CHANGE
No. 4

MCM, 1984
15 November 1990

MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984

This change incorporates Executive Order No. 12708, dated 23 March 1990, published at 55 Fed Reg. 11353, which amends Executive Order No. 12473, dated 13 April 1984, as amended by Executive Order No. 12484, dated 13 July 1984, Executive Order No. 12550, dated 19 February 1986, and Executive Order 12586, dated 3 March 1987. Significant amendments include: clarification of the definitions of "rank" and "grade" [R.C.M. 103(20)]; provision authorizing officers on inactive-duty training to apprehend (R.C.M. 302); provision that motions not timely raised are waived (R.C.M. 905); clarification of the time period computation for the statute of limitations (R.C.M. 907); modification of preliminary instructions in mixed plea cases (R.C.M. 910 and 913); clarification of reserve component "compensation" as "basic pay" (R.C.M. 1003 and Paragraph 5, Part V); verbatim record of trial requirements [R.C.M. 1103(b)]; modification of rules concerning records of trial, SJA recommendation, legal review, convening authority action, and promulgating orders, and petitions under Article 69(b) in "not guilty only by reason of lack of mental responsibility" cases [R.C.M. 1103(e), 1106, 1107, 1112, 1114, and 1201]; clarification of substitute service of post-trial recommendation on defense counsel [R.C.M. 1106(f)]; clarification of Secretarial designation of clemency authority and "unexecuted portion of a sentence" (R.C.M. 1108); provision concerning the impeachment of the accused with a prior unwarned statement (Mil. R. Evid. 304); clarification of Inspector General records privilege (Mil. R. Evid. 506); clarification of offense of absence with intent to abandon guard [Paragraph 10(b), Part IV]; deletion of "wrongful communication of language requesting another to commit an offense" as an offense (Paragraphs 101 and 105, Part IV); clarification of non-judicial punishment suspension conditions (Paragraph 6, Part V), and amendments to Appendix 2 resulting from The Defense Authorization Act of 1990, Pub. L. No. 101-189, 103 Stat. 1352 (1989).

Copies of Executive Order No. 12708 were transmitted to the Congress of the United States in accordance with Section 836 of title 10 of the United States Code on 2 April 1990. See 136 Cong. Rec. H1566-07 (daily ed. 18 April 1990) (EC-2936).

MCM, 1984, is changed as follows:

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

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

Remove pages	*Insert pages*
	Executive order No. 12708
xv and xvi	xv through xvi
xix through xxiv	xix through xxiv
xxvii and xxviii	xxvii through xxviii
xxxi and xxxii	xxxi through xxxii
liii through lviii	liii through lvii
II-3 and II-4	II-3 through II-4.1
II-17 and II-18	II-17 and II-18
II-109 and II-110	II-109 through II-110
II-113 through II-114.1	II-113 through II-114.1
II-118.1 through II-120	II-119 through II-120
II-123 and II-124	II-123 through II-124.1
II-145 and II-146	II-145 through II-146.1
II-161 through II-164	II-161 through II-164.1
II-171 through II-174.1	II-171 through II-174.1
II-177 and II-178	II-177 through II-178.1
II-183 and II-184	II-183 through II-184
II-187 through II-190	II-187 through II-190.2
III-5 and III-6	III-5 through III-6
III-27 and III-28	III-27 through III-28.1
-13 and IV-14	IV-13 through IV-14.1

Remove pages	*Insert pages*
IV–17 and IV–18	IV–17 through IV–18.1
IV–139 through IV–142	IV–139 through IV–142
V–5 through V–9	V–5 through V–10
A2–1 through A2–4.1	A2–1 through A2–4.1
A2–19 through A2–24	A2–19 through A2–24.1
A2–34.1	A2–35 through A2–38
A12–6.1 through A12–8	A12–7 through A12–8
A16–3 and A16–4	A16–3 through A16–4.1
A21–5 and A21–6	A21–5 through A21–6.1
A21–13 and A21–14	A21–13 through A21–14.01
A21–35 through A21–38	A21–35 through A21–38
A21–47 through A21–50.1	A21–47 through A21–50.1
A21–53 through A21–56	A21–53 through A21–56.1
A21–63 and A21–64	A21–63 through A21–64.01
A21–69 and A21–70	A21–69 through A21–70.1
A21–73 through A21–78.1	A21–73 through A21–78.3
A21–87 and A21–88	A21–85 through A21–87
A21–102.1 through A21–106.1	A21–103 through A21–106.1
A22–9 and A22–10	A22–9 through A22–10.1
A22–37 and A22–38	A22–37 through A22–38.1
Index 3 and Index 4	Index 3 through Index 4.1
Index 29 and Index 30	Index 29 through Index 30.1
Index 51 and Index 52	Index 51 through Index 52.1
Index 57 through Index 60	Index 57 through Index 60.1

3. File this change sheet and Executive Order No. 12708 in front of this publication for reference purposes.

DISTRIBUTION:

Army: To be distributed in accordance with DA Form 12–04–E, block number 0002, requirements for Manual for Courts-Martial for Active Army, the Army National Guard, and the U.S. Army Reserve.

Navy: MANCTSM110

Air Force: F

Marine Corps: MARCORPS CODE: FD

Coast Guard: SDL128

★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:

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f. R.C.M. 1103(e) is amended to read as follows:

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g. R.C.M. 1106(e) is amended to read as follows:

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h. R.C.M. 1106(f) is amended—

★ ★ ★ ★ ★ ★ ★

i. R.C.M. 1107(b)(4) is amended to read as follows:

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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:

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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—

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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.

George Bush

THE WHITE HOUSE,
23 March 1990

Page

Page

Chapter XI. Post-Trial Procedure

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

PART V NONJUDICIAL PUNISHMENT

words importing the masculine gender include the feminine as well;

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

the words "insane" and "insane person" and "lunatic" shall include every idiot, lunatic, insane person, and person non compos mentis;

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

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

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

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

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

§ 2. "County" as including "parish," and so forth.

The word "county" includes a parish, or any other equivalent subdivision of a State or Territory of the United States.

§ 3. "Vessel" as including all means of water transportation.

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

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

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

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

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

10 U.S.C. § 101. Definitions

In addition to the definitions in sections 1–5 of title 1, the following definitions apply in this title:

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

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

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

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

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

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

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

(8) "Secretary concerned" means—

(A) the Secretary of the Army, with respect to matters concerning the Army;

(B) the Secretary of the Navy, with respect to matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy;

(C) the Secretary of the Air Force, with respect to matters concerning the Air Force; and

(D) the Secretary of Transportation, with respect to matters concerning the Coast Guard when it is not operating as a service in the Navy.

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

(10) "Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, and the Canal Zone, and the District of Columbia, active and inactive, that—

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article 1, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

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

(12) "Air National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that—

(A) is an air force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article 1, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(31) "Inactive-duty training" means—

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

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

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

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

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

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

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

(36) Repealed.

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

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

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

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

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

10 U.S.C. § 801. Article 1. Definitions

In this chapter:

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

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

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

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

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

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

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

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

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

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

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

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

(13) "Judge Advocate" means—

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

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

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

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

Rule 301. Report of offense

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

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

Discussion

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

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

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

Rule 302. Apprehension

(a) *Definition and scope.*

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

Discussion

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

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

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

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

Discussion

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

Several federal agencies have broad powers to apprehend persons for violations of federal laws, including the Uniform Code of Military Justice. For example, agents of the Federal Bureau of Investigation, United States Marshals, and agents of the Secret Service may apprehend persons for any offenses committed in their presence and for felonies. 18 U.S.C. §§ 3052, 3053, 3056. Other agencies having apprehension powers include the General Services Administration, 40 U.S.C. § 318 and the Veterans Administration, 38 U.S.C. § 218. The extent to which such agencies become involved in the apprehension of persons subject to trial by courts-martial may depend on the statutory authority of the agency and the agency's formal or informal relationships with the Department of Defense.

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

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

Discussion

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

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

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

Discussion

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

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

Discussion

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

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

Discussion

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

(c) *Burden of proof.*

(1) *Standard.* Unless otherwise provided in this Manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.

Discussion

See Mil. R. Evid. 104(a) concerning the applicability of the Military Rules of Evidence to certain preliminary questions.

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(2) *Assignment.*

(A) Except as otherwise provided in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party.

Discussion

See, for example, subsection (c)(2)(B) of this rule, R.C.M. 908 and Mil. R. Evid. 304(e), 311(e), and 321(d) for provisions specifically assigning the burden of proof.

(B) In the case of a motion to dismiss for lack of jurisdiction, denial of the right to speedy trial under R.C.M. 707, or the running of the statute of limitations, the burden of persuasion shall be upon the prosecution.

(d) *Ruling on motions.* A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited by this Manual, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings, but no such determination shall be deferred if a party's right to review or appeal is adversely affected. Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record.

Discussion

When trial cannot proceed further as the result of dismissal or other rulings on motions, the court-martial should adjourn and a record of the proceedings should be prepared for the convening authority. Notwithstanding the dismissal of some specifications, trial may proceed in the normal manner as long as one or more charge and specification remain. The promulgating orders should reflect the action taken by the court-martial on each charge and specification, including any which were dismissed by the military judge on a motion. *See* R.C.M. 1114.

★(e) *Effect of failure to raise defenses or objections.* Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

Discussion

See also R.C.M. 910(j) concerning matters waived by a plea of guilty.

(f) *Reconsideration.* On request of any party or sua sponte, the military judge may reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.

(g) *Effect of final determinations.* Any matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other court-martial of the same accused, except that, when the offenses charged at one court-martial did not arise out of the same transaction as those charged at the court-martial at which the determination was made, a determination of law and the application of law to the facts may be disputed by the United States. This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a Federal governmental unit were parties.

Discussion

See also R.C.M. 907(b)(2)(C). Whether a matter has been finally determined in another judicial proceeding with jurisdiction to decide it, and whether such determination binds the United States in another proceeding are interlocutory questions. *See* R.C.M. 801(e). It does not matter whether the earlier proceeding ended in an acquittal, conviction, or otherwise, as long as the determination is final. Except for a ruling which is, or amounts to, a finding of not guilty, a ruling ordinarily is not final until action on the court-martial is completed. *See* Article 76; R.C.M. 1209. The accused is not bound in a court-martial by rulings in another court-martial. *But see* Article 3(b); R.C.M. 202.

The determination must have been made by a court-martial, reviewing authority, or appellate court, or by another judicial body, such as a United States court. A pretrial determination by a convening authority is not a final determination under this rule, although some decisions by a convening authority may bind the Government under other rules. *See*, for example, R.C.M. 601, 604, 704, 705.

The United States is bound by a final determination by a court of competent jurisdiction even if the earlier determination is erroneous, except when the offenses charged at the second proceeding arose out of a different transaction from those charged at the first and the ruling at the first proceeding was based on an incorrect determination of law.

A final determination in one case may be the basis for a motion to dismiss or a motion for appropriate relief in another case, depending on the circumstances. The nature of the earlier determination and the grounds for it will determine its effect in other proceedings.

Examples:

(1) The military judge dismissed a charge for lack of personal jurisdiction, on grounds that the accused was only 16 years old at the time of enlistment and when the offenses occurred. At a second court-martial of the same accused for a different offense, the determination in the first case would require dismissal of the new charge unless the prosecution could show that since that determination the accused had effected a valid enlistment or constructive enlistment. *See* R.C.M. 202. Note, however, that if the initial ruling had been based on an error of law (for example, if the military judge had ruled the enlistment invalid because the accused was 18 at the time of enlistment) this would not require dismissal in the second court-martial for a different offense.

(2) The accused was tried in United States district court for assault on a Federal officer. The accused defended solely on the basis of alibi and was acquitted. The accused is then charged in a court-martial with assault on a different person at the same time and place as the assault on a Federal officer was alleged to have occurred. The acquittal of the accused in Federal district court would bar conviction of the accused in the court-martial. In cases of this nature, the facts of the first trial must be examined to determine whether the finding of the first trial is logically inconsistent with guilt in the second case.

(3) At a court-martial for larceny, the military judge excluded evidence of a statement made by the accused relating to the larceny and other uncharged offenses because the statement was obtained by coercion. At a second court-martial for an unrelated offense, the statement excluded at the first trial would be inadmissible, based on the earlier ruling, if the first case had become final. If the earlier ruling had been based on an incorrect interpretation of law, however, the issue of admissibility could be litigated anew at the second proceeding.

(4) At a court-martial for absence without authority, the charge and specification were dismissed for failure to state an offense. At a later court-martial for the same offense, the earlier dismissal would be grounds for dismissing the same charge and specification, but would not bar further proceedings on a new specification not containing the same defect as the original specification.

(h) *Written motions.* Written motions may be submitted to the military judge after referral and when appropriate they may be supported by affidavits, with service and opportunity to reply to the opposing party. Such motions may be disposed of before arraignment and without a session. Upon request, either party is entitled to an Article 39(a) session to present oral argument or have an evidentiary hearing concerning the disposition of written motions.

(i) *Service.* Written motions shall be served on all other parties. Unless otherwise directed by the military judge, the service shall be made upon counsel for each party.

(j) *Application to convening authority.* Except as otherwise provided in this Manual, any matters which may be resolved upon motion without trial of the general issue of guilt may be submitted by a party to the convening authority before trial for decision. Submission of such matter to the convening authority is not, except as otherwise provided in this Manual, required, and is, in any event, without prejudice to the renewal of the issue by timely motion before the military judge.

(k) *Production of statements on motion to suppress.* Except as provided in this subsection, R.C.M. 914 shall apply at a hearing on a motion to suppress evidence under subsection (b)(3) of this rule. For purposes of this subsection, a law enforcement officer shall be deemed a witness called by the Government, and upon a claim of privilege the military judge shall excise portions of the statement containing privileged matter.

Discussion

A change of the place of trial may be necessary when there exists in the place where the court-martial is pending so great a prejudice against the accused that the accused cannot obtain a fair and impartial trial there, or to obtain compulsory process over an essential witness.

When it is necessary to change the place of trial, the choice of places to which the court-martial will be transferred will be left to the convening authority, as long as the choice is not inconsistent with the ruling of the military judge.

(12) Determination of multiplicity of offenses for sentencing purposes.

Discussion

See R.C.M. 1003 concerning determination of the maximum punishment. *See also* R.C.M. 907(b)(3)(B) concerning dismissal of charges on grounds of multiplicity.

A ruling on this motion ordinarily should be deferred until after findings are entered.

(13) Preliminary ruling on admissibility of evidence.

Discussion

See Mil. R. Evid. 104(c).

A request for a preliminary ruling on admissibility is a request that certain matters which are ordinarily decided during trial of the general issue be resolved before they arise, outside the presence of members. The purpose of such a motion is to avoid the prejudice which may result from bringing inadmissible matters to the attention of court members.

Whether to rule on an evidentiary question before it arises during trial on the general issue is a matter within the discretion of the military judge. *But see* R.C.M. 905(b)(3) and (d); and Mil. R. Evid. 304(e)(2); 311(e)(2); 321(d)(2).

(14) Motions relating to mental capacity or responsibility of the accused.

Discussion

See R.C.M. 706, 909, and 916(k) regarding procedures and standards concerning the mental capacity or responsibility of the accused.

