation concerning personal or family history; reputation concerning boundaries or general history.* Rules 803(19)–(20) are taken without change from the Federal Rules and had no express equivalents in the 1969 Manual.

(21) *Reputation as to character.* Rule 803(21) is taken from the Federal Rule without change. It is similar to Para. 138 *f* of the 1969 Manual in that it creates an exception to the hearsay rule for reputation evidence. "Reputation" and "community" are defined in Rule 405(d), and "community" includes a "military organization regardless of size." Affidavits and other written statements are admissible to show character under Rule 405(c), and, when offered pursuant to that Rule, are an exception to the hearsay rule.

(22) *Judgment or previous conviction.* Rule 803(22) is taken from the Federal Rule but has been modified to recognize convictions of a crime punishable by a dishonorable discharge, a unique punishment not present in civilian life. *See also* Rule 609 and its Analysis.

There is no equivalent to this Rule in military law. Although the Federal Rule is clearly applicable to criminal cases, its original intent was to allow use of a prior criminal conviction in a subsequent civil action. To the extent that it is used for criminal cases, significant constitutional issues are raised, especially if the prior conviction is a foreign one, a question almost certainly not anticipated by the Federal Rules Advisory Committee.

(23) *Judgment as to personal, family or general history, or boundaries.* Rule 803(23) is taken verbatim from the Federal Rule, and had no express equivalent in the 1969 Manual. Although intended for civil cases, it clearly has potential use in courts-martial for such matters as proof of jurisdiction.

(24) *Other exceptions.* Rule 803(24) is taken from the Federal Rule without change. It had no express equivalent in the 1969 Manual as it establishes a general exception to the hearsay rule. The Rule implements the general policy behind the Rules of permitting admission of probative and reliable evidence. Not only must the evidence in question satisfy the three conditions listed in the Rule (materiality, more probative on the point than any other evidence which can be reasonably obtained, and admission would be in the interest of justice) but the procedural requirements of notice must be complied with. The extent to which this exception may be employed is unclear. The Article III courts have divided as to whether the exception may be used only in extraordinary cases or whether it may have more general application. It is the intent of the Committee that the Rule be employed in the same manner as it is generally applied in the Article III courts. Because the general exception found in Rule 803(24) is basically one intended to apply to highly reliable and necessary evidence, recourse to the theory behind the hearsay rule itself may be helpful. In any given case, both trial and defense counsel may wish to examine the hearsay evidence in question to determine how well it relates to the four traditional considerations usually invoked to exclude hearsay testimony: how truthful was the original declarant? to what extent were his or her powers of observation adequate? was the declaration truthful? was the original declarant able to adequately communicate the statement? Measuring evidence against this framework should assist in determining the reliability of the evidence. Rule 803(24) itself requires the necessity which is the other usual justification for hearsay exceptions.

Rule 804. Hearsay exception; declarant unavailable

(a) *Definition of unavailability.* Subdivisions (a)(1)–(a)(5) of Rule 804 are taken from the Federal Rule without change and are generally similar to the relevant portions of Paras. 145 *a* and 145 *b* of the 1969 Manual, except that Rule 804(a)(3) provides that a witness who "testifies as to a lack of memory of the subject matter of the declarant's statement" is unavailable. The Rule also does not distinguish between capital and non-capital cases.

February 1986 Amendment: The phrase "claim or lack of memory" was changed to "claim of lack of memory" to correct an error in MCM, 1984.

Rule 804(a)(6) is new and has been added in recognition of certain problems, such as combat operations, that are unique to the armed forces. Thus, Rule 804(a)(6) will make unavailable a witness who is unable to appear and testify in person for reason of military necessity within the meaning of Article 49(d)(2). The meaning of "military necessity" must be determined by reference to the cases construing Article 49. The expression is not intended to be a general escape clause, but must be restricted to the limited circumstances that would permit use of a deposition.

(b) *Hearsay exceptions*

(1) *Former testimony.* The first portion of Rule 804(b)(1) is taken from the Federal Rule with omission of the language relating to civil cases. The second portion is new and has been included to clarify the extent to which those military tribunals in which a verbatim record normally is not kept come within the Rule.

The first portion of Rule 804(b)(1) makes admissible former testimony when "the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Unlike Para. 145 *b* of the 1969 Manual, the Rule does not explicitly require that the accused, when the evidence is offered against him or her, have been "afforded at the former trial an opportunity, to be adequately represented by counsel." Such a requirement should be read into the Rule's condition that the party have had "opportunity and similar motive." In contrast to the 1969 Manual, the Rule does not distinguish between capital and non-capital cases.

The second portion of Rule 804(b)(1) has been included to ensure that testimony from military tribunals, many of which ordinarily do not have verbatim records, will not be admissible unless such testimony is presented in the form of a verbatim record. The Committee believed substantive use of former testimony to be too important to be presented in the form of an incomplete statement.

Investigations under Article 32 of the Uniform Code of Military Justice present a special problem. Rule 804(b)(1) requires that "the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony" at the first hearing. The "similar motive" requirement was intended primarily to ensure sufficient identity of issues between the two proceedings and thus to ensure an adequate interest in examination of the witness. *See, e.g.*, J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE Para. 804(b)(1)((04)) (1978). Because Article 32 hearings represent a unique hybrid of preliminary hearings and grand juries with features dissimilar to both, it was particularly difficult for the Committee to determine exactly how subdivision (b)(1) of the Federal Rule would apply to Article 32 hearings. The specific difficulty stems from the fact that Article 32 hearings were intended by Congress to function as discovery devices for the defense as well as to recommend an appropriate disposition of charges to the convening authority. *Hutson v. United States*, 19 U.S.C.M.A. 437, 42 C.M.R. 39 (1970); *United States v. Samuels*, 10 U.S.C.M.A. 206, 212, 27 C.M.R. 280, 286 (1959). *See generally, Hearing on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess., 997 (1949). It is thus permissible, for example, for a defense counsel to limit cross-examination of an adverse witness at an Article 32 hearing using the opportunity for discovery alone, for example, rather than impeachment. In such a case, the defense would not have the requisite "similar motive" found within Rule 804(b)(1).

Notwithstanding the inherent difficulty of determining the defense counsel's motive at an Article 32 hearing, the Rule is explicitly intended to prohibit use of testimony given at an Article 32 hearing unless the requisite "similar motive" was present during that hearing. It is clear that some Article 32 testimony is admissible under the Rule notwithstanding the Congressionally sanctioned discovery purpose of the Article 32 hearing. Consequently, one is left with the question of the extent to which the Rule actually does apply to Article 32 testimony. The only apparent practical solution to what is otherwise an irresolvable dilemma is to read the Rule as permitting only Article 32 testimony preserved via a verbatim record that is not objected to as having been obtained without the requisite "similar motive." While defense counsel's assertion of his or her intent in not examining one or more witnesses or in not fully examining a specific witness is not binding upon the military judge, clearly the burden of establishing admissibility under the Rule is on the prosecution and the burden so placed may be impossible to meet should the defense counsel adequately raise the issue. As a matter of good trial practice, a defense counsel who is limiting cross-examination at the Article 32 hearing because of discovery should announce that intent sometime during the Article 32 hearing so that the announcement may provide early notice to all concerned and hopefully avoid the necessity for counsel to testify at the later trial.

The Federal Rule was modified by the Committee to require that testimony offered under Rule 804(b)(1) which was originally "given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article 32" and which is otherwise admissible under the Rule be offered in the form of a verbatim record. The modification was intended to ensure accuracy in view of the fact that only summarized or minimal records are required of some types of military proceedings.

An Article 32 hearing is a "military tribunal." The Rule distinguishes between Article 32 hearings and other military tribunals in order to recognize that there are other proceedings which are considered the equivalent of Article 32 hearings for purposes of former testimony under Rule 804(b)(1).

(2) *Statement under belief of impending death.* Rule 804(b)(2) is taken from the Federal Rule except that the language, "for any offense resulting in the death of the alleged victim," has been added and reference to civil proceedings has been omitted. The new language has been added because there is no justification for limiting the exception only to those cases in which a homicide charge has actually been preferred. Due to the violent nature of military operations, it may be appropriate to charge a lesser included offense rather than homicide. The same justifications for the exception are applicable to lesser included offenses which are also, of course, of lesser severity. The additional language, taken from Para. 142 *a*, thus retains the 1969 Manual rule, modification of which was viewed as being impracticable.

Rule 804(b)(2) is similar to the dying declaration exception found in Para. 142 *a* of the 1969 Manual, except that the Military Rule does not require that the declarant be dead. So long as the declarant is unavailable and the offense is one for homicide or other offense resulting in the death of the alleged victim, the hearsay exception may be applicable. This could, for example, result from a situation in which the accused, intending to shoot A, shoots both A and B; uttering the hearsay statement, under a belief of impending death, B dies, and although A recovers, A is unavailable to testify at trial. In a trial of the accused for killing B, A's statement will be admissible.

There is no requirement that death immediately follow the declaration, but the declaration is not admissible under this exception if the declarant had a hope of recovery. The declaration may be made by spoken words or intelligible signs or may be in writing. It may be spontaneous or in response to solicitation,

including leading questions. The utmost care should be exercised in weighing statements offered under this exception since they are often made under circumstances of mental and physical debility and are not subject to the usual tests of veracity. The military judge may exclude those declarations which are viewed as being unreliable. *See,* Rule 403.

A dying declaration and its maker may be contradicted and impeached in the same manner as other testimony and witnesses. Under the prior law, the fact that the deceased did not believe in a deity or in future rewards or punishments may be offered to affect the weight of a declaration offered under this Rule but does not defeat admissibility. Whether such evidence is now admissible in the light of Rule 610 is unclear.

(3) *Statement against interest.* Rule 804(b) is taken from the Federal Rule without change, and has no express equivalent in the 1969 Manual. It has, however, been made applicable by case law, *United States v. Johnson*, 3 M.J. 143 (C.M.A. 1977). It makes admissible statements against a declarant's interest, whether pecuniary, proprietary, or penal when a reasonable person in the position of the declarant would not have made the statement unless such a person would have believed it to be true.

The Rule expressly recognizes the penal interest exception and permits a statement tending to expose the declarant to criminal liability. The penal interest exception is qualified, however, when the declaration is offered to exculpate the accused by requiring the "corroborating circumstances clearly indicate the trustworthiness of the statement." This requirement is applicable, for example, when a third party confesses to the offense the accused is being tried for and the accused offers the third party's statement in evidence to exculpate the accused. The basic penal interest exception is established as a matter of constitutional law by the Supreme Court's decision in *Chambers v. Mississippi*, 410 U.S. 284 (1973), which may be broader than the Rule as the case may not require either corroborating evidence or an unavailable declarant.

In its present form, the Rule fails to address a particularly vexing problem— that of the declaration against penal interest which implicates the accused as well as the declarant. On the face of the Rule, such a statement should be admissible, subject to the effects, if any, of *Bruton v. United States*, 391 U.S. 123 (1968) and Rule 306. Notwithstanding this, there is considerable doubt as to the applicability of the Rule to such a situation. *See generally,* 4 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE 804–93, 804–16 (1978). Although the legislative history reflects an early desire on the part of the Federal Rules of Evidence Advisory Committee to prohibit such testimony, a provision doing so was not included in the material reviewed by Congress. Although the House included such a provision, it did so apparently in large part based upon a view that *Bruton, supra*, prohibited such statements— arguably an erroneous view of *Bruton, supra, see, Bruton, supra* n.3 at 128, *Dutton v. Evans*, 400 U.S. 74 (1970). The Conference Committee deleted the House provision, following the Senate's desires, because it believed it inappropriate to "codify constitutional evidentiary principles." WEINSTEIN'S EVIDENCE at 804–16 (1978) citing CONG.REC.H 11931–32 (daily ed. Dec. 14, 1974). Thus, applicability of the hearsay exception to individuals implicating the accused may well rest only on the extent to which *Bruton, supra*, governs such statement. The Committee intends that the Rule extend to such statements to the same extent that subdivision 804(b)(4) is held by the Article III courts to apply to such statements.

(4) *Statement of personal or family history.* Rule 804(b)(4) of the Federal Rule is taken verbatim from the Federal Rule, and had no express equivalent in the 1969 Manual. The primary feature of Rule 803(b)(4)(A) is its application even though the "declarant had no means of acquiring personal knowledge of the matter stated."

(5) *Other exceptions.* Rule 804(b)(5) is taken without change from the Federal Rule and is identical to Rule 803(24). As Rule 803 applies to hearsay statements regardless of the declarant's availability or lack thereof, this subdivision is actually superfluous. As to its effect, *see* the Analysis to Rule 803(24).

Rule 805. Hearsay within hearsay

Rule 805 is taken verbatim from the Federal Rule. Although the 1969 Manual did not exactly address the issue, the military rule is identical with the new rule.

Rule 806. Attacking and supporting credibility of declarant

Rule 806 is taken from the Federal Rule without change. It restates the prior military rule that a hearsay declarant or statement may always be contradicted or impeached. The Rule eliminates any requirement that the declarant be given "an opportunity to deny or explain" an inconsistent statement or inconsistent conduct when such statement or conduct is offered to attack the hearsay statement. As a result, Rule 806 supersedes Rule 613(b) which would require such an opportunity for a statement inconsistent with in-court testimony.

SECTION IX
AUTHENTICATION AND INDENTIFICATION

Rule 901. Requirement of authentication or identification

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

There is substantial question as to the proper interpretation of the Federal Rule equivalent of Rule 901(a). The Rule requires only "evidence sufficient to support a finding that the matter in question is what its proponent claims." It is possible that this phrasing supersedes any formulaic approach to authentication and that rigid rules such as those that have been devised to authenticate taped recordings, for example, are no longer valid. On the other hand, it appears fully appropriate for a trial judge to require such evidence as is needed "to support a finding that the matter in question is what its proponent claims," which evidence may echo in some cases the common law formulations. There appears to be no reason to believe that the Rule will change the present law as

it affects chains of custody for real evidence— especially if fungible. Present case law would appear to be consistent with the new Rule because the chain of custody requirement has not been applied in a rigid fashion. A chain of custody will still be required when it is necessary to show that the evidence is what it is claimed to be and, when appropriate, that its condition is unchanged. Rule 901(a) may make authentication somewhat easier, but is unlikely to make a substantial change in most areas of military practice.

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

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

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

Rule 902. Self-authentication

Rule 902 has been taken from the Federal Rule without significant change except that a new subdivision, 4a, has been added and subdivisions (4) and (10) have been modified. The Rule prescribes forms of self-authentication.

(1) *Domestic public documents under seal.* Rule 902(1) is taken verbatim from the Federal Rule, and is similar to aspects of Paras. 143 *b*(2)(c) and (d) of the 1969 Manual. The Rule does not distinguish between original document and copies. A seal is self-authenticating and, in the absence of evidence to the contrary, is presumed genuine. Judicial notice is not required.

(2) *Domestic public documents not under seal.* Rule 902(2) is taken from the Federal Rule without change. It is similar in scope to aspects of Paras. 143 *b*(2)(c) and (d) of the 1969 Manual in that it authorizes use of a certification under seal to authenticate a public document not itself under seal. This provision is not the only means of authenticating a domestic public record under this Rule. *Compare* Rule 902(4); 902(4a).

(3) *Foreign public documents.* Rule 902(3) is taken without change from the Federal Rule. Although the Rule is similar to Paras. 143 *b*(2)(e) and (f) of the 1969 Manual, the Rule is potentially narrower than the prior military one as the Rule does not permit "final certification" to be made by military personnel as did the Manual rule nor does it permit authentication made by military personnel as did the Manual rule nor does it permit authentication made solely pursuant to the laws of the foreign nation. On the other hand, the Rule expressly permits the military judge to order foreign documents to "be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification."

(4) *Certified copies of public records.* Rule 902(4) is taken verbatim from the Federal Rule except that it has been modified by adding "or applicable regulations prescribed pursuant to statutory authority." The additional language is required by military necessity and includes the now existing statutory powers of the President and various Secretaries to promulgate regulations. *See, generally,* Analysis to Rule 901(b).

Rule 902(4) expands upon prior forms of self-authentication to acknowledge the propriety of certified public records or reports and related materials domestic or foreign, the certification of which complies with subdivisions (1), (2), or (3) of the Rule.

(4a) *Documents or records of the United States accompanied by attesting certificates.* This provision is new and is taken from the third subparagraph of Para. 143 *b*(2)(c) of the 1969 Manual. It has been inserted due to the necessity to facilitate records of the United States in general and military records in particular. Military records do not have seals and it would not be practicable to either issue them or require submission of documents to those officials with them. In many cases, such a requirement would be impossible to comply with due to geographical isolation or the unwarranted time such a requirement could demand.

An "attesting certificate" is a certificate or statement, signed by the custodian of the record or the deputy or assistant of the custodian, which in any form indicates that the writing to which the certificate or statement refers is a true copy of the record or an accurate "translation" of a machine, electronic, or coded record, and the signer of the certificate or statement is acting in an official capacity as the person having custody of the record or as the deputy or assistant thereof. *See* Para. 143 *a*(2)(a) of the 1969 Manual. An attesting certificate does not require further authentication and, absent proof to the contrary, the signature of the custodian or deputy or assistant thereof on the certificate is presumed to be genuine.

(5-9) *Official publications; Newspapers and periodicals; Trade inscriptions and the like; Acknowledged documents; Commercial paper and related documents.* Rules 902(5)–(9) are taken verbatim from the Federal Rules and have no equivalents in the 1969 Manual or in military law.

(10) *Presumptions under Acts of Congress and Regulations.* Rule 902(10) was taken from the Federal Rule but was modified by adding "and Regulations" in the caption and "or by applicable regulation prescribed pursuant to statutory authority." *See generally* the Analysis to Rule 901(b)(10) for the reasons for the additional language. The statutory authority referred to includes the presently existing authority for the President and various Secretaries to prescribe regulations.

Rule 903. Subscribing witness' testimony unnecessary

Rule 903 is taken verbatim from the Federal Rule and has no express equivalent in the 1969 Manual.

SECTION X
CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions

(1) *Writings and recordings.* Rule 1001(1) is taken verbatim from the Federal Rule and is similar in scope to Para. 143 *d* of the 1969 Manual. Although the 1969 Manual was somewhat more detailed, the Manual was clearly intended to be expansive. The Rule adequately accomplishes the identical purpose through a more general reference.

(2) *Photographs.* Rule 1001(2) is taken verbatim from the Federal Rule and had no express equivalent in the 1969 Manual. It does, however, reflect current military law.

(3) *Original.* Rule 1001(3) is taken verbatim from the Federal Rule and is similar to Para. 143 *a*(1) of the 1969 Manual. The 1969 Manual, however, treated "duplicate originals," *i.e.*, carbon and photographic copies made for use as an original, as an "original" while Rule 1001(4) treats such a document as a "duplicate."

(4) *Duplicate.* Rule 1004(4) is taken from the Federal Rule verbatim and includes those documents Para. 143 *a*(1) of the 1969 Manual defined as "duplicate originals." In view of Rule 1003's rule of admissibility for "duplicate," no appreciable negative result stems from the reclassification.

Rule 1002. Requirement of the original

Rule 1002 is taken verbatim from the Federal Rule except that "this Manual"has been added in recognition of the efficacy of other Manual provisions. The Rule is similar in scope to the best evidence rule found in Para. 143 *a*(19) of the 1969 Manual except that specific reference is made in the rule to recordings and photographs. Unlike the 1969 Manual, the Rule does not contain the misleading reference to "best evidence" and is plainly applicable to writings, recordings, or photographs.

It should be noted that the various exceptions to Rule 1002 are similar to but not identical with those found in the 1969 Manual. *Compare* Rules 1005–1007 *with* Para. 143 *a*(2)(f) of the 1969 Manual. For example, Paras. 143 *a*(2)(e) and 144 *c* of the 1969 Manual excepted banking records and business records from the rule as categories while the Rule does not. The actual difference in practice, however, is not likely to be substantial as Rule 1003 allows admission of duplicates unless, for example, "a genuine question is raised as to the authenticity of the original." This is similar in result to the treatment of business records in Para. 144 *a* of the 1969 Manual. Omission of other 1969 Manual exceptions, *e.g.*, certificates of fingerprint comparison and identity, *see* Rule 703, 803, evidence of absence of official or business entries, and copies of telegrams and radiograms, do not appear substantial when viewed against the entirety of the Military Rules which are likely to allow admissibility in a number of ways.

The Rule's reference to "Act of Congress" will now incorporate those statutes that specifically direct that the best evidence rule be inapplicable in one form or another. *See, e.g.*, 1 U.S.C. §209 (copies of District of Columbia Codes of Laws). As a rule, such statutes permit a form of authentication as an adequate substitute for the original document.

Rule 1003. Admissibility of duplicates

Rule 1003 is taken verbatim from the Federal Rule. It is both similar to and distinct from the 1969 Manual. To the extent that the Rule deals with those copies which were intended at the time of their creation to be used as originals, it is similar to the 1969 Manual's treatment of "duplicate originals," Para. 143 *a*(1), except that under the 1969 Manual there was no distinction to be made between originals and "duplicate originals". Accordingly, in this case the Rule would be narrower than the 1969 Manual. To the extent that the Rule deals with copies not intended at their time of creation to serve as originals, however, *e.g.*, when copies are made of pre-existing documents for the purpose of litigation, the Rule is broader than the 1969 Manual because that Manual prohibited such evidence unless an adequate justification for the non-production of the original existed.

Rule 1004. Admissibility of other evidence of contents

Rule 1004 is taken from the Federal Rule without change, and is similar in scope to the 1969 Manual. Once evidence comes within the scope of Rule 1004, secondary evidence is admissible without regard to whether "better" forms of that evidence can be obtained. Thus, no priority is established once Rule 1002 is escaped. Although the 1969 Manual stated in Para. 143 *a*(2) that "the contents may be proved by an authenticated copy or by the testimony of a witness who has seen and can remember the substance of the writing" when the original need not be produced, that phrasing appears illustrative only and not exclusive. Accordingly, the Rule, the Manual, and common law are in agreement in not requiring categories of secondary evidence.

(1) *Originals lost or destroyed.* Rule 1004(1) is similar to the 1969 Manual except that the Rule explicitly exempts originals destroyed in "bad faith." Such an exemption was implicit in the 1969 Manual.

(2) *Original not obtained.* Rule 1004(2) is similar to the justification for nonproduction in Para. 143 *a*(2) of the 1969 Manual, "an admissible writing … cannot feasibly be produced."

(3) *Original in possession of opponent.*

Rule 1004(3) is similar to the 1969 Manual provision in Para. 143 *a*(2) that when a document is in the possession of the accused the original need not be produced except that the 1969 Manual explicitly did not require notice to the accused, and the Rule may require such notice. Under the Rule, the accused must be "put on notice, by the pleadings or otherwise, that the contents would be subject of proof at the hearing." Thus, under certain circumstances, a formal notice to the accused may be required. Under no circumstances should such a request or notice be made in the presence of the court members. The only purpose of such notice is to justify use of secondary evidence and does not serve to compel the surrender of evidence from the accused. It should be noted that Rule 1004(3) acts in favor of the accused as well as the prosecution and allows notice to the prosecution to justify defense use of secondary evidence.

(4) *Collateral matters.* Rule 1004 is not found within the Manual but restates prior military law. The intent behind the Rule is to

avoid unnecessary delays and expense. It is important to note that important matters which may appear collateral may not be so in fact due to their weight. *See, e.g., United States v. Parker,* 13 U.S.C.M.A. 579, 33 C.M.R. 111 (1963) (validity of divorce decree of critical prosecution witness not collateral when witness would be prevented from testifying due to spousal privilege if the divorce were not valid). The Rule incorporates this via its use of the expression "related to a controlling issue."

Rule 1005. Public records

Rule 1005 is taken verbatim from the Federal Rule except that "or attested to" has been added to conform the Rule to the new Rule 902(4a). The Rule is generally similar to Para. 143 *a*(2)(c) of the 1969 Manual although some differences do exist. The Rule is somewhat broader in that it applies to more than just "official records." Further, although the 1969 Manual permitted "a properly authenticated" copy in lieu of the official record, the Rule allows secondary evidence of contents when a certified or attested copy cannot be obtained by the exercise of reasonable diligence. The Rule does, however, have a preference for a certified or attested copy.

Rule 1006. Summaries

Rule 1006 is taken from the Federal Rule without change, and is similar to the exception to the best evidence rule now found in Para. 143 *a*(2)(b) of the 1969 Manual. Some difference between the Rule and the 1969 Manual exists, however, because the Rule permits use of "a chart, summary, or calculation"while the Manual permitted only "a summarization." Additionally, the Rule does not include the 1969 Manual requirement that the summarization be made by a "qualified person or group of qualified persons," nor does the Rule require, as the Manual appeared to, that the preparer of the chart, summary, or calculation testify in order to authenticate the document. The nature of the authentication required is not clear although some form of authentication is required under Rule 901(a).

It is possible for a summary that is admissible under Rule 1006 to include information that would not itself be admissible if that information is reasonably relied upon by an expert preparing the summary. *See generally* Rule 703 and S. Saltzburg & K. Redden, FEDERAL RULES OF EVIDENCE MANUAL 694 (2d ed. 1977).

Rule 1007. Testimony or written admission of party

Rule 1007 is taken from the Federal Rule without change and had no express equivalent in the 1969 Manual. The Rule establishes an exception to Rule 1002 by allowing the contents of a writing, recording or photograph to be proven by the testimony or deposition of the party against whom offered or by the party's written admission.

Rule 1008. Functions of military judge and members

Rule 1008 is taken from the Federal Rule without change, and had no formal equivalent in prior military practice. The Rule specifies three situations in which members must determine issues which have been conditionally determined by the military judge. The members have been given this responsibility in this narrow range of issues because the issues that are involved go to the very heart of a case and may prove totally dispositive. Perhaps the best example stems from the civil practice. Should the trial judge in a contract action determine that an exhibit is in fact the original of a contested contract, that admissibility decision could determine the ultimate result of trial if the jury were not given the opportunity to be the final arbiter of the issue. A similar situation could result in a criminal case, for example, in which the substance of a contested written confession is determinative (this would be rare because in most cases the fact that a written confession was made is unimportant, and the only relevant matter is the content of the oral statement that was later transcribed) or in a case in which the accused is charged with communication of a written threat. A decision by the military judge that a given version is authentic could easily determine the trial. Rule 1008 would give the member the final decision as to accuracy. Although Rule 1008 will rarely be relevant to the usual court-martial, it will adequately protect the accused from having the case against him or her depend upon a single best evidence determination by the military judge.

SECTION XI
MISCELLANEOUS RULES

Rule 1101. Applicability of rules

The Federal Rules have been revised extensively to adapt them to the military criminal legal system. Subdivision (a) of the Federal Rule specifies the types of courts to which the Federal Rules are applicable, and Subdivision (b) of the Federal Rule specifies the types of proceedings to be governed by the Federal Rules. These sections are inapplicable to the military criminal legal system and consequently were deleted. Similarly, most of Federal Rule of Evidence 1101(d) is inapplicable to military law due to the vastly different jurisdictions involved.

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

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

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

(d) *Rules inapplicable.* Rule 1101(d) is taken in concept from subdivision (d) of the Federal Rule. As the content of the Federal Rule is, however, generally inapplicable to military law, the equivalents of the Article III proceedings listed in the Federal Rule have been listed here. They included Article 32 investigative

hearings, the partial analog to grand jury proceedings, proceedings for search authorizations, and proceedings for pretrial release.

1993 Amendment. Mil. R. Evid. 1101(d) was amended to make the provisions of Mil. R. Evid. 412 applicable at pretrial investigations.

1998 Amendment. The Rule is amended to increase to 18 months the time period between changes to the Federal Rules of Evidence and automatic amendment of the Military Rules of Evidence. This extension allows for timely submission of changes through the annual review process.

Rule 1102. Amendments.

Rule 1102 has been substantially revised from the original Federal Rule which sets forth a procedure by which the Supreme Court promulgates amendments to the Federal Rules subject to Congressional objection. Although it is the Committee's intent that the Federal Rules of Evidence apply to the armed forces to the extent practicable, *see* Article 36(a), the Federal Rules are often in need of modification to adapt them to military criminal legal system. Further, some rules may be impracticable. As Congress may make changes during the initial period following Supreme Court publication, some period of time after an amendment's effective date was considered essential for the armed forces to review the final form of amendments and to propose any necessary modifications to the President. Six months was considered the minimally appropriate time period.

Amendments to the Federal Rules are not applicable to the armed forces until 180 days after the effective date of such amendment, unless the President directs earlier application. In the absence of any Presidential action, however, an amendment to the Federal Rule of Evidence will be automatically applicable on the 180th day after its effective date. The President may, however, affirmatively direct that any such amendment may not apply, in whole or in part, to the armed forces and that direction shall be binding upon courts-martial.

1998 Amendment: The Rule is amended to increase to 18 months the time period between changes to the Federal Rules of Evidence and automatic amendment of the Military Rules of Evidence. This extension allows for the timely submission of changes through the annual review process.

Rule 1103. Title

In choosing the title, Military Rules of Evidence, the Committee intends that it be clear that military evidentiary law should echo the civilian federal law to the extent practicable, but should also ensure that the unique and critical reasons behind the separate military criminal legal system be adequately served.

APPENDIX 23
ANALYSIS OF PUNITIVE ARTICLES

Introduction

Unless otherwise indicated, the elements, maximum punishments and sample specifications in paragraphs 3 through 113 are based on paragraphs 157 through 213, paragraph 127 *c* (Table of Maximum Punishments), and Appendix 6 *c* of MCM, 1969 (Rev.).

1986 Amendment: The next to last paragraph of the introduction to Part IV was added to define the term "elements," as used in Part IV. In MCM, 1969 (Rev.), the equivalent term used was "proof." Both "proof" and "elements" referred to the statutory elements of the offense and to any additional aggravating factors prescribed by the President under Article 56, UCMJ, to increase the maximum permissible punishment above that allowed for the basic offense. These additional factors are commonly referred to as "elements," and judicial construction has approved this usage, as long as these "elements" are pled, proven, and instructed upon. *United States v. Flucas*, 23 U.S.C.M.A. 274, 49 C.M.R. 449 (1975); *United States v. Nickaboine*, 3 U.S.C.M.A. 152, 11 C.M.R. 152 (1953); *United States v. Bernard*, 10 C.M.R. 718 (AFBR 1953).

1. Article 77—Principals

b. *Explanation.*

(1) *Purpose.* Article 77 is based on 18 U.S.C. § 2. *Hearings on H. R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1240-1244 (1949). The paragraph of subparagraph b(1) reflects the purpose of 18 U.S.C. § 2 (*see Standefer v. United States*, 447 U.S. 10 (1980)) and Article 77 (*see* Hearings, *supra* at 1240).

The common law definitions in the second paragraph of subparagraph b(1) are based on R. Perkins, *Criminal Law* 643–666 (2d ed. 1969); and 1 C. Torcia, *Wharton's Criminal Law and Procedure* §§ 29–38 (1978). Several common law terms such as "aider and abettor" are now used rather loosely and do not always retain their literal common law meanings, *See United States v. Burroughs*, 12 M.J. 380, 384 n.4. (C.M.A. 1982); *United States v. Molina*, 581 F.2d 56, 61 n.8 (2d Cir. 1978). To eliminate confusion, the explanation avoids the use of such terms where possible. *See United States v. Burroughs*, *supra* at 382 n.3.

(2) *Who may be liable for an offense.* Subparagraph (2)(a) is based on paragraph 156 of MCM, 1969 (Rev.). *See* 18 U.S.C.A. § 2 Historical and Revision Notes (West 1969). *See also United States v. Giles*, 300 U.S. 41 (1937); *Wharton's*, *supra* at §§ 30, 31, 35.