Rule 907. Motions to dismiss

(a) *In general.* A motion to dismiss is a request to terminate further proceedings as to one or more charges and specifications on grounds capable of resolution without trial of the general issue of guilt.

Discussion

Dismissal of a specification terminates the proceeding with respect to that specification unless the decision to dismiss is reconsidered and reversed by the military judge. *See* R.C.M. 905(f). Dismissal of a specification on grounds stated in subsection (b)(1) or (b)(3)(A) below does not ordinarily bar a later court-martial for the same offense if the grounds for dismissal no longer exist. *See also* R.C.M. 905(g) and subsection (b)(2) below.

See R.C.M. 916 concerning defenses.

(b) *Grounds for dismissal.* Grounds for dismissal include the following—

(1) *Nonwaivable grounds.* A charge or specification shall be dismissed at any stage of the proceedings if:

(A) The court-martial lacks jurisdiction to try the accused for the offense; or

Discussion

See R.C.M. 201-203.

(B) The specification fails to state an offense.

Discussion

See R.C.M. 307(c).

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(2) *Waivable grounds.* A charge or specification shall be dismissed upon motion made by the accused before the final adjournment of the court-martial in that case if:

(A) Dismissal is required under R.C.M. 707;

(B) The statute of limitations (Article 43) has run, provided that, if it appears that the accused is unaware of the right to assert the statute of limitations in bar of trial, the military judge shall inform the accused of this right;

Discussion

Except for certain offenses for which there is no limitation as to time, *see* Article 43(a), a person charged with an offense under the code may not be tried by court-martial over objection if sworn charges have not been received by the officer exercising summary court-martial jurisdiction over the command within five years. *See* Article 43(b). This period may be tolled (Article 43(c) and (d)), extended (Article 43(e) and (g)), or suspended (Article 43(f)) under certain circumstances. The prosecution bears the burden of proving that the statute of limitations has been tolled, extended, or suspended if it appears that it has run.

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

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

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

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

When the statute of limitations has run as to a lesser included offense, but not as to the charged offense, *see* R.C.M. 920(e)(2) with regard to instructions on the lesser offense.

(C) The accused has previously been tried by court-martial or federal civilian court for the same offense, provided that:

(i) No court-martial proceeding is a trial in the sense of this rule unless presentation of evidence on the general issue of guilt has begun;

(ii) No court-martial proceeding which has been terminated under R.C.M. 604(b) or R.C.M. 915 shall bar later prosecution for the same offense or offenses, if so provided in those rules;

(iii) No court-martial proceeding in which an accused has been found guilty of any charge or specification is a trial in the sense of this rule until the finding of guilty has become final after review of the case has been fully completed; and

(iv) No court-martial proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of this rule.

(D) Prosecution is barred by:

(i) A pardon issued by the President;

Discussion

A pardon may grant individual or general amnesty.

(ii) Immunity from prosecution granted by a person authorized to do so;

Discussion

A plea of guilty must be in accord with the truth. Before the plea is accepted, the accused must admit every element of the offense(s) to which the accused pleaded guilty. Ordinarily, the elements should be explained to the accused. If any potential defense is raised by the accused's account of the offense or by other matters presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense. If the statute of limitations would otherwise bar trial for the offense, the military judge should not accept a plea of guilty to it without an affirmative waiver by the accused. *See* R.C.M. 907(b)(2)(B).

The accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea. Nevertheless the accused must be convinced of, and able to describe all the facts necessary to establish guilt. For example, an accused may be unable to recall certain events in an offense, but may still be able to adequately describe the offense based on witness statements or similar sources which the accused believes to be true.

The accused should remain at the counsel table during questioning by the military judge.

(f) *Plea agreement inquiry.*

(1) *In general.* A plea agreement may not be accepted if it does not comply with R.C.M. 705.

(2) *Notice.* The parties shall inform the military judge if a plea agreement exists.

Discussion

The military judge should ask whether a plea agreement exists. *See* subsection (d) of this rule. Even if the military judge fails to so inquire or the accused answers incorrectly, counsel have an obligation to bring any agreements or understandings in connection with the plea to the attention of the military judge.

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(3) *Disclosure.* If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge alone the military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.

(4) *Inquiry.* The military judge shall inquire to ensure:

(A) That the accused understands the agreement; and

(B) That the parties agree to the terms of the agreement.

Discussion

If the plea agreement contains any unclear or ambiguous terms, the military judge should obtain clarification from the parties. If there is doubt about the accused's understanding of any terms in the agreement, the military judge should explain those terms to the accused.

(g) *Findings.* Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at an Article 39(a) session unless:

(1) Such action is not permitted by regulations of the Secretary concerned;

(2) The plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged; or

(3) Trial is by a special court-martial without a military judge, in which case the president of the court-martial may enter findings based on the pleas without a formal vote except when subsection (g)(2) of this rule applies.

Discussion

★If the accused has pleaded guilty to some offenses but not to others, the military judge should ordinarily defer informing the members of the offenses to which the accused has pleaded guilty until after findings on the remaining offenses have been entered. *See* R.C.M. 913(a), Discussion and R.C.M. 920(e), Discussion, paragraph 3.

(h) *Later action.*

★(1) *Withdrawal by the accused.* If after acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge may as a matter of discretion permit the accused to do so.

(2) *Statements by accused inconsistent with plea.* If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

Discussion

When the accused withdraws a previously accepted plea of guilty or a plea of guilty is set aside, counsel should be given a reasonable time to prepare to proceed. In a trial by military judge alone, recusal of the military judge or disapproval of the request for trial by military judge alone will ordinarily be necessary when a plea is rejected or withdrawn after findings; in trial with members, a mistrial will ordinarily be necessary.

(3) *Pretrial agreement inquiry.* After sentence is announced the military judge shall inquire into any parts of a pretrial agreement which were not previously examined by the military judge. If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea.

Discussion

See subsection (f)(3) of this rule.

(i) *Record of proceedings.* A verbatim record of the guilty plea proceedings shall be made in cases in which a verbatim record is required under R.C.M. 1103. In other special courts-martial, a summary of the explanation and replies shall be included in the record of trial. As to summary courts-martial, *see* R.C.M. 1305.

(j) *Waiver.* Except as provided in subsection (a)(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made.

Rule 911. Assembly of the court-martial

The military judge shall announce the assembly of the court-martial.

Discussion

When trial is by a court-martial with members, the court-martial is ordinarily assembled immediately after the members are sworn. The members are ordinarily sworn at the first session at which they appear, as soon as all parties and personnel have been announced. The members are seated with the president, who is the senior member, in the center, and the other members alternately to the president's right and left according to rank. If the rank of a member is changed, or if the membership of the court-martial changes, the members should be re-seated accordingly.

When trial is by military judge alone, the court-martial is ordinarily assembled immediately following approval of the request for trial by military judge alone.

Assembly of the court-martial is significant because it marks the point after which: substitution of the members and military judge may no longer take place without good cause (*see* Article 29; R.C.M. 505; 902; 912); the accused may no longer, as a matter of right, request trial by military judge alone or withdraw such a request previously approved (*see* Article 16; R.C.M. 903(a)(2),(d)); and the accused may no longer request, even with the permission of the military judge, or withdraw from a request for, enlisted members (*see* Article 25(c)(1); R.C.M. 903(a)(1),(d)).

Rule 912. Challenge of selection of members; examination and challenges of members

(a) *Pretrial matters.*

(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

Discussion

Examples of matters which may be grounds for challenge under subsection (N) are that the member: has a direct personal interest in the result of the trial; is closely related to the accused, a counsel, or a witness in the case; has participated as a member or counsel in the trial of a closely related case; has a decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offenses charged.

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(2) *When made.*

(A) *Upon completion of examination.* Upon completion of any examination under subsection (d) of this rule and the presentation of evidence, if any, on the matter, each party shall state any challenges for cause it elects to make.

(B) *Other times.* A challenge for cause may be made at any other time during trial when it becomes apparent that a ground for challenge may exist. Such examination of the member and presentation of evidence as may be necessary may be made in order to resolve the matter.

(3) *Procedure.* Each party shall be permitted to make challenges outside the presence of the members. The party making a challenge shall state the grounds for it. Ordinarily the trial counsel shall enter any challenges for cause before the defense counsel. The military judge shall rule finally on each challenge. When a challenge for cause is granted, the member concerned shall be excused. The burden of establishing that grounds for a challenge exist is upon the party making the challenge. A member successfully challenged shall be excused.

(4) *Waiver.* The grounds for challenge in subsection (f)(1)(A) of this rule may not be waived except that membership of enlisted members in the same unit as the accused may be waived. Membership of enlisted members in the same unit as the accused and any other ground for challenge is waived if the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner. Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie. When a challenge for cause has been denied, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.

Discussion

See also Mil. R. Evid. 606(b) when a member may be a witness.

(g) *Peremptory challenges.*

(1) *Procedure.* Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter any peremptory challenge before the defense.

Discussion

No reason is necessary for a peremptory challenge.

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(2) *Waiver*. Failure to exercise a peremptory challenge when properly called upon to do so shall waive the right to make such a challenge. The military judge may, for good cause shown, grant relief from the waiver, but a peremptory challenge may not be made after the presentation of evidence before the members has begun. However, nothing in this subsection shall bar the exercise of a previously unexercised peremptory challenge against a member newly detailed under R.C.M. 505(c)(2)(B), even if presentation of evidence on the merits has begun.

Discussion

When the membership of the court-martial has been reduced below a quorum (*see* R.C.M. 501) or, when enlisted members have been requested, the fraction of enlisted members has been reduced below one-third, the proceedings should be adjourned and the convening authority notified so that new members may be detailed. *See* R.C.M. 505. *See also* R.C.M. 805(d) concerning other procedures when new members are detailed.

(h) *Special courts-martial without a military judge*. In a special court-martial without a military judge, the procedures in this rule shall apply, except that challenges shall be made in the presence of the members and a ruling on any challenge for cause shall be decided by a majority vote of the members upon secret written ballot in closed session. The challenged member shall not be present at the closed session at which the challenge is decided. A tie vote on a challenge disqualifies the member challenged. Before closing, the president shall give such instructions as may be necessary to resolve the challenge. Each challenge shall be decided separately, and all unexcused members except the challenged member shall participate. When only three members are present and one is challenged, the remaining two may decide the challenge. When the president is challenged, the next senior member shall act as president for purposes of deciding the challenge.

(i) *Definitions*.

(1) *Military judge*. For purpose of this rule, ''military judge'' does not include the president of a special court-martial without a military judge.

(2) *Witness*. For purposes of this rule, ''witness'' includes one who testifies at a court-martial and anyone whose declaration is received in evidence for any purpose, including written declarations made by affidavit or otherwise.

Discussion

For example, a person who by certificate has attested or otherwise authenticated an official record or other writing introduced in evidence is a witness.

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(3) *Investigating officer*. For purposes of this rule, ''investigating officer'' includes any person who has investigated charges under R.C.M. 405 and any person who as counsel for a member of a court of inquiry, or otherwise personally has conducted an investigation of the general matter involving the offenses charged.

Rule 913. Presentation of the case on the merits

★(a) *Preliminary instructions*. The military judge may give such preliminary instructions as may be appropriate. If mixed pleas have been entered, the military judge should ordinarily defer informing the members of the offenses to which the accused pleaded guilty until after the findings on the remaining contested offenses have been entered.

Discussion

Preliminary instructions may include a description of the duties of members, procedures to be followed in the court-martial, and other appropriate matters.

★Exceptions to the rule requiring the military judge to defer informing the members of an accused's prior pleas of guilty include cases in which the accused has specifically requested, on the record, that the military judge instruct the members of the prior pleas of guilty and cases in which a plea of guilty was to a lesser included offense within the contested offense charged in the specification. *See* R.C.M. 910(g), Discussion and R.C.M. 920(e), Discussion, paragraph 3.

(b) *Opening statements.* Each party may make one opening statement to the court-martial before presentation of evidence has begun. The defense may elect to make its statement after the prosecution has rested, before the presentation of evidence for the defense. The military judge may, as a matter of discretion, permit the parties to address the court-martial at other times.

Discussion

Counsel should confine their remarks to evidence they expect to be offered which they believe in good faith will be available and admissible and a brief statement of the issues in the case.

★Allowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances. The maximum authorized amount of a partial forfeiture shall be determined by using the basic pay or, in the case of reserve component personnel on inactive-duty, compensation for periods of inactive-duty training, authorized by the cumulative years of service of the accused, and, if no confinement is adjudged, any sea or foreign duty pay. If the sentence also includes reduction in grade, expressly or by operation of law, the maximum forfeiture shall be based on the grade to which the accused is reduced.

Discussion

A forfeiture deprives the accused of the amount of pay (and allowances) specified as it accrues. Forfeitures accrue to the United States.

"Basic pay" does not include pay for special qualifications, such as diving pay, or incentive pay such as flying, parachuting, or duty on board a submarine.

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(3) *Fine.* Any court-martial may adjudge a fine instead of forfeitures. General courts-martial may also adjudge a fine in addition to forfeitures. Special and summary courts-martial may not adjudge any fine in excess of the total amount of forfeitures which may be adjudged in that case. In order to enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial;

Discussion

A fine is in the nature of a judgement and, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted. Ordinarily, a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged against a civilian subject to military law.

See R.C.M. 1113(d)(3) concerning imposition of confinement when the accused fails to pay a fine.

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(4) *Loss of numbers, lineal position, or seniority.* These punishments are authorized only in cases of Navy, Marine Corps, and Coast Guard officers;

Discussion

All losses of numbers will be numbers in the appropriate lineal list.

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(5) *Reduction in pay grade.* Except as provided in R.C.M. 1301(d), a court-martial may sentence an enlisted member to be reduced to the lowest or any intermediate pay grade;

Discussion

Reduction under Article 58a is not a part of the sentence but is an administrative result thereof.

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(6) *Restriction to specified limits.* Restriction may be adjudged for no more than 2 months for each month of authorized confinement and in no case for more than 2 months. Confinement and restriction may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection;

Discussion

Restriction does not exempt the person on whom it is imposed from any military duty. Restriction and hard labor without confinement may be adjudged in the same case provided they do not exceed the maximum limits for each. *See* subsection (c)(1)(A)(ii) of this rule. *See also* R.C.M. 1113(d)(5). The sentence adjudged should specify the limits of the restriction.

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(7) *Hard labor without confinement.* Hard labor without confinement may be adjudged for no more than 1½ months for each month of authorized confinement and in no case for more than three months. Hard labor without confinement may be adjudged only in the cases of enlisted members. The court-martial shall not specify the hard labor to be performed. Confinement and hard labor without confinement may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection.

Discussion

Hard labor without confinement is performed in addition to other regular duties and does not excuse or relieve a person from performing regular duties. Ordinarily, the immediate commander of the accused will designate the amount and character of the labor to be performed. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which entitled.

See R.C.M. 1301(d) concerning limitations on hard labor without confinement in summary courts-martial.