Subparagraph (2)(b) sets forth the basic formulation of the requirements for liability as a principal. An act (which may be passive, as discussed in this subparagraph) and intent are necessary to make one liable as a principal. *See United States v. Burroughs*, *supra; United States v. Jackson*, 6 U.S.C.M.A. 193, 19 C.M.R. 319 (1955); *United States v. Wooten*, 1 U.S.C.M.A. 358, 3 C.M.R. 92 (1952); *United States v. Jacobs*, 1 U.S.C.M.A. 209, 2 C.M.R. 115 (1952). *See also United States v. Walker*, 621 F.2d 163 (5th Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981); *Morei v. United States*, 127 F.2d 827 (6th Cir. 1942); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). The terms "assist" and "encourage, advise, and instigate" have been substituted for "aid" and "abet" respectively, since the latter terms are technical and may not be clear to the lay reader. *See Black's Law Dictionary* 5, 63 (5th ed., 1979). *See also Nye and Nissen v. United States*, 336 U.S. 613, 620 (1949); *Wharton's*, *supra* at 246-47.

The last two sentences in subparagraph (2)(b) are based on the third paragraph and paragraph 156 of MCM, 1969 (Rev.). *See United States v. Ford*, 12 U.S.C.M.A. 31, 30 C.M.R. 31 (1960); *United States v. McCarthy*, 11 U.S.C.M.A. 758, 29 C.M.R. 574 (1960); *United States v. Lyons*, 11 U.S.C.M.A. 68, 28 C.M.R. 292 (1959).

(3) *Presence.* This subparagraph clarifies, as paragraph 156 of MCM, 1969 (Rev.) did not, that presence at the scene is neither necessary nor sufficient to make one a principal. "Aid" and "abet" as used in 18 U.S.C. § 2, and in Article 77, are not used in the narrow common law sense of an "aider and abettor" who must be present at the scene to be guilty as such. *United States v. Burroughs*, *supra; United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980); *United States v. Molina*, *supra; United States v. Carter*, 23 C.M.R. 872 (A.F.B.R. 1957). *Cf. Milanovich v. United States*, 365 U.S. 551 (1961). *See also Wharton's*, *supra* at 231. Subparagraph (b) continues the admonition, contained in the third paragraph of paragraph 156 of MCM, 1969 (Rev.), that presence at the scene of a crime is not sufficient to make one a principal. *See United State v. Waluski*, 6 U.S.C.M.A. 724, 21 C.M.R. 46 (1956); *United States v. Johnson*, 6 U.S.C.M.A. 20, 19 C.M.R. 146 (1955); *United States v. Guest*, 3 U.S.C.M.A. 147, 11 C.M.R. 147 (1953).

(4) *Parties whose intent differs from the perpetrators.* This subparagraph is based on the first paragraph in paragraph 156 of MCM, 1969 (Rev.). *See United States v. Jackson*, 6 U.S.C.M.A. 193, 19 C.M.R. 319 (1955); Wharton's, *supra* at § 35.

(5) *Responsibility for other crimes.* This paragraph is based on the first two paragraphs in paragraph 156 of MCM, 1969 (Rev.). *See United States v. Cowan*, 12 C.M.R. 374 (A.B.R. 1953); *United States v. Self*, 13 C.M.R. 227 (A.B.R. 1953).

Principals independently liable. This subparagraph is new and is based on Federal decisions. *See Standefer v. United States*, *supra; United States v. Chenaur*, 552 F.2d 294 (9th Cir. 1977); *United States v. Frye*, 548 F.2d 765 (8th Cir. 1977).

Withdrawal. This subparagraph is new and is based on *United States v. Williams*, 19 U.S.C.M.A. 334, 41 C.M.R. 334 (1970). *See also United States v. Miasel*, 8 U.S.C.M.A. 374, 24 C.M.R. 184, 188 (157); *United States v. Lowell*, 649 F.2d 950 (3d. Cir., 1981); *United States v. Killian*, 639 F. 2d 206 (5th Cir.), *cert. denied* 451 U.S. 1021 (1981).

2. Article 78—Accessory after the fact

c. *Explanation.*

(1) *In general.* This subparagraph is based on paragraph 157 of MCM, 1969 (Rev.). *See also United States v. Tamas*, 6 U.S.C.M.A. 502, 20 C.M.R. 218(1955).

(2) *Failure to report offense.* This subparagraph is based on paragraph 157 of MCM, 1969 (Rev.); *United States v. Smith*, 5 M.J. 129 (C.M.A. 1978).

(3) *Offense punishable by the code.* This subparagraph is based

on Article 78; *United States v. Michaels*, 3 M.J. 846 (A.C.M.R. 1977); *United States v. Blevins*, 34 C.M.R. 967 (A.F.B.R. 1964).

(4) *Status of principal.* This subparagraph is based on Article 78 and *United States v. Michaels*, 3 M.J. 846 (A.C.M.R. 1977); *United States v. Blevins*, 34 C.M.R. 967 (A.F.B.R. 1964).

(5) *Conviction or acquittal of principal.* The subparagraph is based on paragraph 157 of MCM, 1969 (Rev.); *United States v. Marsh*, 13 U.S.C.M.A. 252, 32 C.M.R. 252 (1962); and *United States v. Humble*, 11 U.S.C.M.A. 38, 28 C.M.R. 262 (1959). *See also United States v. McConnico*, 7 M.J. 302 (C.M.A. 1979).

(6) *Accessory after the fact not a lesser included offense.* This subparagraph is based on *United States v. McFarland*, 8 U.S.C.M.A. 42, 23 C.M.R. 266 (1957).

(7) *Actual Knowledge.* This paragraph is based on United States v. Marsh, supra. *See United States v. Foushee*, 13 M.J. 833 (A.C.M.R. 1982). MCM, 1984, APPENDIX 21, Part IV, ARTICLE 79

3. Article 79—Lesser included offenses

b. *Explanation.*

(1) *In general.* This subparagraph and the three subparagraphs are based on paragraph 158 of MCM, 1969 (Rev.). *See also United States v. Thacker*, 16 U.S.C.M.A. 408, 37 C.M.R. 28 (1966).

(2) *Multiple lesser included offenses.* This subparagraph is based on paragraph 158 of MCM, 1969 (Rev.). *See also United States v. Calhoun*, 5 U.S.C.M.A. 428, 18 C.M.R. 52 (1955).

(3) *Findings of guilty to a lesser included offense.* This subparagraph is taken from paragraph 158 of MCM, 1969 (Rev.).

4. Article 80—Attempts

c. *Explanation.*

(1) *In general.* This subparagraph is based on paragraph 159 of MCM, 1969 (Rev.).

(2) *More than preparation.* This subparagraph is based on paragraph 159 of MCM, 1969 (Rev.); *United States v. Johnson*, 7 U.S.C.M.A. 488, 22 C.M.R. 278 (1957); *United States v. Choat*, 7 U.S.C.M.A. 187, 21 C.M.R. 313 (1956); *United States v. Goff*, 5 M.J. 817 (A.C.M.R. 1978); *United States v. Emerson*, 16 C.M.R. 690 (A.F.B.R. 1954).

(3) *Factual impossibility.* This subparagraph is based on paragraph 159 of MCM, 1969 (Rev.); *United States v. Thomas*, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962). *See United States v. Quijada*, 588 F.2d 1253 (9th Cir. 1978).

(4) *Voluntary abandonment.*

1995 Amendment: Subparagraph (4) is new. It recognizes voluntary abandonment as an affirmative defense as established by the case law. *See United States v. Byrd*, 24 M.J. 286 (C.M.A. 1987). *See also United States v. Schoof*, 37 M.J. 96, 103-04 (C.M.A. 1993); *United States v. Rios*, 33 M.J. 436, 440-41 (C.M.A. 1991); *United States v. Miller*, 30 M.J. 999 (N.M.C.M.R. 1990); *United States v. Walther*, 30 M.J. 829, 829-33 (N.M.C.M.R. 1990). The prior subparagraphs (4) - (6) have been redesignated (5) - (7), respectively.

(5) *Solicitation.* This subparagraph is based on paragraph 159 of MCM, 1969 (Rev.).

(6) *Attempts not under Article 80.* This subparagraph is based on paragraph 159 of MCM, 1969 (Rev.).

1986 Amendment: In 4 *c*(5), subparagraph (e) was redesignated as subparagraph (f), and a new subparagraph (e) was added to reflect the offense of attempted espionage as established by the Department of Defense Authorization Act, 1986, Pub.L. No. 99-145, § 534, 99 Stat. 583, 634-35 (1985) (art. 106a).

(7) *Regulations.* This subparagraph is new and is based on *United States v. Davis*, 16 M.J. 225 (C.M.A. 1983); *United States v. Foster*, 14 M.J. 246 (C.M.A. 1983).

e. *Maximum punishment*

1991 Amendment: This paragraph was revised to allow for the imposition of confinement in excess of 20 years for the offense of attempted murder. There are cases in which the aggravating factors surrounding commission of an attempted murder are so egregious that a 20 year limitation may be inappropriate. Although life imprisonment may be imposed by the sentencing authority, mandatory minimum punishment provisions do not apply in the case of convictions under Article 80.

5. Article 81—Conspiracy

c. *Explanation.*

(1) *Co-conspirators.* This subparagraph is based on paragraph 160 of MCM, 1969 (Rev.); *United States v. Kinder*, 14 C.M.R. 742 (A.F.B.R. 1953). The portion of paragraph 160 which provided that acquittal of all alleged co-conspirators precludes conviction of the accused has been deleted. *See United States v. Garcia* 16 M.J. 52 (C.M.A. 1983). *See also United States v. Standefer*, 447 U.S. 10 (1980).

(2) *Agreement.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.).

(3) *Object of the agreement.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.); *United States v. Kidd*, 13 U.S.C.M.A. 184, 32 C.M.R. 184 (1962). The last three sentences reflect "Wharton's Rule," 4 C. Torcia, Wharton's Criminal Law, § 731 (1981). *See Iannelli v. United States*, 420 U.S. 770 (1975); *United States v. Yarborough*, 1 U.S.C.M.A. 678, 5 C.M.R. 106 (1952); *United States v. Osthoff*, 8 M.J. 629 (A.C.M.R. 1979); *United States v. McClelland*, 49 C.M.R. 557 (A.C.M.R. 1974).

(4) *Overt act.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.); *United States v. Rhodes*, 11 U.S.C.M.A. 735, 29 C.M.R. 551 (1960); *United States v. Salisbury*, 14 U.S.C.M.A. 171, 33 C.M.R. 383 (1963); *United States v. Woodley*, 13 M.J. 984 (A.C.M.R. 1982).

(5) *Liability for offenses.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.). *See Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v. Salisbury*, 14 U.S.C.M.A. 171, 33 C.M.R. 383 (1963); *United States v. Woodley*, 13 M.J. 984 (A.C.M.R. 1982).

(6) *Withdrawal.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.); *United States v. Miasel*, 8 U.S.C.M.A. 374, 24 C.M.R.184 (1957).

(7) *Factual impossibility.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.).

(8) *Conspiracy as a separate offense.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.). *See also United States v. Washington*, 1 M.J. 473 (C.M.A. 1976).

(9) *Special conspiracies under Article 134.* This subparagraph is taken from paragraph 160 of MCM, 1969 (Rev.); *United States v. Chapman*, 10 C.M.R. 306 (A.B.R. 1953).

6. Article 82—Solicitation

b. *Elements.* Solicitation under Article 82 has long been recognized as a specific intent offense. *See* paragraph 161 of MCM, 1969 (Rev.); paragraph 161 of MCM, 1951. *See generally United States v. Mitchell*, 15 M.J. 214 (C.M.A. 1983); *United States v. Benton*, 7 M.J. 606 (N.C.M.R. 1979). It has been added as an element for clarity.

c. *Explanation.* This paragraph is taken from paragraph 161 of MCM, 1969 (Rev.), *United States v. Wysong*, 9 U.S.C.M.A. 248, 26 C.M.R. 29 (1958); *United States v. Gentry*, 8 U.S.C.M.A. 14, 23 C.M.R. 238 (1957); *United States v. Benton*, 7 M.J. 606 (N.C.M.R. 1979).

7. Article 83—Fraudulent enlistment, appointment, or separation

c. *Explanation.* This paragraph is based on paragraph 162 of MCM, 1969 (Rev.); *United States v. Danley*, 21 U.S.C.M.A. 486, 45 C.M.R. 260 (1972). *See Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981).

e. *Maximum Punishment.* The reference to membership in, association with, or activities in connection with organizations, associations, etc., found in the Table of Maximum Punishments, paragraph 127 *c* of MCM, 1969 (Rev.), for Article 83, was deleted as unnecessary. The maximum punishment for all fraudulent enlistment cases was then standardized.

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

c. *Explanation.* This paragraph is taken from paragraph 163 of MCM, 1969 (Rev.). *See also United States v. Hightower*, 5 M.J. 717 (A.C.M.R. 1978).

e. *Maximum punishment.* The reference to membership in, with, or activities in connection with organizations, associations, etc., found in the Table of Maximum Punishments, paragraph 127 *c* of MCM, 1969 (Rev.), or Article 84, was deleted as unnecessary. The maximum punishment for all cases was then standardized.

9. Article 85—Desertion

c. *Explanation.*

(1) Desertion with intent to remain away permanently.

(a) *In general.* This subparagraph is taken from paragraph 164a of MCM, 1969 (Rev.).

(b) *Absence without authority-inception, duration, termination. See* the Analysis, paragraph 10.

(c) *Intent to remain away permanently.* This subparagraph is taken from paragraph 164 *a* of MCM, 1969 (Rev.). The last sentence is based on *United States v. Cothern*, 8 U.S.C.M.A. 158, 23 C.M.R. 382 (1957).

(d) *Effect of enlistment or appointment in the same or a different armed force.* This subparagraph is based on paragraph 164 *a* of MCM, 1969 (Rev.); *United States v. Huff*, 7 U.S.C.M.A. 247, 22 C.M.R. 37 (1956).

(2) *Quitting unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service.*

(a) *Hazardous duty or important service.* This subparagraph is taken from paragraph 164 *a* of MCM, 1969 (Rev.). *See also United States v. Smith*, 18 U.S.C.M.A. 46, 39 C.M.R. 46 (1968); *United States v. Deller*, 3 U.S.C.M.A. 409, 12 C.M.R. 165 (1953).

(b) *Quits.* This subparagraph is based on *United States v. Bondar*, 2 U.S.C.M.A. 357, 8 C.M.R. 157 (1953).

(c) *Actual Knowledge.* This subparagraph is based on *United States v. Stabler*, 4 U.S.C.M.A. 125, 15 C.M.R. 125 (1954) and rejects the view of paragraph 164 *a* of MCM, 1969 (Rev.) that constructive knowledge would suffice. To avoid confusion, the "constructive knowledge" language has been replaced with the statement that actual knowledge may be proved by circumstantial evidence. *See United States v. Curtin*, 9 U.S.C.M.A. 427, 26 C.M.R. 207 (1958).

(3) *Attempting to desert.* This subparagraph is taken from paragraph 164 *b* of MCM, 1969 (Rev.).

(4) *Prisoner with executed punitive discharge.* This subparagraph is taken from paragraphs 164 *a* and 165 of MCM, 1969 (Rev.).

e. *Maximum punishment.* As indicated in the Analysis, paragraph 4, attempts, the punishment for attempted desertion was made uniform. As a result, attempted desertion- "other cases of"- now conforms with the punishment for "desertion- other cases of." This amounts to an increase in the maximum punishment from confinement for one year to either two or three years, depending on the nature of termination.

10. Article 86—Absence without leave

c. *Explanation.*

(1) *In general.* This subparagraph is taken from paragraph 165 of MCM, 1969 (Rev.).

(2) *Actual knowledge.* This subparagraph clarifies that the accused must have in fact known of the time and place of duty to be guilty of a violation of Article 86(1) or (2). Cf. *United States v. Chandler*, 23 U.S.C.M.A. 193, 48 C.M.R. 945 (1974); *United States v. Stabler*, 4 U.S.C.M.A. 125, 15 C.M.R. 125 (1954). *See also United States v. Gilbert*, 23 C.M.R. 914 (A.F.B.R. 1957). The language in paragraph 165 of MCM, 1969 (Rev.) dealing with constructive knowledge has been eliminated. To avoid confusion, this language has been replaced with the statement that actual knowledge may be proved by circumstantial evidence. *See United States v. Curtin*, 9 U.S.C.M.A. 427, 26 C.M.R. 207 (1958).

(3) *Intent.* This subparagraph is based on paragraph 165 of MCM, 1969 (Rev.).

(4) *Aggravated forms of unauthorized absence.* This subparagraph is based on paragraphs 127 *c* and 165 of MCM, 1969 (Rev.).

(5) *Civil authorities.* This subparagraph is taken from paragraph 165 *f* MCM, 1969 (Rev.); *United States v. Myhre*, 9 U.S.C.M.A. 32, 25 C.M.R. 294 (1958); *United States v. Grover*, 10 U.S.C.M.A. 91, 27 C.M.R. 165 (1958). *See also United States v. Dubry*, 12 M.J. 36 (C.M.A. 1981).

(6) *Inability to return.* This subparagraph is taken from paragraph 165 of MCM, 1969 (Rev.).

(7) *Determining the unit or organization of an accused.* This subparagraph is based on *United States v. Pounds*, 23 U.S.C.M.A. 153, 48 C.M.R. 769 (1974); *United States v. Mitchell*, 7 U.S.C.M.A. 238, 22 C.M.R. 28 (1956).

(8) *Duration.* This subparagraph is taken from paragraphs 127 *c* and 165 of MCM, 1969 (Rev.); *United States v. Lovell*, 7 U.S.C.M.A. 445, 22 C.M.R. 235 (1956).

(9) *Computation of duration.* This subsection is based on paragraph 127 *c*(3) of MCM, 1969 (Rev.).

(10) *Termination—methods of return to military control.* This subparagraph is based on paragraph 165 of MCM, 1969 (Rev.); *United States v. Dubry, supra; United States v. Raymo*, 1 M.J. 31 (C.M.A. 1975); *United States v. Garner*, 7 U.S.C.M.A. 578, 23 C.M.R. 42 (1957); *United States v. Coates*, 2 U.S.C.M.A. 625, 10 C.M.R. 123 (1953); *United States v. Jackson*, 1 U.S.C.M.A. 190, 2 C.M.R. 96 (1952); *United States v. Petterson*, 14 M.J. 608 (A.F.C.M.R. 1982); *United States v. Coglin*, 10 M.J. 670 (A.F.C.M.R. 1981). *See also United States v. Zammit*, 14 M.J. 554 (N.M.C.M.R. 1982).

(11) *Findings of more than one absence under one specification.* This subsection is based on *United States v. Francis*, 15 M.J. 424 (C.M.A. 1983).

(e) *Maximum punishment.* The increased maximum punishment for unauthorized absence for more than 30 days terminated by apprehension has been added to parallel the effect of termination of desertion by apprehension and to encourage absent servicemembers to voluntarily return. A bad-conduct discharge was added to the permissible maximum punishment for unauthorized absence with intent to avoid maneuvers of field duty, because with sensitive, high value equipment used in exercises currently, the effect of such absence is more costly and, because of limited available training time, seriously disrupts training and combat readiness.

1990 Amendment: The Note in subsection b(4) was inserted and a conforming change was made in subsection f(4) to clarify the distinction between "unauthorized absence from a guard, watch, or duty section" and "unauthorized absence from guard, watch, or duty section with the intent to abandon it." *See* subsections c(4)(c) and c(4)(d).

11. Article 87—Missing movement

c. *Explanation.*

(1) *Movement.* This subparagraph is based on paragraph 166 of MCM, 1969 (Rev.); *United States v. Kimply*, 17 C.M.R. 469 (N.B.R. 1954).

(2) *Mode of movement.* This subparagraph is based on *United States v. Graham*, 16 M.J. 460 (C.M.A. 1983); *United States v. Johnson*, 3 U.S.C.M.A. 174, 11 C.M.R. 174 (1953); *United States v. Burke*, 6 C.M.R. 588 (A.B.R. 1952); *United States v. Jackson*, 5 C.M.R. 429 (A.B.R. 1952). *See also United States v. Graham*, 12 M.J. 1026 (A.C.M.R.), pet granted, 14 M.J. 223 (1982).

(3) *Design.* This subparagraph is based on *United States v. Clifton*, 5 C.M.R. 342 (N.B.R. 1952).

(4) *Neglect.* This subparagraph is taken from paragraph 166 of MCM, 1969 (Rev.).

(5) *Actual knowledge.* This subparagraph is based on *United States v. Chandler*, 23 U.S.C.M.A. 193, 48 C.M.R. 945 (1974); *United States v. Thompson*, 2 U.S.C.M.A. 460, 9 C.M.R. 90 (1953); and in part on paragraph 166 of MCM, 1969 (Rev.). This paragraph rejects the language of paragraph 166 of MCM, 1969 (Rev.), which has provided for "constructive knowledge," and adopts the "actual knowledge" requirement set forth in *Chandler*.

(6) *Proof of absence.* This subparagraph is taken from paragraph 166 of MCM, 1969 (Rev.).

e. *Maximum punishment.* The maximum punishment for missing movement was increased to make these punishments more equivalent to aggravated offenses of unauthorized absences and violations of orders. The major reliance of the armed forces on rapid deployment and expeditious movement of personnel and equipment to deter or prevent the escalation of hostilities dictates that these offenses be viewed more seriously.

12. Article 88—Contempt toward officials

c. *Explanation.* This paragraph is taken from paragraph 167 of MCM, 1969 (Rev.). For a discussion of the history of Article 88, *see United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

e. *Maximum punishment.* This limitation is new and is based on the authority given the President in Article 56. Paragraph 127 *c* of MCM, 1969 (Rev.) does not mention Article 88. The maximum punishment is based on the maximum punishment for Article of War 62, which was analogous to Article 88, as prescribed in paragraph 117 *c* of MCM (Army), 1949, and MCM (AF), 1949.

13. Article 89—Disrespect toward a superior commissioned officer

c. *Explanation.* This paragraph is taken from Article 1(5); paragraph 168 of MCM, 1969 (rev.); *United States v. Richardson*, 7 M.J. 320 (C.M.A. 1979); *United States v. Ferenczi*, 10 U.S.C.M.A. 3, 27 C.M.R. 77 (1958); *United States v. Sorrells*, 49 C.M.R. 44 (A.C.M.R. 1974); *United States v. Cheeks*, 43 C.M.R. 1013 (A.F.C.M.R. 1971); *United States v. Montgomery*, 11 C.M.R. 308 (A.B.R. 1953).

e. *Maximum punishment.* The maximum punishment was increased from confinement for 6 months to confinement for 1 year to more accurately reflect the serious nature of the offense and to distinguish it from disrespect toward warrant officers under Article 91. *See* paragraph 15 *c.*

14. Article 90—Assaulting or willfully disobeying superior commissioned officer

c. *Explanation.*

(1) *Striking or assaulting superior commissioned officer.* This subparagraph is based on paragraph 169 *a* of MCM, 1969 (Rev.) and other authorities as noted below.

(a) *Definitions.* "Strikes" is clarified to include any intentional offensive touching. Other batteries, such as by culpable negligence, are included in "offers violence." As to "superior commissioned officer," *see* Analysis, paragraph 13.

(d) *Defenses.* This subparagraph modifies the former discussion of self-defense since technically, because unlawfulness is not an element expressly, the officer must be acting illegally or other-

wise outside the role of an officer before self-defense may be in issue. *See United States v. Struckman*, 20 U.S.C.M.A. 493, 43 C.M.R. 333 (1971).

(2) *Disobeying superior commissioned officer.* This subparagraph is based on paragraph 169 *b* of MCM, 1969 (Rev.) and other authorities as noted below.

(a) *Lawfulness of the order.*

(i) *Inference of lawfulness. See United States v. Keenan*, 18 U.S.C.M.A. 108, 39 C.M.R. 108 (1969); *United States v. Schultz*, 18 U.S.C.M.A. 133, 39 C.M.R. 133 (1969); *United States v. Kinder*, 14 C.M.R. 742 (A.B.R. 1954).

(ii) *Authority of issuing officer. See United States v. Marsh*, 3 U.S.C.M.A. 48, 11 C.M.R. 48 (1953).

(iii) *Relationship to military duty. See United States v. Martin*, 1 U.S.C.M.A. 674, 5 C.M.R. 102 (1952); *United States v. Wilson*, 12 U.S.C.M.A. 165, 30 C.M.R. 165 (1961) (restriction on drinking); *United States v. Nation*, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958) (overseas marriage); *United States v. Lenox*, 21 U.S.C.M.A. 314, 45 C.M.R. 88 (1972); *United States v. Stewart*, 20 U.S.C.M.A. 272, 43 C.M.R. 112 (1971); *United States v. Wilson*, 19 U.S.C.M.A. 100, 41 C.M.R. 100 (1969); *United States v. Noyd*, 18 U.S.C.M.A. 483, 40 C.M.R. 195 (1969) (all dealing with matters that do not excuse the disobedience of an order).

(iv) *Relationship to statutory or constitutional rights.* This subparagraph is based on Article 31; *United States v. McCoy*, 12 U.S.C.M.A. 68, 30 C.M.R. 68 (1960); *United States v. Aycock*, 15 U.S.C.M.A. 158, 35 C.M.R. 130 (1964).

(b) *Personal nature of the order. See United States v. Wartsbaugh*, 21 U.S.C.M.A. 535, 45 C.M.R. 309 (1972).

(d) *Specificity of the order. See United States v. Bratcher*, 18 U.S.C.M.A. 125, 38 C.M.R. 125 (1969).

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

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

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

c. *Explanation.* (1) *In general.* This subparagraph is based on paragraph 170 of MCM, 1969 (Rev.) and paragraph 170 of MCM, 1951; a review of the legislative history of Article 91; *United States v. Ransom*, 1 M.J. 1005 (N.C.M.R. 1976); *United States v. Balsarini*, 36 C.M.R. 809 (C.G.B.R. 1965). Paragraph 170 of MCM, 1951 and MCM, 1969 (Rev.) discussed Article 91 as if Congress had required a superior-subordinate relationship in Article 91. *See Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, at 257. Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised edition),* DA PAM 27–2, at 28–6. This was in error and all references thereto have been removed. An amendment to Article 91 was suggested by The Judge Advocate General of the Army (*see Hearings on S.857 and H.R. 4080 Before a Subcommittee of the Senate Armed Service Committee*, 81st Cong., 1st Sess. 274 (1949)) to conform Article 91 to Articles 89 and 90, which explicitly require superiority, and was later offered, but it was not acted on. *See* Congressional Floor Debate on the Uniform Code of Military Justice (amendment M. p. 170). *See also Hearings Before a Subcommittee of the House Armed Services Committee on H.R. 2498*, 81st Cong. 1st Sess. 772, 814, 823 (1949). This present interpretation is consistent with the unambiguous language of Article 91 and its predecessors. *See* Articles of War 65 and 1(b) (1920); and paragraph 135, MCM, 1928; paragraph 153, MCM, (Army), 1949 and MCM (AF), 1949. *See also* Act of Aug. 10, 1956, Pub.L. No. 84–1028, §49(e), 70A Stat. 640 (catchlines in U.C.M.J. not relevant to congressional intent).

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

e. *Maximum punishment.* Subparagraphs (2) and (7) are based on the aggravating circumstances that the victim is also superior to the accused. When this factor exists in a given case, the superiority of the victim must be alleged in the specification. The penalties for disobedience of noncommissioned and petty officers and for assault on and disrespect toward superior noncommissioned and petty officers were increased. In the case of the latter two offenses, this is done in part to distinguish assault on or disrespect toward a superior noncommissioned or petty officer from other assaults or disrespectful behavior, in light of the expansive coverage of the article. Moreover, increasing responsibility for training, complex and expensive equipment, and leadership in combat is placed on noncommissioned and petty officers in today's armed forces. The law should reinforce the respect and obedience which is due them with meaningful sanctions. The maximum punishment for disrespect toward warrant officers was adjusted to conform to these changes.

16. Article 92— Failure to obey order or regulation

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

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

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

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

February 1986 Amendment: The rule was revised to add constructive knowledge as an alternative to the actual knowledge requirement in paragraph (*b*)(3)(*b*) and the related explanation in subparagraph c(3)(b). In reviewing these provisions, it was concluded that the reliance of the drafters of the 1984 revision on the *Curtin* case was misplaced because the portion of that case dealt with failure to obey under Article 92(2), not dereliction under Article 92(3). As revised, the elements and the explanation add an objective standard appropriate for military personnel.

17. Article 93— Cruelty and maltreatment

c. *Explanation.* This paragraph is based on paragraph 172 of MCM, 1969 (Rev.); *United States v. Dickey*, 20 C.M.R. 486 (A.B.R. 1956). The phrase "subject to the Code or not" was added to reflect the fact that the victim could be someone other than a member of the military. The example of sexual harassment was added because some forms of such conduct are nonphysical maltreatment.

18. Article 94— Mutiny and sedition

c. *Explanation.* This paragraph is taken from paragraph 173 of MCM, 1969 (Rev.). Subparagraph (1) is also based on *United States v. Woolbright*, 12 U.S.C.M.A. 450, 31 C.M.R. 36 (1961); *United States v. Duggan*, 4 U.S.C.M.A. 396, 15 C.M.R. 396 (1954). The reference in paragraph 173 of MCM, 1969 (Rev.) to charging failure to report an impending mutiny or sedition under Article 134 has been deleted in subparagraph (4). This is because such an offense was not listed in the Table of Maximum Punishments or elsewhere under Article 134 in that Manual. Article of War 67 included this offense, but Article 94 excludes it. The drafters of paragraph 173 of MCM, 1951 noted the change. To fill the gap they referred to Article 134. Instead, they should have referred to Article 92(3) because dereliction is the gravamen of the offense.

19. Article 95—Resistance, breach of arrest, and escape

b. *Elements.* The elements listed for breaking arrest and escape from custody or confinement have been modified. Paragraph 174 *b, c,* and *d* of MCM, 1969 (Rev.) provided that the accused by "duly" placed in arrest, custody, or confinement. "Duly" was deleted from the elements of these offenses. Instead, the elements specify that the restraint be imposed by one with authority to impose it. This was done to clarify the meaning of the word "duly" and the burden of going forward on the issues of authority to order restraint and the legal basis for the decision to order restraint.

"Duly" means "in due or proper form or manner, according to legal requirements." *Black's Law Dictionary* 450 (5th ed. 1979). *See also United States v. Carson*, 15 U.S.C.M.A. 407, 35 C.M.R. 379 (1965). Thus the term includes a requirement that restraint be imposed by one with authority to do so, and a requirement that such authority be exercised lawfully. Until 1969, the Manual also provided that arrest, confinement, or custody which is "officially imposed is presumed to be legal." Paragraph 174 of MCM, 1951. *See also* paragraph 157 of MCM, (Army), 1949, MCM (AF), 1949; paragraph 139 of MCM, 1928. In practical effect, therefore, the prosecution had only to present some evidence of the authority of the official imposing restraint to meet its burden of proof, unless the presumption of legality was rebutted by some evidence. *See United States v. Delgado*, 12 C.M.R. 651 (C.G.B.R. 1953). *Cf. United States v. Clansey*, 7 U.S.C.M.A. 230, 22 C.M.R. 20 (1956); *United States v. Gray*, 6 U.S.C.M.A. 615, 20 C.M.R. 331 (1956).

The drafters of MCM, 1969 (Rev.), deleted the presumption of legality. In their view the holding in *United States v. Carson, supra*, that this is a question of law to be decided by the military judge made such a presumption meaningless. *Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised edition)*, DA PAM 27–2, at 28–8. The drafters considered deleting "duly" as an element but did not because the prosecution must show that restraint was "duly" imposed. *Id.* The result left the implication that the prosecution must produce evidence of both the authority of the person imposing or ordering restraint, and the legality of that official's decision in every case, whether or not the latter is contested. Given the dual meaning of the word "duly" and the reason for deleting the presumption of legality, it is unclear whether the drafters intended this result. *Cf. United States v. Stinson*, 43 C.M.R. 595 (A.C.M.R. 1970).

"Duly" is replaced with the requirement that the person ordering restraint be proved to have authority to do so. This clarifies that proof of arrest, custody, or confinement ordered by a person with authority to do so is sufficient without proof of the underlying basis for the restraint (e.g., probable cause, legally sufficient nonjudicial punishment, risk of flight), unless the latter is put in issue by the defense. This is consistent with Article 95 which on its face does not require the restraint to be lawful (*compare* Article 95 *with* Articles 90–92 which prohibit violations of "*lawful* orders"—which orders are presumed lawful in the absence of evidence to the contrary. *United States v. Smith*, 21 U.S.C.M.A. 231, 45 C.M.R. 5 (1972)). This construction is also supported by judicial decisions. *See United States v. Wilson*, 6 M.J. 214 (C.M.A. 1979); *United States v. Clansey, supra; United States v. Yerger*, 1 U.S.C.M.A. 288, 3 C.M.R. 22 (1952); *United States v. Delgado, supra. Cf. United States v. Mackie*, 16 U.S.C.M.A. 14, 36 C.M.R. 170 (1966); *United States v. Gray, supra. But see United States v. Rozier*, 1 M.J. 469 (C.M.A. 1976). This construction also avoids unnecessary litigation of a collateral issue and eliminates the necessity for the introduction of uncharged misconduct, except when the door is opened by the defense. *Cf. United States v. Yerger, supra; United States v. Mackie, supra.*

1991 Amendment: Subparagraph b(4) was amended by adding an aggravating element of post-trial confinement to invoke increased punishment for escapes from post-trial confinement.

c. *Explanation.*

(1) *Resisting apprehension.*

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

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

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

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

(e) *Illegal apprehension.* The first sentence of this subparagraph is taken from paragraph 174 *a* of MCM, 1969 (Rev.). Although such a rule is not without criticism, *see United States v. Lewis*, 7 M.J. 348 (C.M.A. 1979); *United States v. Moore*, 483 F.2d 1361, 1364 (9th Cir.1973), it has long been recognized in military and civilian courts. *John Bad Elk v. United States*, 177 U.S. 529 (1900); paragraph 174 *a* of MCM, 1951. *Cf.* paragraph 157 of MCM (Army), 1949; MCM (AF), 1949; paragraph 139 of MCM, 1928; W. Winthrop, *Military Law and Precedents* 122 (2d ed. 1920 reprint). (Before 1951 resisting apprehension was not specifically prohibited by the Articles of War. Earlier references are to breaking arrest or escape from confinement.)

The second sentence has been added to make clear that the issue of legality of an apprehension (e.g., whether based on probable cause or otherwise in accordance with requirements for legal sufficiency; *see* R.C.M. 302(e)) is not in issue until raised by the defense. *United States v. Wilson*, and *United States v. Clansey*, both *supra. Cf. United States v. Smith*, 21 U.S.C.M.A. 231, 45 C.M.R. 5 (1972). *See also* Analysis, paragraph 19 *b*. The presumption is a burden assigning device; it has no evidentiary weight once the issue is raised. Because the issue of legality is not an element, and because the prosecution bears the burden of establishing legality when the issue is raised, the problems of *Mullaney v. Wilbur*, 421 U.S. 684 (1975) and *Turner v. United States*, 396 U.S. 398 (1970) are not encountered. *Cf. Patterson v. New York*, 432 U.S. 197 (1977).

The third sentence is based on *United States v. Carson, supra.*

(2) *Breaking arrest.*

(a) *Arrest.* This subparagraph has been added for clarity.

(b) *Authority to order arrest. See* Analysis, R.C.M. 304(b); R.C.M. 1101; and paragraph 2, Part V.

(c) *Nature of restraint imposed by arrest.* This subparagraph is based on paragraph 174 *b* of MCM, 1969 (Rev.). *See also* Analysis, paragraph 19 *b*.

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

(e) *Illegal arrest.* The first sentence in this subparagraph is based on paragraph 174 *b* of MCM, 1969 (Rev.). The second sentence has been added to clarify that legality of an arrest (e.g., whether based on probable cause or based on legally sufficient nonjudicial punishment or court-martial sentence) is not in issue until raised by the defense. *See* Analysis, paragraphs 19 *b* and 19 *c*(1)(e). The third sentence is based on *United States v. Carson*, *supra.*

(3) *Escape from custody.*

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

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

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

(d) *Illegal custody.* The first sentence in this subparagraph is based on paragraph 174 *b* of MCM, 1969 (Rev.). The second sentence has been added to clarify that legality of custody (e.g., whether based on probable cause) is not in issue until raised by the defense. *See* Analysis, paragraphs 19 *b* and 19 *c*(1)(*e*). The third sentence is based on *United States v. Carson, supra.*

(4) *Escape from confinement.*

(a) *Confinement. See* Article 9(a). *See also* Analysis, R.C.M. 305; R.C.M. 1101; and paragraph 5 *c*, Part v.

1991 Amendment: Subparagraph c(4)(a) was amended to specify that escape from post-trial confinement is subject to increased punishment.

(b) *Authority to order confinement. See* Analysis, R.C.M. 304(b); R.C.M. 1101; and paragraph 2, Part V.

(c) *Escape.* This subparagraph is based on paragraph 174 *c* of MCM, 1969 (Rev.). *See also United States v. Maslanich*, 13 M.J. 611 (A.F.C.M.R. 1982).

(d) *Status when temporarily outside confinement facility.* This subparagraph is based on *United States v. Silk*, 37 C.M.R. 523 (A.B.r. 1966); *United States v. Sines*, 34 C.M.R. 716 (N.B.R. 1964).

(e) *Legality of confinement.* This subparagraph is based on 174 *a* of MCM, 1969 (Rev.). The second sentence has been added to clarify that legality of confinement (e.g., whether based on probable cause or otherwise in accordance with requirements for legal sufficiency) is not in issue until raised by the defense. *See* Analysis, paragraphs 19 *b* and 19 *c*(1)(e). The third sentence is based on *United States v. Carson, supra.*

1991 Amendment: Subparagraphs *e* and *f* were amended to provide increased punishment for escape from post-trial confinement. The increased punishment reflects the seriousness of the offense and is consistent with other federal law. *See* 18 U.S.C. 751(a).

1998 Amendment: Subparagraphs *a, b, c,* and *f* were amended to implement the amendment to 10 U.S.C. §895 (Article 95, UCMJ) contained in section 1112 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 461 (1996). The amendment proscribes fleeing from apprehension without regard to whether the accused otherwise resisted apprehension. The amendment responds to the U.S. Court of Appeals for the Armed Forces decisions in *United States v. Harris*, 29 M.J. 169 (C.M.A. 1989), and *United States v. Burgess*, 32 M.J. 446 (C.M.A. 1991). In both cases, the court held that resisting apprehension does not include fleeing from apprehension, contrary to the then-existing explanation in Part IV, paragraph 19c.(1)(c), MCM, of the nature of the resistance required for resisting apprehension. The 1951 and 1969 Manuals for Courts-Martial also explained that flight could constitute resisting apprehension under Article 95, an interpretation affirmed in the only early military case on point, *United States v. Mercer*, 11 C.M.R. 812 (A.F.B.R. 1953). Flight from apprehension should be expressly deterred and punished under military law. Military personnel are specially trained and routinely expected to submit to lawful authority. Rather than being a merely incidental or reflexive action, flight from apprehension in the context of the armed

forces may have a distinct and cognizable impact on military discipline.

20. Article 96— Releasing prisoner without proper authority

c. *Explanation.* This paragraph is based on paragraph 175 of MCM, 1969 (Rev.); *United States v. Johnpier*, 12 U.S.C.M.A. 90, 30 C.M.R. 90 (1961). Subparagraphs (1)(c) and (d) have been modified to conform to rules elsewhere in this Manual and restated for clarity.

21. Article 97— Unlawful detention

c. *Explanation.* This paragraph is based on paragraph 176 of MCM, 1969 (Rev.); *United States v. Johnson*, 3 M.J. 361 (C.M.A. 1977). The explanation of the scope of Article 97 is new and results from *Johnson* and the legislative history of Article 97 cited therein. *Id.* at 363 n.6.

22. Article 98— Noncompliance with procedural rules

c. *Explanation.* This paragraph is taken from paragraph 177 of MCM, 1969 (Rev.).

e. *Maximum punishment.* The maximum punishment for intentional failure to enforce or comply with provisions of the Code has been increased from that specified in paragraph 127 *c* of MCM, 1969 (Rev.) to more accurately reflect the seriousness of this offense. *See generally* 18 U.S.C. § 1505, the second paragraph of which prohibits acts analogous to those prohibited in Article 98(2).

23. Article 99— Misbehavior before the enemy

c. *Explanation.* This paragraph is based on paragraphs 178 and 183 *a* of MCM, 1969 (Rev.); *United States v. Sperland*, 1 U.S.C.M.A. 661, 5 C.M.R. 89 (1952) (discussion of "before or in the presence of the enemy"); *United States v. Parker*, 3 U.S.C.M.A. 541, 13 C.M.R. 97 (1953) (discussion of "running away"); *United States v. Monday*, 36 C.M.R. 711 (A.B.R. 1966), *pet. denied*, 16 U.S.C.M.A. 659, 37 C.M.R. 471 (1966) (discussion of "the enemy") (*see also United States v. Anderson*, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968)); *United States v. Yarborough*, 1 U.S.C.M.A. 678, 5 C.M.R. 106 (1952) (discussion of "fear"); *United States v. Presley*, 18 U.S.C.M.A. 474, 40 C.M.R. 186 (1969); *United States v. King*, 5 U.S.C.M.A. 3, 17 C.M.R. 2 (1954) (discussion of illness as a defense to a charge of cowardice); *United States v. Terry*, 36 C.M.R. 756 (N.B.R. 1965), *aff'd* 16 U.S.C.M.A. 192, 36 C.M.R. 348 (1966) (discussion of "false alarm"); *United States v. Payne*, 40 C.M.R. 516 (A.B.R. 1969); *pet. denied*, 18 U.S.C.M.R. 327 (1969) (discussion of failure to do utmost).

24. Article 100— Subordinate compelling surrender

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

25. Article 101— Improper use of countersign

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

26. Article 102— Forcing a safeguard

c. *Explanation.* This paragraph is taken from paragraph 181 of MCM, 1969 (Rev.). Note that a "time of war" need not exist for the commission of this offense. *See Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 1229 (1949). *See also United States v. Anderson*, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968) (concerning a state of belligerency short of formal war).

27. Article 103— Captured or abandoned property

c. *Explanation.* This paragraph is taken from paragraph 182 of MCM, 1969 (Rev.).

e. *Maximum punishment.* The maximum punishments based on value have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100), only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdictions.

28. Article 104— Aiding the enemy

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

29. Article 105— Misconduct as a prisoner

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

30. Article 106— Spies

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

30a. Article 106a— Espionage

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

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

1995 Amendment: This subparagraph was amended to clarify that the intent element of espionage is not satisfied merely by proving that the accused acted without lawful authority. Article 106a, Uniform Code of Military Justice. The accused must have acted in bad faith. *United States v. Richardson*, 33 M.J. 127

(C.M.A. 1991); *see Gorin v. United States*, 312 U.S. 19, 21 n.1 (1941).

31. Article 107— False official statements

c. *Explanation.*

(1) *Official documents and statements.* This subparagraph is based on paragraph 186 of MCM, 1969 (Rev.); *United States v. Cummings*, 3 M.J. 246 (C.M.A. 1977). *See also United States v. Collier*, 23 U.S.C.M.A. 713, 48 C.M.R. 789 (1974) (regarding voluntary false statement to military police).

(2) *Status of victim.* The first sentence of this subparagraph is based on *United States v. Cummings*, *supra.* The second sentence is based on *United States v. Ragins*, 11 M.J. 42 (C.M.A. 1981).

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

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

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

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

d. *Maximum punishment.* The maximum penalty for all offenses under Article 107 has been increased to include confinement for 5 years to correspond to 18 U.S.C. § 1001, the Federal civilian counterpart of Article 107. *See United States v. DeAngelo*, 15 U.S.C.M.A. 423, 35 C.M.R. 395 (1965).

32. Article 108— Military property of the United States— sale, loss, damage, destruction, or wrongful disposition

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

1986 Amendment: Subparagraph *c*(1) was amended to correct an ambiguity in the definition of military property. The previous language "military department" is specifically defined in 10 U.S.C. 101(7) as consisting of the Department of the Army, Navy and Air Force. Article 1(8), UCMJ, however, defines "military" when used in the Code as referring to all the armed forces. Use of the term "military department" inadvertently excluded property owned or used by the Coast Guard. The subparagraph has been changed to return to the state of the law prior to 1984, as including the property of all the armed forces. *See United States v. Geisler*, 37 C.M.R. 530 (A.B.R. 1966); *United States v. Schelin*, 15 M.J. 218, 220 n.6 (C.M.A. 1983).

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

1986 Amendment: Subparagraph *d*(1) was amended to include a lesser included offense previously omitted. *See United States v. Rivers*, 3 C.M.R. 564 (A.F.B.R. 1952) and 18 U.S.C. 641. Subparagraphs *d*(2) and (4) were amended to include lesser included offenses recognizing that destruction and damage of property which is not proved to be military may be a violation of Article 109. *See United States v. Suthers*, 22 C.M.R. 787 (A.F.B.R. 1956).

e. *Maximum punishment.* The maximum punishments have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100) only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdictions. The punishments are based on 18 U.S.C. § 1361. The maximum punishment for selling or wrongfully disposing of a firearm or explosive and for willfully damaging, destroying, or losing such property or suffering it to be lost, damaged, destroyed, sold, or wrongfully disposed of includes 10 years confinement regardless of the value of the item. The harm to the military in such cases is not simply the intrinsic value of the item. Because of their nature, special accountability and protective measures are employed to protect firearms or explosives against loss, damage, destruction, sale, and wrongful disposition. Such property may be a target of theft or other offenses without regard to its value. Therefore, to protect the Government's special interest in such property, and the community against improper disposition, such property is treated the same as property of a higher value.

33. Article 109— Property other than military property of the United States— waste, spoilage, or destruction

c. *Explanation.* This paragraph is based on paragraph 188 of MCM, 1969 (Rev.). *See also United States v. Bernacki*, 13 U.S.C.M.A. 641, 33 C.M.R. 173 (1963).

e. *Maximum punishment.* The maximum punishments have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100), only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdictions.

f. *Sample specification*. *See United States v. Collins*, 16 U.S.C.M.A. 167, 36 C.M.R. 323 (1966), concerning charging damage to different articles belonging to different owners, which occurred during a single transaction, as one offense.

34. Article 110— Improper hazarding of vessel

c. *Explanation.* This paragraph is based on paragraph 189 of MCM, 1969 (Rev.). *See also United States v. Adams*, 42 C.M.R. 911 (N.C.M.R. 1970), *pet. denied*, 20 U.S.C.M.A. 628 (1970); *United States v. MacLane*, 32 C.M.R. 732 (C.G.B.R. 1962); *United States v. Day*, 23 C.M.R. 651 (N.B.R. 1957).

35. Article 111— Drunken or reckless driving

b. *Elements.* The aggravating element of injury is listed as suggested by sample specification number 75 and the Table of Maxi-

mum Punishments at 25–13 and A6–13 of MCM, 1969 (Rev.). The wording leaves it possible to plead and prove that the *accused* was injured as a result of the accused's drunken driving and so make available the higher maximum punishment. This result recognizes the interest of society in the accused's resulting unavailability or impairment for duty and the costs of medical treatment. Paragraph 190 (Proof, (c)) of MCM, 1969 (Rev.) used "victim," the ambiguity of which might have implied that injury to the accused would not aggravate the maximum punishment. *Analysis of Contents, Manual for Courts-Martial, United States, 1969 (Revised Edition)* DA PAM 27–2, at 28–10, does not suggest that the drafters intended such a result.

c. *Explanation.* This paragraph is taken from paragraph 190 of MCM, 1969 (Rev.). *See also United States v. Bull*, 3 U.S.C.M.A. 635, 14 C.M.R. 53 (1954) (drunkenness); *United States v. Eagleson*, 3 U.S.C.M.A. 685, 14 C.M.R. 103 (1954) (reckless); *United States v. Grossman*, 2 U.S.C.M.A. 406, 9 C.M.R. 36 (1953) (separate offenses).

1991 Amendment: The order of the last and penultimate phrases was reversed to clarify that "so as to cause the particular vehicle to move" modifies only "the manipulation of its controls" and not the "setting of its motive power in action". This change makes clear that merely starting the engine, without movement of the vehicle, is included within the definition of "operating".

e. *Maximum Punishment.* The maximum authorized confinement for drunk driving resulting in injury was increased from 1 year to 18 months. This increase reflects the same concern for the seriousness of the misconduct as that which has, by current reports, motivated almost half the states to provide more stringent responses.

1986 Amendment: Subparagraphs b(2), c(3), and f were amended to implement the amendment to Article 111 contained in the Anti-Drug Abuse Act of 1986, tit. III, § 3055, Pub.L. No. 99–570, enacted 27 October 1986, proscribing driving while impaired by a substance described in Article 112a(b). This amendment codifies prior interpretation of the scope of Article 111, as previously implemented in paragraph 35c(3).

1995 Amendment: This paragraph was amended pursuant to the changes to Article 111 included in the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315, 2506 (1992). New subparagraphs c(2) and (3) were added to include vessels and aircraft, respectively. Paragraph 35 was also amended to make punishable actual physical control of a vehicle, aircraft, or vessel while drunk or impaired, or in a reckless fashion, or while one's blood or breath alcohol concentration is in violation of the described per se standard. A new subparagraph c(5) was added to define the concept of actual physical control. This change allows drunk or impaired individuals who demonstrate the capability and power to operate a vehicle, aircraft, or vessel to be apprehended if in the vehicle, aircraft, or vessel, but not actually operating it at the time.

The amendment also clarifies that culpability extends to the person operating or exercising actual physical control through the agency of another (*e.g.*, the captain of a ship giving orders to a helmsman). The amendment also provides a blood/alcohol blood/breath concentration of 0.10 or greater as a per se standard for illegal intoxication. The change will not, however, preclude prosecution where no chemical test is taken or even where the results of the chemical tests are below the statutory limits, where other evidence of intoxication is available. *See United States v. Gholson*, 319 F. Supp. 499 (E.D. Va. 1970).

A new paragraph c(9) was added to clarify that in order to show that the accused caused personal injury, the government must prove proximate causation and not merely cause–in–fact. *Accord United States v. Lingenfelter*, 30 M.J. 302 (C.M.A. 1990). The definition of "proximate cause" is based on *United States v. Romero*, 1 M.J. 227, 230 (C.M.A. 1975). Previous subparagraph c(2) is renumbered c(4). Previous subparagraphs c(3)–c(5) are renumbered c(6)–c(8), respectively, and previous subparagraph c(6) is renumbered c(10).

Subparagraphs d(1) and (2) are redesignated d(2)(b) and d(2)(c). The new d(2)(a) adds Article 110 (improper hazarding of a vessel) as a lesser included offense of drunken operation or actual physical control of a vessel.

The new d(1) adds Article 110 (improper hazarding of a vessel) as a lesser included offense of reckless or wanton or impaired operation or physical control of a vessel.

36. Article 112— Drunk on duty

c. *Explanation.* This paragraph is based on paragraph 191 of MCM, 1969 (Rev.). The discussion of defenses is based on *United States v. Gossett*, 14 U.S.C.M.A. 305, 34 C.M.R. 85 (1963); *United States v. Burroughs*, 37 C.M.R. 775 (C.G.B.R. 1966).

37. Article 112a— Wrongful use, possession, etc., of controlled substances

Introduction. This paragraph is based on Article 112a (*see* Military Justice Act of 1983, Pub.L. No. 98–209, § 8, 97 Stat. 1393 (1983)), and on paragraphs 127 and 213, and Appendix 6c of MCM, 1969 (Rev.), as amended by Exec. Order No. 12383 (Sep. 23, 1982). Paragraphs 127 and 213 and Appendix 6c of MCM, 1969 (Rev.) are consistent with Article 112a. *See* S.Rep. No. 53, 98th Cong., 1st Sess. 29 (1983).

The only changes made by Article 112a in the former Manual paragraphs are: elimination of the third element under Article 134; substitution of barbituric acid for phenobarbital and secobarbital (these are still specifically listed in subparagraph c), and inclusion of importation and exportation of controlled substances. The definition of "customs territory of the United States" is based on 21 U.S.C. § 951(a)(2) and on general headnote 2 to the Tariff Schedules of the United States. *See* 21 U.S.C. § 1202. *See also* H.R.Rep. No. 91–1444, 91st Cong., 2d Sess. 74 (1970). The maximum punishments for importing or exporting a controlled substance are based generally on 21 U.S.C. § 960. *See also* 21 U.S.C. §§ 951–53.

The definition of "missile launch facility" has been added to clarify that the term includes not only the actual situs of the missile, but those places directly integral to the launch of the missile.

The following is an analysis of Exec. Order No. 12383 (Sep. 23,1982):

Section 1 (now subparagraph e) amends paragraph 127 *c*, Section A of the MCM, 1969 (Rev.). This amendment of the Table of Maximum Punishments provides a completely revised system of punishments for contraband drug offenses under Article 134. The punishments under 21 U.S.C. §§ 841 and 844 were used as a benchmark for punishments in this paragraph. Thus, the maxi-

mum penalty for distribution or possession with intent to distribute certain Schedule I substances under 21 U.S.C. § 841—15 years imprisonment— is the same as the highest maximum punishment under paragraph 127 *c* (except when the escalator clause is triggered, *see* analysis of section 2 *infra.*)

Within the range under the 15 year maximum, the penalties under paragraph 127 *c* are generally somewhat more severe than those under 21 U.S.C. §§ 841 and 844. This is because in the military *any* drug offense is serious because of high potential for adversely affecting readiness and mission performance. *See generally Schlesinger v. Councilman*, 420 U.S. 738, 760 n.34 (1975); *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980). The availability of contraband drugs, especially in some overseas locations, the ambivalence toward and even acceptance of drug usage in some segments of society, especially among young people, and the insidious nature of drug offenses all require that deterrence play a substantial part in the effort to prevent drug abuse by servicemembers.

The following sentence enhancement provisions in the United States Code were not adopted: (1) the recidivism provisions in 21 U.S.C. §§ 841(b), 844(a), and 845(b), which either double or triple the otherwise prescribed maximum penalty; and (2) the provision in 21 U.S.C. § 845(a) which doubles the maximum penalty for distribution of a controlled substance to a person under the age of 21. (The latter provision would probably apply to a high percentage of distribution offenses in the armed forces, given the high proportion of persons in this age group in the armed forces.) These special provisions were not adopted in favor of a simpler, more uniform punishment system. The overall result is an absence of the higher punishment extremes of the Federal system, while some of the offenses treated more leniently in the lower end of the scale in the Federal system are subject to potentially higher punishments in the military, for the reasons stated in the preceding paragraph. There are no mandatory minimum sentences for any drug offense. *See* Article 56.

The expungement procedure in 21 U.S.C. § 844(b) and (c) is unnecessary and inappropriate for military practice. Alternatives to prosecution for drug offenses already exist. *See, e.g.*, Article 15. The use of such alternatives is properly a command prerogative.

Section 2 (now the last paragraph of subparagraph e) amends paragraph 127c Section B by adding an escalator clause to provide for certain special situations, unique to the military, in which drug involvement presents an even greater danger than normal. *See* 37 U.S.C. § 310 concerning hostile fire pay zones.

Section 3 (now subparagraphs b and c) amends paragraph 213, dealing with certain offenses under Article 134. Paragraph 213 *g* replaces the discussion of offenses involving some contraband drugs which was found in the last paragraph of paragraph 213 *b* of MCM, 1969 (Rev.). It was considered necessary to treat drug offenses more extensively in the Manual for Court-Martial because of the significant incidence of drug offenses in the military and because of the serious effect such offenses have in the military environment. It was also necessary to provide a comprehensive treatment of drugs, with a complete set of maximum punishments, in order to eliminate the confusion, disruption, and disparate treatment of some drug offenses among the services in the wake of *United States v. Courtney*, 1 M.J. 438 (C.M.A. 1976); *United States v. Jackson*, 3 M.J. 101 (C.M.A. 1977); *United States v. Hoesing*, 5 M.J. 355 (C.M.A. 1978); *United States v. Guilbault*, 6 M.J. 20 (C.M.A. 1978); *United States v. Thurman*, 7 M.J. 26 (C.M.A. 1979).

(1) *Controlled substance.* The list of drugs specifically punishable under Article 134 has been expanded to cover the substances which are, according to studies, most prevalent in the military community. *See, e.g.*, M. Burt, *et al. Highlights from the Worldwide Survey of Nonmedical Drug Use and Alcohol Use Among Military Personnel: 1980.* In addition, the controlled substances which are listed in Schedules I through V of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (codified at 21 U.S.C. § 801 *et seq.*) as amended are incorporated. The most commonly abused drugs are listed separately so that it will be unnecessary to refer to the controlled substances list, as modified by the Attorney General in the Code of Federal Regulations, in most cases. Most commanders and some legal offices do not have ready access to such authorities.

(2) *Possess.* The definition of possession is based upon *United States v. Aloyian*, 16 U.S.C.M.A. 333, 36 C.M.R. 489 (1966) and paragraph 4–144, *Military Judges' Benchbook*, DA PAM 27–9 (May 1982). *See also United States v. Wilson*, 7 M.J. 290 (C.M.A. 1979) and cases cited therein concerning the concept of constructive possession. With respect to the inferences described in this subparagraph and subparagraph (5) *Wrongfulness, see United States v. Alvarez*, 10 U.S.C.M.A. 24, 27 C.M.R. 98 (1958); *United States v. Nabors*, 10 U.S.C.M.A. 27, 27 C.M.R. 101 (1958). It is important to bear in mind that distinction between inferences and presumptions. *See United States v. Mahan*, 1 M.J. 303 (C.M.R. 1976). *See also United States v. Baylor*, 16 U.S.C.M.A. 502, 37 C.M.R. 122 (1967).

(3) *Distribute.* This subparagraph is based on 21 U.S.C. § 802(8) and (11). *See also* E. Devitt and C. Blackmar, 2 *Federal Jury Practice and Instructions*, § 58.03 (3d ed. 1977).

"Distribution" replaces "sale" and "transfer." This conforms with Federal practice, *see* 21 U.S.C. § 841(a), and will simplify military practice by reducing pleading, proof, and associated multiplicity problems in drug offenses. *See, e.g., United States v. Long*, 7 M.J. 342 (C.M.A. 1979); *United States v. Maginley*, 13 U.S.C.M.A. 445, 32 C.M.R. 445 (1963). Evidence of sale is not necessary to prove the offense of distributing a controlled substance. *See United States v. Snow*, 537 F.2d 1166 (4th Cir. 1976); *United States v. Johnson*, 481 F.2d 645 (5th Cir. 1973). Thus, the defense of "agency" *see United States v. Fruscella*, 21 U.S.C.M.A. 26, 44 C.M.R. 80 (1971), no longer applies in the military. *Cf. United States v. Snow, supra; United States v. Pruitt*, 487 F.2d 1241 (8th Cir. 1973); *United States v. Johnson, supra* ("procuring agent" defense abolished under 21 U.S.C. § 801 *et seq.*). Evidence of sale is admissible, of course, on the merits as "part and parcel" of the criminal transaction (*see United States v. Stokes*, 12 M.J. 229 (C.M.A. 1982); *cf. United States v. Johnson, supra; see also* Mil. R. Evid. 404(b)), or in aggravation (*see* paragraph 75 *b*(4) of MCM, 1969 (Rev.); *see also United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982)).

(4) *Manufacture*. This definition is taken from 21 U.S.C. § 802(14). The exception in 21 U.S.C. § 802(14) is covered in subparagraph (5).

(5) *Wrongfulness.* This subparagraph is based on the last paragraph of paragraph 213 *b* of MCM, 1969 (Rev.). *Cf.* 21 U.S.C. § 822(c). *See also United States v. West*, 15 U.S.C.M.A. 3, 34

C.M.R. 449 (1964); paragraphs 4–144 and 145, Military Judges' Benchbook, DA PAM 27–9 (May 1982). It is not intended to perpetuate the holding in *United States v. Rowe*, 11 M.J. 11 (C.M.A. 1981).

(6) *Intent to distribute.* This subparagraph parallels Federal law which allows for increased punishment for drug offenses with an intent to distribute. 21 U.S.C. §841(a)(1). The discussion of circumstances from which an inference of intent to distribute may be inferred is based on numerous Federal cases. *See, e.g., United States v. Grayson*, 625 F.2d 66 (5th Cir. 1980); *United States v. Hill*, 589 F.2d 1344 (8th Cir. 1979), *cert. denied*, 442 U.S. 919 (1979); *United States v. Ramirez-Rodriquez*, 552 F.2d 883 (9th Cir. 1977); *United States v. Blake*, 484 F.2d 50 (8th Cir. 1973); *cert. denied*, 417 U.S. 949 (1974). *Cf. United States v. Mather*, 465 F.2d 1035 (5th Cir.1972), *cert. denied*, 409 U.S. 1085 (1972). Possession of a large amount of drugs may permit an inference but does not create a presumption of intent to distribute. *See Turner v. United States*, 396 U.S. 398 (1970); *United States v. Mahan*, 1 M.J. 303 (C.M.A. 1976).

(7) *Certain amount.* This subparagraph is based on *United States v. Alvarez*, 10 U.S.C.M.A. 24, 27 C.M.R. 98 (1958); *United States v. Brown*, 45 C.M.R. 416 (A.C.M.R. 1972); *United States v. Burns*, 37 C.M.R. 942 (A.F.B.R. 1967); *United States v. Owens*, 36 C.M.R. 909 (A.B.R. 1966).

1993 Amendment. Paragraph *c* was amended by adding new paragraphs (10) and (11). Subparagraph (10) defines the term "use" and delineates knowledge of the presence of the controlled substance as a required component of the offense. *See United States v. Mance*, 26 M.J. 244 (C.M.A. 1988). The validity of a permissive inference of knowledge is recognized. *See United States v. Ford*, 23 M.J. 331 (C.M.A. 1987); *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986). Subparagraph (11) precludes an accused from relying upon lack of actual knowledge when such accused has purposefully avoided knowledge of the presence or identity of controlled substances. *See United States v. Mance, supra*, (Cox, J., concurring). When an accused deliberately avoids knowing the truth concerning a crucial fact (i.e. presence or identity) and there is a high probability that the crucial fact does exist, the accused is held accountable to the same extent as one who has actual knowledge. *See United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). Subsection (11) follows federal authority which equates actual knowledge with deliberate ignorance. *See United States v. Ramsey*, 785 F.2d 184 (7th Cir. 1986), *cert. denied*, 476 U.S. 1186 (1986).

Section 4 (now subparagraph f) amends Appendix 6c. The new sample specifications are based on sample specifications 144 through 146 found in appendix 6c of the MCM, 1969 (Rev.), as modified to reflect the new comprehensive drug offense provision.

Section 5 provides an effective date for the new amendments.

Section 6 requires the Secretary of Defense to transmit these amendments to Congress.

38. Article 113— Misbehavior of sentinel or lookout

c. *Explanation.* Subparagraphs (1), (2), and (3) are based on paragraph 192 of MCM, 1969 (Rev.). Subparagraph (4) is based on *United States v. Seeser*, 5 U.S.C.M.A. 472, 18 C.M.R. 96 (1955); paragraph 192 of MCM, 1969 (Rev.); paragraph 174 of MCM (Army), 1949; paragraph 174 of MCM (AF), 1949. Subparagraph (6) is based on *United States v. Williams*, 4 U.S.C.M.A. 69, 15 C.M.R. 69 (1954); *United States v. Cook*, 31 C.M.R. 550 (A.F.B.R. 1961). *See also United States v. Getman*, 2 M.J. 279 (A.F.C.M.R. 1976).

39. Article 114— Duelling

c. *Explanation.* This paragraph is based on paragraph 193 of MCM, 1969 (Rev.). The explanation of conniving at fighting a duel was modified to reflect the requirement for actual knowledge and to more correctly reflect the term connive.

f. *Sample specification.* The sample specification for conniving at fighting a duel was redrafted to more accurately reflect the nature of the offense.

40. Article 115— Malingering

c. *Explanation.* This paragraph is based on paragraph 194 of MCM, 1969 (Rev.). *See also United States v. Kisner*, 15 U.S.C.M.A. 153, 35 C.M.R. 125 (1964); *United States v. Mamaluy*, 10 U.S.C.M.A. 102, 27 C.M.R. 176 (1959); *United States v. Kersten*, 4 M.J. 657 (A.C.M.R. 1977).

d. *Lesser included offenses. See United States v. Taylor*, 17 U.S.C.M.A. 595, 38 C.M.R. 393 (1968).

e. *Maximum punishment*. The maximum punishments were changed to reflect the greater seriousness of malingering in war or other combat situations and to add a greater measure of deterrence in such cases.