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(8) *Confinement.* The place of confinement shall not be designated by the court-martial. A court-martial shall not adjudge a sentence to solitary confinement or to confinement without hard labor;

Discussion

The authority executing a sentence to confinement may require hard labor whether or not the words "at hard labor" are included in the sentence. *See* Article 58(b). To promote uniformity, the words "at hard labor" should be omitted in a sentence to confinement.

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(9) *Confinement on bread and water or diminished rations.* Confinement on bread and water or diminished rations may be adjudged only in cases of enlisted members attached to or embarked in a vessel and for no more than 3 days. The categories of enlisted personnel upon whom this type of punishment may be imposed may be further limited by regulations of the Secretary concerned. If adjudged in the same sentence with confinement, hard labor without confinement, or restriction, confinement on bread and water or diminished rations for 1 day shall be treated as the equivalent of confinement for 2 days;

Discussion

A sentence to confinement on bread and water or diminished rations may be served in a place where the prisoner can communicate only with authorized personnel. The ration to be furnished is that specified by the authority charged with the administration of the punishment, but may not consist solely of bread and water unless that punishment was specifically adjudged. A medical officer's approval must be obtained before the punishment may be executed. *See* R.C.M. 1113(d)(5); 1305(d).

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(10) *Punitive separation.* A court-martial may not adjudge an administrative separation from the service. There are three types of punitive separation.

(A) *Dismissal.* Dismissal applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dismissal may be adjudged for any offense of which a commissioned officer, commissioned warrant officer, cadet, or midshipman has been found guilty;

(B) *Dishonorable discharge.* A dishonorable discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dishonorable discharge may be adjudged for any offense of which a warrant officer who is not commissioned has been found guilty. A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment; and

Discussion

See also subsection (d)(1) of this rule regarding when a dishonorable discharge is authorized as an additional punishment.

(C) *Bad-conduct discharge*. A bad-conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial which has met the requirements of R.C.M.

shall be reported in supplementary orders in accordance with R.C.M. 1114 and shall state whether the approved period of confinement is to be executed or whether all or part of it is to be suspended.

Discussion

See Appendix 16 for forms.

Rule 1102. Post-trial sessions

(a) *In general.* Post-trial sessions may be proceedings in revision or Article 39(a) sessions. Such sessions may be directed by the military judge or the convening authority in accordance with this rule.

(b) *Purpose.*

(1) *Proceedings in revision.* Proceedings in revision may be directed to correct an apparent error, omission, or improper or inconsistent action by the court-martial, which can be rectified by reopening the proceedings without material prejudice to the accused.

Discussion

Because the action at a proceeding in revision is corrective, a proceeding in revision may not be conducted for the purpose of presenting additional evidence.

Examples when a proceeding in revision is appropriate include: correction of an ambiguous or apparently illegal action by the court-martial; inquiry into the terms of a pretrial agreement; and inquiry to establish the accused's awareness of certain rights.

See also R.C.M. 1104(d) concerning correction of the record by certificate of correction.

(2) *Article 39(a) sessions.* An Article 39(a) session under this rule may be called for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence.

Discussion

For example, an Article 39(a) session may be called to examine allegations of misconduct by a member or by counsel.

(c) *Matters not subject to post-trial sessions.* Post-trial sessions may not be directed:

(1) For reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty;

(2) For reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of the code; or

(3) For increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.

(d) *When directed.* The military judge may direct a post-trial session any time before the record is authenticated. The convening authority may direct a post-trial session any time before the convening authority takes initial action on the case or at such later time as the convening authority is authorized to do so by a reviewing authority, except that no proceeding in revision may be held when any part of the sentence has been ordered executed.

(e) *Procedure.*

(1) *Personnel.* The requirements of R.C.M. 505 and 805 shall apply at post-trial sessions except that—

(A) For a proceeding in revision, if trial was before members and the matter subject to the proceeding in revision requires the presence of members:

(i) The absence of any members does not invalidate the proceedings if, in the case of a general court-martial, at least five members are present, or, in the case of a special court-martial, at least three members are present; and

(ii) A different military judge may be detailed, subject to R.C.M. 502(c) and 902, if the military judge who presided at the earlier proceedings is not reasonably available.

(B) For an Article 39(a) session, a different military judge may be detailed, subject to R.C.M. 502(c) and 902, for good cause.

(2) *Action.* The military judge shall take such action as may be appropriate, including appropriate instructions when members are present. The members may deliberate in closed session, if necessary, to determine what corrective action, if any, to take.

(3) *Record.* All post-trial sessions, except any deliberations by the members, shall be held in open session. The record of the post-trial sessions shall be prepared, authenticated, and served in accordance with R.C.M. 1103 and 1104 and shall be included in the record of the prior proceedings.

Rule 1103. Preparation of record of trial

(a) *In general.* Each general, special, and summary court-martial shall keep a separate record of the proceedings in each case brought before it.

(b) *General courts-martial.*

(1) *Responsibility for preparation.* The trial counsel shall:

(A) Under the direction of the military judge, cause the record of trial to be prepared; and

(B) Under regulations prescribed by the Secretary concerned, cause to be retained stenographic or other notes or mechanical or electronic recordings from which the record of trial was prepared.

(2) *Contents.*

(A) *In general.* The record of trial in each general court-martial shall be separate, complete, and independent of any other document.

(B) *Verbatim transcript required.* Except as otherwise provided in subsection (j) of this rule, the record of trial shall include a verbatim written transcript of all sessions except sessions closed for deliberations and voting when:

★(i) Any part of the sentence adjudged exceeds six months confinement or other punishments which may be adjudged by a special court-martial; or

(ii) A bad-conduct discharge has been adjudged.

Discussion

A verbatim transcript includes: all proceedings including sidebar conferences, arguments of counsel, and rulings and instructions by the military judge; matters which the military judge orders stricken from the record or disregarded; and when a record is amended in revision proceedings (*see* R.C.M. 1102), the part of the original record changed and the changes made, without physical alteration of the original record.

Conferences under R.C.M. 802 need not be recorded, but matters agreed upon at such conferences must be included in the record.

If testimony is given through an interpreter, a verbatim transcript must so reflect.

(C) *Verbatim transcript not required.* If a verbatim transcript is not required under subsection (b)(2)(B) of this rule, a summarized report of the proceedings may be prepared instead of a verbatim transcript.

Discussion

See also R.C.M. 910(i) concerning guilty plea inquiries.

(D) *Other matters.* In addition to the matter required under subsection (b)(2)(B) or (b)(2)(C) of this rule, a complete record shall include:

(i) The original charge sheet or a duplicate;

(ii) A copy of the convening order and any amending order(s);

(iii) The request, if any, for trial by military judge alone, or that the membership of the court-martial include enlisted persons, and, when applicable, any statement by the convening authority required under R.C.M. 201(f)(2)(B)(ii) or 503(a)(2); and

(iv) Exhibits, or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence and any appellate exhibits.

(3) *Matters attached to the record.* The following matters shall be attached to the record:

(A) If not used as exhibits—

(i) The report of investigation under Article 32, if any;

(ii) The staff judge advocate's pretrial advice under Article 34, if any; and

(iii) If the trial was a rehearing or new or other trial of the case, the record of the former hearing(s);

(iv) Written special findings, if any, by the military judge;

(B) Exhibits or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were marked for and referred to on the record but not received in evidence;

(C) Any matter filed by the accused under R.C.M. 1105, or any written waiver of the right to submit such matter;

(D) Any deferment request and the action on it;

(E) Explanation for any substitute authentication under R.C.M. 1104(a)(2)(B);

(F) Explanation for any failure to serve the record of trial on the accused under R.C.M. 1104(b);

(G) The post-trial recommendation of the staff judge advocate or legal officer and proof of service on defense counsel in accordance with R.C.M. 1106(f)(1);

(H) Any response by defense counsel to the post-trial review;

(I) Recommendations and other papers relative to clemency;

(J) Any statement why it is impracticable for the convening authority to act;

(K) Conditions of suspension, if any, and proof of service on probationer under R.C.M. 1108;

(L) The certificate of a medical officer concerning the physical condition of an accused sentenced to confinement on bread and water or diminished rations;

(M) Any waiver or withdrawal of appellate review under R.C.M. 1110; and

(N) Records of any proceedings in connection with vacation of suspension under R.C.M. 1109.

(c) *Special courts-martial.*

(1) *Involving a bad-conduct discharge.* The requirements of subsections (b)(1), (b)(2)(A), (b)(2)(B), (b)(2)(D), and (b)(3) of this rule shall apply in a special court-martial in which a bad-conduct discharge has been adjudged.

(2) *Not involving a bad-conduct discharge.* If the special court-martial resulted in findings of guilty but a bad-conduct discharge was not adjudged, the requirements of subsections (b)(1), (b)(2)(C), (b)(2)(D), and (b)(3)(A)–(F) and (I)–(N) of this rule shall apply.

(d) *Summary courts-martial.* The summary court-martial record of trial shall be prepared as prescribed in R.C.M. 1305.

★(e) *Acquittal; courts-martial resulting in findings of not guilty only by reason of lack of mental responsibility; termination prior to findings.* Notwithstanding subsections (b), (c), and (d) of this rule, if proceedings resulted in an acquittal of all charges and specifications or in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or if the proceedings were terminated by withdrawal, mistrial, or dismissal before findings, the record may consist of the original charge sheet, a copy of the convening order and amending orders (if any), and sufficient information to establish jurisdiction over the accused and the offenses (if not shown on the charge sheet). The convening authority or higher authority may prescribe additional requirements.

Discussion

The notes or recordings of court-martial proceedings described in this subsection should be retained if reinstitution and re-referral of the affected charges is likely or when they may be necessary for the trial of another accused in a related case. *See* R.C.M. 905(g) and 914.

(f) *Loss of notes or recordings of the proceedings.* If, because of loss of recordings or notes, or other reasons, a verbatim transcript cannot be prepared when required by subsection (b)(2)(B) or (c)(1) of this rule, a record which meets the requirements of subsection (b)(2)(C) of this rule shall be prepared, and the convening authority may:

(1) Approve only so much of the sentence which could be adjudged by a special court-martial, except that no bad-conduct discharge may be approved; or

(2) Direct a rehearing as to any offense of which the accused was found guilty if the finding is supported by the summary of the evidence contained in the record, provided that the court-martial in a rehearing may not adjudge any sentence in excess of that adjudged by the earlier court-martial.

(g) *Copies of the record of trial.*

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

(A) *In general.* In general and special courts-martial which require a verbatim transcript under subsections (b) or (c) of this rule, the trial counsel shall cause to be prepared an original and four copies of the record of trial. In all other general and special courts-martial the trial counsel shall cause to be prepared an original and one copy of the record of trial.

Discussion

In a joint or common trial an additional copy of the record must be prepared for each accused. *See* R.C.M. 1104(b).

(B) *Additional copies.* The convening or higher authority may direct that additional copies of the record of trial of any general or special court-martial be prepared.

(2) *Summary courts-martial.* Copies of the summary court-martial record of trial shall be prepared as prescribed in R.C.M. 1305(b).

(h) *Security classification.* If the record of trial contains matter which must be classified under applicable security regulations, the trial counsel shall cause a proper security classification to be assigned to the record of trial and on each page thereof on which classified material appears.

Discussion

See R.C.M. 1104(b)(1)(D) concerning the disposition of records of trial requiring security protection.

(i) *Examination and correction before authentication.*

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

(A) *Examination and correction by trial counsel.* In general and special courts-martial, the trial counsel shall examine the record of trial before authentication and cause those changes to be made which are necessary to report the proceedings accurately. The trial counsel shall not change the record after authentication.

Discussion

The trial counsel may personally correct and initial the necessary changes or, if major changes are necessary, direct the reporter to rewrite the entire record or the portion of the record which is defective.

The trial counsel must ensure that the reporter makes a true, complete, and accurate record of the proceedings such that the record will meet the applicable requirements of this rule.

(6) *Effect of error.* In case of error in the recommendation not otherwise waived under subsection (f)(6) of this rule, appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority.

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

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

★(1) *Service of recommendation on defense counsel and accused.* Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused. If it is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the court-martial or in writing, the accused's copy shall be forwarded to the accused's defense counsel. A statement shall be attached to the record explaining why the accused was not served personally.

Discussion

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

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

Discussion

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

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

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

Discussion

See also R.C.M. 1105.

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(5) *Time period.* Counsel for the accused shall be given 10 days from service of the record of trial under R.C.M. 1104(b) or receipt of the recommendation, whichever is later, in which to submit

comments on the recommendation. The convening authority may, for good cause, extend the period in which comments may be submitted for up to 20 additional days.

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

Discussion

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

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

Discussion

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

Rule 1107. Action by convening authority

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

Discussion

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

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

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

(b) *General considerations.*

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

Discussion

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

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

(3) *Matters considered.*

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

(i) The result of trial;

Discussion

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

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

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

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

(i) The record of trial;

(ii) The personnel records of the accused; and

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

★(4) *When proceedings resulted in finding of not guilty or not guilty only by reason of lack of mental responsibility, or there was a ruling amounting to a finding of not guilty.* The convening authority shall not take action approving or disapproving a finding of not guilty, a finding of not guilty only by reason of lack of mental responsibility, or a ruling amounting to a finding of not guilty.

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

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

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

(2) Set aside any finding of guilty and—

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

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

Discussion

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

(d) *Action on the sentence.*

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

Discussion

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

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

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

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

Discussion

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

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

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

Discussion

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

(e) *Ordering rehearing or other trial.*

(1) *Rehearing.*

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

Discussion

A rehearing may be appropriate when an error substantially affecting the findings or sentence is noticed by the convening authority. The severity of the findings or the sentence of the original court-martial may not be increased at a rehearing unless the sentence prescribed for the offense is mandatory. *See* R.C.M. 810(d). If the accused is placed under restraint pending a rehearing, *see* R.C.M. 304; 305.

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

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

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

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

Discussion

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

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trial is combined with a trial on additional offenses and except as otherwise provided in R.C.M. 810(d), if any part of the original sentence was suspended and the suspension was not properly vacated before the order directing the rehearing, the convening authority shall take the necessary suspension action to prevent an increase in the same type of punishment as was previously suspended. The convening authority may approve a sentence adjudged upon a rehearing or other trial regardless whether any kind or amount of the punishment adjudged at the former trial has been served or executed. However, in computing the term or amount of punishment to be actually served or executed under the new sentence, the accused shall be credited with any kind or amount of the former sentence included within the new sentence that was served or executed before the time it was disapproved or set aside. The convening authority shall, if any part of a sentence adjudged upon a rehearing or other trial is approved, direct in the action that any part or amount of the former sentence served or executed between the date it was adjudged and the date it was disapproved or set aside shall be credited to the accused. If, in the action on the record of a rehearing, the convening authority disapproves the findings of guilty of all charges and specifications which were tried at the former hearing and that part of the sentence which was based on these findings, the convening authority shall, unless a further rehearing is ordered, provide in the action that all rights, privileges, and property affected by any executed portion of the sentence adjudged at the former hearing shall be restored. The convening authority shall take the same restorative action of a court-martial at a rehearing acquits the accused of all charges and specifications which were tried at the former hearing.

(B) *New trial.* The action of the convening authority on a new trial shall, insofar as practicable, conform to the rules prescribed for rehearings and other trials in subsection (f)(5)(A) of this rule.

Discussion

See R.C.M. 810 for procedures at other trials.

(g) *Incomplete, ambiguous, or erroneous action.* When the action of the convening or of a higher authority is incomplete, ambiguous, or contains clerical error, the authority who took the incomplete, ambiguous, or erroneous action may be instructed by an authority acting under Article 64, 66, 67, or 69 to withdraw the original action and substitute a corrected action.

(h) *Service on accused.* A copy of the convening authority's action shall be served on the accused or on defense counsel. If the action is served on defense counsel, defense counsel shall, by expeditious means, provide the accused with a copy.

Discussion

If the promulgating order is prepared promptly, service of it will satisfy subsection (h).

Rule 1108. Suspension of execution of sentence; remission

(a) *In general.* Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted. Remission cancels the unexecuted part of a sentence to which it applies.

★(b) *Who may suspend and remit.* The convening authority may, after approving the sentence, suspend the execution of all or any part of the sentence of a court-martial except for a sentence of death. The general court-martial convening authority over the accused at the time of the court-martial may, when taking 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 unexpected part of any sentence by summary court-martial or of any sentence by special court-martial which does not include a bad conduct discharge regardless of whether the person acting has previously approved the sentence. The "unexecuted part of any sentence" includes that part which has been approved and ordered executed but which has not actually been carried out.

Discussion

See R.C.M. 1113 (execution of sentences); R.C.M. 1201 (action by the Judge Advocate General); R.C.M. 1206 (powers and responsibilities of the Secretary).

The military judge and members of courts-martial may not suspend sentences.

(c) *Conditions of suspension.* The authority who suspends the execution of the sentence of a court-martial shall:

(1) Specify in writing the conditions of the suspension;

(2) Cause a copy of the conditions of the suspension to be served on the probationer; and

(3) Cause a receipt to be secured from the probationer for service of the conditions of the suspension.

Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the code.

(d) *Limitations on suspension.* Suspension shall be for a stated period or until the occurrence of an anticipated future event. The period shall not be unreasonably long. The Secretary concerned may further limit by regulations the period for which the execution of a sentence may be suspended. The convening authority shall provide in the action that unless the suspension is sooner vacated, the expiration of the period of suspension shall remit the suspended portion of the sentence. An appropriate authority may, before the expiration of the period of suspension, remit any part of the sentence, including a part which has been suspended; reduce the period of suspension; or, subject to R.C.M. 1109, vacate the suspension in whole or in part.

(e) *Termination of suspension by remission.* Expiration of the period provided in the action suspending a sentence or part of a sentence shall remit the suspended portion unless the suspension is sooner vacated. Death or separation which terminates status as a person subject to the code shall result in remission of the suspended portion of the sentence.

Discussion

See R.C.M. 1109(b)(4) concerning interruption of the period of suspension.

Rule 1109. Vacation of suspension of sentence

(a) *In general.* Suspension of execution of the sentence of a court-martial may be vacated for violation of the conditions of the suspension as provided in this rule.

(b) *Timeliness.*

(1) *Violation of conditions.* Vacation shall be based on a violation of the conditions of suspension which occurs within the period of suspension.

(2) *Vacation proceedings.* Vacation proceedings under this rule shall be completed within a reasonable time.

(3) *Order vacating the suspension.* The order vacating the suspension shall be issued before the expiration of the period of suspension.

Discussion

The order vacating a suspended sentence must be issued before the end of suspension even though, in certain cases, it may not be effective as an order of execution of the suspended sentence until the completion of appellate review or action by the President or the Secretary concerned. *See* R.C.M. 1113 concerning execution of sentences.

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(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.*

Advocate General, or directly with the Judge Advocate General.

(f) *Time limit.*

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

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

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

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

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

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

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

Rule 1111. Disposition of the record of trial after action

(a) *General courts-martial.*

(1) *Cases forwarded to the Judge Advocate General.* A record of trial by general court-martial and the convening authority's action shall be sent directly to the Judge Advocate General concerned if the approved sentence includes death or if the accused has not waived review under R.C.M. 1110. Unless otherwise prescribed by regulations of the Secretary concerned, 10 copies of the order promulgating the result of trial as to each accused shall be forwarded with the original record of trial. Two additional copies of the record of trial shall accompany the original record if the approved sentence includes death or if it includes dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more and the accused has not waived appellate review.

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

(b) *Special courts-martial.*

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

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

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

Discussion

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

Rule 1112. Review by a judge advocate

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

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

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

(3) Each summary court-martial.

★(b) *Exception.* If the accused was found not guilty or not guilty only by reason of lack of mental responsibility of all offenses or if the convening authority disapproved all findings of guilty, no review under this rule is required.

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

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

(1) Conclusions as to whether—

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

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

(C) The sentence was legal;

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

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

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

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

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

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

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

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

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

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

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

(2) *Confinement*

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

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

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

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

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

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

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

Discussion

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

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(3) *Confinement in lieu of fine.* Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.

(4) *Restriction; hard labor without confinement.* When restriction and hard labor without confinement are included in the same sentence, they shall, unless one is suspended, be executed concurrently.

(5) *Confinement on bread and water or diminished rations.* A sentence to confinement on bread and water or diminished rations may be executed only if a medical officer examines the accused and the place of confinement and certifies in writing that service of such a sentence will not, in that officer's opinion, produce serious injury to the health of the accused. A sentence of confinement on bread and water or diminished rations may be executed in a place where the accused can communicate only with authorized personnel.

(6) *More than one sentence.* If at the time forfeitures may be ordered executed, the accused is already serving a sentence to forfeitures by another court-martial, the authority taking action may order that the later forfeitures will be executed when the earlier sentence to forfeitures is completed.

Rule 1114. Promulgating orders

(a) *In general.*

(1) *Scope of rule.* Unless otherwise prescribed by the Secretary concerned, orders promulgating the result of trial and the actions of the convening or higher authorities on the record shall be prepared, issued, and distributed as prescribed in this rule.

(2) *Purpose.* A promulgating order publishes the result of the court-martial and the convening authority's action and any later action taken on the case.

(3) *Summary courts-martial.* An order promulgating the result of a trial by summary court-martial need not be issued.

Discussion

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

(b) *By whom issued.*

(1) *Initial orders.* The order promulgating the result of trial and the initial action of the convening authority shall be issued by the convening authority.

(2) *Orders issued after the initial action.* Any action taken on the case subsequent to the initial action shall be promulgated in supplementary orders. The subsequent action and the supplementary order may be the same document if signed personally by the appropriate convening or higher authority.

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

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

(c) *Contents.*

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

★(2) *Dates.* A promulgating order shall bear the date of the initial action, if any, of the convening authority. An order promulgating an acquittal, a court-martial terminated before findings, a court-martial resulting in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or action on the findings or sentence taken after the initial action of the convening authority shall bear the date of its publication. A promulgating order shall state the date the sentence was adjudged, the date on which the acquittal was announced, or the date on which the proceedings were otherwise terminated.

Discussion

See Appendix 17 for sample forms for promulgating orders.

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

(d) *Orders containing classified information.* When an order contains information which must be classified, only the order retained in the unit files and those copies which accompany the record of trial shall be complete and contain the classified information. The order shall be assigned the appropriate security classification. Asterisks shall be substituted for the classified information in the other copies of the order.

(e) *Authentication.* The promulgating order shall be authenticated by the signature of the convening or other competent authority acting on the case, or a person acting under the direction of such authority. A promulgating order prepared in compliance with this rule shall be presumed authentic.

(f) *Distribution.* Promulgating orders shall be distributed as provided in regulations of the Secretary concerned.

CHAPTER XII. APPEALS AND REVIEW

Rule 1201. Action by the Judge Advocate General

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

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

(2) In which—

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

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

Discussion

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

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

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

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

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

Discussion

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

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

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

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

Discussion

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

★Review of a finding of not guilty only by reason of lack of mental responsibility under this rule may not extend to the determination of lack of mental responsibility. Thus, modification of a finding of not guilty only by reason of lack of mental responsibility under this rule is limited to changing the finding to not guilty or not guilty only by reason of lack of mental responsibility of a lesser included offense.

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

Discussion

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

★(C) *Time limits on applications.* Any application for review by the Judge Advocate General under Article 69 must be made on or before the last day of the two year period beginning on the date the sentence is approved by the convening authority or the date the findings are announced for cases which do not proceed to sentencing, unless the accused establishes good cause for failure to file within that time.

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

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

Rule 1202. Appellate counsel

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

(b) *Duties.*

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

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

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

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

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

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

therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.

(b) *Exceptions.*

★(1) Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) or 305(f), or the requirements concerning counsel under Mil. R. Evid. 305(d), 305(e), and 305(g), this rule does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

(2) Evidence that was obtained as a result of an involuntary statement may be used when the evidence would have been obtained even if the involuntary statement had not been made.

(3) *Derivative evidence.* Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by the use of the statement, or that the evidence would have been obtained even if the statement had not been made.

(c) *Definitions.* As used in these rules:

(1) *Confession.* A "confession" is an acknowledgement of guilt.

(2) *Admission.* An "admission" is a self-incriminating statement falling short of an acknowledgement of guilt, even if it was intended by its maker to be exculpatory.

(3) *Involuntary.* A statement is "involuntary" if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.

(d) *Procedure.*

(1) *Disclosure.* Prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces.

(2) *Motions and objections.*

(A) Motions to suppress or objections under this rule or Mil. R. Evid. 302 or 305 to statements that have been disclosed shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

(B) If the prosecution intends to offer against the accused a statement made by the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interests of justice.

(C) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule or Mil. R. Evid. 302 or 305 shall be made in accordance with the procedure for challenging a statement under (A). If such evidence has not been so disclosed prior to arraignment, the requirements of (B) apply.

(3) *Specificity.* The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement, the military judge may make any order required in the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

(4) *Rulings.* A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for

determination at trial, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

(5) *Effect of guilty plea.* Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all privileges against self-incrimination and all motions and objections under this rule with respect to that offense regardless of whether raised prior to plea.

(e) *Burden of proof.* When an appropriate motion or objection has been made by the defense under this rule, the prosecution has the burden of establishing the admissibility of the evidence. When a specific motion or objection has been required under subdivision (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

(1) *In general.* The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. When trial is by a special court-martial without a military judge, a determination by the president of the court that a statement was made voluntarily is subject to objection by any member of the court. When such objection is made, it shall be resolved pursuant to R.C.M. 801(e)(3)(C).

(2) *Weight of the evidence.* If a statement is admitted into evidence, the military judge shall permit the defense to present relevant evidence with respect to the voluntariness of the statement and shall instruct the members to give such weight to the statement as it deserves under all the circumstances. When trial is by military judge without members, the military judge shall determine the appropriate weight to give the statement.

(3) *Derivative evidence.* Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the evidence would have been obtained even if the statement had not been made.

(f) *Defense evidence.* The defense may present evidence relevant to the admissibility of evidence as to which there has been an objection or motion to suppress under this rule. An accused may testify for the limited purpose of denying that the accused made the statement or that the statement was made voluntarily. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(g) *Corroboration.* An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements, offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(1) *Quantum of evidence needed.* The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

(B) *Standard.* Classified information is not subject to disclosure under this subdivision unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence.

(C) *Ruling.* Unless the military judge makes a written determination that the information meets the standard set forth in (B), the information may not be disclosed or otherwise elicited at a court-martial proceeding. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

(D) *Alternatives to full disclosure.* If the military judge makes a determination under this subdivision that would permit disclosure of the information or if the Government elects not to contest the relevance, necessity, and admissibility of any classified information, the Government may proffer a statement admitting for purposes of the proceeding any relevant facts such information would tend to prove or may submit a portion of summary to be used in lieu of the information. The military judge shall order that such statement, portion, or summary be used by the accused in place of the classified information unless the military judge finds that use of the classified information itself is necessary to afford the accused a fair trial.

(E) *Sanctions.* If the military judge determines that alternatives to full disclosure may not be used and the Government continues to object to disclosure of the information, the military judge shall issue any order that the interests of justice require. Such an order may include an order:

(i) striking or precluding all or part of the testimony of a witness;

(ii) declaring a mistrial;

(iii) finding against the Government on any issue as to which the evidence is relevant and material to the defense;

(iv) dismissing the charges, with or without prejudice; or

(v) dismissing the charges or specifications or both to which the information relates.

Any such order shall permit the Government to avoid the sanction for nondisclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding.

(j) *Introduction of classified information.*

(1) *Classification status.* Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(2) *Precautions by the military judge.* In order to prevent unnecessary disclosure of classified information, the military judge may order admission into evidence of only part of a writing, recording, or photograph or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein.

(3) *Contents of writing, recording, or photograph.* The military judge may permit proof of the contents of a writing, recording, or photograph that contains classified information without requiring introduction into evidence of the original or a duplicate.

(4) *Taking of testimony.* During the examination of a witness, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be relevant and necessary to the defense. Following such an objection, the military judge shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring the Government to provide the military judge with a proffer or the witness' response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

(5) *Closed session.* If counsel for all parties, the military judge, and the members have received appropriate security clearances, the military judge may exclude the public during that portion of the testimony of a witness that discloses classified information.

(6) *Record of trial.* The record of trial with respect to any classified matter will be prepared under R.C.M. 1103(h) and 1104(b)(1)(D).

(k) *Security procedures to safeguard against compromise of classified information disclosed to courts-martial.* The Secretary of Defense may prescribe security procedures for protection against the compromise of classified information submitted to courts-martial and appellate authorities.

Rule 506. Government information other than classified information

(a) *General rule of privilege.* Except where disclosure is required by an Act of Congress, government information is privileged from disclosure if disclosure would be detrimental to the public interest.

(b) *Scope.* "Government information" includes official communication and documents and other information within the custody or control of the Federal Government. This rule does not apply to classified information (Mil. R. Evid. 505) or to the identity of an informant (Mil. R. Evid. 507).

★(c) *Who may claim the privilege.* The privilege may be claimed by the head of the executive or military department or government agency concerned. The privilege for records and information of the Inspector General may be claimed by the immediate superior of the inspector general officer responsible for creation of the records or information, the Inspector General, or any other superior authority. A person who may claim the privilege may authorize a witness or the trial counsel to claim the privilege on his or her behalf. The authority of a witness or the trial counsel to do so is presumed in the absence of evidence to the contrary.

(d) *Action prior to referral of charges.* Prior to referral of charges, the Government shall respond in writing to a request for government information if the privilege in this rule is claimed for such information. The Government shall:

(1) delete specified items of government information claimed to be privileged from documents made available to the accused;

(2) substitute a portion or summary of the information for such documents;

(3) substitute a statement admitting relevant facts that the government information would tend to prove;

(4) provide the document subject to conditions similar to those set forth in subdivision (g) of this rule; or

(5) withhold disclosure if actions under (1) through (4) cannot be taken without causing identifiable damage to the public interest.

(e) *Action after referral of charges.* After referral of charges, if a claim of privilege has been made under this rule with respect to government information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter shall be reported to the convening authority. The convening authority may:

(1) institute action to obtain the information for use by the military judge in making a determination under subdivision (i);

(2) dismiss the charges;

(3) dismiss the charges or specifications or both to which the information relates; or

(4) take other action as may be required in the interests of justice.