41. Article 116— Riot or breach of peace

c. *Explanation.* This paragraph is based on paragraph 195 of MCM, 1969 (Rev.) and *United States v. Metcalf*, 16 U.S.C.M.A. 153, 36 C.M.R. 309 (1966). The reference to "use of vile or abusive words to another in a public place" contained in paragraph 195 *b* of MCM, 1969 (Rev.) has been replaced by the language contained in the fourth sentence of subparagraph (2) since the former language was subject to an overly broad application. *See Gooding v. Wilson*, 405 U.S. 518 (1972).

f. *Sample specifications.* Riot— *see United States v. Randolf*, 49 C.M.R. 336 (N.C.M.R. 1974); *United States v. Brice*, 48 C.M.R. 368 (N.C.M.R. 1973).

42. Article 117— Provoking speeches or gestures

c. *Explanation.* Subparagraph (1) is based on paragraph 196 of MCM, 1969 (Rev.); *United States v. Thompson*, 22 U.S.C.M.A. 88, 46 C.M.R. 88 (1972). *See generally Gooding v. Wilson*, 405 U.S. 518 (1972); *United States v. Hughens*, 14 C.M.R. 509 (N.B.R. 1954). Subparagraph (2) is based on the language of Article 117 and *United States v. Bowden*, 24 C.M.R. 540 (A.F.B.R. 1957), *pet. denied*, 24 C.M.R. 311 (1957). *See also United States v. Lacy*, 10 U.S.C.M.A. 164, 27 C.M.R. 238 (1959).

1986 Amendment: The listing of "Article 134— indecent language" as a lesser included offense of provoking speeches was deleted. *United States v. Linyear*, 3 M.J. 1027 (N.M.C.M.R. 1977), held that provoking speeches is actually a lesser included offense of indecent language. Also, indecent language carries a greater maximum punishment than provoking speeches, which would be unusual for a lesser offense.

e. *Maximum punishment.* The maximum punishment was in-

creased from that set forth in paragraph 127 *c* of MCM, 1969 (Rev.) to more accurately reflect the seriousness of the offense.

43. Article 118— Murder

b. *Elements.* Element (b) in (3), *Act inherently dangerous to others*, has been modified based on *United States v. Hartley*, 16 U.S.C.M.A. 249, 36 C.M.R. 405 (1966).

c. *Explanation.* This paragraph is based on paragraph 197 of MCM, 1969 (Rev.). Subparagraphs c(2)(b) is based on *United States v. Sechler*, 3 U.S.C.M.A. 363, 12 C.M.R. 119 (1953). As to subparagraph (c)(4)(A), *see United States v. Vandenack*, 15 M.J. 428 (C.M.A. 1983). Subparagraph c(4)(b) is based on *United States v. Stokes*, 6 U.S.C.M.A. 65, 19 C.M.R. 191 (1955).

d. *Lesser included offenses.* As to Article 118(3), *see United States v. Roa*, 12 M.J. 210 (C.M.A. 1982).

1993 Amendment: The listed lesser included offenses of murder under Article 118(3) were changed to conform to the rationale of *United States v. Roa*, 12 M.J. 210 (C.M.A. 1982). Inasmuch as Article 118(3) does not require specific intent, attempted murder, voluntary manslaughter, assault with intent to murder and assault with intent to commit voluntary manslaughter are not lesser included offenses of murder under Article 118(3).

*1995 Amendment:*The word "others" was replaced by the word "another" in Article 118(3) pursuant to the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102—484, 106 Stat. 2315, 2506 (1992). This change addresses the limited language previously used in Article 118(3) as identified in *United States v. Berg*, 30 M.J. 195 (C.M.A. 1990).

44. Article 119— Manslaughter

c. *Explanation.* This paragraph is based on paragraph 198 of MCM, 1969 (Rev.). *See also United States v. Moglia*, 3 M.J. 216 (C.M.A. 1977); *United States v. Harrison*, 16 U.S.C.M.A. 484, 37 C.M.R. 104 (1967); *United States v. Redding*, 14 U.S.C.M.A. 242, 34 C.M.R. 22 (1963); *United States v. Fox*, 2 U.S.C.M.A. 465, 9 C.M.R. 95 (1953).

e. *Maximum punishment.*

1994 Amendment. The amendment to paragraph 44e(1) increased the maximum period of confinement for voluntary manslaughter to 15 years. The 10-year maximum confinement period was unnecessarily restrictive; an egregious case of voluntary manslaughter may warrant confinement in excess of ten years.

1994 Amendment. The amendment to paragraph 44e(2) eliminated the anomaly created when the maximum authorized punishment for a lesser included offense of involuntary manslaughter was greater than the maximum authorized punishment for the offense of involuntary manslaughter. For example, prior to the amendment, the maximum authorized punishment for the offense of aggravated assault with a dangerous weapon was greater than that of involuntary manslaughter. This amendment also facilitates instructions on lesser included offenses of involuntary manslaughter. *See United States v. Emmons*, 31 M.J. 108 (C.M.A. 1990).

45. Article 120— Rape and carnal knowledge

c. *Explanation.* This paragraph is based on paragraph 199 of MCM, 1969 (Rev.). The third paragraph of paragraph 199(a) was deleted as unnecessary. The third paragraph of paragraph 199(b) was deleted based on the preemption doctrine. *See United States v. Wright*, 5 M.J. 106 (C.M.A. 1978); *United States v. Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953). *Cf. Williams v. United States*, 327 U.S. 711 (1946) (scope of preemption doctrine). The Military Rules of Evidence deleted the requirement for corroboration of the victim's testimony in rape and similar cases under former paragraph 153 *a* of MCM, 1969. *See* Analysis, Mil. R. Evid. 412.

d. *Lesser included offenses.* Carnal knowledge was deleted as a lesser included offense of rape in view of the separate elements in each offense. Both should be separately pleaded in a proper case. *See generally United States v. Smith*, 7 M.J. 842 (A.C.M.R. 1979).

1993 Amendment. The amendment to para 45 *d*(1) represents an administrative change to conform the Manual with case authority. Carnal knowledge is a lesser included offense of rape where the pleading alleges that the victim has not attained the age of 16 years. *See United States v. Baker*, 28 M.J. 900 (A.C.M.R. 1989); *United States v. Stratton*, 12 M.J. 998 (A.F.C.M.R. 1982), *pet. denied*, 15 M.J. 107 (C.M.A. 1983); *United States v. Smith*, 7 M.J. 842 (A.C.M.R. 1979).

e. *Maximum punishment.*

1994 Amendment. Subparagraph *e* was amended by creating two distinct categories of carnal knowledge for sentencing purposes -- one involving children who had attained the age of 12 years at the time of the offense, now designated as subparagraph e(2), and the other for those who were younger than 12 years. The latter is now designated as subparagraph e(3). The punishment for the older children was increased from 15 to 20 years confinement. The maximum confinement for carnal knowledge of a child under 12 years was increased to life. The purpose for these changes is to bring the punishments more in line with those for sodomy of a child under paragraph 51e of this part and with the Sexual Abuse Act of 1986, 18 U.S.C. §§ 2241–2245. The alignment of the maximum punishments for carnal knowledge with those of sodomy is aimed at paralleling the concept of gender–neutrality incorporated into the Sexual Abuse Act.

1995 Amendment. The offense of rape was made gender neutral and the spousal exception was removed under Article 120(a). National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315, 2506 (1992).

Rape may "be punished by death" only if constitutionally permissible. In *Coker v. Georgia*, 322 U.S. 585 (1977), the Court held that the death penalty is "grossly disproportionate and excessive punishment for the rape of an adult woman," and is "therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.* at 592 (plurality opinion). *Coker*, however, leaves open the question of whether it is permissible to impose the death penalty for the rape of a minor by an adult. *See Coker*, 433 U.S. at 595. *See Leatherwood v. State*, 548 So.2d 389 (Miss. 1989) (death sentence for rape of minor by an adult is not cruel and unusual punishment prohibited by the Eighth Amendment). *But see Buford v. State*, 403 So.2d 943 (Fla. 1981) (sentence of death is grossly disproportionate for sexual assault of a minor by an adult and consequently is forbidden by Eighth Amendment as cruel and unusual punishment).

1998 Amendment: In enacting section 1113 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 462 (1996), Congress amended Article 120,

UCMJ, to make the offense gender neutral and create a mistake of fact as to age defense to a prosecution for carnal knowledge. The accused must prove by a preponderance of the evidence that the person with whom he or she had sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this person was at least 16 years of age.

46. Article 121— Larceny and wrongful appropriation

c. *Explanation.* This paragraph is based on paragraph 200 of MCM, 1969 (Rev.). The discussion in the fourth and fifth sentences of paragraph 200 *a*(4) was deleted as ambiguous and overbroad. The penultimate sentence in subparagraph c(1)(d) adequately covers the point. C. Torcia, *2 Wharton's Criminal Law and Procedure* § 393 (1980); *Hall v. United States*, 277 Fed. 19 (8th Cir. 1921). As to subparagraph c(1)(c) *see also United States v. Leslie*, 13 M.J. 170 (C.M.A. 1982). As to subparagraph c(1)(d) *see also United States v. Smith*, 14 M.J. 68 (C.M.A. 1982); *United States v. Cunningham*, 14 M.J. 539 (A.C.M.R. 1981). As to subparagraph c(1)(f), *see also United States v. Kastner*, 17 M.J. 11 (C.M.A. 1983); *United States v. Eggleton*, 22 U.S.C.M.A. 504, 47 C.M.R. 920 (1973); *United States v. O'Hara*, 14 U.S.C.M.A. 167, 33 C.M.R. 379 (1963); *United States v. Hayes*, 8 U.S.C.M.A. 627, 25 C.M.R. 131 (1958). As to subparagraph c(1)(h)(i) *see also United States v. Malone*, 14 M.J. 563 (N.M.C.M.R. 1982).

e. *Maximum punishment.* The maximum punishments have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100) only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdictions. The maximum punishment for larceny or wrongful appropriation of a firearm or explosive includes 5 or 2 years' confinement respectively. This is because, regardless of the intrinsic value of such items, the threat to the community and disruption of military activities is substantial when such items are wrongfully taken. Special accountability and protective measures are taken with firearms and explosives, and they may be the target of theft regardless of value.

1986 Amendment: The maximum punishments for larceny were revised as they relate to larceny of military property to make them consistent with the punishments under Article 108 and paragraph 32e, Part IV, MCM, 1984. Before this amendment, a person who stole military property faced less punishment than a person who willfully damaged, destroyed, or disposed of military property. The revised punishments are also consistent with 18 U.S.C. § 641.

47. Article 122— Robbery

c. *Explanation.* This paragraph is based on paragraph 201 of MCM, 1969 (Rev.). *See also United States v. Chambers*, 12 M.J. 443 (C.M.A. 1982); *United States v. Washington*, 12 M.J. 1036 (A.C.M.R. 1982), *pet. denied*, 14 M.J. 170 (1982). Subparagraph (5) is based on *United States v. Parker*, 17 U.S.C.M.A. 545, 38 C.M.R. 343 (1968).

d. *Lesser included offenses. See United States v. Calhoun*, 5 U.S.C.M.A. 428, 18 C.M.R. 52 (1955).

e. *Maximum punishment.* The aggravating factor of use of a firearm in the commission of a robbery, and a higher maximum punishment in such cases, have been added because of the increased danger when robbery is committed with a firearm whether or not loaded or operable. *Cf.* 18 U.S.C. §§ 2113 and 2114; *United States v. Shelton*, 465 F.2d 361 (4th Cir. 1972); *United States v. Thomas*, 455 F.2d 320 (6th Cir. 1972); *Baker v. United States*, 412 F.2d 1069 (5th Cir. 1969). *See also* U.S. Dep't of Justice, *Attorney General's Task Force on Violent Crime, Final Report* 29–33 (Aug. 17, 1981). The 15-year maximum is the same as that for robbery under 18 U.S.C. § 2111.

48. Article 123— Forgery

c. *Explanation.* This paragraph is based on paragraph 202 of MCM, 1969 (Rev.).

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

c. *Explanation.* This paragraph is based on paragraph 202A of MCM, 1969 (Rev.). The language in paragraph 202A using an illegal transaction such as an illegal gambling game as an example of "for any other purpose" was eliminated in subparagraph (7), based on *United States v. Wallace*, 15 U.S.C.M.A. 650, 36 C.M.R. 148 (1966). The statutory inference found in Article 123a and explained in subparagraph (17) was not meant to preempt the usual methods of proof of knowledge and intent. *See* S.Rep. No. 659, 87th Cong. 1st Sess. 2 (1961). Subparagraph (18) is based on *United States v. Callaghan*, 14 U.S.C.M.A. 231, 34 C.M.R. 11 (1963). *See also United States v. Webb*, 46 C.M.R. 1083 (A.C.M.R. 1972). As to share drafts *see also United States v. Palmer*, 14 M.J. 731 (A.F.C.M.R. 1982); *United States v. Grubbs*, 13 M.J. 594 (A.F.C.M.R. 1982).

e. *Maximum punishment.* The maximum punishment for subsection (1) has been revised. Instead of three levels ($50 or less, $50 to $100, and over $100) only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdiction.

f. *Sample specification. See also United States v. Palmer* and *United States v. Grubbs*, both *supra* (pleading share drafts; pleading more than one check or draft).

50. Article 124— Maiming

c. *Explanation.* This paragraph is based on paragraph 203 of MCM, 1969 (Rev.). Subparagraph c(3) is based on *United States v. Hicks*, 6 U.S.C.M.A. 621, 20 C.M.R. 337 (1956). The discussion of intent has been modified to reflect that some specific intent to injure is necessary. *United States v. Hicks, supra.* The third sentence of the third paragraph of paragraph 203 of MCM, 1969 (Rev.), which was based on *Hicks (see Analysis of Contents, Manual for Courts-martial, United States, 1969 (Revised edition)*, DA PAM 27–2 at 28–15), was misleading in this regard. *Contra United States v. Tua*, 4 M.J. 761 (A.C.M.R. 1977), *pet. denied*, 5 M.J. 91 (1978).

51. Article 125— Sodomy

c. *Explanation.* This paragraph is based on paragraph 204 of MCM, 1969 (Rev.). Fellatio and cunnilingus are within the scope of Article 125. *See United States v. Harris*, 8 M.J. 52 (C.M.A.

1979); *United States v. Scoby*, 5 M.J. 160 (C.M.A. 1978). For a discussion of the possible constitutional limitations on the application of Article 125 (for example, the sexual activity of a married couple), *see United States v. Scoby, supra.*

d. *Paragraph 51e.* The Analysis accompanying subparagraph 51e is amended by inserting the following at the end thereof:

1994 Amendment. One of the objectives of the Sexual Abuse Act of 1986, 18 U.S.C. §§ 2241–2245 was to define sexual abuse in gender-neutral terms. Since the scope of Article 125, U.C.M.J., accommodates those forms of sexual abuse other than the rape provided for in Article 120, U.C.M.J., the maximum punishments permitted under Article 125 were amended to bring them more in line with Article 120 and the Act, thus providing sanctions that are generally equivalent regardless of the victim's gender. Subparagraph e(1) was amended by increasing the maximum period of confinement from 20 years to life. Subparagraph e(2) was amended by creating two distinct categories of sodomy involving a child, one involving children who have attained the age of 12 but are not yet 16, and the other involving children under the age of 12. The latter is now designated as subparagraph e(3). The punishment for the former category remains the same as it was for the original category of children under the age of 16. This amendment, however, increases the maximum punishment to life when the victim is under the age of 12 years.

e. *Maximum punishment.* The maximum punishment for forcible sodomy was raised in recognition of the severity of the offense which is similar to rape in its violation of personal privacy and dignity.

52. Article 126— Arson

c. *Explanation.* This paragraph is based on paragraph 205 of MCM, 1969 (Rev.). *See United States v. Acevedo-Velez*, 17 M.J. 1 (C.M.A.1983); *United States v. Duke*, 16 U.S.C.M.A. 460, 37 C.M.R. 80 (1966); *United States v. Scott*, 8 M.J. 853 (N.C.M.R. 1980); *United States v. Jones*, 2 M.J. 785 (A.C.M.R. 1976).

e. *Maximum punishment.* The maximum period of confinement for simple arson of property of a value of more than $100 has been reduced from 10 to 5 years. This parallels 18 U.S.C. § 81. The separate punishment for simple arson of property of a value of $100 or less has been retained because 18 U.S.C. Sec. 81 does not cover most personal property.

53. Article 127— Extortion

c. *Explanation.* This paragraph is based on paragraph 206 of MCM, 1969 (Rev.). *See also United States v. Schmidt*, 16 U.S.C.M.A. 57, 36 C.M.R. 213 (1966); R. Perkins, *Criminal Law* 373–74 (2d ed. 1969). Subparagraph (4) is based on *United States v. McCollum*, 13 M.J. 127 (C.M.A. 1982).

54. Article 128— Assault

c. *Explanation.* This paragraph is based on paragraph 207 of MCM, 1969 (Rev.). *See also United States v. Vigil*, 3 U.S.C.M.A. 474, 13 C.M.R. 30 (1953) (aggravated assault); *United States v. Spearman*, 23 U.S.C.M.A. 31, 48 C.M.R. 405 (1974) (grievous bodily harm).

e. *Maximum punishment.* The maximum punishment for (2) Assault consummated by a battery has been increased because of the range of types of harm which may be caused by a battery. These may include serious injury, even though unintended or not caused by a means or force likely to produce grievous bodily harm. The maximum punishment for (6) Assault upon a sentinel or lookout in the execution of duty, or upon any person who, in the execution of office, is performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties, has been increased based on 18 U.S.C. § 111 and 18 U.S.C. § 1114. The maximum punishment for aggravated assaults committed with firearms has been increased based on 18 U.S.C. § 924(c). *See also* U.S. Dep't of Justice, *Attorney General's Task Force on Violent Crime, Final Report* 29–33 (Aug. 17, 1981). Note that the higher maximum for assault with a dangerous weapon when the weapon is a firearm applies even if the firearm is used as a bludgeon. This is because the danger injected is significantly greater when a loaded firearm is used, even as a bludgeon.

In certain situations, this punishment scheme may have the effect of making intentional infliction of grievous bodily harm a lesser included offense of assault with a dangerous weapon. For example, if in the course of an assault with a loaded firearm the accused or a coactor stabs the victim with a knife, the assault with a dangerous weapon (the firearm) would carry an 8 year maximum penalty, as opposed to 5 years for the assault intentionally inflicting grievous bodily harm. In such a case, the specification should be carefully tailored to describe each facet of the assault.

1998 Amendment: A separate maximum punishment for assault with an unloaded firearm was created due to the serious nature of the offense. Threatening a person with an unloaded firearm places the victim of that assault in fear of losing his or her life. Such a traumatic experience is a far greater injury to the victim than that sustained in the course of a typical simple assault. Therefore, it calls for an increased punishment.

55. Article 129— Burglary

c. *Explanation.* This paragraph is based on paragraph 208 of MCM, 1969 (Rev.). *See also United States v. Klutz*, 9 U.S.C.M.A. 20, 25 C.M.R. 282 (1958). Subparagraph c(2) and (3) have been revised based on R. Perkins, *Criminal Law* 192–193 and 199 (2d ed. 1969). As to subparagraph c(2), *see also* 13 AM.Jur. 2d *Burglary* § 18 (1964); Annot., 70 A.L.R. 3d 881 (1976).

f. *Sample specification. See United States v. Knight*, 15 M.J. 202 (C.M.A. 1983).

56. Article 130— Housebreaking

c. *Explanation.* This paragraph is based on paragraph 209 of MCM, 1969 (Rev.) and *United States v. Gillin*, 8 U.S.C.M.A. 669, 25 C.M.R. 173 (1958). *See also United States v. Breen*, 15 U.S.C.M.A. 658, 36 C.M.R. 156 (1966); *United States v. Hall*, 12 U.S.C.M.A. 374, 30 C.M.R. 374 (1961); *United States v. Taylor*, 12 U.S.C.M.A. 44, 3O C.M.R. 44 (1960) (all regarding "structure"); *United States v. Weaver*, 18 U.S.C.M.A. 173, 39 C.M.R. 173 (1969) ("separate offense"); *United States v. Williams*, 4 U.S.C.M.A. 241, 15 C.M.R. 241 (1954) ("entry").

57. Article 131— Perjury

c. *Explanation.* Subparagraph (1) and (2) are based on paragraph

210 of MCM, 1969 (Rev.). In the last sentence of subparagraph (2)(a), the phrase "unless the witness was forced to answer over a valid claim of privilege"which appeared at the end of the fourth paragraph of paragraph 210 of MCM, 1969 (Rev.) has been deleted based on *United States v. Mandujano*, 425 U.S. 564 (1976); *Harris v. New York*, 401 U.S. 222 (1971). *See also United States v. Armstrong*, 9 M.J. 374 (C.M.A. 1980). Subparagraph (3) is new and is based on Public Law 94–550 of 1976 which amended Article 131 by adding a second clause based on section 1746 of title 28 United States Code, which was also enacted as part of Pub.L. No. 94–550.

Text of section 1746 of title 28, United States Code

§ 1746. Unsworn declarations under penalty of perjury.

Whenever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)"

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)"

If someone signs a statement under penalty of perjury outside a judicial proceeding or course of justice, and Article 107 (false official statement) is not applicable, it may be possible to use Article 134 (clause 3) (*see* paragraph 60) to charge a violation of 18 U.S.C. § 1621.

Text of section 1621 of title 18, United States Code

§ 1621. Perjury generally

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except or otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

d. *Lesser included offenses.*

1991 Amendment: Subparagraph *d* was amended by deleting false swearing as a lesser included offense of perjury. *See United States v. Smith*, 26 C.M.R. 16 (C.M.A. 1958); MCM 1984, Part IV, para. 79c(1). Although closely related to perjury, the offense of false swearing may be charged separately.

58. Article 132— Frauds against the United States

c. *Explanation.* This paragraph is based on paragraph 211 of MCM, 1969 (Rev.).

e. *Maximum punishment.* The maximum punishments have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100) only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdictions.

59. Article 133— Conduct unbecoming an officer and gentleman

c. *Explanation.* This paragraph is based on paragraph 212 of MCM, 1969 (Rev.). *See Parker v. Levy*, 417 U.S. 733 (1974) (constitutionality of Article 133). For a discussion of Article 133, *see United States v. Giordano*, 15 U.S.C.M.A. 163, 35 C.M.R. 135 (1964); Nelson, *Conduct Expected of an Officer and a Gentleman: Ambiguity*, 12 A.F.JAG L.Rev. 124 (Spring 1970). As to subparagraph (1), *see* 1 U.S.C. § 1; Pub.L. No. 94–106, § 803, 89 Stat. 537–38 (Oct. 7, 1975).

e. *Maximum punishment.* A maximum punishment is established for the first time in order to provide guidance and uniformity for Article 133 offenses.

f. *Sample specifications.* Some sample specifications for Article 133 in MCM, 1969 (Rev.) were deleted solely to economize on space.

60. Article 134— General article

Introduction. Paragraph 60 introduces the General Article. Paragraph 61–113 describe and list the maximum punishments for many offenses under Article 134. These paragraphs are not exclusive. *See generally Parker v. Levy*, 417 U.S. 733 (1974); *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964).

Except as otherwise noted in the Analyses of paragraphs 61–113, the offenses listed below are based on paragraph 127 *c* (Table of Maximum Punishments), paragraph 213 *f*, and Appendix 6 (sample specifications 126–187) of MCM, 1969 (Rev.). Eight offenses previously listed (allowing prisoner to do unauthorized acts, criminal libel, criminal nuisance, parole violation, statutory perjury, transporting stolen vehicle in interstate commerce, unclean accoutrements, and unclean uniform) are not listed here because they occur so infrequently or because the gravamen of the misconduct is such that it is more appropriately charged under another provision.

c. *Explanation.* Except as noted below, this paragraph is based on paragraph 213 *a* through *e* of MCM, 1969 (Rev.).

(1) *In general. See Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974); *Parker v. Levy, supra* (constitutionality of Article 134 upheld).

(4)(c)(ii) *Federal Assimilative Crimes Act. See United States v.*

Wright, 5 M.J. 106 (C.M.A. 1978); *United States v. Rowe*, 13 U.S.C.M.A. 302, 32 C.M.R. 302 (1962).

(5)(a) *Preemption doctrine. See United States v. McCormick*, 12 U.S.C.M.A. 26, 30 C.M.R. 26 (1960) (assault on child under 16); *United States v. Hallet*, 4 U.S.C.M.A. 378, 15 C.M.R. 378 (1954) (misbehavior before the enemy); *United States v. Deller*, 3 U.S.C.M.A. 409, 12 C.M.R. 165 (1953) (absence offenses); *United States v. Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953) (larceny). *But see* the following cases for examples of where offenses not preempted: *United States v. Wright*, *supra* (burglary of automobile); *United States v. Bonavita*, 21 U.S.C.M.A. 407, 45 C.M.R. 181 (1972) (concealing stolen property); *United States v. Maze*, 21 U.S.C.M.A. 260, 45 C.M.R. 34 (1972) (unlawfully altering public records); *United States v. Taylor*, 17 U.S.C.M.A. 595, 38 C.M.R. 393 (1968) (self-inflicted injury with no intent to avoid Service) *United States v. Gaudet*, 11 U.S.C.M.A. 672, 29 C.M.R. 488 (1960) (stealing from mail); *United States v. Fuller*, 9 U.S.C.M.A. 143, 25 C.M.R. 405 (1958) (fraudulent burning); *United States v. Holt*, 7 U.S.C.M.A. 617, 23 C.M.R. 81 (1957) (graft, fraudulent misrepresentation).

(5)(b) *Capital offense. See United States v. French*, 10 U.S.C.M.A. 171, 27 C.M.R. 245 (1959).

(6)(b) *Specifications under clause 3. See United States v. Mayo*, 12 M.J. 286 (C.M.A. 1982); *United States v. Perry*, 12 M.J. 112 (C.M.A. 1981); *United States v. Rowe*, *supra; United States v. Hogsett*, 8 U.S.C.M.A. 681, 25 C.M.R. 185 (1958).

(6)(c) *Specifications for clause 1 or 2 offenses not listed. See United States v. Sadinsky*, *supra; United States v. Mardis*, 6 U.S.C.M.A 624, 20 C.M.R. 340 (1956).

61. Article 134— (Abusing a public animal)

c. *Explanation.* This new paragraph defines "public animal."

62. Article 134— (Adultery)

c. *Explanation.* This paragraph is based on *United States v. Ambalada*, 1 M.J. 1132 (N.C.M.R.), *pet. denied*, 3 M.J. 164 (1977). For a discussion of the offense of adultery, *see United States v. Butler*, 5 C.M.R. 213 (A.B.R. 1952).

63. Article 134— (Assault— indecent)

c. *Explanation.* This paragraph is based on paragraph 213 *f*(2) of MCM, 1969 (Rev.). *See United States v. Caillouette*, 12 U.S.C.M.A. 149, 30 C.M.R. 149 (1961) regarding specific intent. *See also United States v. Headspeth*, 2 U.S.C.M.A. 635, 10 C.M.R. 133 (1953).

Gender-neutral language has been used in this paragraph, as well as throughout this Manual. This will eliminate any question about the intended scope of certain offenses, such as indecent assault such as may have been raised by the use of the masculine pronoun in MCM, 1969 (Rev.). It is, however, consistent with the construction given to the former Manual. *See, e.g., United States v. Respess*, 7 M.J. 566 (A.C.M.R. 1979). *See generally* 1 U.S.C. § 1 ("unless the context indicates otherwise … words importing the masculine gender include the feminine as well ….").

d. *Lesser included offenses. See United States v. Thacker*, 16 U.S.C.M.A. 408, 37 C.M.R. 28 (1966); *United States v. Jackson*, 31 C.M.R. 738 (A.F.B.R. 1962).

64. Article 134— (Assault— with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking)

c. *Explanation.* This paragraph is based on paragraph 213 *f*(1) of MCM, 1969 (Rev.).

65. Article 134— (Bigamy)

c. *Explanation.* This paragraph is based on paragraph 213 *f*(9) of MCM, 1969 (Rev.). *See also United States v. Pruitt*, 17 U.S.C.M.A. 438, 38 C.M.R. 236 (1968), concerning the defense of mistake.

66. Article 134— (Bribery and graft)

c. *Explanation.* This paragraph is new and is based on *United States v. Marshall*, 18 U.S.C.M.A. 426, 40 C.M.R. 138 (1969); *United States v. Alexander*, 3 U.S.C.M.A. 346, 12 C.M.R. 102 (1953). *See also United States v. Eslow*, 1 M.J. 620 (A.C.M.R. 1975).

d. *Lesser included offenses.* Graft is listed as a lesser included offense of bribery. *See United States v. Raborn*, 575 F.2d 688 (9th Cir. 1978); *United States v. Crutchfield*, 547 F.2d 496 (9th Cir. 1977).

e. *Maximum punishment.* The maximum punishment for bribery has been revised to reflect the greater seriousness of bribery, which requires a specific intent to influence. *See also* 18 U.S.C. § 201.

67. Article 134— (Burning with intent to defraud)

c. *Explanation.* This paragraph is new and is self-explanatory. For a discussion of this offense *see United States v. Fuller*, 9 U.S.C.M.A. 143, 25 C.M.R. 405 (1958).

68. Article 134— (Check, worthless, making and uttering— by dishonorably failing to maintain funds)

c. *Explanation.* This paragraph is based on paragraph 213 *f*(8) of MCM, 1969 (Rev.). *See also United States v. Groom*, 12 U.S.C.M.A. 11, 30 C.M.R. 11 (1960).

d. *Lesser included offense. See United States v. Downard*, 6 U.S.C.M.A. 538, 20 C.M.R. 254 (1955).

69. Article 134— (Cohabitation, wrongful)

c. *Explanation.* This paragraph is new and is based on *United States v. Acosta*, 19 U.S.C.M.A. 341, 41 C.M.R. 341 (1970); *United States v. Melville*, 8 U.S.C.M.A. 597, 25 C.M.R. 101 (1958); *United States v. Leach*, 7 U.S.C.M.A. 388, 22 C.M.R. 178 (1956); and *United States v. Boswell*, 35 C.M.R. 491 (A.B.R. 1964), *pet. denied*, 35 C.M.R. 478 (1964).

70. Article 134— (Correctional custody— offenses against)

Introduction. The elements and sample specifications have been modified by replacing "duly" with "by a person authorized to do so." *See* Analysis, paragraph 19.

c. *Explanation.* This paragraph is taken from paragraph 213 *f*(13) of MCM, 1969 (Rev.). *See also United States v. Mackie*, 16

U.S.C.M.A. 14, 36 C.M.R. 170 (1966) (proof of the offense for which correctional custody imposed not required).

71. Article 134— (Debt, dishonorably failing to pay)

c. *Explanation.* This paragraph is based on paragraph 213 *f*(7) of MCM, 1969 (Rev.). *See also United States v. Kirksey*, 6 U.S.C.M.A. 556, 20 C.M.R. 272 (1955).

72. Article 134— (Disloyal statements)

c. *Explanation.* This paragraph is based on paragraph 213 *f*(5) of MCM, 1969 (Rev.); *Parker v. Levy*, 417 U.S. 733 (1974); *United States v. Priest*, 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972); *United States v. Gray*, 20 U.S.C.M.A. 63, 42 C.M.R. 255 (1970); *United States v. Harvey*, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970).

73. Article 134— (Disorderly conduct, drunkenness)

c. *Explanation.* (2) Disorderly. This subparagraph is based on *United States v. Manos*, 24 C.M.R. 626 (A.F.B.R. 1957). *See also United States v. Haywood*, 41 C.M.R. 939 (A.F.C.M.R. 1969) and *United States v. Burrow*, 26 C.M.R. 761 (N.B.R. 1958), for a discussion of disorderly conduct in relation to the offense of breach of the peace 40c).

74. Article 134— (Drinking liquor with prisoner)

c. *Explanation.* This paragraph is new.

75. Article 134— (Drunk Prisoner)

c. *Explanation. See* Analysis, paragraph 35.

76. Article 134— (Drunkenness— incapacitation for performance of duties through prior wrongful overindulgence in intoxicating liquor or drugs)

c. *Explanation.* This paragraph is based on *United States v. Roebuck*, 8 C.M.R. 786 (A.F.B.R. 1953); *United States v. Jones*, 7 C.M.R. 97 (A.B.R. 1952); *United States v. Nichols*, 6 C.M.R. 239 (A.B.R. 1952).

77. Article 134— (False or unauthorized pass offenses)

c. *Explanation.* This paragraph is based on paragraph 213 *f*(11) of MCM, 1969 (Rev.). *See also United States v. Burton*, 13 U.S.C.M.A. 645, 33 C.M.R. 177 (1963); *United States v. Warthen*, 11 U.S.C.M.A. 93, 28 C.M.R. 317 (1959).

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

c. *Explanation.* This paragraph is based on *United States v. Herndon*, 15 U.S.C.M.A. 510, 36 C.M.R. 8 (1965); *United States v. Abeyta*, 12 M.J. 507 (A.C.M.R. 1981); *United States v. Case*, 37 C.M.R. 606 (A.B.R. 1966).

e. *Maximum punishment.* The maximum punishments have been revised. Instead of three levels ($50 or less, $50 to $100, and over $100) only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in similar offenses in civilian jurisdictions.

79. Article 134— (False swearing)

c. *Explanation.* This paragraph is based on paragraph 213 *f*(4) of MCM, 1969 (Rev.). *See also United States v. Whitaker*, 13 U.S.C.M.A. 341, 32 C.M.R. 341 (1962); *United States v. McCarthy*, 11 U.S.C.M.A. 758, 29 C.M.R. 574 (1960).

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

c. *Explanation.* This paragraph is based on *United States v. Darisse*, 17 U.S.C.M.A. 29, 37 C.M.R. 293 (1967); *United States v. Barrientes*, 38 C.M.R. 612 (A.B.R. 1967). The term "carelessness" was changed to "negligence" because the latter is defined in paragraph 85c(2).

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

c. *Explanation.* This paragraph is based on *United States v. Potter*, 15 U.S.C.M.A. 271, 35 C.M.R. 243 (1965).

82. Article 134— (Fleeing scene of accident)

c. *Explanation.* (1) Nature or offense. This paragraph is based on *United States v. Seeger*, 2 M.J. 249 (A.F.C.M.R. 1976).

(2) *Knowledge.* This paragraph is based on *United States v. Eagleson*, 3 U.S.C.M.A. 685, 14 C.M.R. 103 (1954) (Latimer, J., concurring in the result). Actual knowledge is an essential element of the offense rather than an affirmative defense as is current practice. This is because actual knowledge that an accident has occurred is the point at which the driver's or passenger's responsibilities begin. *See United States v. Waluski*, 6 U.S.C.M.A. 724, 21 C.M.R. 46 (1956).

(3) *Passengers. See United States v. Waluski*, supra.

83. Article 134— (Fraternization)

Introduction. This paragraph is new to the Manual for Courts-Martial, although the offense of fraternization is based on longstanding custom of the services, as recognized in the sources below. Relationships between senior officers and junior officers and between noncommissioned or petty officers and their subordinates may, under some circumstances, be prejudicial to good order and discipline. This paragraph is not intended to preclude prosecution for such offenses.

c. *Explanation.* This paragraph is new and is based on *United States v. Pitasi*, 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971); *United States v. Free*, 14 C.M.R. 466 (N.B.R. 1953). *See also* W. Winthrop, *Military Law and Precedents* 41, 716 n.44 (2d ed. 1920 reprint); *Staton v. Froehlke*, 390 F.Supp. 503 (D.D.C. 1975); *United States v. Lovejoy*, 20 U.S.C.M.A. 18, 42 C.M.R. 210 (1970); *United States v. Rodriquez*, ACM 23545 (A.F.C.M.R. 1982); *United States v. Livingston*, 8 C.M.R. 206 (A.B.R. 1952). *See* Nelson, *Conduct Expected of an Officer and a Gentleman: Ambiguity*, 12 A.F. JAG. L.R. 124 (1970).

d. *Maximum punishment.* The maximum punishment for this offense is based on the maximum punishment for violation of gen-

eral orders and regulations, since some forms of fraternization have also been punished under Article 92. As to dismissal, *see* Nelson, *supra* at 129–130.

f. *Sample specification. See United States v. Free, supra.*

84. Article 134— (Gambling with subordinate)

c. *Explanation.* This paragraph is new and is based on *United States v. Burgin*, 30 C.M.R. 525 (A.B.R. 1961).

d. *Maximum punishment.* The maximum punishment was increased from that provided in paragraph 127 *c* of MCM, 1969 (Rev.) to expressly authorize confinement. *Cf.* the second paragraph of paragraph 127 *c*(2) of MCM, 1969 (Rev.).

e. *Sample specification.* Sample specification 153 in Appendix 6c of MCM, 1969 (Rev.) was revised to more correctly reflect the elements of the offense.

85. Article 134— (Homicide, negligent)

c. *Explanation.* This paragraph is based on paragraph 213 *f*(12) of MCM, 1969 (Rev.); *United States v. Kick*, 7 M.J. 82 (C.M.A. 1979).

e. *Maximum punishment.*

1994 Amendment: Subparagraph e was amended to increase the maximum punishment from a bad conduct discharge, total forfeitures, and confinement for 1 year, to a dishonorable discharge, total forfeitures, and confinement for 3 years. This eliminated the incongruity created by having the maximum punishment for drunken driving resulting in injury that does not necessarily involve death exceed that of negligent homicide where the result must be the death of the victim.

86. Article 134— (Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official)

b. *Elements.* The elements are based on *United States v. Yum*, 10 M.J. 1 (C.M.A. 1980).

c. *Explanation.* This paragraph is new and is based on *United States v. Demetris*, 9 U.S.C.M.A. 412, 26 C.M.R. 192 (1958); *United States v. Messenger*, 2 U.S.C.M.A. 21, 6 C.M.R. 21 (1952).

87. Article 134— (Indecent acts or liberties with a child)

c. *Explanation.* This paragraph is based on paragraph 213 *f*(3) of MCM, 1969 (Rev.). *See also United States v. Knowles*, 15 U.S.C.M.A. 404, 35 C.M.R. 376 (1965); *United States v. Brown*, 3 U.S.C.M.A. 454, 13 C.M.R. 454, 13 C.M.R. 10 (1953); *United States v. Riffe*, 25 C.M.R. 650 (A.B.R. 1957), *pet. denied*, 9 U.S.C.M.A. 813, 25 C.M.R. 486 (1958). "Lewd" and "lascivious" were deleted because they are synonymous with indecent. *See id. See also* paragraph 90c.

88. Article 134— (Indecent exposure)

c. *Explanation.* This paragraph is new and is based on *United States v. Manos*, 8 U.S.C.M.A. 734, 25 C.M.R. 238 (1958). *See also United States v. Caune*, 22 U.S.C.M.A. 200, 46 C.M.R. 200 (1973); *United States v. Conrad*, 15 U.S.C.M.A. 439, 35 C.M.R. 411 (1965).

e. *Maximum punishment.* The maximum punishment has been increased to include a bad-conduct discharge. Indecent exposure in some circumstances (e.g., in front of children, but without the intent to incite lust or gratify sexual desires necessary for indecent acts or liberties) is sufficiently serious to authorize a punitive discharge.

89. Article 134— (Indecent language)

Introduction. "Obscene" was removed from the title because it is synonymous with "indecent." *See* paragraph 90c and Analysis. "Insulting" was removed from the title based on *United States v. Prince*, 14 M.J. 654 (A.C.M.R. 1982); *United States v. Linyear*, 3 M.J. 1027 (N.C.M.R. 1977).

Gender-neutral language has been used in this paragraph, as well as throughout this Manual. This will eliminate any question about the intended scope of certain offenses, such as indecent language, which may have been raised by the use of the masculine pronoun in MCM, 1969 (Rev.). It is, however, consistent with the construction given to the former Manual. *See e.g., United States v. Respess*, 7 M.J. 566 (A.C.M.R. 1979). *See generally* 1 U.S.C. §§ ("unless the context indicates otherwise … words importing the masculine gender include the feminine as well ….").

c. *Explanation.* This paragraph is new and is based on *United States v. Knowles*, 15 U.S.C.M.A. 404, 35 C.M.R. 376 (1965); *United States v. Wainwright*, 42 C.M.R. 997 (A.F.C.M.R. 1970). For a general discussion of this offense, *see United States v. Linyear supra.*

1986 Amendment: "Provoking speeches and gestures" was added as a lesser included offense. *United States v. Linyear*, 3 M.J. 1027 (N.M.C.M.R. 1977).

*1995 Amendment:*The second sentence is new. It incorporates a test for "indecent language" adopted by the Court of Military Appeals in *United States v. French*, 31 M.J. 57, 60 (C.M.A. 1990). The term "tends reasonably" is substituted for the term "calculated to" to avoid the misinterpretation that indecent language is a specific intent offense.

e. *Maximum punishment.* The maximum punishment in cases other than communication to a child under the age of 16 has been reduced. It now parallels that for indecent exposure.

90. Article 134— (Indecent acts with another)

c. *Explanation.* This paragraph is new and is based on *United States v. Holland*, 12 U.S.C.M.A. 444, 31 C.M.R. 30 (1961); *United States v. Gaskin*, 12 U.S.C.M.A. 419, 31 C.M.R. 5 (1962); *United States v. Sanchez*, 11 U.S.C.M.A. 216, 29 C.M.R. 32 (1960); *United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978). "Lewd" and "lascivious" have been deleted as they are synonymous with "indecent." *See id.*

91. Article 134— (Jumping from vessel into the water)

Introduction. This offense is new to the Manual for Courts-Martial. It was added to the list of Article 134 offenses based on *United States v. Sadinsky*, 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964).

92. Article 134— (Kidnapping)

Introduction. This offense is new to the Manual for Courts-Martial. It is based generally on 18 U.S.C. § 1201. *See also Military Judges' Benchbook*, DA PAM 27–9, paragraph 3–190 (May 1982).

Kidnapping has been recognized as an offense under Article 134 under several different theories. Appellate courts in the military have affirmed convictions for kidnapping in violation of State law, as applied through the third clause of Article 134 and 18 U.S.C. § 13 (*see* paragraph 60), *e.g., United States v. Picotte*, 12 U.S.C.M.A. 196, 30 C.M.R. 196 (1961); in violation of Federal law (18 U.S.C. § 1201) as applied through the third clause of Article 134, *e.g., United States v. Perkins*, 6 M.J. 602 (A.C.M.R. 1978); and in violation of the first two clauses of Article 134, *e.g., United States v. Jackson*, 17 U.S.C.M.A. 580, 38 C.M.R. 378 (1968). As a result, there has been some confusion concerning pleading and proving kidnapping in courts-martial. *See, e.g., United States v. Smith*, 8 M.J. 522 (A.C.M.R. 1979); *United States v. DiGiulio*, 7 M.J. 848 (A.C.M.R. 1979); *United States v. Perkins, supra.*

After *United States v. Picotte, supra*, was decided, 18 U.S.C. § 1201 was amended to include kidnapping within the special maritime and territorial jurisdiction of the United States. Pub.L. 92–539, § 201, 86 Stat. 1072 (1972). Consequently, reference to state law through 18 U.S.C. § 13 is no longer necessary (or authorized) in most cases. *See United States v. Perkins, supra.* Nevertheless, there remains some uncertainty concerning kidnapping as an offense in the armed forces, as noted above. This paragraph should eliminate such uncertainty, as well as any different treatment of kidnapping in different places.

b. *Elements.* The elements are based on 18 U.S.C. § 1201. The language in that statute "for ransom or reward or otherwise" has been deleted. This language has been construed to mean that no specific purpose is required for kidnapping. *United States v. Healy*, 376 U.S. 75 (1964); *Gooch v. United States* 297 U.S. 124 (1936); *Gawne v. United States*, 409 F.2d 1399 (9th Cir. 1969), *cert. denied* 397 U.S. 943 (1970). Instead it is required that the holding be against the will of the victim. *See Chatwin v. United States*, 326 U.S. 455 (1946); 2 E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 43.09 (1977); *Military Judges' Benchbook, supra* at paragraph 3–190. *See also Amsler v. United States*, 381 F.2d 37 (9th Cir. 1967); *Davidson v. United States*, 312 F.2d 163 (8th Cir. 1963).

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

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

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

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

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

93. Article 134— (Mail: taking, opening, secreting, destroying, or stealing)

c. *Explanation.* This paragraph is new and is based on *United States v. Gaudet*, 11 U.S.C.M.A. 672, 29 C.M.R. 488 (1960); *United States v. Manausa*, 12 U.S.C.M.A. 37, 30 C.M.R. 37 (1960). This offense is not preempted by Article 121. *See United States v. Gaudet, supra. See also* paragraph 60.

94. Article 134— (Mails: depositing or causing to be deposited obscene matters in)

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

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

95. Article 134— (Misprision of serious offense)

c. *Explanation.* This paragraph is based on paragraph 213 *f*(6) of MCM, 1969 (Rev.). The term "serious offense" is substituted for "felony" to make clear that concealment of serious military offenses, as well a serious civilian offenses, is an offense. Subsection (1) is based on *Black's Law Dictionary* 902 (5th ed. 1979). *See also United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970); *United States v. Perlstein*, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942); 18 U.S.C. § 4.

96. Article 134— (Obstructing justice)

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

f. *Sample specification.*

1991 Amendment: The form specification was amended by deleting the parentheses encompassing "wrongfully" as this language is not optional, but is a required component of a legally sufficient specification.

96a. Article 134— (Wrongful interference with an adverse administrative proceeding)

1993 Amendment. Paragraph 96 *a* is new and proscribes conduct that obstructs administrative proceedings. *See generally* 18 U.S.C. 1505, Obstruction of proceedings before departments, agencies, and committees. This paragraph, patterned after paragraph 96, covers obstruction of certain administrative proceedings not currently covered by the definition of criminal proceeding

found in paragraph 96 *c*. This paragraph is necessary given the increased number of administrative actions initiated in each service.

97. Article 134— (Pandering and prostitution)

c. *Explanation.* This paragraph is new and is based on *United States v. Adams*, 18 U.S.C.M.A. 310, 40 C.M.R. 22 (1966); *United State v. Bohannon*, 20 C.M.R. 870 (A.F.B.R. 1955).

e. *Maximum punishment.* The maximum punishment for prostitution is based on 18 U.S.C. § 1384.

97a Article 134— (Parole, Violation of)

1998 Amendment. The addition of paragraph 97a to Part IV, Punitive Articles, makes clear that violation of parole is an offense under Article 134, UCMJ. Both the 1951 and 1969 Manuals for Courts-Martial listed the offense in their respective Table of Maximum Punishments. No explanatory guidance, however, was contained in the discussion of Article 134, UCMJ in the Manual for Courts-Martial. The drafters added paragraph 97a to ensure that an explanation of the offense, to include its elements and a sample specification, is contained in the Manual for Courts-Martial, Part IV, Punitive Articles. *See generally United States v. Faist*, 41 C.M.R. 720 (ACMR 1970); *United States v. Ford*, 43 C.M.R. 551 (ACMR 1970).

98. Article 134— (Perjury: subornation of)

c. *Explanation.* This paragraph is new. It is based on 18 U.S.C. § 1622 which applies to any perjury. *See* 18 U.S.C. § 1621. *See generally* R. Perkins, *Criminal Law* 466–67 (2d ed. 1969). *See also* the Analysis, paragraph 57; *United States v. Doughty*, 14 U.S.C.M.A. 540, 34 C.M.R. 320 (1964)(res judicata); *United States v. Smith*, 49 C.M.R. 325 (N.C.M.R. 1974) (pleading).

99. Article 134— (Public record: altering, concealing, removing mutilating, obliterating, or destroying)

c. *Explanation.* This paragraph is new and is based on Mil.-R.Evid. 803(8), but does not exclude certain types of records which are inadmissible under Mil. R. Evid. 803(8) for policy reasons. *See United States v. Maze*, 21 U.S.C.M.A. 260, 45 C.M.R. 34 (1972) for a discussion of one of these offenses in relation to the doctrine of preemption. *See generally* 18 U.S.C. § 2071.

f. *Sample specification.* The specification contained in Appendix 6c, no. 172, from MCM, 1969 (Rev.) was modified by deleting the word "steal" because this would be covered by "remove."

100. Article 134— (Quarantine: medical, breaking)

b. *Elements.* The word "duly" has been deleted from the elements of this offense for the same reasons explained in Analysis, paragraph 19.

c. *Explanation.* Putting a person "on quarters" or other otherwise excusing a person from duty because of illness does not of itself constitute a medical quarantine.

f. *Sample specification.* Sample specification no. 173, Appendix 6c of MCM, 1969 (Rev.) was modified based on the deletion of the word "duly," as explained in the analysis to paragraph 19. *See* subparagraph b, above.

100a. Article 134— (Reckless endangerment)

c. *Explanation.* This paragraph is new and is based on *United States v. Woods*, 28 M.J. 318 (C.M.A. 1989); *see also* Md. Ann. Code art. 27, § 120. The definitions of "reckless" and "wanton" have been taken from Article 111 (drunken or reckless driving). The definition of "likely to produce grievous bodily harm" has been taken from Article 128 (assault).

101. Article 134— (Requesting commission of an offense)

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

c. *Explanation.* This paragraph is based on *United States v. Benton, supra. See also United States v. Oakley*, 7 U.S.C.M.A. 733, 23 C.M.R. 197 (1957).

e. *Maximum punishment.* The maximum punishment is based on *United States v. Oakley*, *supra.*

1990 Amendment: The offense of'requesting the commission of an offense' was deleted. Solicitation of another to commit an offense, whether prosecuted under Article 82 or 134, UCMJ, is a specific intent offense. *See United States v. Mitchell*, 15 M.J. 214 (C.M.A. 1983). The preemption doctrine precludes the creation of a lesser included offense of solicitation which does not require specific intent. *See United States v. Taylor*, 23 M.J. 314 (C.M.A. 1987).

102. Article 134— (Restriction; breaking)

Elements. The word "duly" has been deleted from the elements of this offense, for the same reasons explained in Analysis, paragraph 19.

c. *Explanation.* This paragraph is new and is based on paragraph 20 *b*, 126 *g*, 131 *c*, and 174 *b* of MCM, 1969 (Rev.). *See also United States v. Haynes*, 15 U.S.C.M.A. 122, 35 C.M.R. 94 (1964).

f. *Sample specification.* Sample specification no. 175, appendix 6c of MCM, 1969 (Rev.) was modified based on the deletion of the word "duly," as explained in the analysis of paragraph 19. *See* subparagraph b, above.

103. Article 134— (Seizure: destruction, removal, or disposal of property to prevent)

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

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

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

103a. Article 134— (Self-injury without intent to avoid service)

c. *Explanation. 1995 Amendment:* This offense is based on paragraph 183 *a* of MCM, U.S. Army, 1949; *United States v. Ramsey*, 35 M.J. 733 (A.C.M.R. 1992), *aff'd*, 40 M.J. 71 (C.M.A. 1994); *United States v. Taylor*, 38 C.M.R. 393 (C.M.A. 1968); *see generally* TJAGSA Practice Note, *Confusion About Malingering and Attempted Suicide*, The Army Lawyer, June 1992, at 38.

e. *Maximum punishment. 1995 Amendment:*The maximum punishment for subsection (1) reflects the serious effect that this offense may have on readiness and morale. The maximum punishment reflects the range of the effects of the injury, both in degree and duration, on the ability of the accused to perform work, duty, or service. The maximum punishment for subsection (1) is equivalent to that for offenses of desertion, missing movement through design, and certain violations of orders. The maximum punishment for subsection (2) is less than the maximum punishment for the offense of malingering under the same circumstances because of the absence of the specific intent to avoid work, duty, or service. The maximum punishment for subsection (2) is equivalent to that for nonaggravated offenses of desertion, willfully disobeying a superior commissioned officer, and nonaggravated malingering by intentional self-inflicted injury.

f. *Sample specification. 1995 Amendment: See* appendix 4, paragraph 177 of MCM, U.S. Army, 1949. Since incapacitation to perform duties is not an element of the offense, language relating to "unfitting himself for the full performance of military service" from the 1949 MCM has been omitted. The phrase "willfully injure" has been changed to read "intentionally injure" to parallel the language contained in the malingering specification under Article 115.

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

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

e. *Maximum punishment.* The maximum punishment for loitering or wrongfully sitting on post by a sentinel or lookout was increased because of the potentially serious consequences of such misconduct. *Cf.* Article 113.

105. Article 134— (Soliciting another to commit an offense)

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

c. *Explanation. See* the Analysis, paragraph 6.

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

1990 Amendment: Listing of "Article 134 — Requesting another to commit an offense, wrongful communication of language" as a lesser included offense of soliciting another to commit an offense was deleted in conjunction with the deletion of such a request as a substantive offense. *See United States v. Taylor*, 23 M.J. 314 (C.M.A. 1987); and, the Analysis, paragraph 101.

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

February 1986 Amendment: The Committee considered maximum imprisonment for 5 years inappropriate for the offense of solicitation to commit espionage under new Article 106a. A maximum punishment authorizing imprisonment for life is more consistent with the serious nature of the offense of espionage.

106. Article 134— (Stolen property: knowingly receiving, buying, concealing)

c. *Explanation.* This paragraph is based on paragraph 213 *f*(14) of MCM, 1969 (Rev.). and *United States v. Cartwright*, 13 M.J. 174 (C.M.A. 1982); *United States v. Ford*, 12 U.S.C.M.A. 3, 30 C.M.R. 3 (1960). *See United States v. Rokoski*, 30 C.M.R. 433 (A.B.R. 1960) concerning knowledge. *See also United States v. Bonavita*, 21 U.S.C.M.A. 407, 45 C.M.R. 181 (1972), concerning this offense in general.

e. *Maximum punishment.* The maximum punishments have been revised. Instead of three levels (less than $50, $50 to $100, and over $100) only two are used. This is simpler and conforms more closely to the division between felony and misdemeanor penalties contingent on value in property offenses in civilian jurisdictions.

107. Article 134— (Straggling)

c. *Explanation.* This paragraph is new and is based on *Military Judges' Benchbook*, DA PAM 27–9, paragraph 3–180 (May 1982).

108. Article 134— (Testify: wrongful refusal)

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

f. *Sample specification.* "Duly appointed" which appeared in front of the words "board of officers" in sample specification no. 174, Appendix 6 of MCM, 1969 (Rev.) was deleted. This is because all of the bodies under this paragraph must be properly convened or appointed. Summary courts-martial were expressly added to the sample specification to make clear that this offense may occur before a summary court-martial.

109. Article 134— (Threat or hoax: bomb)

Introduction. This offense is new to the Manual for Courts-Martial. It is based generally on 18 U.S.C. § 844(e) and on *Military Judges' Benchbook*, DA PAM 27–9, paragraph 3–189 (May 1982). Bomb hoax has been recognized as an offense under clause 1 of Article 134. *United States v. Mayo*, 12 M.J. 286 (C.M.R. 1982).

c. *Explanation.* This paragraph is based on *Military Judges' Benchbook, supra* at paragraph 3–189.

e. *Maximum punishment.* The maximum punishment is based on 18 U.S.C. § 844(e).

110. Article 134— (Threat, communicating)

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

111. Article 134— (Unlawful entry)

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

112. Article 134— (Weapon: concealed, carrying)

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

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

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

APPENDIX 24
ANALYSIS OF NONJUDICIAL PUNISHMENT PROCEDURE

1. General

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

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

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

f. *Limitations on nonjudicial punishment.*

(1) *Double punishment prohibited.* This subparagraph is taken from the first paragraph of paragraph 128 *d* of MCM, 1969 (Rev.). Note that what is prohibited is the service of punishment twice. Where nonjudicial punishment is set aside, this does not necessarily prevent reimposition of punishment and service of punishment not previously served.

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

(3) *Multiple punishment prohibited.* This paragraph is based on the guidance for court-martial offenses, found in paragraph 30g and 33 *h* of MCM, 1969 (Rev.).

(4) *Statute of limitations.* This paragraph restates the requirements of Article 43(c) regarding nonjudicial punishment.

(5) *Civilian courts.* This paragraph is derived from service regulations (*see, e.g.,* AR 27–10, chap. 4 (1 Sep. 1982)) and is intended to preclude the possibility of a servicemember being punished by separate jurisdictions for the same offense, except in unusual cases.

g. *Relationship of nonjudicial punishment to administrative corrective measures.* This paragraph is derived from paragraph 128 *c* of MCM, 1969 (Rev.) and service regulations. *See e.g.,* AR 27–10, para. 3–4 (1 Sep. 1982).

h. *Effect of errors.* This paragraph is taken from paragraph 130 of MCM, 1969 (Rev.).

2. Who may impose nonjudicial punishment

This paragraph is taken from paragraph 128 *a* of MCM, 1969 (Rev.) and service regulations. *See, e.g.,* AR 27–10, para. 3–7 (1 Sep. 1982); JAGMAN sec. 0101; AFR 111–9, para. 3 (31 Aug. 1979). Additional guidance in this area is left to Secretarial regulation, in accordance with the provisions of Article 15(a).

3. Right to demand trial

This paragraph is taken from Article 15(a) and paragraph 132 of MCM, 1969 (Rev.).

4. Procedure

This paragraph is based on paragraph 133 of MCM, 1969 (Rev.) and service regulations. It provides a uniform basic procedure for nonjudicial punishment for all the services. Consistent with the purposes of nonjudicial punishment (*see* S.Rep. No. 1911, 87th Cong. 2d Sess. 4 (1962)) it provides due process protections and is intended to meet the concerns expressed in the Memorandum of Secretary of Defense Laird, 11 January 1973. *See also United States v. Mack,* 9 M.J. 300, 320–21 (C.M.A. 1980). The Report of the Task Force on the Administration of Military Justice in the Armed Forces, 1972, and GAO Report to the Secretary of Defense, *Better Administration of Military Article 15 Punishments for Minor Offenses is Needed,* September 2, 1980, were also considered.

Note that there is no right to consult with counsel before deciding whether to demand trial by court-martial. Unless otherwise prescribed by the Secretary concerned, the decision whether to permit a member to consult with counsel is left to the commander. In *United States v. Mack, supra,* records of punishments where such opportunity was not afforded (except when the member was attached to or embarked in a vessel) were held inadmissible in courts-martial.

1986 Amendment: Subparagraph (c)(2) was amended to state clearly that a servicemember has no absolute right to refuse to appear personally before the person administering the nonjudicial punishment proceeding. In addition, Part V was amended throughout to use the term "nonjudicial punishment authority" in circumstances where the proceeding could be administered by a commander, officer in charge, or a principal assistant to a general court-martial convening authority or general or flag officer.

5. Punishments

This paragraph is taken from paragraph 131 of MCM, 1969 (Rev.). Subparagraph b(2)(b)4 is also based on S.Rep. 1911, 87th Cong., 1st Sess. 7 (1962). Subparagraph c(4) is also based on *id.* at 6–7 and *Hearings Before a Subcomm. of the House Comm. on Armed Services,* 87th Cong., 1st Sess. 33 (1962). Detention of pay was deleted as a punishment because under current centralized pay systems, detention of pay is cumbersome, ineffective, and seldom used. The concept of apportionment, authorized in Article 15(b) and set forth in paragraph 131 *d* of MCM, 1969 (Rev.), was eliminated as unnecessary and confusing. Accordingly, the Table of Equivalent Punishments is no longer necessary.

Subparagraph d, in concert with the elimination of the apportionment concept, will ease the commanders burden of determin-

ing an appropriate punishment and make the implementation of that punishment more efficient and understandable.

1987 Amendment: Subparagraph e was redesignated as subparagraph g and new subparagraphs e and f were added to implement the amendments to Articles 2 and 3, UCMJ, contained in the "Military Justice Amendments of 1986," tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99–661, 100 Stat. 3905 (1986).

1990 Amendment: Subsection (c)(8) was amended to incorporate the statutory expansion of jurisdiction over reserve component personnel provided in the Military Justice Amendments of 1990, tit. XIII, § 1303, National Defense Authorization Act of Fiscal Year 1990, Pub. L. 101–189, 103 Stat. 1352 (1989).

6. Suspension, mitigation, remission, and setting aside

This paragraph is taken from Article 15, paragraph 134 of MCM 1969 (Rev.), and service regulations. *See e.g.*, AR 27–10, paras. 3–23 through 3–28 (1 Sep. 1982); JAGMAN sec. 0101; AFR 111–9, para 7 (31 Aug 1979). Subparagraph a dealing with suspension was expanded to: require a violation of the code during the period of suspension as a basis for vacation action, and to explain that vacation action is not in itself nonjudicial punishment and does not preclude the imposition of nonjudicial punishment for the offenses upon which the vacation action was based. Subparagraph a(4) provides a procedure for vacation of suspended nonjudicial punishment. This procedure parallels the procedure found sufficient to make admissible in courts-martial records of vacation of suspended nonjudicial punishment. *United States v. Covington*, 10 M.J. 64 (C.M.A. 1980).

1990 Amendment: A new subsection a(4) was added to permit punishment imposed under Article 15 to be suspended based on conditions in addition to violations of the UCMJ. This affords the same flexibility given to authorities who suspend punishment adjudged at court-martial under R.C.M. 1108(c). Experience has demonstrated the necessity and utility of such flexibility in the nonjudicial punishment context.

7. Appeals

This paragraph is taken from paragraph 135 of MCM, 1969 (Rev.) and service regulations dealing with appeals. *See* AR 27–10, paras. 3–29 through 3–35 (1 Sep. 1982); JAGMAN 0101; AFR 111–9, para. 8 (31 Aug. 1981). Subparagraph (d) requires an appeal to be filed within 5 days or the right to appeal will be waived, absent unusual circumstances. This is a reduction from the 15 days provided for in paragraph 135 and is intended to expedite the appeal process. Subparagraph f(2) is intended to promote sound practice, that is, the superior authority should consider many factors when reviewing an appeal, and not be limited to matters submitted by the appellant or the officer imposing the punishment. Subparagraph f(3) provides for "additional proceedings" should a punishment be set aside due to a procedural error. This is consistent with court-martial practice and intended to ensure that procedural errors do not prevent appropriate disposition of a disciplinary matter.

8. Records of nonjudicial punishment

This paragraph is taken from Article 15(g) and paragraph 133c of MCM, 1969 (Rev.).

APPENDIX 25
HISTORICAL EXECUTIVE ORDERS

EXECUTIVE ORDER 12473 AS AMENDED BY EXECUTIVE ORDER 12484, MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

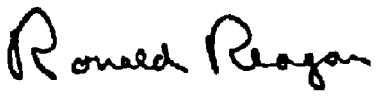
By virtue of the authority vested in me as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States (Uniform Code of Military Justice), I hereby prescribe the following Manual for Courts-Martial to be designated as "Manual for Courts-Martial, United States, 1984."

This Manual shall take effect on August 1, 1984, with respect to all court-martial processes taken on and after that date: *Provided*, That nothing contained in this Manual shall be construed to invalidate any restraint, investigation, referral of charges, designation or detail of a military judge or counsel, trial in which arraignment had been had, or other action begun prior to that date, and any such restraint, investigation, trial, or other action may be completed in accordance with applicable laws, Executive orders, and regulations in the same manner and with the same effect as if this Manual had not been prescribed; *Provided further*, That Rules for Courts-Martial 908, 1103(j), 1105-1107, 1110-1114, 1201, and 1203 shall not apply to any case in which the findings and sentence were adjudged by a court-martial before August 1, 1984, and the post-trial and appellate review of such cases shall be completed in accordance with applicable laws, Executive orders, and regulations in the same manner and with the same effect as if this Manual had not been prescribed; *Provided further*, That nothing contained in this Manual shall be construed to make punishable any act done or omitted prior to August 1, 1984, which was not punishable when done or omitted; *Provided further*, That nothing in part IV of this Manual shall be construed to invalidate the prosecution of any offense committed before the effective date of this Manual; *Provided further*, That the maximum punishment for an offense committed prior to August 1, 1984, shall not exceed the applicable limit in effect at the time of the commission of such offense; *Provided further*, That for offenses committed prior to August 1, 1984, for which a sentence is adjudged on or after August 1, 1984, if the maximum punishment authorized in this Manual is less than that previously authorized, the lesser maximum authorized punishment shall apply; *And provided further*, That Part V of this Manual shall not apply to nonjudicial punishment proceedings which were initiated before August 1, 1984, and nonjudicial punishment proceedings in such cases shall be completed in accordance with applicable laws, Executive orders, and regulations in the same manner and with the same effect as if this Manual had not been prescribed.