If, after a reasonable period of time, the information is not provided to the military judge, the military judge shall dismiss the charges or specifications or both to which the information relates.

(f) *Pretrial session.* At any time after referral of charges and prior to arraignment any party may move for a session under Article 39(a) to consider matters relating to government information that may arise in connection with the trial. Following such motion, or sua sponte, the military judge promptly shall hold a pretrial session under Article 39(a) to establish the timing of requests for discovery, the provision of notice under subdivision (h), and the initiation of the procedure under subdivision (i). In addition, the military judge may consider any other matters that relate to government information or that may promote a fair and expeditious trial.

(g) *Disclosure of Government information to the accused.* If the Government agrees to disclose government information to the accused subsequent to a claim of privilege under this rule, the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

(1) Prohibiting the disclosure of the information except as authorized by the military judge;

(a) *Hazardous duty or important service.* "Hazardous duty" or "important service" may include service such as duty in a combat or other dangerous area; embarkation for certain foreign or sea duty; movement to a port of embarkation for that purpose; entrainment for duty on the border or coast in time of war or threatened invasion or other disturbances; strike or riot duty; or employment in aid of the civil power, in, for example, protecting property, or quelling or preventing disorder in times of great public disaster. Such services as drill, target practice, maneuvers, and practice marches are not ordinarily "hazardous duty or important service." Whether a duty is hazardous or a service is important depends upon the circumstances of the particular case, and is a question of fact for the court-martial to decide.

(b) *Quits.* "Quits" in Article 85 means "goes absent without authority."

(c) *Actual knowledge.* Article 85*a*(2) requires proof that the accused actually knew of the hazardous duty or important service. Actual knowledge may be proved by circumstantial evidence.

(3) *Attempting to desert.* Once the attempt is made, the fact that the person desists, voluntarily or otherwise, does not cancel the offense. The offense is complete, for example, if the person, intending to desert, hides in an empty freight car on a military reservation, intending to escape by being taken away in the car. Entering the car with the intent to desert is the overt act. For a more detailed discussion of attempts, *see* paragraph 4. For an explanation concerning intent to remain away permanently, *see* subparagraph 9*c*(1)(*c*).

(4) *Prisoner with executed punitive discharge.* A prisoner whose dismissal or dishonorable or bad-conduct discharge has been executed is not a "member of the armed forces" within the meaning of Articles 85 or 86, although the prisoner may still be subject to military law under Article 2(*a*)(7). If the facts warrant, such a prisoner could be charged with escape from confinement under Article 95 or an offense under Article 134.

d. *Lesser included offense.* Article 86—absence without leave

e. *Maximum punishment.*

(1) *Completed or attempted desertion with intent to avoid hazardous duty or to shirk important service.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Other cases of completed or attempted desertion.*

(a) Terminated by apprehension. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(b) Terminated otherwise. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(3) *In time of war.* Death or such other punishment as a court-martial may direct.

f. *Sample specifications.*

(1) *Desertion with intent to remain away permanently.*

In that ________ (personal jurisdiction data), did, on or about ________ 19 ____ , (a time of war) without authority and with intent to remain away therefrom permanently, absent himself/herself from his/her (unit) (organization) (place of duty), to wit: ____________ , located at (________), and did remain so absent in desertion until (he/she was apprehended) on or about ________ 19 ____ .

(2) *Desertion with intent to avoid hazardous duty or shirk important service.*

In that ________ (personal jurisdiction data), did, on or about ________ 19 ____ , (a time of war) with intent to (avoid hazardous duty) (shirk important service), namely: __________ , quit his/her (unit) (organization) (place of duty), to wit: ____________ , located at (__________), and did remain so absent in desertion until on or about ________ 19 ____ .

(3) *Desertion prior to acceptance of resignation.*

In that ________ (personal jurisdiction data) having tendered his/her resignation and prior to due notice of the acceptance of the same, did, on or about ________ 19 ____ , (a time of war) without leave and with intent to remain away therefrom permanently, quit his/her (post) (proper duties), to wit: ____________ , and did remain so absent in desertion until (he/she was apprehended) on or about ________ 19 ____ .

(4) *Attempted desertion.*

In that ________ (personal jurisdiction data), did (at/on board-location), on or about ________ 19 ____ , (a time of war) attempt to [absent himself/herself from his/her (unit) (organization) (place of duty) to wit: ____________ , without authority and with intent to remain away therefrom permanently] [quit his/her (unit) (organization) (place of duty), to wit: __________ , located at ____________ , with intent to (avoid hazardous duty) (shirk important service) namely ____________] [____________].

10. Article 86—Absence without leave

a. *Text.*

"Any member of the armed forces who, without authority—

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

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct."

b. *Elements.*

(1) *Failure to go to appointed place of duty.*

(a) That a certain authority appointed a certain time and place of duty for the accused;

(b) That the accused knew of that time and place; and

(c) That the accused, without authority, failed to go to the appointed place of duty at the time prescribed.

(2) *Going from appointed place of duty.*

(a) That a certain authority appointed a certain time and place of duty for the accused;

(b) That the accused knew of that time and place; and

(c) That the accused, without authority, went from the appointed place of duty after having reported at such place.

(3) *Absence from unit, organization, or place of duty.*

(a) That the accused absented himself or herself from his or her unit, organization, or place of duty at which he or she was required to be;

(b) That the absence was without authority from anyone competent to give him or her leave; and

(c) That the absence was for a certain period of time.

[Note: if the absence was terminated by apprehension, add the following element]

(d) That the absence was terminated by apprehension.

(4) *Abandoning watch or guard.*

(a) That the accused was a member of a guard, watch, or duty;

(b) That the accused absented himself or herself from his or her guard, watch, or duty section;

(c) That the absence of the accused was without authority; and

★[Note: If the absence was with intent to abandon the accused's guard, watch, or duty section, add the following element.]

(d) That the accused intended to abandon his or her guard, watch, or duty section.

(5) *Absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises.*

(b) For more than 3 days but not more than 30 days. Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

(c) For more than 30 days. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(d) For more than 30 days and terminated by apprehension. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(3) *From guard or watch.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(4) *From guard or watch with intent to abandon.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(5) *With intent to avoid maneuvers or field exercises.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specifications.*

(1) *Failing to go or leaving place of duty.*

In that ________ (personal jurisdiction data), did (at/on board—location), on or about ________ 19 ____ , without authority, (fail to go at the time prescribed to) (go from) his/her appointed place of duty, to wit: (here set forth the appointed place of duty).

(2) *Absence from unit, organization, or place of duty.*

In that ________ (personal jurisdiction data), did, on or about ________ 19 ____ , without authority, absent himself/herself from his/her (unit) (organization) (place of duty at which he/she was required to be), to wit: ____________ , located at ____________ , and did remain so absent until (he/she was apprehended) on or about ________ 19 ____ .

(3) *Absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises.*

In that ________ (personal jurisdiction data), did, on or about ________ 19 ____ , without authority and with intent to avoid (maneuvers) (field exercises), absent himself/herself from his/her (unit) (organization) (place of duty at which he/she was required to be), to wit: __________ located at (____________), and did remain so absent until on or about ________ 19 ____ .

★(4) *Abandoning watch or guard.*

In that ________ (personal jurisdiction data), being a member of the ________ (guard) (watch) (duty section), did, (at/on board-location), on or about ________ 19 ____ , without authority, go from his/her (guard) (watch) (duty section) (with intent to abandon the same).

11. Article 87—Missing movement

a. *Text.*

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

b. *Elements.*

(1) That the accused was required in the course of duty to move with a ship, aircraft or unit;

(2) That the accused knew of the prospective movement of the ship, aircraft or unit;

(3) That the accused missed the movement of the ship, aircraft or unit; and

(4) That the accused missed the movement through design or neglect.

c. *Explanation.*

(1) *Movement.* "Movement" as used in Article 87 includes a move, transfer, or shift of a ship, aircraft, or unit involving a substantial distance and period of time. Whether a particular movement is substantial is a question to be determined by the court-martial considering all the circumstances. Changes which do not constitute a "movement" include practice marches of a short duration with a return to the point of departure, and minor changes in location of ships, aircraft, or units, as when a ship is shifted from one berth to another in the same shipyard or harbor or when a unit is moved from one barracks to another on the same post.

(2) *Mode of movement.*

(a) *Unit.* If a person is required in the course of duty to move with a unit, the mode of travel is not important, whether it be military or commercial, and includes travel by ship, train, aircraft, truck, bus, or walking. The work "unit" is not limited to any specific technical category such as those listed in a table of organization and equipment, but also includes units which are created before the movement with the intention that they have organizational continuity upon arrival at their destination regardless of their technical designation, and units intended to be disbanded upon arrival at their destination.

(b) *Ship, aircraft.* If a person is assigned as a crew member or is ordered to move as a passenger aboard a particular ship or aircraft, military or chartered, then missing the particular sailing or flight is essential to establish the offense of missing movement.

(3) *Design.* "Design" means on purpose, intentionally, or according to plan and requires specific intent to miss the movement.

(4) *Neglect.* "Neglect" means the omission to take such measures as are appropriate under the circumstances to assure presence with a ship, aircraft, or unit at the time of a scheduled movement, or doing some act without giving attention to its probable consequences in connection with the prospective movement, such as a departure from the vicinity of the prospective movement to such a distance as would make it likely that one could not return in time for the movement.

(5) *Actual knowledge.* In order to be guilty of the offense, the accused must have actually known of the prospective movement that was missed. Knowledge of the exact hour or even of the exact date of the scheduled movement is not required. It is sufficient if the approximate date was known by the accused as long as there is a causal connection between the conduct of the accused and the missing of the scheduled movement. Knowledge may be proved by circumstantial evidence.

(6) *Proof of absence.* That the accused actually missed the movement may be proved by documentary evidence, as by a proper entry in a log or a morning report. This fact may also be proved by the testimony of personnel of the ship, aircraft, or unit (or by other evidence) that the movement occurred at a certain time, together with evidence that the accused was physically elsewhere at that time.

d. *Lesser included offenses.*

(1) *Design.*

(a) Article 87—missing movement through neglect

(b) Article 86—absence without authority

(c) Article 80—attempts

(2) *Neglect.* Article 86—absence without authority

e. *Maximum punishment.*

(1) *Design.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Neglect*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification*.

In that ________ (personal jurisdiction data), did, (at/on board—location), on or about ________ 19 ____ , through (neglect) (design) miss the movement of (Aircraft No. ________) (Flight ________) (the USS ________) (Company A, 1st Battalion, 7th Infantry) (________) with which he/she was required in the course of duty to move.

12. Article 88—Contempt toward officials

a. *Text*.

person authorized to order the accused into medical quarantine, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ________ 19 ____ , break said medical quarantine.

101. [RESERVED]

102. Article 134 (Restriction, breaking)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) That a certain person ordered the accused to be restricted to certain limits;

(2) That said person was authorized to order said restriction;

(3) That the accused knew of the restriction and the limits thereof;

(4) That the accused went beyond the limits of the restriction before being released therefrom by proper authority; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* Restriction is the moral restraint of a person imposed by an order directing a person to remain within certain specified limits. "Restriction" includes restriction under R.C.M. 304(*a*)(2), restriction resulting from imposition of either nonjudicial punishment (*see* Part V) or the sentence of a court-martial (*see* R.C.M. 1003(*b*)(6)), and administrative restriction in the interest of training, operations, security, or safety.

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

e. *Maximum punishment.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

f. *Sample specification.*

In that ________ (personal jurisdiction data), having been restricted to the limits of __________ , by a person authorized to do so, did, (at/on board—location), on or about ________ 19 ____ , break said restriction.

103. Article 134 (Seizure: destruction, removal, or disposal of property to prevent)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) That one or more persons authorized to make searches and seizures were seizing, about to seize, or endeavoring to seize certain property;

(2) That the accused destroyed, removed, or otherwise disposed of that property with intent to prevent the seizure thereof;

(3) That the accused then knew that person(s) authorized to make searches were seizing, about to seize, or endeavoring to seize the property; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation. See* Mil. R. Evid. 316(*e*) concerning military personnel who may make seizures. It is not a defense that a search or seizure was technically defective.

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

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification.*

In that ________ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about ________ 19 ____ , with intent to prevent its seizure, (destroy) (remove) (dispose of) ____________ , property which, as ____________ then knew, (a) person(s) authorized to make searches and seizures were (seizing) (about to seize) (endeavoring to seize).

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

a. *Text. See* paragraph 60.

b. *Elements.*

(1) *Disrespect to a sentinel or lookout.*

(a) That a certain person was a sentinel or lookout;

(b) That the accused knew that said person was a sentinel or lookout;

(c) That the accused used certain disrespectful language or behaved in a certain disrespectful manner;

(d) That such language or behavior was wrongful;

(e) That such language or behavior was directed toward and within the sight or hearing of the sentinel or lookout;

(f) That said person was at the time in the execution of duties as a sentinel or lookout; and

(g) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) *Loitering or wrongfully sitting on post by a sentinel or lookout.*

(a) That the accused was posted as a sentinel or lookout;

(b) That while so posted, the accused loitered or wrongfully sat down on post; and

(c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

[Note: If the offense was committed in time of war or while the accused was receiving special pay under 37 U.S.C. § 310, add the following element after element (*a*): That the accused was so posted (in time of war) (while receiving special pay under 37 U.S.C. § 310)]

c. *Explanation.*

(1) *Disrespect*. For a discussion of "disrespect," *see* paragraph 13c(3).

(2) *Loitering or wrongfully sitting on post.*

(a) *In general*. The discussion set forth in paragraph 38c applies to loitering or sitting down while posted as a sentinel or lookout as well.

(b) *Loiter*. "Loiter" means to stand around, to move about slowly, to linger, or to lay behind when that conduct is in violation of known instructions or accompanied by a failure to give complete attention to duty.

d. *Lesser included offenses.*

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

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

e. *Maximum punishment.*

(1) *Disrespect to a sentinel or lookout.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(2) *Loitering or wrongfully sitting on post by a sentinel or lookout.*

(a) *In time of war or while receiving special pay under 37 U.S.C. § 310.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(b) *Other cases.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specifications.*

(1) *Disrespect to a sentinel or lookout.*

In that __________ (personal jurisdiction data), did, (at/on board—location), on or about __________ 19 _____ , then knowing that ______________ was a sentinel or lookout, [wrongfully use the following disrespectful language " ______________ ," or words to that effect, to ____________] [wrongfully behave in a disrespectful manner toward ______________ , by] a (sentinel) (lookout) in the execution of his/her duty.

(2) *Loitering or wrongfully sitting down on post by a sentinel or lookout.*

In that __________ (personal jurisdiction data), while posted as a (sentinel) (lookout), did (at/on board—location) (while receiving special pay under 37 U.S.C. § 310) on or about __________ 19 _____ , (a time of war) (loiter) (wrongfully sit down) on his/her post.

105. Article 134 (Soliciting another to commit an offense)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) That the accused solicited or advised a certain person or persons to commit a certain offense under the code other than one of the four offenses named in Article 82;

(2) That the accused did so with the intent that the offense actually be committed; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation. See* paragraph 6c. If the offense solicited was actually committed, *see also* paragraph 1.