The Manual for Courts-Martial, 1969, United States (Revised edition), prescribed by Executive Order No. 11476, as amended by Executive Order Nos. 11835, 12018, 12198, 12233, 12306, 12315, 12340, 12383, and 12460 is hereby rescinded, effective August 1, 1984.

The Secretary of Defense shall cause this Manual to be reviewed annually and shall recommend to the President any appropriate amendments.

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



THE WHITE HOUSE
July 13, 1984

EXECUTIVE ORDER 12550
AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

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

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

a. R.C.M. 707(a) is amended to read as follows:

b. R.C.M. 805(b) is amended by

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

d. R.C.M. 909 is amended

e. R.C.M. 916(e)(3) is amended by

f. R.C.M. 920(e)(2) is amended by

g. R.C.M. 921(d) is amended by

h. R.C.M. 922(b) is amended

i. R.C.M. 1001 is amended

j. R.C.M. 1003(b)(10)(B) is amended by

k. R.C.M. 1004 is amended

l. R.C.M. 1010 is amended

m. R.C.M. 1106(b) is amended by

n. R.C.M. 1114(c) is amended by

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

a. Mil. R. Evid. 304 is amended as follows:

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

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

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

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

a. Paragraph 16 is amended

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

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

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

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

Section 6. These amendments shall take effect on 1 March 1986, with respect to all court-martial processes taken on and after that date: *Provided*, That nothing contained in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to that date, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed; *Provided further*, That the amendments made in Rule for Court-Martial 1004(c) shall apply in the trial of offenses committed on or after 1 March 1986; *Provided further*, That nothing contained in these amendments shall be construed to invalidate any capital sentencing proceeding conducted prior to 1 March 1986, and any such proceeding shall be completed and reviewed in the same manner and with the same effect as if these amendments had not been prescribed; *Provided further*, That amendments to Rule for Court-Martial 707(a) shall not apply to any condition on liberty imposed before 1 March 1986, and the effect of such a condition on liberty shall be considered under Rule for Court-Martial 707(a) as it existed before 1 March 1986; *Provided further*, That the amendments made in paragraph 16 of Part IV shall apply in trials of offenses committed on or after 1 March 1986; *Provided further*, That the amendments made in paragraph 30a of Part IV shall apply in the trials of offenses committed under Article 106a on or after 1 March 1986; *And provided further*, That the amendments made in paragraph 30a of Part IV authorizing capital punishment shall apply with respect to offenses under Article 106a committed on or after 1 March 1986.

Section 7. The Secretary of Defense, on behalf of the President, shall transmit a copy of this Order to the Congress of the United States in accord with Section 836 of Title 10 of the United States Code.

Ronald Reagan

THE WHITE HOUSE
February 19, 1986

EXECUTIVE ORDER 12586
AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

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

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

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

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

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

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

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

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

g. R.C.M. 707 is amended—

h. R.C.M. 903 is amended—

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

j. R.C.M. 918(a) is amended—

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

l. R.C.M. 921(c) is amended—

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

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

o. R.C.M. 1003(c) is amended—

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

q. R.C.M. 1105(c) is amended by—

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

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

t. R.C.M. 1109 is amended—

u. R.C.M. 1112 is amended—

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

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

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

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

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

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

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

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

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

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

a. Paragraph 4 is amended

b. Paragraph 10 is amended

c. Paragraph 32 is amended—

d. Paragraph 35 is amended—

e. Paragraph 42 is amended

f. Paragraph 46 is amended

g. Paragraph 89 is amended

Section 4. Part V of the Manual for Courts-Martial,

United States, 1984, is amended by paragraph 5 by—

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

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

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

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

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

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

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

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

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

Ronald Reagan

THE WHITE HOUSE
March 3, 1987

EXECUTIVE ORDER 12708
AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution of the United States and by chapter 47 of title 10 of the United States Code (Uniform Code of Military Justice), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order Nos. 12484, 12550 and 12586, it is hereby ordered as follows:

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

a. R.C.M. 302(b)(2) is amended to read as follows:

b. R.C.M. 905(e) is amended to read as follows:

c. R.C.M. 913(a) is amended by

d. R.C.M. 1003(b)(2) is amended by

e. R.C.M. 1103(b)(2)(B)(i) is amended to read as follows:

f. R.C.M. 1103(e) is amended to read as follows:

g. R.C.M. 1106(c) is amended to read as follows:

h. R.C.M. 1106(f) is amended—

i. R.C.M. 1107(b)(4) is amended to read as follows:

j. R.C.M. 1108(b) is amended—

k. R.C.M. 1112(b) is amended to read as follows:

l. R.C.M. 1114(c)(2) is amended to read as follows:

m. R.C.M. 1201(b)(3)(C) is amended to read as follows:

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

a. Mil. R. Evid. 304(b)(1) is amended to read as follows:

b. Mil. R. Evid. 506(c) is amended to read as follows:

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

a. Paragraph 10 is amended—

b. Paragraph 101 is deleted

c. Paragraph 105 is amended by—

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

a. Paragraph 5 is amended by—

b. Paragraph 6a is amended by—

Section 5. These amendments shall take effect on 1 April 1990, subject to the following:

a. The amendment made to paragraph 10 of Part IV, shall apply to any offense committed on or after 1 April 1990.

b. The amendments made to Rule for Courts-Martial 905 and to Military Rule of Evidence 304 shall apply only in cases in which arraignment has been completed on or after 1 April 1990.

c. The amendment made to Rule for Courts-Martial 1106 shall apply only in cases in which the sentence is adjudged on or after 1 April 1990.

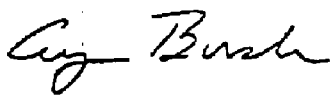
d. Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to 1 April 1990 which was not punishable when done or omitted.

e. The maximum punishment for an offense committed prior to 1 April 1990 shall not exceed the

applicable maximum in effect at the time of the commission of such offense.

f. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to 1 April 1990, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

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



THE WHITE HOUSE
March 23, 1990

EXECUTIVE ORDER NO. 12767
AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution of the United States of America, and by chapter 47 of title 10 of the United States Code (Uniform Code of Military Justice), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550, Executive Order No. 12586, Executive Order No. 12708, it is hereby ordered as follows:

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

a. R.C.M. 405(g)(1)(A) is amended to read as follows:

b. R.C.M. 405(g)(4)(B) is amended—

c. R.C.M. 701(a)(3)(B) is amended to read as follows:

d. R.C.M. 701(b) is amended—

e. R.C.M. 705(c)(2) is amended by deleting the first sentence and substituting therefor the following sentence:

f. R.C.M. 705(d) is amended—

g. R.C.M. 707 is amended to read as follows:

h. R.C.M. 802(c) is amended to read as follows:

i. R.C.M. 908(b)(4) is amended to read as follows:

j. R.C.M. 908(b) is amended by inserting the following new sub-paragraph at the end thereof:

k. R.C.M. 1004(c)(8) is amended to read as follows:

l. R.C.M. 1010 is amended to read as follows:

m. R.C.M. 1103(b)(2)(D) is amended by—

n. R.C.M. 1107(f)(1) is amended to read as follows:

o. R.C.M. 1110(f)(1) is amended to read as follows:

p. R.C.M. 1113(c)(1) is amended in the first paragraph thereof to read as follows:

Section 2. Part III of the Manual for Courts-Martial, United States, 1984, is amended by adding the following new rule at the end of Section VII thereof: [M.R.E. Polygraph examinations]

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

a. Paragraph 4e is amended to read as follows:

b. Paragraph 19 is amended—

c. Paragraph 35c(2) is amended to read as follows:

d. Paragraph 57d is amended to read as follows:

e. Paragraph 96f is amended to read as follows:

Section 4. These amendments shall take effect on 6 July 1991, subject to the following:

a. The amendments made to Rule for Courts-Martial 1004(c)(8) and paragraphs 4c, 19, and 35c(2) of Part IV shall apply to any offense committed on or after 6 July 1991.

b. Military Rule of Evidence 707 shall apply only in cases in which arraignment has been completed on or after 6 July 1991.

c. The amendments made to Rules for Courts-Martial 701 and 705 shall apply only in cases in which charges are preferred on or after 6 July 1991.

d. The amendments made to Rules for Courts-Martial 707 and 1010 shall apply only to cases in which arraignment occurs on or after 6 July 1991.

e. The amendment made to Rule for Courts-Martial 908(b)(9) shall apply only to cases in which pretrial confinement is imposed on or after 6 July 1991.

f. The amendment made to Rule for Courts-Martial 1113(c)(1) shall apply only in cases in which the sentence is adjudged on or after 6 July 1991.

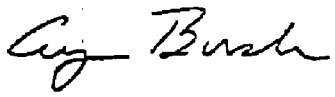
g. Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to 6 July 1991, which was not punishable when done or omitted.

h. The maximum punishment for an offense committed prior to 6 July 1991 shall not exceed the applicable maximum in effect at the time of the commission of such offense.

i. Nothing in these amendments shall be con-

strued to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to 6 July 1991, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

Section 5. The Secretary of Defense, on behalf of the President, shall transmit a copy of this Order to the Congress of the United States in accord with section 836 of Title 10 of the United States Code.



THE WHITE HOUSE
June 27, 1991

EXECUTIVE ORDER 12888
AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550, Executive Order No. 12586, Executive Order No. 12708, and Executive Order No. 12767, it is hereby ordered as follows:

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

a. R.C.M. 109 is amended as follows:

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

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

(c) *Investigation of judges.*

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

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

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

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

(5) *Initial inquiry.*

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

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

nated to conduct the initial inquiry should, if practicable, be a military trial judge or an individual with experience as a military trial judge. If the subject of the complaint is an appellate military judge, the individual designated to conduct the inquiry should, if practicable, have experience as an appellate military judge.

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

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

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

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

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

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

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

(7) *The Ethics Commission.*

(A) *Membership.* If appointed pursuant to subsection (c)(6)(B) of this rule, an ethics commission shall consist of at least three members. If the subject of the complaint is a military trial judge, the commission should include one or more military trial judges or individuals with experience as a military trial judge. If the subject of the complaint is an appellate military judge, the commission should include one or more individuals with experience as an appellate military judge. Members of the commission should, if practicable, be senior to the subject of the complaint.

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

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

b. R.C.M. 305(f) is amended to read as follows:

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

this rule to have military counsel of the prisoner's own selection."

c. R.C.M. 305(h)(2)(A) is amended to read as follows:

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

d. R.C.M. 305(i)(1) is amended to read as follows:

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

e. R.C.M. 405(i) is amended to read as follows:

"(i) *Military Rules of Evidence.* The Military Rules of Evidence—other than Mil. R. Evid. 301, 302, 303, 305, 412, and Section V—shall not apply in pretrial investigations under this rule."

f. R.C.M. 701(g)(3)(C) is amended to read as follows:

"(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and".

g. R.C.M. 704(e) is amended to read as follows:

"(e) *Decision to grant immunity.* Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the appropriate general court-martial convening authority. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion of the defense, grant appropriate relief directing that either an appropriate general court-martial convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated, upon findings that:

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

(2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own 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."

h. R.C.M. 910(a)(1) is amended to read as follows:

"(1) *In general.* An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty. A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial."

i. R.C.M. 918(a)(1) is amended to read as follows:

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

j. R.C.M. 920(b) is amended to read as follows:

"(b) *When given.* Instructions on findings shall be given before or after arguments by counsel, or at both times, and before the members close to deliberate on findings, but the military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time."

k. R.C.M. 1103(g)(1)(A) is amended to read as follows:

" *In general.* In general and special courts-martial which require a verbatim transcript under subsec-

tions (b) or (c) of this rule and are subject to review by a Court of Military Review under Article 66, the trial counsel shall cause to be prepared an original and four copies of the record of trial. In all other general and special courts-martial the trial counsel shall cause to be prepared an original and one copy of the record of trial."

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

a. Mil. R. Evid. 311(e)(2) is amended to read as follows:

"(2) *Derivative Evidence.* Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence ultimately would have been obtained by lawful means even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant. Notwithstanding other provisions of this Rule, an apprehension made in a dwelling in a manner that violates R.C.M. 302 (d)(2)&(e) does not preclude the admission into evidence of a statement of an individual apprehended provided (1) that the apprehension was based on probable cause, (2) that the statement was made subsequent to the apprehension at a location outside the dwelling, and (3) that the statement was otherwise in compliance with these rules."

b. Mil. R. Evid. 505(a) is amended to read as follows:

"(a) *General rule of privilege.* Classified information is privileged from disclosure if disclosure would be detrimental to the national security. As with other rules of privilege this rule applies to all stages of the proceedings."

c. Mil. R. Evid. 505(g)(1)(D) is amended by adding the following at the end:

"All persons requiring security clearance shall cooperate with investigatory personnel in any investigations which are necessary to obtain a security clearance."

d. Mil. R. Evid. 505(h)(3) is amended to read as follows:

"(3) *Content of notice.* The notice required by this subdivision shall include a brief description of the classified information. The description, to be sufficient, must be more than a mere general statement of the areas about which evidence may be introduced. The accused must state, with particularity, which items of classified information he reasonably expects will be revealed by his defense."

e. Mil. R. Evid. 505(i)(3) is amended to read as follows:

"(3) *Demonstration of national security nature of the information.* In order to obtain an in camera proceeding under this rule, the Government shall submit the classified information and an affidavit ex parte for examination by the military judge only. The affidavit shall demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation."

f. Mil. R. Evid. 505(i)(4)(B) is amended to read as follows:

" *Standard.* Classified information is not subject to disclosure under this subdivision unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence. In presentencing proceedings, relevant and material classified information pertaining to the appropriateness of, or the appropriate degree of, punishment shall be admitted only if no unclassified version of such information is available."

g. Mil. R. Evid. 505(j)(5) is amended to read as follows:

"(5) *Closed session.* The military judge may exclude the public during that portion of the presentation of evidence that discloses classified information."

h. Mil. R. Evid. 609(a) is amended to read as follows:

"(a) *General rule.* For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Mil. R. Evid. 403, if the crime was punishable by death, dishonorable discharge, or imprisonment in excess of one

year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial."

i. Mil. R. Evid. 1101(d) is amended to read as follows:

"(d) *Rules inapplicable.* These rules (other than with respect to privileges and Mil. R. Evid. 412) do not apply in investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence pursuant to Article 72; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the code or this Manual and not listed in subdivision (a)."

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

a. Paragraph 37c is amended by inserting the following new subparagraphs (10) and (11) at the end thereof:

"(10) *Use.* 'Use' means to inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance. Knowledge of the presence of the controlled substance is a required component of use. Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge."

"(11) *Deliberate ignorance.* An accused who consciously avoids knowledge of the presence of a controlled substance or the contraband nature of the substance is subject to the same criminal liability as one who has actual knowledge."

b. The last paragraph of paragraph 37e is amended to read as follows:

"When an offense under paragraph 37 is committed: while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under the control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; while receiving special pay under 37 U.S.C. Section 310; in time of war; or in a confinement facility used by or under the control of the armed forces, the maximum period of confinement authorized for such an offense shall be increased by 5 years."

c. Paragraph 43d is amended to read as follows:

"(d) *Lesser included offenses.*

(1) *Premeditated murder and murder during certain offenses.* Article 118(2) and (3)—murder

(2) *All murders under Article 118.*

(a) Article 119—involuntary manslaughter

(b) Article 128—assault; assault consummated by a battery; aggravated assault

(c) Article 134—negligent homicide

(3) *Murder as defined in Article 118(1), (2), and (4).*

(a) Article 80—attempts

(b) Article 119—voluntary manslaughter

(c) Article 134—assault with intent to commit murder

(d) Article 134—assault with intent to commit voluntary manslaughter".

d. Para 45d(1) is amended by adding the following at the end thereof:

"(e) Article 120(b)—carnal knowledge".

e. Para 45f(1) is amended to read as follows:

"(1) *Rape.*

In that_____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about _____ 19 ____, rape_____ (a person who had not attained the age of 16 years)."

f. The following new paragraph is inserted after paragraph 96:

96a. Article 134 (Wrongful interference with an adverse administrative proceeding)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) That the accused wrongfully did a certain act;

(2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be adverse administrative proceedings pending;

(3) That the act was done with the intent to influence, impede, or obstruct the conduct of such adverse administrative proceeding, or otherwise obstruct the due administration of justice;

(4) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* For purposes of this paragraph [adverse administrative proceeding] includes any administrative proceeding or action, initiated against a servicemember, that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification. Examples of wrongful interference include wrongfully influencing, intimidating, impeding, or injuring a witness, an investigator, or other person acting on an adverse administrative action; by means of bribery, intimidation, misrepresentation, or force or threat of force delaying or preventing communication of information relating to such administrative proceeding; and, the wrongful destruction or concealment of information relevant to such adverse administrative proceeding.

d. *Lesser included offenses.* None.

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.* In that_____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about_____ 19____, wrongfully (endeavor to) [impede (an adverse administrative proceeding) (an investigation) (_____)] [influence the actions of_____, (an officer responsible for making a recommendation concerning the adverse administrative proceeding) (an individual responsible for making a decision concerning an adverse administrative proceeding) (an individual responsible for processing an adverse administrative proceeding) (_____)] [(influence) (alter) the testimony of_____ a witness before (a board established to consider an adverse administrative proceeding or elimination) (an investigating officer) (_____)] in the case of_____, by [(promising) (offering) (giving) to the said _____, (the sum of $_____) (_____, of a value of about $_____)] [communicating to the said_____ a threat to_____] [_____], (if) (unless) the said_____, would [recommend dismissal of the action against said_____] [(wrongfully refuse to testify) (testify falsely concerning_____) (_____)] [(at such administrative proceeding) (before such investigating officer) (before such administrative board)] [_____]].

Section 4. These amendments shall take effect on January 21, 1994, subject to the following:

a. The amendments made to paragraphs 37c, 37e, 43d(2), 45d(1), and 96a of Part IV shall apply to any offense committed on or after January 21, 1994.

b. The amendments made to Section III shall apply only in cases in which arraignment has been completed on or after January 21, 1994.

c. The amendment made to Rules for Courts-Martial 405(i), 701(g)(3)(C), and 704(e) shall apply only in cases in which charges are preferred on or after January 21, 1994.

d. The amendments made to Rules for Courts-Martial 910, 918, and 920 shall apply only to cases in which arraignment occurs on or after January 21, 1994.

e. The amendments made to Rule for Courts-Martial 305 shall apply only to cases in which pretrial confinement is imposed on or after January 21, 1994.

f. The amendment to Rule for Courts-Martial

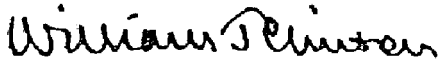
1103(g)(1)(A) shall apply only in cases in which the sentence is adjudged on or after January 21, 1994.

g. Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to January 21, 1994, which was not punishable when done or omitted.

h. The maximum punishment for an offense prior to January 21, 1994, shall not exceed the applicable maximum in effect at the time of the commission of such offense.

i. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to January 21, 1994, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

Section 5. The Secretary of Defense, on behalf of the President, shall transmit a copy of this order to the Congress of the United States in accord with section 836 of title 10 of the United States Code.



THE WHITE HOUSE
December 23, 1993.

EXECUTIVE ORDER 12936
AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550, Executive Order No. 12586, Executive Order No. 12708, Executive Order No. 12767, and Executive Order No. 12888, it is hereby ordered as follows:

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

a. R.C.M. 405(g)(1)(B) is amended to read as follows:

"(B) *Evidence.* Subject to Mil. R. Evid., Section V, evidence, including documents or physical evidence, which is under the control of the Government and which is relevant to the investigation and not cumulative, shall be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely. As soon as practicable after receipt of a request by the accused for information which may be protected under Mil. R. Evid. 505 or 506, the investigating officer shall notify the person who is authorized to issue a protective order under subsection (g)(6) of this rule, and the convening authority, if different. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence."

b. R.C.M. 405(g) is amended by inserting the following new subparagraph (6) at the end thereof:

"(6) *Protective order for release of privileged information.* If, prior to referral, the Government agrees to disclose to the accused information to which the protections afforded by Mil. R. Evid. 505 or Mil. R. Evid. 506 may apply, the convening authority, or other person designated by regulations of the Secretary of the service concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority issuing the protective order, as well as those terms specified in Mil. R. Evid. 505(g)(1)(B) through (F) or Mil. R. Evid. 506(g)(2) through (5)."

c. R.C.M. 905(f) is amended to read as follows:

"(f) *Reconsideration.* On request of any party or sua sponte, the military judge may, prior to authentication of the record of trial, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge."

d. R.C.M. 917(f) is amended to read as follows:

"(f) *Effect of ruling.* A ruling granting a motion for a finding of not guilty is final when announced and may not be reconsidered. Such a ruling is a finding of not guilty of the affected specification, or affected portion thereof, and, when appropriate, of the corresponding charge. A ruling denying a motion for a finding of not guilty may be reconsidered at any time prior to authentication of the record of trial."

e. R.C.M. 1001(b)(5) is amended to read as follows:

"(5) *Evidence of rehabilitative potential.* Rehabilitative potential refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society.

(A) *In general.* The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation.

(B) *Foundation for opinion.* The witness or deponent providing opinion evidence regarding the accused's rehabilitative potential must possess sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority. Relevant information and knowledge include, but are not limited to, information and knowledge about the accused's character, performance of duty, moral fiber, determination

to be rehabilitated, and nature and severity of the offense or offenses.

(C) *Bases for opinion.* An opinion regarding the accused's rehabilitative potential must be based upon relevant information and knowledge possessed by the witness or deponent, and must relate to the accused's personal circumstances. The opinion of the witness or deponent regarding the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential.

(D) *Scope of opinion.* An opinion offered under this rule is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential. A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit.

(E) *Cross-examination.* On cross-examination, inquiry is permitted into relevant and specific instances of conduct.

(F) *Redirect.*Notwithstanding any other provision in this rule, the scope of opinion testimony permitted on redirect may be expanded, depending upon the nature and scope of the cross-examination."

f. R.C.M. 1003(b)(2) is amended to read as follows:

"(2) *Forfeiture of pay and allowances.* Unless a total forfeiture is adjudged, a sentence to forfeiture shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last. Allowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances. The maximum authorized amount of a partial forfeiture shall be determined by using the basic pay, retired pay, or retainer pay, as applicable, or, in the case of reserve component personnel on inactive-duty, compensation for periods of inactive-duty training, authorized by the cumulative years of service of the accused, and, if no confinement is adjudged, any sea or foreign duty pay. If the sentence also includes reduction in grade, expressly or by operation of law, the maximum forfeiture shall be based on the grade to which the accused is reduced."

g. R.C.M. 1004(c)(4) is amended to read as follows:

"(4) That the offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 104, 106a, or 120."

h. R.C.M. 1004(c)(7)(B) is amended to read as follows:

"(B) The murder was committed: while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; or while the accused was engaged in the commission or attempted commission of any offense involving the wrongful distribution, manufacture, or introduction or possession, with intent to distribute, of a controlled substance; or, while the accused was engaged in flight or attempted flight after the commission or attempted commission of any such offense."

i. R.C.M. 1004(c)(7)(I) is amended to read as follows:

"(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim." For purposes of this section, "substantial physical harm" means fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs or other serious bodily injuries.

The term "substantial physical harm" does not mean minor injuries, such as a black eye or a bloody nose. The term "substantial physical harm or physical pain and suffering" is accorded its common meaning and includes torture.

j. R.C.M. 1102(b)(2) is amended to read as follows:

"(2) *Article 39(a) sessions.* An Article 39(a) session under this rule may be called for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence. The military judge may also call an Article 39(a) session, upon motion of either party or sua sponte, to reconsider any trial

ruling that substantially affects the legal sufficiency of any findings of guilty or the sentence."

k. R.C.M. 1105(c)(1) is amended to read as follows:

"(1) *General and special courts-martial.* After a general or special court-martial, the accused may submit matters under this rule within the later of 10 days after a copy of the authenticated record of trial, or, if applicable, the recommendation of the staff judge advocate or legal officer, or an addendum to the recommendation containing new matter is served on the accused. If, within the 10-day period, the accused shows that additional time is required for the accused to submit such matters, the convening authority or that authority's staff judge advocate may, for good cause, extend the 10-day period for not more than 20 additional days; however, only the convening authority may deny a request for such an extension."

l. R.C.M. 1106(f)(7) is amended to read as follows:

"(7) *New matter in addendum to recommendation.* The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to comment. When new matter is introduced after the accused and counsel for the accused have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given ten days from service of the addendum in which to submit comments. Substitute service of the accused's copy of the addendum upon counsel for the accused is permitted in accordance with the procedures outlined in subparagraph (f)(1) of this rule."

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

a. Mil. R. Evid. 305(d)(1)(B) is amended to read as follows:

"(B) The interrogation is conducted by a person subject to the code acting in a law enforcement capacity or the agent of such a person, the interrogation is conducted subsequent to the preferral of charges, and the interrogation concerns the offenses or matters that were the subject of the preferral of charges."

b. Mil. R. Evid. 305(e) is amended to read as follows:

"(e) *Presence of counsel.*

(1) *Custodial interrogation.* Absent a valid waiver of counsel under subdivision (g)(2)(B), when an accused or person suspected of an offense is subjected to custodial interrogation under circumstances described under subdivision (d)(1)(A) of this rule, and the accused or suspect requests counsel, counsel must be present before any subsequent custodial interrogation may proceed.

(2) *Post-preferral interrogation.* Absent a valid waiver of counsel under subdivision (g)(2)(C), when an accused or person suspected of an offense is subjected to interrogation under circumstances described in subdivision (d)(1)(B) of this rule, and the accused or suspect either requests counsel or has an appointed or retained counsel, counsel must be present before any subsequent interrogation concerning that offense may proceed."

c. Mil. R. Evid. 305(f) is amended to read as follows:

"(f) *Exercise of rights.*

(1) *The privilege against self-incrimination.* If a person chooses to exercise the privilege against self-incrimination under this rule, questioning must cease immediately.

(2) *The right to counsel.* If a person subjected to interrogation under the circumstances described in subdivision (d)(1) of this rule chooses to exercise the right to counsel, questioning must cease until counsel is present."

d. Mil. R. Evid. 305(g)(2) is amended to read as follows:

"(2) *Counsel.*

(A) If the right to counsel in subdivision (d) is applicable and the accused or suspect does not decline affirmatively the right to counsel, the prosecution must demonstrate by a preponderance of the evidence that the individual waived the right to counsel.

(B) If an accused or suspect interrogated under circumstances described in subdivision (d)(1)(A) requests counsel, any subsequent waiver of the right to counsel obtained during a custodial interrogation

concerning the same or different offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that—

(i) the accused or suspect initiated the communication leading to the waiver; or

(ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver.

(C) If an accused or suspect interrogated under circumstances described in subdivision (d)(1)(B) requests counsel, any subsequent waiver of the right to counsel obtained during an interrogation concerning the same offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that the accused or suspect initiated the communication leading to the waiver."

e. Mil. R. Evid. 314(g)(3) is amended to read as follows:

"(3) *Examination for other persons.*

(A) *Protective sweep.* When an apprehension takes place at a location in which other persons might be present who might endanger those conducting the apprehension and others in the area of the apprehension, a reasonable examination may be made of the general area in which such other persons might be located. A reasonable examination under this rule is permitted if the apprehending officials have a reasonable suspicion based on specific and articulable facts that the area to be examined harbors an individual posing a danger to those in the area of the apprehension.

(B) *Search of attack area.* Apprehending officials may, incident to apprehension, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of apprehension from which an attack could be immediately launched."

f. Mil. R. Evid. 404(b) is amended to read as follows:

"(B) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided, that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

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

a. Paragraph 44e(1) is amended to read as follows:

"(1) *Voluntary manslaughter.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years."

b. Paragraph 44e(2) is amended to read as follows:

"(2) *Involuntary manslaughter.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years."

c. Paragraph 45e is amended to read as follows:

"(e) *Maximum punishment.*

(1) *Rape.* Death or such other punishment as a court-martial may direct.

(2) *Carnal knowledge with a child who, at the time of the offense, has attained the age of 12 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) *Carnal knowledge with a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life."

d. Paragraph 51e is amended to read as follows:

"(e) *Maximum punishment.*

(1) *By force and without consent.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

(2) *With a child who, at the time of the offense, has attained the age of 12 years, but is under the age of 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) *With a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

(4) *Other cases.* Dishonorable discharge, for-

feiture of all pay and allowances, and confinement for 5 years."

e. Paragraph 85e is amended to read as follows:

"(e) *Maximum punishment*.Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years."

Section 4. These amendments shall take effect on December 9, 1994, subject to the following:

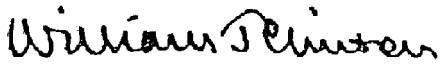
a. The amendments made to Rule for Courts-Martial 1004(c)(4) shall only to offenses committed prior to December 9, 1994.

b. Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to December 9, 1994, which was not punishable when done or omitted.

c. The maximum punishment for an offense committed prior to December 9, 1994, shall no exceed the applicable maximum in effect at the time of the commission of such offense.

d. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to December 9, 1994, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

Section 5. The Secretary of Defense, on behalf of the President, shall transmit a copy of this order to the Congress of the United States in accord with section 836 of title 10 of the United States Code.



THE WHITE HOUSE
November 10,1994.

EXECUTIVE ORDER 12960
AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946), in order to prescribe amendments to the Manual for Courts-Martial, United States, 1984, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550, Executive Order No. 12586, Executive Order No. 12708, Executive Order No. 12767, Executive Order No. 12888, and Executive Order No. 12936, it is hereby ordered as follows:

Section 1. Part I of the Manual for Courts-Martial, United States, 1984, is amended as follows:
Preamble, paragraph 4, is amended to read as follows:

4. Structure and application of the Manual for Courts-Martial.

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

The Manual shall be identified as "Manual for Courts-Marital, United States (19xx edition)." Any amendments to the Manual made by Executive Order shall be identified as "19xx Amendments to the Manual for Courts-Martial, United States."

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

a. R.C.M. 810(d) is amended as follows:

"(d) *Sentence limitations.*

(1) *In general.* Sentences at rehearings, new trials, or other trials shall be adjudged within the limitations set forth in R.C.M. 1003. Except as otherwise provided in subsection (d)(2) of this rule, offenses on which a rehearing, new trial, or other trial has been ordered shall not be the basis for an approved sentence in excess of or more severe than the sentence ultimately approved by the convening or higher authority following the previous trial or hearing, unless the sentence prescribed for the offense is mandatory. When a rehearing or sentencing is combined with trial on new charges, the maximum punishment that may be approved by the convening authority shall be the maximum punishment under R.C.M. 1003 for the offenses being reheard as limited above, plus the total maximum punishment under R.C.M. 1003 for any new charges of which the accused has been found guilty. In the case of an "other trial" no sentence limitations apply if the original trial was invalid because a summary or special court-martial improperly tried an offense involving a mandatory punishment or one otherwise considered capital.

(2) *Pretrial agreement.* If, after the earlier court-martial, the sentence was approved in accordance with a pretrial agreement and at the rehearing the accused fails to comply with the pretrial agreement, by failing to enter a plea of guilty or otherwise, the approved sentence resulting at a rehearing of the affected charges and specifications may include any otherwise lawful punishment not in excess of or more serious than lawfully adjudged at the earlier court-martial".

b. R.C.M. 924(a) is amended as follows:

"(a) *Time for reconsideration.* Members may reconsider any finding reached by them before such finding is announced in open session".

c. R.C.M. 924(c) is amended as follows:

"(c) *Military judge sitting alone.* In a trial by military judge alone, the military judge may reconsider any finding of guilty at any time before announcement of sentence and may reconsider the issue of the finding of guilty of the elements in a finding of not guilty only by reason of lack of mental responsibility at any time before announcement of sentence or authentication of the record of trial in the case of a complete acquittal".

d. R.C.M. 1003(b)(9) is deleted.

e. R.C.M. 1003(b)(10), (11), and (12) are redesignated as subsections (9), (10), and (11) respectively.

f. R.C.M. 1009 is amended as follows:

"(a) *Reconsideration.* Subject to this rule, a sentence may be reconsidered at any time before such sentence is announced in open session of the court."

"(b) *Exceptions.*

(1) If the sentence announced in open session was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty, the court that announced the sentence may reconsider such sentence after it has been announced, and may increase the sentence upon reconsideration in accordance with subsection (e) of this rule.

(2) If the sentence announced in open session exceeds the maximum permissible punishment for the offense or the jurisdictional limitation of the court-martial, the sentence may be reconsidered after announcement in accordance with subsection (e) of this rule."

(c) *Clarification of sentence.*A sentence may be clarified at any time prior to action of the convening authority on the case.

(1) *Sentence adjudged by the military judge.* When a sentence adjudged by the military judge is ambiguous, the military judge shall call a session for clarification as soon as practical after the ambiguity is discovered.

(2) *Sentence adjudged by members.* When a sentence adjudged by members is ambiguous, the military judge shall bring the matter to the attention of the members if the matter is discovered before the court-martial is adjourned. If the matter is discovered after adjournment, the military judge may call a session for clarification by the members who adjudged the sentence as soon as practical after the ambiguity is discovered.

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

(e) *Reconsideration procedure.* Any member of the court-martial may propose that a sentence reached by the members be reconsidered.

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

(2) *Voting.*The members shall vote by secret written ballot in closed session whether to reconsider a sentence already reached by them.

(3) *Number of votes required.*

(A) *With a view to increasing.* Subject to subsection (b) of this rule, members may reconsider a sentence with a view of increasing it only if at least a majority of the members vote for reconsideration.

(B) *With a view to decreasing.* Members may reconsider a sentence with a view to decreasing it only if:

(i) In the case of a sentence which includes death, at least one member votes to reconsider;

(ii) In the case of a sentence which includes confinement for life or more than 10 years, more than one-fourth of the members vote to reconsider; or

(iii) In the case of any other sentence, more than one-third of the members vote to reconsider.

(4) *Successful vote.* If a vote to reconsider a sentence succeeds, the procedures in R.C.M. 1006 shall apply".

g. R.C.M. 1103(b)(3)(L) is deleted.

h. R.C.M. 1103(b)(3)(M) and (N) are redesignated as subsections (L) and (M), respectively.

i. R.C.M. 1103(c)(2) is amended to read as follows:

"(2) *Not involving a bad-conduct discharge.*If the special court-martial resulted in findings of guilty but a bad-conduct discharge was not adjudged, the requirements of subsections (b)(1), (b)(2)(D), and (b)(3)(A) - (F) and (I) - (M) of this rule shall apply".

j. R.C.M. 1104(b)(2) is amended to read as follows:

"(2) *Summary courts-martial.*The summary court-martial record of trial shall be disposed of as provided in R.C.M. 1305(d). Subsection (b)(1)(D) of this rule shall apply if classified information is included in the record of trial of a summary court-martial".

k. R.C.M. 1106(d)(3) is amended, by adding a new subsection (B) as follows:

"(B) A recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence";

l. R.C.M. 1106(d)(3)(B)-(E) are redesignated as subsections (C)-(F), respectively.

m. R.C.M. 1107(d) is amended by adding a new subparagraph (3) as follows:

"(3) *Postponing service of a sentence to confinement.*

(A) In a case in which a court-martial sentences an accused referred to in subsection (B), below, to confinement, the convening authority may postpone service of a sentence to confinement by a court-martial, without the consent of the accused, until after the accused has been permanently released to the armed forces by a state or foreign country.

(B) Subsection (A) applies to an accused who, while in custody of a state or foreign country, is temporarily returned by that state or foreign country to the armed forces for trial by court-martial; and after the court-martial, is returned to that state or foreign country under the authority of a mutual agreement or treaty, as the case may be.

(C) As used in subsection (d)(3), the term "state" means a state of the United States, the District of Columbia, a territory, and a possession of the United States."

n. R.C.M. 1107(d)(3) is redesignated R.C.M. 1107(d)(4).

o. R.C.M. 1107(e)(1)(C)(iii) is amended as follows:

"(iii) *Rehearing on sentence only.* A rehearing on sentence only shall not be referred to a different kind of court-martial from that which made the original findings. If the convening authority determines a rehearing on sentence is impracticable, the convening authority may approve a sentence of no punishment without conducting a rehearing".

p. R.C.M. 1107(f)(2) is amended to read as follows:

"(2) *Modification of initial action.* The convening authority may recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified. The convening authority also may recall and modify any action at any time prior to forwarding the record for review, as long as the modification does not result in action less favorable to the accused than the earlier action. In addition, in any special court-martial not involving a bad conduct discharge or any summary court-martial, the convening authority may recall and correct an illegal, erroneous, incomplete, or ambiguous action at any time before completion of review under R.C.M. 1112, as long as the correction does not result in action less favorable to the accused than the earlier action. When so directed by a higher reviewing authority or the Judge Advocate General, the convening authority shall modify any incomplete, ambiguous, void, or inaccurate action noted in review of the record of trial under Article 64, 66, 67, or examination of the record of trial under Article 69. The convening authority shall personally sign any supplementary or corrective action".

q. R.C.M. 1108(b) is amended to read as follows:

"(b) *Who may suspend and remit.* The convening authority may, after approving the sentence, suspend the execution of all or any part of the sentence of a court-martial except for a sentence of death. The general court-martial convening authority over the accused at the time of the court-martial may, when taking the action under R.C.M. 1112(f), suspend or remit any part of the sentence. The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or commanding officer may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President. The commander of the accused who has the authority to convene a court-martial of the kind which adjudged the sentence may suspend or remit any part or amount of the unexecuted part of any sentence by summary court-martial or of any sentence by special court-martial which does not include a bad-conduct discharge regardless of whether the person acting has previously approved the sentence." The "unexecuted" part of any sentence includes that part which has been approved and ordered executed but which has not actually been "carried out".

r. R.C.M. 1113(d)(2)(A) is amended by adding a new subparagraph (iii) as follows:

"(iii) Periods during which the accused is in custody of civilian or foreign authorities after the convening authority, pursuant to Article 57(e), has postponed the service of a sentence to confinement";

s. R.C.M. 1113(d)(2)(A)(iii) - (iv) are redesignated 1113(d)(A)(iv) - (v), respectively.

t. R.C.M. 1113(d)(5) is deleted.

u. R.C.M. 1113(d)(6) is redesignated as subsection (5).

v. R.C.M. 1201(b)(3)(A) is amended to read as follows:

"(A) *In general*. Notwithstanding R.C.M. 1209, the Judge Advocate General may, *sua sponte* or, except when the accused has waived or withdrawn the right to appellate review under R.C.M. 1110, upon application of the accused or a person with authority to act for the accused, vacate or modify, in whole or in part, the findings, sentence, or both of a court-martial that has been finally reviewed, but has not been reviewed either by a Court of Military Review or by the Judge Advocate General under subsection (b)(1) of this rule, on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence".

w. R.C.M. 1305(d) is deleted.

x. R.C.M. 1305(e) is redesignated as subsection (d).

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

a. M.R.E. 311(g)(2) is amended to read as follows:

"(2) *False statements.* If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, the defense, upon request, shall be entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion shall be granted unless the search is otherwise lawful under these rules".

b. M.R.E. 506(e) and (f) are amended to read as follows:

"(e) *Pretrial session.* At any time after referral of charges and prior to arraignment, any party may move for a session under Article 39(a) to consider matters relating to government information that may arise in connection with the trial. Following such motion, or sua sponte, the military judge promptly shall hold a pretrial session under Article 39(a) to establish the timing of requests for discovery, the provision of notice under subsection (h), and the initiation of the procedure under subsection (i). In addition, the military judge may consider any other matters that relate to government information or that may promote a fair and expeditious trial.

(f) *Action after motion for disclosure of information.* After referral of charges, if the defense moves for disclosure of government information for which a claim of privilege has been made under this rule, the matter shall be reported to the convening authority. The convening authority may:

(1) institute action to obtain the information for use by the military judge in making a determination under subdivision (i);

(2) dismiss the charges;

(3) dismiss the charges or specifications or both to which the information relates; or

(4) take other action as may be required in the interests of justice.

If, after a reasonable period of time, the information is not provided to the military judge, the military judge shall dismiss the charges or specifications or both to which the information relates".

M.R.E. 506(h) is amended to read as follows:

"(h) *Prohibition against disclosure.* The accused

may not disclose any information known or believed to be subject to a claim of privilege under this rule unless the military judge authorizes such disclosure".

d. M.R.E. 506(i) is amended to read as follows:

(i) *In camera proceedings.*

(1) *Definition.* For purposes of this subsection, an "in camera proceeding" is a session under Article 39(a) from which the public is excluded.

(2) *Motion for in camera proceeding.* Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an in camera proceeding concerning the use at any proceeding of any government information that may be subject to a claim of privilege. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege may grant the Government leave to move for an in camera proceeding concerning the use of additional government information.

(3) *Demonstration of public interest nature of the information.*In order to obtain an in camera proceeding under this rule, the Government shall demonstrate, through the submission of affidavits and information for examination only by the military judge, that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest.

(4) *In camera proceeding.*

(A) *Finding of identifiable damage.* Upon finding that the disclosure of some or all of the information submitted by the Government under subsection (i)(3) reasonably could be expected to cause identifiable damage to the public interest, the military judge shall conduct an in camera proceeding."

(B) *Disclosure of the information to the defense.* Subject to subsection (F), below, the Government shall disclose government information for which a claim of privilege has been made to the accused, for the limited purpose of litigating, in camera, the admissibility of the information at trial. The military judge shall enter an appropriate protective order to the accused and all other appropriate trial participants concerning the disclosure of the information according to subsection (g), above. The accused shall not disclose any information provided under this subsection unless, and until, such information has been admitted into evidence by the military judge. In the in camera proceeding, both parties shall have the opportunity to brief and argue the admissibility of the government information at trial.

(C) *Standard.*Government information is subject to disclosure at the court-martial proceeding under this subsection if the party making the request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence or to punishment of the accused, and is otherwise admissible in the court-martial proceeding.

(D) *Ruling.* No information may be disclosed at the court-martial proceeding or otherwise unless the military judge makes a written determination that the information is subject to disclosure under the standard set forth in subsection (C), above. The military judge will specify in writing any information that he or she determines is subject to disclosure. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

(E) *Alternatives to full disclosure.* If the military judge makes a determination under this subsection that the information is subject to disclosure, or if the Government elects not to contest the relevance, necessity, and admissibility of the government information, the Government may proffer a statement admitting for purposes of the court-martial any relevant facts such information would tend to prove or may submit a portion or summary to be used in lieu of the information. The military judge shall order that such statement, portion, summary, or some other form of information which the military judge finds to be consistent with the interests of justice, be used by the accused in place of the government information, unless the military judge finds that use of the government information itself is necessary to afford the accused a fair trial.

(F) *Sanctions.* Government information may not be disclosed over the Government's objection. If the Government continues to object to disclosure of the information following rulings by the military judge, the military judge shall issue any order that the interests of justice require. Such an order may include:

(i) striking or precluding all or part of the testimony of a witness;

(ii) declaring a mistrial;

(iii) finding against the Government on

any issue as to which the evidence is relevant and necessary to the defense;

(iv) dismissing the charges, with or without prejudice; or

(v) dismissing the charges or specifications or both to which the information relates.

e. A new M.R.E. 506(j) is added as follows:

"(j) *Appeals of orders and rulings.* In a court-martial in which a punitive discharge may be adjudged, the Government may appeal an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification, directs the disclosure of government information, or imposes sanctions for nondisclosure of government information. The Government also may appeal an order or ruling in which the military judge refuses to issue a protective order sought by the United States to prevent the disclosure of government information, or to enforce such an order previously issued by appropriate authority. The Government may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification".

f. M.R.E. 506(j) and (k) are redesignated as (k) and (l), respectively.

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

a. Paragraph 4.c. is amended by adding a new subparagraph (4) as follows:

"(4) *Voluntary abandonment.* It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended crime, solely because of the person's own sense that it was wrong, prior to the completion of the crime. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, such as, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance. A person who is entitled to the defense of voluntary abandonment may nonetheless be guilty of a lesser included, completed offense. For example, a person who voluntarily abandoned an attempted armed robbery may nonetheless be guilty of assault with a dangerous weapon".

b. Paragraph 4.c.(4), (5), and (6) are redesignated as subparagraphs (5), (6) and (7), respectively.

c. Paragraph 30a.c(1), is amended to read as follows:

"(1) *Intent.* "Intent or reason to believe" that the information "is to be used to the injury of the United States or to the advantage of a foreign nation" means that the accused acted in bad faith *and* without lawful authority with respect to information that is not lawfully accessible to the public."

d. Paragraph 35 is amended to read as follows:

"(35) *Article 111—Drunken or reckless operation of a vehicle, aircraft, or vessel*

(a) *Text.*

Any person subject to this chapter who-

(1) operates or physically controls any vehicle, aircraft, or vessel in a reckless or wanton manner or while impaired by a substance described in section 912a(b) of this title (Article 112a(b)), or

(2) operates or is in actual physical control of any vehicle, aircraft, or vessel while drunk or when the alcohol concentration in the person's blood or breath is 0.10 grams of alcohol per 100 milliliters of blood or 0.10 grams of alcohol per 210 liters of breath, as shown by chemical analysis, shall be punished as a court-martial may direct."

(b) *Elements.*

(1) That the accused was operating or in physical control of a vehicle, aircraft, or vessel; and

(2) That while operating or in physical control of a vehicle, aircraft, or vessel, the accused:

(a) did so in a wanton or reckless manner,

(b) was drunk or impaired, or

(c) the alcohol concentration in the accused's blood or breath was 0.10 grams of alcohol per 100 milliliters of blood or 0.10 grams of alcohol per 210 liters of breath, or greater, as shown by chemical analysis.

[Note: If injury resulted add the following element]

(3) That the accused thereby caused the vehicle, aircraft, or vessel to injure a person.

(c) *Explanation.*

(1) *Vehicle.* See 1 U.S.C. § 4.

(2) *Vessel.* See 1 U.S.C. § 3.

(3) *Aircraft.* Any contrivance used or designed for transportation in the air.

(4) *Operates.* Operating a vehicle, aircraft, or vessel includes not only driving or guiding a vehicle, aircraft, or vessel while it is in motion, either in person or through the agency of another, but also setting of its motive power in action or the manipulation of its controls so as to cause the particular vehicle, aircraft, or vessel to move.

(5) *Physical control and actual physical control.* These terms as used in the statute are synonymous. They describe the present capability and power to dominate, direct, or regulate the vehicle, vessel, or aircraft, either in person or through the agency of another, regardless of whether such vehicle, aircraft, or vessel is operated. For example, the intoxicated person seated behind the steering wheel of a vehicle with the keys of the vehicle in or near the ignition but with the engine not turned on could be deemed in actual physical control of that vehicle. However, the person asleep in the back seat with the keys in his or her pocket would not be deemed in actual physical control. Physical control necessarily encompasses operation.

(6) *Drunk or impaired.* "Drunk" and "impaired" mean any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties. The term "drunk" is used in relation to intoxication by alcohol. The term "impaired" is used in relation to intoxication by a substance described in Article 112(a), Uniform Code of Military Justice.

(7) *Reckless.*The operation or physical control of a vehicle, vessel, or aircraft is "reckless" when it exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, but all these factors may be admissible and relevant as bearing upon the ultimate question: whether, under all the circumstances, the accused's manner of operation or physical control of the vehicle, vessel, or aircraft was of that heedless nature which made it actually or imminently dangerous to the occupants, or to the rights or safety of others. It is operating or physically controlling a vehicle, vessel, or aircraft with such a high degree of negligence that if death were caused, the accused would have committed involuntary manslaughter, at least. The nature of the conditions in which the vehicle, vessel, or aircraft is operated or controlled, the time of day or night, the proximity and number of other vehicles, vessels, or aircraft, and the condition of the vehicle, vessel, or aircraft, are often matters of importance in the proof of an offense charged under this article and, where they are of importance, may properly be alleged.

(8) *Wanton.* "Wanton" includes "reckless", but in describing the operation or physical control of a vehicle, vessel, or aircraft, "wanton" may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(9) *Causation.*The accused's drunken or reckless driving must be a proximate cause of injury for the accused to be guilty of drunken or reckless driving resulting in personal injury. To be proximate, the accused's actions need not be the sole cause of the injury, nor must they be the immediate cause of the injury; that is, the latest in time and space preceding the injury. A contributing cause is deemed proximate only if it plays a material role in the victim's injury.

(10) *Separate offenses.* While the same course of conduct may constitute violations of both subsections (1) and (2) of the Article, (*e.g.*, both drunken and reckless operation or physical control), this article proscribes the conduct described in both subsections as separate offenses, which may be charged separately. However, as recklessness is a relative matter, evidence of all the surrounding circumstances that made the operation dangerous, whether alleged or not, may be admissible. Thus, on a charge of reckless driving, for example, evidence of drunkenness might be admissible as establishing one aspect of the recklessness, and evidence that the vehicle exceeded a safe speed, at a relevant prior point and time, might be admissible as corroborating other evidence of the specific recklessness charged. Similarly, on a charge of drunken driving, relevant evidence of recklessness might have probative value as corroborating other proof of drunkenness.

(d) *Lesser included offense.*

(1) Reckless or wanton or impaired operation or physical control of a vessel. Article 110—improper hazarding of a vessel.

(2) Drunken operation of a vehicle, vessel, or aircraft while drunk or with a blood or breath

alcohol concentration in violation of the described per se standard.

(a) Article 110—improper hazarding of a vessel

(a) Article 112—drunk on duty

(a) Article 134—drunk on station

(e) *Maximum punishment.*

(1) Resulting in personal injury. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(2) No personal injury involved. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(f) *Sample specification.*

In that_____ (personal jurisdiction data), did (at/onboard—location) (subject-matter jurisdiction data, if required), on or about_____ 19____, (in the motor pool area) (near the Officer's Club) (at the intersection of_____ and_____) (while in the Gulf of Mexico) (while in flight over North America) physically control [a vehicle, to wit: (a truck) (a passenger car) (_____)] [an aircraft, to wit: (an AH-64 helicopter) (an F-14A fighter) (a KC-135 tanker)(_____)] [a vessel, to wit: (the aircraft carrier USS_____) (the Coast Guard Cutter) (_____)], [while drunk] [while impaired by_____] [while the alcohol concentration in his (blood was 0.10 grams of alcohol per 100 milliliters of blood or greater) (breath was 0.10 grams of alcohol per 210 liters of breath or greater) as shown by chemical analysis] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (by ordering that the aircraft be flown below the authorized altitude)] [and did thereby cause said (vehicle) (aircraft) (vessel) to (strike and) (injure_____)].

e. Paragraph 43.a.(3) is amended to read as follows:

"(3) is engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life; or";

f. Paragraph 43.b.(3)(c) is amended to read as follows:

"(c) That this act was inherently dangerous to another and showed a wanton disregard for human life";

g. Paragraph 43.c.(4)(a) is amended to read as follows:

"(a) *Wanton disregard for human life.* Intentionally engaging in an act inherently dangerous to another -- although without an intent to cause the death of or great bodily harm to any particular person, or even with a wish that death will not be caused -- may also constitute murder if the act shows wanton disregard of human life. Such disregard is characterized by heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm. Examples include throwing a live grenade toward another or others in jest or flying an aircraft very low over one or more persons to cause alarm".

h. Paragraph 45.a.(a) is amended to read as follows:

"(a) Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct".

i. Paragraph 45.b.(1) is amended to read as follows:

"(a) That the accused committed an act of sexual intercourse; and

(b) That the act of sexual intercourse was done by force and without consent".

j. Paragraph 45.c.(1)(a) and (b) are amended as follows:

"(a) *Nature of offense.*Rape is sexual intercourse by a person, executed by force and without consent of the victim. It may be committed on a victim of any age. Any penetration, however slight, is sufficient to complete the offense."

"(b) *Force and lack of consent.*Force and lack of consent are necessary to the offense. Thus, if the victim consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or

where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a victim gave consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the victim is of unsound mind or unconscious to an extent rendering him or her incapable of giving consent, the act is rape. Likewise, the acquiescence of a child of such tender years that he or she is incapable of understanding the nature of the act is not consent".

k. Paragraph 89.c. is amended to read as follows:

"(c) *Explanation.* "Indecent" language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards. See paragraph 87 if the communication was made in the physical presence of a child".

l. Paragraph 103. The following new paragraph is added after paragraph 103:

"(a) *Text.* See paragraph 60.

(b) *Elements.*

(1) That the accused intentionally inflicted injury upon himself or herself;

(2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[Note: If the offense was committed in time of war or in a hostile fire pay zone, add the following element]

(3) That the offense was committed (in time of war) (in a hostile fire pay zone).

(c) *Explanation.*

(1) *Nature of offense*. This offense differs from malingering (see paragraph 40) in that for this offense, the accused need not have harbored a design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. This offense is characterized by intentional self-injury under such circumstances as prejudice good order and discipline or discredit the armed forces. It is not required that the accused be unable to perform duties, or that the accused actually be absent from his or her place of duty as a result of the injury. For example, the accused may inflict the injury while on leave or pass. The circumstances and extent of injury, however, are relevant to a determination that the accused's conduct was prejudicial to good order and discipline, or service-discrediting.

(2) *How injury inflicted.* The injury may be inflicted by nonviolent as well as by violent means and may be accomplished by any act or omission that produces, prolongs, or aggravates a sickness or disability. Thus, voluntary starvation that results in a debility is a self-inflicted injury. Similarly, the injury may be inflicted by another at the accused's request.

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

(e) *Maximum punishment.*

(1) *Intentional self-inflicted injury.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Intentional self-inflicted injury in time of war or in a hostile fire pay zone.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(f) *Sample specification.*

In that_____(personal jurisdiction data), did, (at/on board--location) (in a hostile fire pay zone) on or about_____ 19_____, (a time of war,) intentionally injure himself/herself by_____(nature and circumstances of injury)".

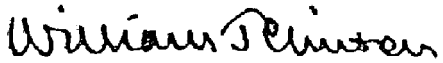
Section 5. These amendments shall take effect on June 10, 1995, subject to the following:

a. Nothing in these amendments shall be construed to make punishable any act done or omitted prior to June 10, 1995.

b. The maximum punishment for an offense committed prior to June 10, 1995, shall not exceed the applicable maximum in effect at the time of the commission of such offense.

c. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or

other action begun prior to June 10, 1995, and any such restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.



THE WHITE HOUSE
May 12, 1995

EXECUTIVE ORDER 13086
1998 AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801–946), in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order No. 12473, as amended by Executive Order No. 12484, Executive Order No. 12550, Executive Order No. 12586, Executive Order No. 12708, Executive Order No. 12767, Executive Order No. 12888, Executive Order No. 12936, and Executive Order No. 12960, it is hereby ordered as follows:

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

a. R.C.M. 305(g) through 305(k) are amended as follows:

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

(h) *Notification and action by commander.*

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

(2) *Action by commander.*

(A) *Decision.* Not later than 72 hours after the commander's ordering of a prisoner into pretrial confinement or, after receipt of a report that a member of the commander's unit or organization has been confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue. A commander's compliance with this subsection may also satisfy the 48-hour probable cause determination of subsection R.C.M. 305(i)(1) below, provided the commander is a neutral and detached officer and acts within 48 hours of the imposition of confinement under military control. Nothing in subsections R.C.M. 305(d), R.C.M. 305(i)(1), or this subsection prevents a neutral and detached commander from completing the 48-hour probable cause determination and the 72-hour commander's decision immediately after an accused is ordered into pretrial confinement.

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

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

(ii) The prisoner committed it; and

(iii) Confinement is necessary because it is foreseeable that:

(a) The prisoner will not appear at trial, pretrial hearing, or investigation, or

(b) The prisoner will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

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

(C) *72-hour memorandum.* If continued pretrial confinement is approved, the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement in subsection (h)(2)(B) of this rule have been met. This memorandum may include hearsay and may incorporate by reference other documents,

such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the 7-day reviewing officer under subsection (i)(2) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared; however, additional information may be added to the memorandum at any time.

(i) *Procedures for review of pretrial confinement.*

(1) *48-hour probable cause determination.* Review of the adequacy of probable cause to continue pretrial confinement shall be made by a neutral and detached officer within 48 hours of imposition of confinement under military control. If the prisoner is apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion.

(2) *7-day review of pretrial confinement.* Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination and necessity for continued pretrial confinement. In calculating the number of days of confinement for purposes of this rule, the initial date of confinement under military control shall count as one day and the date of the review shall also count as one day.

(A) *Nature of the 7-day review.*

(i) *Matters considered.* The review under this subsection shall include a review of the memorandum submitted by the prisoner's commander under subsection (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the accused. The prisoner and the prisoner's counsel, if any, shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable. A representative of the command may also appear before the reviewing officer to make a statement.

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

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

(B) *Extension of time limit.* The 7-day reviewing officer may, for good cause, extend the time limit for completion of the review to 10 days after the imposition of pretrial confinement.

(C) *Action by 7-day reviewing officer.* Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release.

(D) *Memorandum.* The 7-day reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. A copy of the memorandum and of all documents considered by the 7-day reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

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

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

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

(A) The 7-day reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subsection (h)(2)(B) of this rule;

(B) Information not presented to the 7-day reviewing officer establishes that the prisoner should be released under subsection (h)(2)(B) of this rule; or

(C) The provisions of subsection (i)(1) or (2) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subsection (h)(2)(B) of this rule.

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

(k) *Remedy.* The remedy for noncompliance with subsections (f), (h), (i), or (j) of this rule shall be an

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

b. R.C.M. 405(e) is amended to read as follows:

"(e) *Scope of investigation.* The investigating officer shall inquire into the truth and form of the charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges. If evidence adduced during the investigation indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of such offense and make a recommendation as to its disposition, without the accused first having been charged with the offense. The accused's rights under subsection (f) are the same with regard to investigation of both charged and uncharged offenses."

c. R.C.M. 706(c)(2)(D) is amended to read as follows:

"(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense of the case?"

d. R.C.M. 707(b)(3) is amended by adding subsection (E) which reads as follows:

"(E) *Commitment of the incompetent accused.* If the accused is committed to the custody of the Attorney General for hospitalization as provided in R.C.M. 909(f), all periods of such commitment shall be excluded when determining whether the period in subsection (a) of this rule has run. If, at the end of the period of commitment, the accused is returned to the custody of the general court-martial convening authority, a new 120-day time period under this rule shall begin on the date of such return to custody."

e. R.C.M. 707(c) is amended to read as follows:

"(c) *Excludable delay.* All periods of time during which appellate courts have issued stays in the proceedings, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded."

f. R.C.M. 809(b)(1) is amended by deleting the last sentence, which reads:

"In such cases, the regular proceedings shall be suspended while the contempt is disposed of."

g. R.C.M. 809(c) is amended to read as follows:

"(c) *Procedure.* The military judge shall in all cases determine whether to punish for contempt and, if so, what the punishment shall be. The military judge shall also determine when during the court-martial the contempt proceedings shall be conducted; however, if the court-martial is composed of members, the military judge shall conduct the contempt proceedings outside the members' presence. The military judge may punish summarily under subsection (b)(1) only if the military judge recites the facts for the record and states that they were directly witnessed by the military judge in the actual presence of the court-martial. Otherwise, the provisions of subsection (b)(2) shall apply."

h. R.C.M. 908(a) is amended to read as follows:

"(a) *In general.* In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification, or excludes evidence that is substantial proof of a fact material in the proceedings, or directs the

disclosure of classified information, or that imposes sanctions for nondisclosure of classified information. The United States may also appeal a refusal by the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information or to enforce such an order that has previously been issued by the appropriate authority. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification."

i. R.C.M. 909 is amended to read as follows:

"(a) *In general.* No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings against them or to conduct or cooperate intelligently in the defense of the case.

(b) *Presumption of capacity.* A person is presumed to have the capacity to stand trial unless the contrary is established.

(c) *Determination before referral.* If an inquiry pursuant to R.C.M. 706 conducted before referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the convening authority before whom the charges are pending for disposition may disagree with the conclusion and take any action authorized under R.C.M. 401, including referral of the charges to trial. If that convening authority concurs with the conclusion, he or she shall forward the charges to the general court-martial convening authority. If, upon receipt of the charges, the general court-martial convening authority similarly concurs, then he or she shall commit the accused to the custody of the Attorney General. If the general court-martial convening authority does not concur, that authority may take any action that he or she deems appropriate in accordance with R.C.M. 407, including referral of the charges to trial.

(d) *Determination after referral.* After referral, the military judge may conduct a hearing to determine the mental capacity of the accused, either *sua sponte* or upon request of either party. If an inquiry pursuant to R.C.M. 706 conducted before or after referral concludes that an accused is suffering from a mental disease or defect that renders him or her mentally incompetent to stand trial, the military judge shall conduct a hearing to determine the mental capacity of the accused. Any such hearing shall be conducted in accordance with paragraph (e) of this rule.

(e) *Incompetence determination hearing.*

(1) *Nature of issue.* The mental capacity of the accused is an interlocutory question of fact.

(2) *Standard.* Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. In making this determination, the military judge is not bound by the rules of evidence except with respect to privileges.

(3) If the military judge finds the accused is incompetent to stand trial, the judge shall report this finding to the general court-martial convening authority, who shall commit the accused to the custody of the Attorney General.

(f) *Hospitalization of the accused.* An accused who is found incompetent to stand trial under this rule shall be hospitalized by the Attorney General as provided in section 4241(d) of title 18, United States Code. If notified that the accused has recovered to such an extent that he or she is able to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense of the case, then the general court-martial convening authority shall promptly take custody of the accused. If, at the end of the period of hospitalization, the accused's mental condition has not so improved, action shall be taken in accordance with section 4246 of title 18, United States Code.

(g) *Excludable delay.* All periods of commitment shall be excluded as provided by R.C.M. 707(c). The 120-day time period under R.C.M. 707 shall begin anew on the date the general court-martial convening authority takes custody of the accused at the end of any period of commitment."

j. R.C.M. 916(b) is amended to read as follows:

"(b) *Burden of proof.* Except for the defense of lack of mental responsibility and the defense of mistake of fact as to age as described in Part IV, para. 45c.(2) in a prosecution for carnal knowledge, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist. The accused has the burden of proving the defense

of lack of mental responsibility by clear and convincing evidence, and has the burden of proving mistake of fact as to age in a carnal knowledge prosecution by a preponderance of the evidence."

k. R.C.M. 916(j) is amended to read as follows:

"(j) *Ignorance or mistake of fact.*

(1) *Generally.* Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

(2) *Carnal knowledge.* It is a defense to a prosecution for carnal knowledge that, at the time of the sexual intercourse, the person with whom the accused had sexual intercourse was at least 12 years of age, and the accused reasonably believed the person was at least 16 years of age. The accused must prove this defense by a preponderance of the evidence."

l. R.C.M. 920(e)(5)(D) is amended to read as follows:

"(D) The burden of proof to establish the guilt of the accused is upon the Government. [When the issue of lack of mental responsibility is raised, add: The burden of proving the defense of lack of mental responsibility by clear and convincing evidence is upon the accused. When the issue of mistake of fact as to age in a carnal knowledge prosecution is raised, add: The burden of proving the defense of mistake of fact as to age in carnal knowledge by a preponderance of the evidence is upon the accused.]"

m. R.C.M. 1005(e) is amended to read as follows:

"(e) *Required Instructions.* Instructions on sentence shall include:

(1) A statement of the maximum authorized punishment that may be adjudged and of the mandatory minimum punishment, if any;

(2) A statement of the effect any sentence announced including a punitive discharge and confinement, or confinement in excess of six months will have on the accused's entitlement to pay and allowances;

(3) A statement of the procedures for deliberation and voting on the sentence set out in R.C.M. 1006;

(4) A statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and

(5) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3), and (5)."

n. The heading for R.C.M. 1101 is amended as follows:

"Rule 1101. Report of result of trial; post-trial restraint; deferment of confinement, forfeitures and reduction in grade; waiver of Article 58b forfeitures"

o. R.C.M. 1101(c) is amended as follows:

"(c) *Deferment of confinement, forfeitures or reduction in grade.*

(1) *In general.* Deferment of a sentence to confinement, forfeitures, or reduction in grade is a postponement of the running of a sentence.