★d. *Lesser included offenses.* Article 80—attempts.

(1) Article 134—Requesting another to commit an offense, wrongful communication of language

(2) Article 80—attempts

e. *Maximum punishment.* Any person subject to the code who is found guilty of soliciting or advising another person to commit an offense which, if committed by one subject to the code, would be punishable under the code, shall be subject to the maximum punishment authorized for the offense solicited or advised, except that in no case shall the death penalty be imposed nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 5 years. However, any person subject to the code who is found guilty of soliciting or advising another person to commit the offense of espionage (Article 106a) shall be subject to any punishment, other than death, that a court-martial may direct.

f. *Sample specification.*

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

106. Article 134 (Stolen property: knowingly receiving, buying, concealing)

a. *Text. See* paragraph 60.

b. *Elements.*

(1) That the accused wrongfully received, bought, or concealed certain property of some value;

(2) That the property belonged to another person;

(3) That the property had been stolen;

(4) That the accused then knew that the property had been stolen; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *In general.* The actual thief is not criminally liable for receiving the property stolen; however a principal to the larceny (*see* paragraph 1), when not the actual thief, may be found guilty of knowingly receiving the stolen property but may not be found guilty of both the larceny and receiving the property.

(2) *Knowledge.* Actual knowledge that the property was stolen is required. Knowledge may be proved by circumstantial evidence.

(3) *Wrongfulness.* Receiving stolen property is wrongful if it is without justification or excuse. For example, it would not be wrongful for a person to receive stolen property for the purpose of returning it to its rightful owner, or for a law enforcement officer to seize it as evidence.

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

e. *Maximum punishment.* Stolen property, knowingly receiving, buying, or concealing.

(1) *Of a value of $100.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) *Of a value of more than $100.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. *Sample specification.*

In that _________ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _________ 19 _____ , wrongfully (receive) (buy) (conceal) _________ ,

(A) By any commanding officer—restriction to specified limits, with or without suspension from duty for not more than 30 consecutive days;

(B) If imposed by an officer exercising general court-martial jurisdiction, an officer of general or flag rank in command, or a principal assistant as defined in paragraph 2c of this Part—

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

(ii) forfeiture of not more than one-half of one months' pay per month for 2 months;

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

(2) Upon other military personnel of the command—

(A) By any nonjudicial punishment authority—

(i) If imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than 3 consecutive days;

(ii) correctional custody for not more than 7 consecutive days;

(iii) forfeiture of not more than 7 days' pay;

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

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

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

(B) if imposed by a commanding officer of the grade of major or lieutenant commander or above or a principal assistant as defined in paragraph 2c of this Part—

(i) If imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than 3 consecutive days;

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

(iii) forfeiture of not more than one-half of 1 month's pay per month for 2 months;

(iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but enlisted members in pay grades above E4 may not be reduced more than one pay grade, except that during time of war or national emergency this category of persons may be reduced two grades if the Secretary concerned determines that circumstances require the removal of this limitation;

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

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

(c) *Nature of punishment.*

(1) *Admonition and reprimand.* Admonition and reprimand are two forms of censure intended to express adverse reflection upon or criticism of a person's conduct. A reprimand is a more severe form of censure than an admonition. When imposed as nonjudicial punishment, the admonition or reprimand is considered to be punitive, unlike the nonpunitive admonition and reprimand provided

for in paragraph 1f of this Part. In the case of commissioned officers and warrant officers, admonitions and reprimands given as nonjudicial punishment must be administered in writing. In other cases, unless otherwise prescribed by the Secretary concerned, they may be administered either orally or in writing.

(2) *Restriction.* Restriction is the least severe form of deprivation of liberty. Restriction involves moral rather than physical restraint. The severity of this type of restraint depends on its duration and the geographical limits specified when the punishment is imposed. A person undergoing restriction may be required to report to a designated place at specified times if reasonably necessary to ensure that the punishment is being properly executed. Unless otherwise specified by the nonjudicial punishment authority, a person in restriction may be required to perform any military duty.

(3) *Arrest in quarters.* As in the case of restriction, the restraint involved in arrest in quarters is enforced by a moral obligation rather than by physical means. This punishment may be imposed only on officers. An officer undergoing this punishment may be required to perform those duties prescribed by the Secretary concerned. However, an officer so punished is required to remain within that officer's quarters during the period of punishment unless the limits of arrest are otherwise extended by appropriate authority. The quarters of an officer may consist of a military residence, whether a tent, stateroom, or other quarters assigned, or a private residence when government quarters have not been provided.

(4) *Correctional custody.* Correctional custody is the physical restraint of a person during duty or nonduty hours, or both, imposed as a punishment under Article 15, and may include extra duties, fatigue duties, or hard labor as an incident of correctional custody. A person may be required to serve correctional custody in a confinement facility, but, if practicable, not in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial. A person undergoing correctional custody may be required to perform those regular military duties, extra duties, fatigue duties, and hard labor which may be assigned by the authority charged with the administration of the punishment. The conditions under which correctional custody is served shall be prescribed by the Secretary concerned. In addition, the Secretary concerned may limit the categories of enlisted members upon whom correctional custody may be imposed. The authority competent to order the release of a person from correctional custody shall be as designated by the Secretary concerned.

(5) *Confinement on bread and water or diminished rations.* Confinement on bread and water or diminished rations involves confinement in places where the person so confined may communicate only with authorized personnel. The ration to be furnished a person undergoing a punishment of confinement on bread and water or diminished rations is that specified by the authority charged with the administration of the punishment, but the ration may not consist solely of bread and water unless this punishment has been specifically imposed. When punishment of confinement on bread and water or diminished rations is imposed, a signed certificate of a medical officer containing an opinion that no serious injury to the health of the person to be confined will be caused by that punishment, must be obtained before the punishment is executed. The categories of enlisted personnel upon whom this type of punishment may be imposed may be limited by the Secretary concerned.

(6) *Extra duties.* Extra duties involve the performance of duties in addition to those normally assigned to the person undergoing the punishment. Extra duties may include fatigue duties. Military duties of any kind may be assigned as extra duty. However, no extra duty may be imposed which constitutes a known safety or health hazard to the member or which constitutes cruel or unusual punishment or which is not sanctioned by customs of the service concerned. Extra duties assigned as punishment of noncommissioned officers, petty officers, or any other enlisted persons of equivalent grades or positions designated by the Secretary concerned, should not be of a kind which demeans their grades or positions.

(7) *Reduction in grade.* Reduction in grade is one of the most severe forms of nonjudicial punishment and it should be used with discretion. As used in Article 15, the phrase "if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer

subordinate to the one who imposes the reduction'' does not refer to the authority to promote the person concerned but to the general authority to promote to the grade held by the person to be punished.

★(8) *Forfeiture of pay.* Forefeiture means a permanent loss of entitlement to the pay forfeited. ''Pay,'' as used with respect to forfeiture of pay under Article 15, refers to the basic pay of the person or, in the case of reserve component personnel on inactive-duty, compensation for periods of inactive-duty training, plus any sea or foreign duty pay. ''Basic pay'' includes no element of pay other than the basic pay fixed by statute for the grade and length of service of the person concerned and does not include special pay for a special qualification, incentive pay for the performance of hazardous duties, proficiency pay, subsistence and quarters allowances, and similar types of compensation. If the punishment includes both reduction, whether or not suspended, and forfeiture of pay, the forfeiture must be based on the grade to which reduced. The amount to be forfeited will be expressed in whole dollar amounts only and not in a number of day's pay or fractions of monthly pay. If the forfeiture is to be applied for more than 1 month, the amounts to be forfeited and the number of months should be stated. Forfeiture of pay may not extend to any pay accrued before the date of its imposition.

d. *Limitations on combination of punishments.*

(1) Arrest in quarters may not be imposed in combination with restriction;

(2) Confinement on bread and water or diminished rations may not be imposed in combination with correctional custody, extra duties, or restriction;

(3) Correctional custody may not be imposed in combination with restriction or extra duties;

(4) Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum imposable for extra duties;

(5) Subject to the limits in subparagraphs d(1) through (4) all authorized punishments may be imposed in a single case in the maximum amounts.

e. *Punishments imposed on reserve component personnel while on inactive-duty training.* When a punishment under Article 15 amounting to a deprivation of liberty (for example, restriction, correctional custody, extra duties, or arrest in quarters) is imposed on a member of a reserve component during a period of inactive-duty training, the punishment may be served during one or both of the following:

(1) a normal period of inactive-duty training; or

(2) a subsequent period of active duty (not including a period of active duty under Article 2(d)(1), unless such active duty was approved by the Secretary concerned).

Unserved punishments may be carried over to subsequent periods of inactive-duty training or active duty. A sentence to forfeiture of pay may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

f. *Punishments imposed on reserve component personnel when ordered to active duty for disciplinary purposes.* When a punishment under Article 15 is imposed on a member of a reserve component during a period of active duty to which the reservist was ordered pursuant to R.C.M. 204 and which constitutes a deprivation of liberty (for example, restriction, correctional custody, extra duties, or arrest in quarters), the punishment may be served during any or all of the following:

(1) that period of active duty to which the reservist was ordered pursuant to Article 2(d), but only where the order to active duty was approved by the Secretary concerned;

(2) a subsequent normal period of inactive-duty training; or

(3) a subsequent period of active duty (not including a period of active duty pursuant to R.C.M. 204 which was not approved by the Secretary concerned).

Unserved punishments may be carried over to subsequent periods of inactive-duty training or active duty. A sentence to forfeiture of pay may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

g. *Effective date and execution of punishments.* Reduction and forfeiture of pay, if unsuspended, take effect on the date the commander imposes the punishments. Other punishments, if unsuspended, will take effect and be carried into execution as prescribed by the Secretary concerned.

6. Suspension, mitigation, remission, and setting aside

a. *Suspension.* The nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment, or a successor in command over the person punished, may, at any time, suspend any part or amount of the unexecuted punishment imposed and may suspend a reduction in grade or a forfeiture, whether or not executed, subject to the following rules:

(1) An executed punishment of reduction or forfeiture of pay may be suspended only within a period of 4 months after the date of execution.

(2) Suspension of a punishment may not be for a period longer than 6 months from the date of the suspension, and the expiration of the current enlistment or term of service of the servicemember involved automatically terminates the period of suspension.

(3) Unless the suspension is sooner vacated, suspended portions of the punishment are remitted, without further action, upon the termination of the period of suspension.

★(4) Unless otherwise stated, an action suspending a punishment includes a condition that the servicemember not violate any punitive article of the code. The nonjudicial punishment authority may specify in writing additional conditions of the suspension.

★(5) A suspension may be vacated by any nonjudicial punishment authority or commander competent to impose upon the servicemember concerned punishment of the kind and amount involved in the vacation of suspension. Vacation of suspension may be based only on a violation of the conditions of suspension which occurs within the period of suspension. Before a suspension may be vacated, the servicemember ordinarily shall be notified and given an opportunity to respond. Although a hearing is not required to vacate a suspension, if the punishment is of the kind set forth in Article 15(e)(1)-(7), the servicemember should, unless impracticable, be given an opportunity to appear before the officer authorized to vacate suspension of the punishment to present any matters in defense, extenuation, or mitigation of the violation on which the vacation action is to be based. Vacation of a suspended nonjudicial punishment is not itself nonjudicial punishment, and additional action to impose nonjudicial punishment for a violation of a punitive article of the code upon which the vacation action is based is not precluded thereby.

b. *Mitigation.* Mitigation is a reduction is either the quantity or quality of a punishment, its general nature remaining the same. Mitigation is appropriate when the offender's later good conduct merits a reduction in the punishment, or when it is determined that the punishment imposed was disproportionate. The nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment, or a successor in command may, at any time, mitigate any part or amount of the unexecuted portion of the punishment imposed. The nonjudicial punishment authority who imposes nonjudicial punishment, the commander who imposes nonjudicial punishment, or a successor in command may also mitigate reduction in grade, whether executed or unexecuted, to forefeiture of pay, but the amount of the forfeiture may not be greater than the amount that could have been imposed by the officer who initially imposed the nonjudicial punishment. Reduction in grade may be mitigated to forfeiture of pay only within 4 months after the date of execution.

When mitigating—

(1) Arrest in quarters to restriction;

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

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

(4) Extra duties to restriction, the mitigated punishment may not be for a greater period than the punishment mitigated. As restriction is the least severe form of deprivation of liberty, it may not be mitigated to a lesser period of another form of deprivation of liberty, as that would mean an increase in the quality of the punishment.

c. *Remission.* Remission is an action whereby any portion of the unexecuted punishment is cancelled. Remission is appropriate under the same circumstances as mitigation. The nonjudicial punishment authority who imposes punishment, the commander who imposes nonjudicial punishment, or a successor in command may, at any time, remit any part or amount of the unexecuted portion of the punishment imposed. The expiration of the current enlistment or term of service of the servicemember automatically remits any unexecuted punishment imposed under Article 15.

d. *Setting aside.* Setting aside is an action whereby the punishment or any part or amount thereof, whether executed or unexecuted, is set aside and any property, privileges, or rights affected by the portion of the punishment set aside are restored. The nonjudicial punishment authority who imposed punishment, the commander who imposes nonjudicial punishment, or a successor in command may set aside punishment. The power to set aside punishments and restore rights, privileges, and property affected by the executed portion of a punishment should ordinarily be exercised only when the authority considering the case believes that, under all circumstances of the case, the punishment has resulted in clear injustice. Also, the power to set aside an executed punishment should ordinarily be exercised only within a reasonable time after the punishment has been executed. In this connection, 4 months is a reasonable time in the absence of unusual circumstances.

7. Appeals

a. *In general.* Any servicemember punished under Article 15 who considers the punishment to be unjust or disproportionate to the offense may appeal through the proper channels to the next superior authority.

b. *Who may act on appeal.* A "superior authority," as prescribed by the Secretary concerned, may act on an appeal. When punishment has been imposed under delegation of a commander's authority to administer nonjudicial punishment (*see* paragraph 2c of this Part), the appeal may not be directed to the commander who delegated the authority.

c. *Format of appeal.* Appeals shall be in writing and may include the appellant's reasons for regarding the punishment as unjust or disproportionate.

d. *Time limit.* An appeal shall be submitted within 5 days of imposition of punishment, or the right to appeal shall be waived in the absence of good cause shown. A servicemember who has appealed may be required to undergo any punishment imposed while the appeal is pending, except that if action is not taken on the appeal within 5 days after the appeal was submitted, and if the servicemember so requests, any unexecuted punishment involving restraint or extra duty shall be stayed until action on the appeal is taken.

e. *Legal review.* Before acting on an appeal from any punishment of the kind set forth in Article 15(e)(1)-(7), the authority who is to act on the appeal shall refer the case to a judge advocate or to a lawyer of the Department of Transportation for consideration and advice, and may so refer the case upon appeal from any punishment imposed under Article 15. When the case is referred, the judge advocate or lawyer is not limited to an examination of any written matter comprising the record of proceedings and may make any inquiries and examine any additional matter deemed necessary.

f. *Action by superior authority.*

(1) *In general.* In acting on an appeal, the superior authority may exercise the same power with respect to the punishment imposed as may be exercised under Article 15(d) and paragraph 6 of

this Part by the officer who imposed the punishment. The superior authority may take such action even if no appeal has been filed.

(2) *Matters considered.* When reviewing the action of an officer who imposed nonjudicial punishment, the superior authority may consider the record of the proceedings, any matters submitted by the servicemember, any matters considered during the legal review, if any, and any other appropriate matters.

(3) *Additional proceedings.* If the superior authority sets aside a nonjudicial punishment due to a procedural error, that authority may authorize additional proceedings under Article 15, to be conducted by the officer who imposed the nonjudicial punishment, the commander, or a successor in command, for the same offense involved in the original proceedings. Any punishment imposed as a result of these additional proceedings may be no more severe than that originally imposed.

(4) *Notification.* Upon completion of action by the superior authority, the servicemember upon whom punishment was imposed shall be promptly notified of the result.

(5) *Delegation to principal assistant.* If authorized by regulations of the Secretary concerned a superior authority who is a commander exercising general court-martial jurisdiction, or is an officer of general or flag rank in command, may delegate the power under Article 15(e) and this paragraph to a principal assistant.

8. Records of nonjudicial punishment

The content, format, use, and disposition of records of nonjudicial punishment may be prescribed by regulations of the Secretary concerned.

APPENDIX 2

UNIFORM CODE OF MILITARY JUSTICE

Chapter 47. UNIFORM CODE OF MILITARY JUSTICE

Subchapter 1. GENERAL PROVISIONS

§ 801. Art. 1. Definitions.

In this chapter.

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

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

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

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

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

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

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

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

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

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

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

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

(13) "Judge Advocate" means—

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

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

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

(14) "Record", when used in connection with the proceedings of a court-martial, means—

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

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

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

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

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

(2) Cadets, aviation cadets, and midshipmen.

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

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

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

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

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

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

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

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

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

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

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

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

(1) submitted voluntarily to military authority;

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

(3) received military pay or allowances; and

(4) performed military duties;
is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

(d) (1) A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 815 (article 15) or section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of—

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

(B) trial by court-martial; or

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

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

(A) on active duty; or

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

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

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

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

(A) be sentenced to confinement; or

(B) be required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive-duty training or active duty (other than active duty ordered under paragraph (1)).

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

(a) Subject to section 843 of this title (article 43), no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.

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

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

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

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

(a) If any commissioned officer, dismissed by order of the President, makes a written application for trial by court-martial setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try that officer on the charges on which he was dismissed. A court-martial so convened has jurisdiction to try the dismissed officer on those charges, and he shall be considered to have waived the right to plead any stutute 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 confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement.

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

(d) No person may be 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

(1) a dishonorable or bad-conduct discharge;

(2) confinement; or

(3) hard labor without confinement;

reduces that member to pay grade E1, effective on the date of that approval.

(b) If the sentence of a member who is reduced in pay grade under subsection (a) is set aside or disapproved, or, as finally approved, does not include any punishment named in subsection (a)(1), (2), or (3), the rights and privileges of which he was deprived because of that reduction shall be restored to him and he is entitled to the pay and allowances to which he would have been entitled for the period the reduction was in effect, had he not been so reduced.

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

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

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

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

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

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

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

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

(3) In a summary court-martial case, the accused shall be promptly provided a copy of the record of trial for use in preparing a submission authorized by paragraph (1).

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

(c) (1) The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority. Under regulations of the Secretary concerned, a commissioned officer 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 an order or ruling of the military judge which terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceeding. However, the United States may not appeal an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification.

(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Such notice shall include a certification by the

trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence 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 Military Review and shall, whenever practicable, have priority over all other proceedings before that court. In ruling on an appeal under this section, the Court of Military Review may act only with respect to matters of law, notwithstanding section 866(c) of this title (article 66(c)).

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

§ 863. Art. 63. Rehearings

Each rehearing under this chapter shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence may be imposed, 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 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 Military Review

(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall 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 Military Review the record in each case of trial by court-martial—

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

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

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

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

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

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

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

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

★§ 867. Art. 67. Review by the Court of Military Appeals

(a) The Court of Military Appeals shall review the record in—

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

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

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

(b) the accused may petition the Court of Military Appeals for review of a decision of a Court of Military Review within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Military Review; or

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

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

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

(e) After it has acted on a case, the Court of Military Appeals may direct the Judge Advocate General to return the record to the Court of Military Review for further review in accordance with the decision of the Court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

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

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

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

§ 868. Art. 68. Branch offices

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

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

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

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

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

★(d) A Court of Military Review may review, under section 866 of this title (article 66)—

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

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

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

§ 870. Art. 70. Appellate counsel

(a) The Judge Advocate General shall detail in his office one or more commissioned officers as appellate Government counsel, and one or more commissioned officers as appellate defense counsel, who are qualified under section 827(b)(1) of this title (article 27(b)(1)).

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

(c) Appellate defense counsel shall represent the accused before the Court of Military Review, the Court of Military Appeals, or the Supreme Court—

(1) when requested by the accused;

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

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

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

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

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

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

(b) If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of the sentence, as he sees fit. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

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

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

(B) such a petition is rejected by the Court of Military Appeals; or

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

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

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

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

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

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

§ 872. Art. 72. Vacation of suspension

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

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

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

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

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

§ 874. Art. 74. Remission and suspension

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

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

§ 875. Art. 75. Restoration

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

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

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

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

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

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

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

Subchapter X. PUNITIVE ARTICLES

forward the complaint to the office exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

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

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

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

§ 940. Art. 140. Delegation by the President

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

★Subchapter XII—COURT OF MILITARY APPEALS

§ 941. Art. 141. Status.

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

§ 942. Art. 142. Judges

(a) *Number.* The United States Court of Military Appeals consists of five judges.

(b) *Appointment; qualification.*

(1) Each judge of the court shall be appointed from civil 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.

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

(1) neglect of duty;

(2) misconduct; or

(3) mental or physical disability.

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

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

(e) *Senior judges.*

(1) A 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.

(2) (A) The chief judge of the court may call upon a senior judge of the court, 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) 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 (2) 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 (2);

(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 (2); 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 (2).

(f) *Service of Article III judges.*

(1) The Chief Justice of the United States, upon the request of the chief judge of the court, may designate a judge of a United States court of appeals or of a United States district court to perform the duties of judge of the United States Court of Military Appeals—

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

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

(2) 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.

(3) 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.* The President shall designate from time to time one of the judges of the United States Court of Military Appeals to be chief judge of the court.

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

(c) *Status of attorney positions.*

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

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

§ 944. Art. 144. Procedure

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

§ 945. Art. 145. Annuities for judges and survivors

(a) *Retirement annuities for judges.*

(1) A person who has completed a term of service for which he was appointed as a judge of the United States Court of Military Appeals is eligible for an annuity under this section upon separation from civilian service in the Federal Government.

(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 II of chapter 85 of title 5 based on service as a judge of the United States Court of Military Appeals.

(B) Upon receiving any notification under subparagraph (A) in the case of a person making an election under (2), the Director shall determine the amount of the person's lump-sum credit under subchapter III of chapter 83 or subchapter II of chapter 84 of title 5, as applicable, and shall request the Secretary of the Treasury to transfer such amount from the Civil Service Retirement and Disability Fund to the Department of Defense Military Retirement Fund. The Secretary of the Treasury shall make any transfer so requested.

(C) In determining the amount of a lump-sum credit under section 8331(8) of title 5 for purposes of this paragraph—

(i) interest shall be computed using the rates under section 8334(e)(3) of such title; and

(ii) the completion of 5 years of civilian service (or longer) shall not be a basis for excluding interest.

(b) *Amount of annuity.* The annuity payable under this section to a person who makes an election under subsection (a)(2) is 80 percent of the rate of pay for a judge in active service on the United States Court of Military Appeals as of the date on which the person is separated from civilian service.

(c) *Relation to thrift savings plan.* Nothing in this section affects any right of any person to participate in the thrift savings plan under section 8351 of title 5 of subchapter III of chapter 84 of such title.

(d) *Survivor annuities.* The Secretary of Defense shall prescribe by regulation a program to provide annuities for survivors and former spouses of persons receiving annuities under this section by reason of elections made by such persons under subsection (a)(2). That program shall, to the maximum extent practicable, provide benefits and establish terms and conditions that are similar to those provided under survivor and former spouse annuity programs under other retirement systems for civilian employees of the Federal Government. The program may include provisions for the reduction in the annuity paid the person as a condition for the survivor annuity. An election by a judge (including a senior judge) or former judge to receive an annuity under this section terminates any right or interest which any other individual may have to a survivor annuity under any other retirement system for civilian employees of the Federal Government based on the service of that judge or former judge as a civilian officer or employee of the Federal Government (except with respect to an election under subsection (g)(1)(B)).

(e) *Cost-of-living increases.* The Secretary of Defense shall periodically increase annuities and survivor annuities paid under this section in order to take account of changes in the cost of living. The Secretary shall prescribe by regulation procedures for increases in annuities under this section. Such system shall, to the maximum extent appropriate, provide cost-of-living adjustments that are similar to those that are provided under other retirement systems for civilian employees of the Federal Government.

(f) *Dual compensation.* A person who is receiving an annuity under this section by reason of service as a judge of the court and who is appointed to a position in the Federal Government shall, during the period of such person's service in such position, be entitled to receive only the annuity under this section or the pay for that position, whichever is higher.

(g) *Election of judicial retirement benefits.*

(1) A person who is receiving an annuity under this section by reason of service as a judge of the court and who later is appointed as a justice or judge of the United States to hold office during good behavior and who retires from that office, or from regular active service in that office, shall be paid either—

(A) the annuity under this section, or

(B) the annuity or salary to which he is entitled by reason of his service as such a justice or judge of the United States, as determined by an election by that person at the time of his retirement from the office, or from regular active service in the office, of justice or judge of the United States. Such an election may not be revoked.

(2) An election by a person to be paid an annuity or salary pursuant to paragraph (1)(B) terminates (A) any election previously made by such person to provide a survivor annuity pursuant to subsection (d), and (B) any right of any other individual to receive a survivor annuity pursuant to subsection (d) on the basis of the service of that person.

(h) *Source of payment of annuities.* Annuities and survivor annuities paid under this section shall be paid out of the Department of Defense Military Retirement Fund.

§ 946. Art. 146. Code committee

(a) *Annual survey.* A committee shall meet at least annually and shall make an annual comprehensive survey of the operation of this chapter.

(b) *Composition of committee.* The committee shall consist of—

(1) the judges of the United States Court of Military Appeals;

(2) the Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel of the Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps; and

(3) two members of the public appointed by the Secretary of Defense.

(c) *Reports.*

(1) After each such survey, the committee shall submit a report—

(A) to the Committees on Armed Services of the Senate and House of Representatives; and

(B) to the Secretary of Defense, the Secretaries of the military departments, and the Secretary of Transportation.

(2) Each report under paragraph (1) shall include the following:

(A) Information on the number and status of pending cases.

(B) Any recommendation of the committee relating to—

(i) uniformity of policies as to sentences;

(ii) amendments to this chapter; and

(iii) any other matter the committee considers appropriate.

(d) *Qualifications and terms of appointed members.* Each member of the committee appointed by the Secretary of Defense under subsection (B)(3) shall be a recognized authority in military justice or criminal law. Each such member shall be appointed for a term of three years.

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

Article	Offenses	Discharge	Confinement	Forfeitures
	Correctional custody, escape from	DD, BCD	1 yr.	Total
	Correctional custody, breach of	BCD	6 mos.	Total
	Debt, dishonorably failing to pay	BCD	6 mos.	Total
	Disloyal statements	DD, BCD	3 yrs.	Total
	Disorderly conduct			
	—Under such circumstances as to bring discredit	None	4 mos.	2/3 4 mos.
	—Other cases	None	1 mo.	2/3 1 mo.
	Drunkenness			
	—Aboard ship or under such circumstances as to bring discredit	None	3 mos.	2/3 3 mos.
	—Other cases	None	1 mo.	2/3 1 mo.
	Drunk and disorderly			
	—Aboard ship	BCD	6 mos.	Total
	—Under such circumstances as to bring discredit	None	6 mos.	2/3 6 mos.
	—Other cases	None	3 mos.	2/3 3 mos.
	Drinking liquor with prisoner	None	3 mos.	2/3 3 mos.
	Drunk prisoner	None	3 mos.	2/3 3 mos.
	Drunkenness—incapacitating oneself for performance of duties through prior indulgence in intoxicating liquor or drugs	None	3 mos.	2/3 3 mos.
	False or unauthorized pass offenses			
	—Possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling	DD, BCD	3 yrs.	Total
	—All other cases	BCD	6 mos.	Total
	False pretenses, obtaining services under			
	—Of a value of $100.00 or less	BCD	6 mos.	Total
	—Of a value of more than $100.00	DD, BCD	5 yrs.	Total
	False swearing	DD, BCD	3 yrs.	Total
	Firearm, discharging—through negligence	None	3 mos.	2/3 3 mos.
	Firearm, discharging—willfully, under such circumstances as to endanger human life	DD, BCD	1 yr.	Total
	Fleeing scene of accident	BCD	6 mos.	Total
	Fraternization	Dismissal	2 yrs.	Total
	Gambling with subordinates	None	3 mos.	2/3 3 mos.
	Homicide, negligent	BCD	1 yr.	Total
	Impersonation			
	—With intent to defraud	DD, BCD	3 yrs.	Total
	—All other cases	BCD	6 mos.	Total
	Indecent act, liberties with child	DD, BCD	7 yrs.	Total
	Indecent exposure	BCD	6 mos.	Total
	Indecent language			
	—Communicated to child under 16 yrs.	DD, BCD	2 yrs.	Total

—Other cases	BCD	6 mos.	Total
Indecent acts with another	DD, BCD	5 yrs.	Total
Jumping from vessel into the water	BCD	6 mos.	Total
Kidnapping	DD, BCD	Life	Total
Mail, taking, opening, secreting, destroying, or stealing	DD, BCD	5 yrs.	Total
Mails, depositing or causing to be deposited obscene matters in	DD, BCD	5 yrs.	Total
Misprison of serious offense	DD, BCD	3 yrs.	Total
Obstructing justice	DD, BCD	5 yrs.	Total
Pandering	DD, BCD	5 yrs.	Total
Prostitution	DD, BCD	1 yr.	Total
Parole, violation of	BCD	6 mos.	2/3 6 mos.
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.
Restriction, breaking	None	1 mo.	2/3 1 mo.
Seizure, destruction, removal, or disposal of property to prevent	DD, BCD	1 yr.	Total
Sentinel, lookout			
—Disrespect to	None	3 mos.	2/3 3 mos.
—Loitering or wrongfully sitting on post by			
—In time of war or while receiving special pay	DD, BCD	2 yrs.	Total
—Other cases	BCD	6 mos.	Total
Soliciting another to commit an offense (*see* Part IV, para. 105e)			
Stolen property, knowingly receiving, buying, concealing			
Of a value of $100.00 or less	BCD	6 mos.	Total
Of a value of more than $100.00	DD, BCD	3 yrs.	Total
Straggling	None	3 mos.	2/3 3 mos.
Testify, wrongfully refusing to	DD, BCD	5 yrs.	Total
Threat, bomb, or hoax	DD, BCD	5 yrs.	Total
Threat, communicating	DD, BCD	3 yrs.	Total
Unlawful entry	BCD	6 mos.	Total
Weapon, concealed, carrying	BCD	1 yr.	Total
Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button	BCD	6 mos.	Total

__________ months). The sentence as changed is approved and will be executed. (__________ is designated as the place of confinement.)