(2) *Who may defer.* The convening authority or, if the accused is no longer in the convening authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may, upon written application of the accused at any time after the adjournment of the court-martial, defer the accused's service of a sentence to confinement, forfeitures, or reduction in grade that has not been ordered executed.

(3) *Action on deferment request.* The authority acting on the deferment request may, in that authority's discretion, defer service of a sentence to confinement, forfeitures, or reduction in grade. The accused shall have the burden of showing that the

interests of the accused and the community in deferral outweigh the community's interest in imposition of the punishment on its effective date. Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include, where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; the accused's character, mental condition, family situation, and service record. The decision of the authority acting on the deferment request shall be subject to judicial review only for abuse of discretion. The action of the authority acting on the deferment request shall be in writing and a copy shall be provided to the accused.

(4) *Orders.* The action granting deferment shall be reported in the convening authority's action under R.C.M. 1107(f)(4)(E) and shall include the date of the action on the request when it occurs prior to or concurrently with the action. Action granting deferment after the convening authority's action under R.C.M. 1107 shall be reported in orders under R.C.M. 1114 and included in the record of trial.

(5) *Restraint when deferment is granted.* When deferment of confinement is granted, no form of restraint or other limitation on the accused's liberty may be ordered as a substitute form of punishment. An accused may, however, be restricted to specified limits or conditions may be placed on the accused's liberty during the period of deferment for any other proper reason, including a ground for restraint under R.C.M. 304.

(6) *End of deferment.* Deferment of a sentence to confinement, forfeitures, or reduction in grade ends when:

(A) The convening authority takes action under R.C.M. 1107, unless the convening authority specifies in the action that service of confinement after the action is deferred;

(B) The confinement, forfeitures, or reduction in grade are suspended;

(C) The deferment expires by its own terms; or

(D) The deferment is otherwise rescinded in accordance with subsection (c)(7) of this rule. Deferment of confinement may not continue after the conviction is final under R.C.M. 1209.

(7) *Rescission of deferment.*

(A) *Who may rescind.* The authority who granted the deferment or, if the accused is no longer within that authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may rescind the deferment.

(B) *Action.* Deferment of confinement, forfeitures, or reduction in grade may be rescinded when additional information is presented to a proper authority which, when considered with all other information in the case, that authority finds, in that authority's discretion, is grounds for denial of deferment under subsection (c)(3) of this rule. The accused shall promptly be informed of the basis for the rescission and of the right to submit written matters on the accused's behalf and to request that the rescission be reconsidered. However, the accused may be required to serve the sentence to confinement, forfeitures, or reduction in grade pending this action.

(C) *Execution.* When deferment of confinement is rescinded after the convening authority's action under R.C.M. 1107, the confinement may be ordered executed. However, no such order to rescind a deferment of confinement may be issued within 7 days of notice of the rescission of a deferment of confinement to the accused under subsection (c)(7)(B) of this rule, to afford the accused an opportunity to respond. The authority rescinding the deferment may extend this period for good cause shown. The accused shall be credited with any confinement actually served during this period.

(D) *Orders.* Rescission of a deferment before or concurrently with the initial action in the case shall be reported in the action under R.C.M. 1107(f)(4)(E), which action shall include the dates of the granting of the deferment and the rescission. Rescission of a deferment of confinement after the convening authority's action shall be reported in supplementary orders in accordance with R.C.M. 1114 and shall state whether the approved period of confinement is to be executed or whether all or part of it is to be suspended."

p. R.C.M. 1101 is amended by adding the following new subparagraph (d):

"(d) *Waiving forfeitures resulting from a sen-*

tence to confinement to provide for dependent support.

(1) With respect to forfeiture of pay and allowances resulting only by operation of law and not adjudged by the court, the convening authority may waive, for a period not to exceed six months, all or part of the forfeitures for the purpose of providing support to the accused's dependent(s). The convening authority may waive and direct payment of any such forfeitures when they become effective by operation of Article 57(a).

(2) Factors that may be considered by the convening authority in determining the amount of forfeitures, if any, to be waived include, but are not limited to, the length of the accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. 1059.

(3) For the purposes of this Rule, a "dependent" means any person qualifying as a "dependent" under 37 U.S.C. 401."

q. The following new rule is added after R.C.M. 1102:

"Rule 1102A. Post-trial hearing for person found not guilty only by reason of lack of mental responsibility

(a) *In general.* The military judge shall conduct a hearing not later than forty days following the finding that an accused is not guilty only by reason of a lack of mental responsibility.

(b) *Psychiatric or psychological examination and report.* Prior to the hearing, the military judge or convening authority shall order a psychiatric or psychological examination of the accused, with the resulting psychiatric or psychological report transmitted to the military judge for use in the post-trial hearing.

(c) *Post-trial hearing.*

(1) The accused shall be represented by defense counsel and shall have the opportunity to testify, present evidence, call witnesses on his or her behalf, and to confront and cross-examine witnesses who appear at the hearing.

(2) The military judge is not bound by the rules of evidence except with respect to privileges.

(3) An accused found not guilty only by reason of a lack of mental responsibility of an offense involving bodily injury to another, or serious damage to the property of another, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his or her release would not create a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect. With respect to any other offense, the accused has the burden of such proof by a preponderance of the evidence.

(4) If, after the hearing, the military judge finds the accused has satisfied the standard specified in subsection (3) of this section, the military judge shall inform the general court-martial convening authority of this result and the accused shall be released. If, however, the military judge finds after the hearing that the accused has not satisfied the standard specified in subsection (3) of this section, then the military judge shall inform the general court-martial convening authority of this result and that authority may commit the accused to the custody of the Attorney General."

r. R.C.M. 1105(b) is amended to read as follows:

"(b) *Matters that may be submitted.*

(1) The accused may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilt or to approve the sentence. The convening authority is only required to consider written submissions.

(2) Submissions are not subject to the Military Rules of Evidence and may include:

(A) Allegations of errors affecting the legality of the findings or sentence;

(B) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial;

(C) Matters in mitigation that were not available for consideration at the court-martial; and

(D) Clemency recommendations by any member, the military judge, or any other person. The defense may ask any person for such a recommendation."

s. R.C.M. 1107(b)(4) is amended to read as follows:

"(4) *When proceedings resulted in a finding of not guilty or not guilty only by reason of lack of*

mental responsibility, or there was a ruling amounting to a finding of not guilty. The convening authority shall not take action disapproving a finding of not guilty, a finding of not guilty only by reason of lack of mental responsibility, or a ruling amounting to a finding of not guilty. When an accused is found not guilty only by reason of lack of mental responsibility, the convening authority, however, shall commit the accused to a suitable facility pending a hearing and disposition in accordance with R.C.M. 1102A."

t. The subheading for R.C.M. 1107(d)(3) is amended to read as follows:

"(3) *Deferring service of a sentence to confinement.*"

u. R.C.M. 1107(d)(3)(A) is amended to read as follows:

"(A) In a case in which a court-martial sentences an accused referred to in subsection (B), below, to confinement, the convening authority may defer service of a sentence to confinement by a court-martial, without the consent of the accused, until after the accused has been permanently released to the armed forces by a state or foreign country."

v. R.C.M. 1109 is amended to read as follows: "Rule 1109. Vacation of suspension of sentence

(a) *In general.* Suspension of execution of the sentence of a court-martial may be vacated for violation of the conditions of the suspension as provided in this rule.

(b) *Timeliness.*

(1) *Violation of conditions.* Vacation shall be based on a violation of the conditions of suspension that occurs within the period of suspension.

(2) *Vacation proceedings.* Vacation proceedings under this rule shall be completed within a reasonable time.

(3) *Order vacating the suspension.* The order vacating the suspension shall be issued before the expiration of the period of suspension.

(4) *Interruptions to the period of suspension.* Unauthorized absence of the probationer or the commencement of proceedings under this rule to vacate suspension interrupts the running of the period of suspension.

(c) *Confinement of probationer pending vacation proceedings.*

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

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

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

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

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

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

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

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

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

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

(C) *Decision.* The hearing officer shall de-

termine whether there is probable cause to believe that the probationer violated the conditions of the probationer's suspension. If the hearing officer determines that probable cause is lacking, the hearing officer shall issue a written order directing that the probationer be released from confinement. If the hearing officer determines that there is probable cause to believe that the probationer violated the conditions of suspension, the hearing officer shall set forth that decision in a written memorandum, detailing therein the evidence relied upon and reasons for making the decision. The hearing officer shall forward the original memorandum or release order to the probationer's commander and forward a copy to the probationer and the officer in charge of the confinement facility.

(d) *Vacation of suspended general court-martial sentence.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) *Vacation of a suspended special court-martial sentence wherein a bad-conduct discharge was not adjudged.*

(1) *In general.* Before vacating the suspension of a special court-martial punishment that does not include a bad-conduct discharge, the special court-martial convening authority for the command in which the probationer is serving or assigned shall

cause a hearing to be held on the alleged violation(s) of the conditions of suspension.

(2) *Notice to probationer.* The person conducting the hearing shall notify the probationer, in writing, before the hearing of the rights specified in subsection (d)(1)(B) of this rule.

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

(4) *Authority to vacate suspension.* The special court-martial convening authority for the command in which the probationer is serving or assigned shall have the authority to vacate any punishment that the officer has the authority to order executed.

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

(6) *Decision.* The special court-martial convening authority shall review the record produced by and the recommendation of the person who conducted the vacation proceeding, decide whether the probationer violated a condition of suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence.

(7) *Execution.* Any unexecuted part of a suspended sentence ordered vacated under this subsection shall be ordered executed.

(f) *Vacation of a suspended special court-martial sentence that includes a bad-conduct discharge.*

(1) The procedure for the vacation of a suspended approved bad-conduct discharge shall follow that set forth in subsection (d) of this rule.

(2) The procedure for the vacation of the suspension of any lesser special court-martial punishment shall follow that set forth in subsection (e) of this rule.

(g) *Vacation of a suspended summary court-martial sentence.*

(1) Before vacation of the suspension of a summary court-martial sentence, the summary court-martial convening authority for the command in which the probationer is serving or assigned shall cause a hearing to be held on the alleged violation(s) of the conditions of suspension.

(2) *Notice to probationer.* The person conducting the hearing shall notify the probationer before the hearing of the rights specified in subsections (d)(1)(B)(i), (ii), (iii), and (v) of this rule.

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

(4) *Authority to vacate suspension.* The summary court-martial convening authority for the command in which the probationer is serving or assigned shall have the authority to vacate any punishment that the officer had the authority to order executed.

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

(6) *Decision.* A commander with authority to vacate the suspension shall review the record produced by and the recommendation of the person who conducted the vacation proceeding, decide whether the probationer violated a condition of suspension, and, if so, decide whether to vacate the suspended sentence. If the officer exercising jurisdiction decides to vacate the suspended sentence, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating the suspended sentence.

(7) *Execution.* Any unexecuted part of a suspended sentence ordered vacated under this subsection shall be ordered executed."

w. R.C.M. 1201(b)(3)(A) is amended to read as follows:

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

offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence."

x. R.C.M. 1203(c)(1) is amended to read as follows:

"(1) *Forwarding by the Judge Advocate General to the Court of Appeals for the Armed Forces.* The Judge Advocate General may forward the decision of the Court of Criminal Appeals to the Court of Appeals for the Armed Forces for review with respect to any matter of law. In such a case, the Judge Advocate General shall cause a copy of the decision of the Court of Criminal Appeals and the order forwarding the case to be served on the accused and on appellate defense counsel. While a review of a forwarded case is pending, the Secretary concerned may defer further service of a sentence to confinement that has been ordered executed in such a case."

y. R.C.M. 1210(a) is amended by adding at the end thereof the following sentence:
"A petition for a new trial of the facts may not be submitted on the basis of newly discovered evidence when the petitioner was found guilty of the relevant offense pursuant to a guilty plea."

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

a. M.R.E. 412 is amended to read as follows:
"Rule 412. Nonconsensual sexual offenses; relevance of victim's behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c) of this rule:

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior; and

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions.*

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) Evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) Evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) Evidence the exclusion of which would violate the constitutional rights of the accused.

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subdivision (b) of this rule must:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirma-

tive defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses."

b. M.R.E. 413 is added to read as follows:
Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, "offense of sexual assault" means an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved—

(1) any sexual act or sexual contact, without consent, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(2) contact, without consent of the victim, between any part of the accused's body, or an object held or controlled by the accused, and the genitals or anus of another person;

(3) contact, without consent of the victim, between the genitals or anus of the accused and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1) through (4).

(e) For purposes of this rule, the term "sexual act" means:

(1) contact between the penis and the vulva or the penis and the anus, and for purposes of this rule, contact occurs upon penetration, however slight, of the penis into the vulva or anus;

(2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purposes of this rule, the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States."

c. M.R.E. 414 is added to read as follows:
"Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, "child" means a person below the age of sixteen, and "offense of child molestation" means an offense punishable under the Uniform Code of Military Justice, or a

crime under Federal law or the law of a State that involved—

(1) any sexual act or sexual contact with a child proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(2) any sexually explicit conduct with children proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(3) contact between any part of the accused's body, or an object controlled or held by the accused, and the genitals or anus of a child;

(4) contact between the genitals or anus of the accused and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1) through (5) of this subdivision.

(e) For purposes of this rule, the term "sexual act" means:

(1) contact between the penis and the vulva or the penis and the anus, and for purposes of this rule contact occurs upon penetration, however slight, of the penis into the vulva or anus;

(2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purpose of this rule, the term "sexually explicit conduct" means actual or simulated:

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadistic or masochistic abuse; or

(5) lascivious exhibition of the genitals or pubic area of any person.

(h) For purposes of this rule, the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States."

d. M.R.E. 1102 is amended to read as follows:

"Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President."

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

a. Paragraph 19 is amended to read as follows:

"**19. Article 95—Resistance, flight, breach of arrest, and escape**

a. *Text.*

"Any person subject to this chapter who-

(1) resists apprehension;

(2) flees from apprehension;

(3) breaks arrest; or

(4) escapes from custody or confinement shall be punished as a court-martial may direct."

b. *Elements.*

(1) *Resisting apprehension.*

(a) That a certain person attempted to apprehend the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused actively resisted the apprehension.

(2) *Flight from apprehension.*

(a) That a certain person attempted to apprehend the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused fled from the apprehension.

(3) *Breaking arrest.*

(a) That a certain person ordered the accused into arrest;

(b) That said person was authorized to or-

der the accused into arrest; and

(c) That the accused went beyond the limits of arrest before being released from that arrest by proper authority.

(4) *Escape from custody.*

(a) That a certain person apprehended the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused freed himself or herself from custody before being released by proper authority.

(5) *Escape from confinement.*

(a) That a certain person ordered the accused into confinement;

(b) That said person was authorized to order the accused into confinement; and

(c) That the accused freed himself or herself from confinement before being released by proper authority. [Note: If the escape was from post-trial confinement, add the following element]

(d) That the confinement was the result of a court-martial conviction.

c. *Explanation.*

(1) *Resisting apprehension.*

(a) *Apprehension.* Apprehension is the taking of a person into custody. *See* R.C.M. 302.

(b) *Authority to apprehend. See* R.C.M. 302(b) concerning who may apprehend. Whether the status of a person authorized that person to apprehend the accused is a question of law to be decided by the military judge. Whether the person who attempted to make an apprehension had such a status is a question of fact to be decided by the factfinder.

(c) *Nature of the resistance.* The resistance must be active, such as assaulting the person attempting to apprehend. Mere words of opposition, argument, or abuse, and attempts to escape from custody after the apprehension is complete, do not constitute the offense of resisting apprehension although they may constitute other offenses.

(d) *Mistake.* It is a defense that the accused held a reasonable belief that the person attempting to apprehend did not have authority to do so. However, the accused's belief at the time that no basis existed for the apprehension is not a defense.

(e) *Illegal apprehension.* A person may not be convicted of resisting apprehension if the attempted apprehension is illegal, but may be convicted of other offenses, such as assault, depending on all the circumstances. An attempted apprehension by a person authorized to apprehend is presumed to be legal in the absence of evidence to the contrary. Ordinarily the legality of an apprehension is a question of law to be decided by the military judge.

(2) *Flight from apprehension.* The flight must be active, such as running or driving away.

(3) *Breaking arrest.*

(a) *Arrest.* There are two types of arrest: pretrial arrest under Article 9 (*see* R.C.M. 304), and arrest under Article 15 (*see* paragraph 5c.(3), Part V, MCM). This article prohibits breaking any arrest.

(b) *Authority to order arrest. See* R.C.M. 304(b) and paragraphs 2 and 5b, Part V, MCM, concerning authority to order arrest.

(c) *Nature of restraint imposed by arrest.* In arrest, the restraint is moral restraint imposed by orders fixing the limits of arrest.

(d) *Breaking.* Breaking arrest is committed when the person in arrest infringes the limits set by orders. The reason for the infringement is immaterial. For example, innocence of the offense with respect to which an arrest may have been imposed is not a defense.

(e) *Illegal arrest.* A person may not be convicted of breaking arrest if the arrest is illegal. An arrest ordered by one authorized to do so is presumed to be legal in the absence of some evidence to the contrary. Ordinarily, the legality of an arrest is a question of law to be decided by the military judge.

(4) *Escape from custody.*

(a) *Custody.* "Custody" is restraint of free locomotion imposed by lawful apprehension. The restraint may be physical or, once there has been a submission to apprehension or a forcible taking into custody, it may consist of control exercised in the presence of the prisoner by official acts or orders. Custody is temporary restraint intended to continue until other restraint (arrest, restriction, confinement) is imposed or the person is released.

(b) *Authority to apprehend. See* subparagraph (1)(b) above.

(c) *Escape.* For a discussion of escape, *see* subparagraph c(5)(c), below.

(d) *Illegal custody.* A person may not be convicted of this offense if the custody was illegal. An apprehension effected by one authorized to apprehend is presumed to be lawful in the absence of

evidence to the contrary. Ordinarily, the legality of an apprehension is a question of law to be decided by the military judge.

(e) *Correctional custody. See* paragraph 70.

(5) *Escape from confinement.*

(a) *Confinement.* Confinement is physical restraint imposed under R.C.M. 305, 1101, or paragraph 5b, Part V, MCM. For purposes of the element of post-trial confinement (subparagraph b(5)(d), above) and increased punishment therefrom (subparagraph e (4), below), the confinement must have been imposed pursuant to an adjudged sentence of a court-martial, and not as a result of pretrial restraint or nonjudicial punishment.

(b) *Authority to order confinement. See* R.C.M. 304(b), 1101, and paragraphs 2 and 5b, Part V, MCM, concerning who may order confinement.

(c) *Escape.* An escape may be either with or without force or artifice, and either with or without the consent of the custodian. However, where a prisoner is released by one with apparent authority to do so, the prisoner may not be convicted of escape from confinement. *See also* paragraph 20c.(l)(b). Any completed casting off of the restraint of confinement, before release by proper authority, is an escape, and lack of effectiveness of the restraint imposed is immaterial. An escape is not complete until the prisoner is momentarily free from the restraint. If the movement toward escape is opposed, or before it is completed, an immediate pursuit follows, there is no escape until opposition is overcome or pursuit is eluded.

(d) *Status when temporarily outside confinement facility.* A prisoner who is temporarily escorted outside a confinement facility for a work detail or other reason by a guard, who has both the duty and means to prevent that prisoner from escaping, remains in confinement.

(e) *Legality of confinement.* A person may not be convicted of escape from confinement if the confinement is illegal. Confinement ordered by one authorized to do so is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of confinement is a question of law to be decided by the military judge.

d. *Lesser included offenses.*

(1) *Resisting apprehension.* Article 128—assault; assault consummated by a battery

(2) *Breaking arrest.*

(a) Article 134—breaking restriction

(b) Article 80—attempts

(3) *Escape from custody.* Article 80—attempts

(4) *Escape from confinement.* Article 80—attempts

e. *Maximum punishment.*

(1) *Resisting apprehension.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Flight from apprehension.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(3) *Breaking arrest.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(4) *Escape from custody, pretrial confinement, or confinement on bread and water or diminished rations imposed pursuant to Article 15.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(5) *Escape from post-trial confinement.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications.*

(1) *Resisting apprehension.*

In that_____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about_____ 19____, resist being apprehended by_____, (an armed force policeman) (_____), a person authorized to apprehend the accused.

(2) *Flight from apprehension.*

In that_____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about_____ 19____, flee apprehension by_____ (an armed force policeman) (_____), a person authorized to apprehend the accused.

(3) *Breaking arrest.*

In that_____ (personal jurisdiction data), having been placed in arrest (in quarters) (in his/her company area) (_____) by a person authorized to order the accused into arrest, did, (at/on board—location) on or about_____ 19____, break said arrest.

(4) *Escape from custody.*

In that_____ (personal jurisdiction da-

ta), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about_____ 19____, escape from the custody of_____, a person authorized to apprehend the accused.

(5) *Escape from confinement.*

In that_____ (personal jurisdiction data), having been placed in (post-trial) confinement in (place of confinement), by a person authorized to order said accused into confinement did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about_____ 19____, escape from confinement."

b. The following new paragraph is added after paragraph 97:

"97a. Article 134—(Parole, Violation of)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) That the accused was a prisoner as the result of a court-martial conviction or other criminal proceeding;

(2) That the accused was on parole;

(3) That there were certain conditions of parole that the parolee was bound to obey;

(4) That the accused violated the conditions of parole by doing an act or failing to do an act; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) "Prisoner" refers only to those in confinement resulting from conviction at a court-martial or other criminal proceeding.

(2) "Parole" is defined as "word of honor." A prisoner on parole, or parolee, has agreed to adhere to a parole plan and conditions of parole. A "parole plan" is a written or oral agreement made by the prisoner prior to parole to do or refrain from doing certain acts or activities. A parole plan may include a residence requirement stating where and with whom a parolee will live, and a requirement that the prisoner have an offer of guaranteed employment. "Conditions of parole" include the parole plan and other reasonable and appropriate conditions of parole, such as paying restitution, beginning or continuing treatment for alcohol or drug abuse, or paying a fine ordered executed as part of the prisoner's court-martial sentence. In return for giving his or her "word of honor" to abide by a parole plan and conditions of parole, the prisoner is granted parole.

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

e. *Maximum punishment.* Bad-conduct discharge, confinement for 6 months, and forfeiture of two-thirds pay per month for 6 months.

f. *Sample specification.*

In that_____ (personal jurisdiction data), a prisoner on parole, did, (at/on board—location), on or about_____ 20____, violate the conditions of his/her parole by_____"

c. Paragraph 45.a and b are amended to read as follows:

"45. Article 120—Rape and carnal knowledge

a. *Text.*

"(a) Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person—

(1) who is not his or her spouse; and

(2) who has not attained the age of sixteen years; is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(c) Penetration, however slight, is sufficient to complete either of these offenses.

(d)(1) In a prosecution under subsection (b), it is an affirmative defense that—

(A) the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve years; and

(B) the accused reasonably believed that the person had at the time of the alleged offense attained the age of 16 years.

(2) The accused has the burden of proving a defense under subparagraph (d)(1) by a preponderance of the evidence."

b. *Elements.*

(1) *Rape.*

(a) That the accused committed an act of sexual intercourse; and

(b) That the act of sexual intercourse was done by force and without consent.

(2) *Carnal knowledge.*

(a) That the accused committed an act of sexual intercourse with a certain person;

(b) That the person was not the accused's spouse; and

(c) That at the time of the sexual intercourse the person was under 16 years of age."

d. Paragraph 45c.(2) is amended to read as follows:

"(2) *Carnal knowledge.* "Carnal knowledge" is sexual intercourse under circumstances not amounting to rape, with a person who is not the accused's spouse and who has not attained the age of 16 years. Any penetration, however slight, is sufficient to complete the offense. It is a defense, however, which the accused must prove by a preponderance of the evidence, that at the time of the act of sexual intercourse, the person with whom the accused committed the act of sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this same person was at least 16 years of age."

e. Paragraph 54e.(l) is amended to read as follows:

"(1) *Simple Assault.*

(A) *Generally.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(B) *When committed with an unloaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years."

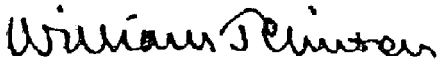
Section 4. These amendments shall take effect on May 27, 1998, subject to the following:

(a) The amendments made to Military Rules of Evidence 412, 413, and 414 shall apply only to courts-martial in which arraignment has been completed on or after June 26, 1998.

(b) Nothing contained in these amendments shall be construed to make punishable any act done or omitted prior to June 26, 1998, which was not punishable when done or omitted.

(c) The amendment made to Part IV, para. 45c.(2), authorizing a mistake of fact defense as to age in carnal knowledge prosecutions is effective in all cases in which the accused was arraigned on the offense of carnal knowledge, or for a greater offense that is later reduced to the lesser included offense of carnal knowledge, on or after 10 February 1996.

(d) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to May 27, 1998, and any such nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial or other action may proceed in the same manner and with the same effect as if these amendments had not been ãprescribed.ã



THE WHITE HOUSE
May 27, 1998

EXECUTIVE ORDER 13140
1999 AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801-946), in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473, as amended by Executive Order 12484, Executive Order 12550, Executive Order 12586, Executive Order 12708, Executive Order 12767, Executive Order 12888, Executive Order 12936, Executive Order 12960, and Executive Order 13086, it is hereby ordered as follows:

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

a. R.C.M. 502(c) is amended to read as follows:

"(c) *Qualifications of military judge.* A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judges in special courts-martial. As used in this subsection "military judge" does not include the president of a special court-martial without a military judge."

b. R.C.M. 804 is amended by redesignating the current subsection (c) as subsection (d) and inserting after subsection (b) the following new subsection (c):

"(c) *Voluntary absence for limited purpose of child testimony.*

(1) *Election by accused.* Following a determination by the military judge that remote live testimony of a child is appropriate pursuant to Mil. R. Evid. 611(d)(3), the accused may elect to voluntarily absent himself from the courtroom in order to preclude the use of procedures described in R.C.M. 914A.

(2) *Procedure.*The accused's absence will be conditional upon his being able to view the witness' testimony from a remote location. Normally, a two-way closed circuit television system will be used to transmit the child's testimony from the courtroom to the accused's location. A one-way closed circuit television system may be used if deemed necessary by the military judge. The accused will also be provided private, contemporaneous communication with his counsel. The procedures described herein shall be employed unless the accused has made a knowing and affirmative waiver of these procedures.

(3) *Effect on accused's rights generally.*An election by the accused to be absent pursuant to subsection (c)(1) shall not otherwise affect the accused's right to be present at the remainder of the trial in accordance with this rule."

c. The following new rule is inserted after R.C.M. 914:

"Rule 914A. Use of remote live testimony of a child

(a) *General procedures.* A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied. The procedure used to take such testimony will be determined by the military judge based upon the exigencies of the situation. However, such testimony should normally be taken via a two-way closed circuit television system. At a minimum, the following procedures shall be observed:

(1) The witness shall testify from a remote location outside the courtroom;

(2) Attendance at the remote location shall be limited to the child, counsel for each side (not including an accused pro se), equipment operators, and other persons, such as an attendant for the child, whose presence is deemed necessary by the military judge;

(3) Sufficient monitors shall be placed in the courtroom to allow viewing and hearing of the testimony by the military judge, the accused, the members, the court reporter and the public;

(4) The voice of the military judge shall be

transmitted into the remote location to allow control of the proceedings; and

(5) The accused shall be permitted private, contemporaneous communication with his counsel.

(b) *Prohibitions.* The procedures described above shall not be used where the accused elects to absent himself from the courtroom pursuant to R.C.M. 804(c)."

d. R.C.M. 1001(b)(4) is amended by inserting the following sentences between the first and second sentences:

"Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."

e. R.C.M. 1003(b) is amended-

(1) by striking subsection (4) and

(2) by redesignating subsections (5), (6), (7), (8), (9), (10), and (11) as subsections (4), (5), (6), (7), (8), (9), and (10), respectively.

f. R.C.M. 1004(c)(7) is amended by adding at end the following new subsection:

"(K) The victim of the murder was under 15 years of age."

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

a. Insert the following new rule after Mil. R. Evid. 512:

"Rule 513. Psychotherapist-patient privilege

(a) *General rule of privilege.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who may claim the privilege.* The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service reg-

ulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(e) *Procedure to determine admissibility of patient records or communications.*

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise."

b. Mil. R. Evid. 611 is amended by inserting the following new subsection at the end:

"(d) *Remote live testimony of a child.*

(1) In a case involving abuse of a child or domestic violence, the military judge shall, subject to the requirements of subsection (3) of this rule, allow a child victim or witness to testify from an area outside the courtroom as prescribed in R.C.M. 914A.

(2) The term "child" means a person who is under the age of 16 at the time of his or her testimony. The term "abuse of a child"means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child. The term "exploitation" means child pornography or child prostitution. Theterm "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to endanger seriously the physical health of the child. The term "domestic violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is committed by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with

the victim as a spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim.

(3) Remote live testimony will be used only where the military judge makes a finding on the record that a child is unable to testify in open court in the presence of the accused, for any of the following reasons:

(A) The child is unable to testify because of fear;

(B) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

(C) The child suffers from a mental or other infirmity; or

(D) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.

(4) Remote live testimony of a child shall not be utilized where the accused elects to absent himself from the courtroom in accordance with R.C.M. 804(c)."

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

a. Insert the following new paragraph after paragraph 100:

"100a. Article 134—(Reckless endangerment)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) That the accused did engage in conduct;

(2) That the conduct was wrongful and reckless or wanton;

(3) That the conduct was likely to produce death or grievous bodily harm to another person; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *In general.* This offense is intended to prohibit and therefore deter reckless or wanton conduct that wrongfully creates a substantial risk of death or serious injury to others.

(2) *Wrongfulness.* Conduct is wrongful when it is without legal justification or excuse.

(3) *Recklessness.* "Reckless" conduct is conduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. The accused need not intentionally cause a resulting harm or know that his conduct is substantially certain to cause that result. The ultimate question is whether, under all the circumstances, the accused's conduct was of that heedless nature that made it actually or imminently dangerous to the rights or safety of others.

(4) *Wantonness.* "Wanton" includes "reckless," but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(5) *Likely to produce* When the natural or probable consequence of particular conduct would be death or grievous bodily harm, it may be inferred that the conduct is "likely" to produce that result. *See* paragraph 54c(4)(a)(ii).

(6) *Grievous bodily harm.* "Grievous bodily harm" means serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

(7) *Death or injury not required.* It is not necessary that death or grievous bodily harm be actually inflicted to prove reckless endangerment.

d. *Lesser included offense.* None.

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification.*

In that_____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about_____ 20____, wrongfully and recklessly engage in conduct, to wit:(he/she)(describe conduct) and that the accused's conduct was likely to cause death or serious bodily harm to_____"

Sec. 4. These amendments shall take effect on 1 November 1999, subject to the following:

(a) The amendments made to Military Rule of Evidence 611, shall apply only in cases in which arraignment has been completed on or after 1 November 1999.

(b) Military Rule of Evidence 513 shall only apply to communications made after 1 November 1999.

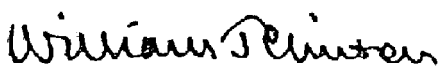
(c) The amendments made to Rules for Courts-Martial 502, 804, and 914A shall only apply in cases in which arraignment has been completed on or after 1 November 1999.

(d) The amendments made to Rules for Courts-Martial 1001(b)(4) and 1004(c)(7) shall only apply to offenses committed after 1 November 1999.

(e) Nothing in these amendments shall be construed to make punishable any act done or omitted prior to 1 November 1999, which was not punishable when done or omitted.

(f) The maximum punishment for an offense committed prior to 1 November 1999, shall not exceed the applicable maximum in effect at the time of the commission of such offense.

(g) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to 1 November 1999, and any such nonjudicial punishment, restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.



THE WHITE HOUSE
October 6, 1999.

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