Suspension of sentence. See R.C.M. 1107(f)(4)(B); 1108(d). Note if the portion of the sentence extending to dismissal or a dishonorable or a bad-conduct discharge is suspended, Form 5 or Form 6, as appropriate, may be used. If parts of the sentence other than an approved dismissal or discharge are suspended, the following form may be used:

—Adjudged sentence approved; part of sentence, other than dismissal or dishonorable or bad-conduct discharge, suspended.

14. In the case of __________ , the sentence is approved and, except for that part of the sentence 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 __________ 19 ______ to __________ 19 ______ (in violation of Article 86)) (__________). Only so much of the sentence as provides for __________ is approved and (, except for the (dismissal) (dishonorable discharge) (bad-conduct discharge),) will be executed. (__________ is designated as the place of confinement.)

Some findings of guilty and sentence disapproved; combined rehearing ordered. See 1107(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 following 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 ______ 19 ______ to ______ 19 ______ under the sentence adjudged at the former trial of this case.

Action on rehearing; restoration of rights.

22. In the case of __________ , the findings of guilty and the sentence are disapproved and the charges are dismissed. All rights, privileges, and property of which the accused has been deprived by virtue of the execution of the sentence adjudged at the former trial of this case on __________ 19 ______ will be restored.

23. In the case of __________ , the accused was found not guilty of all the charges and specifications which were tried at the former hearing. All rights, privileges, and property of which the accused has been deprived by virtue of the execution of the sentence adjudged at the former trial of this case on __________ 19 ______ will be restored.

★WITHDRAWAL OF PREVIOUS ACTION. Form 24 is appropriate for withdrawal of an earlier action. *See* R.C.M. 1107(f)(2) concerning modification of an earlier action. Form 24a is appropriate for withdrawal of previous action pursuant to instructions from reviewing authority pursuant to R.C.M. 1107(f)(2) or (g). When the action of a predecessor in command is withdrawn due to ambiguity, see *United States v. Lower*, 10 M.J. 263 (C.M.A. 1981).

24. In the case of __________ , the action taken by (me) (my predecessor in command) on __________ 19 ______ is withdrawn and the following substituted therefor: __________ .

★**24a.** In the case of __________ , in accordance with instructions from (The Judge Advocate General) (the __________ Court of Military Review) pursuant to Rule for Courts-Martial [1107(f)(2)] [1107(g)], the action taken by (me) (my predecessor in command) is withdrawn. The following is substituted therefor: __________ .

FORMS FOR ACTIONS APPROVING AND SUSPENDING PUNISHMENTS MENTIONED IN ARTICLE 58a AND RETAINING ACCUSED IN PRESENT OR INTERMEDIATE GRADE.

Under the authority of Article 58a, the Secretary concerned may, by regulation, limit or specifically preclude the reduction in grade which would otherwise be effected under that Article upon the approval of certain court-martial sentences by the convening authority. The Secretary concerned may provide in regulations that if the convening or higher authority taking action on the case suspends those elements of the sentence that are specified in Article 58a the accused may be retained in the grade held by the accused at the time of the sentence or in any intermediate grade. Forms 25–27 may be used by the convening or higher authority in effecting actions authorized by the Secretary concerned in regulations pursuant to the authority of Article 58a.

If the convening authority or higher authority when taking action on a case in which the sentence includes a punitive discharge, confinement, or hard labor without confinement elects to approve the sentence and to retain the enlisted member in the grade held by that member at the time of sentence or in any intermediate grade, that authority may do so if permitted by regulations of the Secretary concerned whether or not the sentence also includes a reduction to the lowest enlisted grade, by using one of the following forms of action. The first action, Form 25, is appropriate when the sentence does not specifically provide for reduction. The second and third actions, Forms 26 and 27, are appropriate when the sentence specifically provides for reduction to the grade of E-1. The action set forth in Form 26 is intended for a case in which the accused is to be probationally retained in the grade held by that accused at the time of sentence. The action set forth in Form 27 is for a case in which the accused is to serve probationally in an intermediate grade.

Automatic reduction suspended; sentence does not specifically include reduction.

25. In the case of ______________ , the sentence is approved and will be executed, but the execution of that part of the sentence extending to (a dishonorable discharge) (a bad-conduct discharge) (confinement) (hard labor without

(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 which 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); 310(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 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. JAG L. 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 circumstance 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 statute of limitations under Article 43(f)); *United States v. Ayers, supra* (Korean 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 of 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.

Rule 104. Unlawful command influence

This rule is based on Article 37 and paragraph 38 of MCM, 1969 (Rev.). *See also United States v. Charette*, 15 M.J. 197 (C.M.A. 1983); *United States v. Blaylock*, 15 M.J. 190 (C.M.A. 1983); *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976); *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967); *United States v. Wright*, 17 U.S.C.M.A. 110, 37 C.M.R. 374 (1967); *United States v. Hawthorne*, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956). The discussion is based on H. R. Rep. No. 491, 81st Cong., 1st Sess. 21 (1949). As to supervision of military judges and counsel, *see* Articles 6, 26, and 27. Subsection (b)(2)(B) is retained. It is rare that a military judge in a special court-martial is not assigned to the judicial agency or activity of the service concerned. *See e.g.*, AR 27-10, para. 8-6b (3) (Nov. 1982). Subsection (b)(2)(B) ensures that in the unusual situation that it is necessary to detail a military judge not so assigned, the military judge's performance of judicial duties will not be the subject of comment or evaluation in an efficiency or fitness report prepared or reviewed by the convening authority. The second sentence in subsection (b)(2)(B) clarifies that the convening authority may comment only on the military judge's nonjudicial duties in such a report. Subsection (D) is new and clarifies that the military judge, members, and counsel are not immune from action for any offense they might commit while in that capacity, e.g. failure to repair.

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

The petty offenses exception rests on a similar doctrinal foundation as the overseas exception. Because there is no consitutional right to indictment by grand jury or trial by jury for petty offenses (*see Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Duke v. United States*, 301 U.S. 492 (1937)), the service-connection requirement does not apply to them. *United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969). Under *Baldwin v. New York, supra*, a petty offense is one in which the maximum sentence is six months confinement or less. Any time a punitive discharge is included in the maximum punishment, the offense is not petty. *See United States v. Smith*, 9 M.J. 359, 360 n.1 (C.M.A. 1980); *United States v. Brown*, 13 U.S.C.M.A. 333, 32 C.M.R. 333 (1962).

Sharkey relied on the maximum punishment under the table of maximum punishments in determining whether an offense is petty. It is the view of the Working Group that offenses tried by summary courts-martial and special courts-martial at which no punitive discharge may be adjudged are "petty offenses" for purposes of *O'Callahan*, in view of the jurisdictional limitations of such courts. Whether the jurisdictional limits of a summary or such special court-martial makes an offense referred to such a court-martial petty has not been judicially determined.

★Rule 204. Jurisdiction over certain reserve component personnel

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 source of this rule is paragraphs 29*a* and 31 of MCM, 1969 (Rev.). Those provisions were adopted in substance except that subsection (b) provides that reports be conveyed to the "immediate commander" of suspects, meaning the "commander exercising immediate jurisdiction . . . under Article 15." The language was changed because the previous language was cumbersome and legalistic. There is no corresponding provision in the Federal Rules of Criminal Procedure. The most closely analogous provision of the Federal Rules of Criminal Procedure is Rule 3 (complaints). However, "[w]ith respect to the complaint, in general, it should be noted that its principle purpose is to serve as the basis for an arrest warrant." J. Moore, *Moore's Federal Practice, Rules Pamphlet* (part 3) 10 (1982). That purpose is not the same as the purpose of R.C.M. 301. R.C.M. 301 is simply to assure that ordinarily information relating to offenses is conveyed promptly to the suspect's immediate commander.

Rule 302. Apprehension

(a) *Definition and scope.* The definition of "apprehension" in subsection (1) is taken from Article 7(a), as was its predecessor, paragraph 18*a* 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 Stats v. Banks*, 539 F.2d 14 (9th Cir. 1976). The rule also does not affect the authority of persons not listed in subsection (b) to apprehend. The discussion gives some examples of such categories.

(b) *Who may apprehend.* This subsection restates the substance of Articles 7(b) and (c) and 8, and paragraphs 19*a* and 23 of MCM, 1969 (Rev.). Subsection (3), Federal civilian law enforcement officers, is the only new provision.

Subsection (1) is taken from paragraph 19*a* of MCM, 1969 (Rev.). The phrase "whether subject to the code or not" is added to the present rule to make clear that contract civilian guards and police and similar civilian law enforcement agents of the military have the power to apprehend persons subject to the code.

The discussion of subsection (1) reflects the elimination of the previous restrictive policy against apprehensions of commissioned and warrant officers by enlisted and civilian law enforcement personnel. This recognizes the authority of such personnel commensurate with their law enforcement duties. The rule does not foreclose Secretarial limitations on the discretion of such personnel.

★*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 commited in their presence and for felonies upon probable cause. *See e.g.* 18 U.S.C. §§ 3052, 3053, 3056. To restrict the military apprehension power by requiring warrants in all or most cases would actually be inconsistent with civilian practice. The problem of apprehensions in dwellings is addressed by cross-reference to subsection (e)(2).

Subsection (3) clarifies the power of military law enforcement officials to secure the custody of a person. There is no similar provision in the Federal Rules of Criminal Procedure. It is general, leaving to the services ample breadth in which to make more definitive regulations.

The discussion restates paragraph 19*d* of MCM, 1969 (Rev.). There is no corollary provision in the Federal Rules of Criminal Procedure. The purpose of the notification is twofold. First, it ensures that the unit commander of the person in custody will know the status of that member of the command and can participate in later decisionmaking that will affect the availability of the member apprehended. Second, it ensures that law enforcement officials will promptly bring the case and suspect before the commander, thus ensuring that later procedural requirements of the code and these rules will be considered and met if appropriate. This is parallel in intent to Fed. R. Crim. P. 5 and 5.1.

(e) *Where an apprehension may be made.* Subsection (1) is based on Article 5. It is similar to Fed. R. Crim. P.4(d)(2) but broader because the code is not similarly limited by geography.

Subsection (2) adds the warrant requirement of *Payton v. New York*, 445 U.S. 573 (1980), conforming the procedure to military practice. *See also Steagald v. United States*, 451 U.S. 204 (1981); *United States v. Mitchell*, 12 M.J. 265 (C.M.A. 1982); *United States v. Davis*, 8 M.J. 79 (C.M.A. 1979); *United States v. Jamison* 2 M.J. 906 (A.C.M.R. 1976). The first sentence clarifies the extent of *Payton* by citing examples of the kinds of dwellings in which one may and may not reasonably expect privacy to be protected to such a degree as to require application of *Payton*. Subsection (C) joins the warrant

(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.

Rule 705. Pretrial agreements

Introduction. This rule is new. The code does not address pretrial agreements, and MCM, 1969 (Rev.) did not discuss them. Pretrial agreements have long existed and been sanctioned in courts-martial, however, *see United States v. Allen*, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957). *See generally Gray, Pretrial Agreements*, 37 Fed. Bar J. 49 (1978). The rule recognizes the utility of pretrial agreements. At the same time the rule, coupled with the requirement for judicial inquiry in R.C.M. 910, is intended to prevent informal agreements and protect the rights of the accused and the interests of the Government. *See also Santobello v. New York*, 404 U.S. 257 (1971); Fed. R. Crim. P. 11(e); *ABA Standards, Pleas of Guilty* (1979).

(a) *In general.* This subsection is based on *United States v. Allen, supra.* Only the convening authority may enter a pretrial agreement with an accused. *See United States v. Caruth*, 6 M.J. 184 (C.M.A. 1979); *United States v. Johnson*, 2 M.J. 541 (A.C.M.R. 1976); *United States v. Crawford*, 46 C.M.R. 1007 (A.C.M.R. 1972). *See also United States v. Troglin*, 21 U.S.C.M.A. 183, 44 C.M.R. 237 (1972). Pretrial agreements have long been subject to service regulations. *See, e.g.*, A.F.M. 111-1, para. 4-8 (May 13, 1980); JAGMAN section 0114 (June 11, 1982). Subsection (a) expressly continues such authority. The discussion is based on Department of Defense Directive 1355.1 (July 21, 1981).

(b) *Nature of agreement.* This subsection recognizes the matters contained in pretrial agreements. *See United States v. Cooke*, 12 M.J. 448 (C.M.A. 1982); *United States v. Schaffer*, 12 M.J. 425 (C.M.A. 1982); *United States v. Brown*, 12 M.J. 420 (C.M.A. 1982); *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977); *United States v. Allen, supra.* As to prohibited and permitted terms and conditions, *see* subsection (c) of this rule. This discussion under subsection (2)(C) is based on *United States v. Cook, supra.*

(c) *Terms and conditions.* This subsection is intended to ensure that certain fundamental rights of the accused cannot be bargained away while permitting the accused substantial latitude to enter into terms or conditions as long as the accused does so freely and voluntarily. Subsection (1)(B) lists certain matters which cannot be bargained away. This is because to give up these matters would leave no substantial means to judicially ensure that the accused's plea was provident, that the accused entered the pretrial agreement voluntarily, and that the sentencing proceedings and met acceptable standards. *See United States v. Mills*, 12 M.J. 1 (C.M.A. 1981); *United States v. Green*, 1 M.J. 453 (C.M.A. 1976); *United States v. Holland*, 1 M.J. 58 (C.M.A. 1975); *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969); *United States v. Cummings*, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968); *United States v. Allen, supra.* The discussion under subsection (2) is based on *United States v. Holland, supra.* The rule is not intended to codify *Holland* to the extent that *Holland* may prevent the accused from giving up the right to make any motions before trial. *Cf. United States v. Schaffer, supra.* Subsection (1)(A) provides that any term or condition, even if not otherwise prohibited, must be agreed to by the accused freely and voluntarily. *Cf. United States v. Green, supra; United States v. Care, supra.*

Subsection (2) makes clear that certain terms or conditions are not included in subsection (1)(B) and are permissible as long as they are freely and voluntarily agreed to by the accused. Since the accused may waive many matters other than jurisdiction, in some cases by failure to object or raise a matter (*see* R.C.M. 905(e); Mil. R. Evid. 103(a)), or by a plea of guilty (*see* R.C.M. 910(j) and Analysis), there is no reason why the accused should not be able to seek a more favorable agreement by agreeing to waive such matters as part of a pretrial agreement. Indeed, authorization for such terms or conditions, coupled with the requirement that they be included in the written agreement (*see* subsection (d)(3) of this rule) prevents *sub rosa* agreements concerning such matters and ensures that a careful judicial inquiry into, and record of, the accused's understanding of such matters will be made. The matters listed in subsection (2) have been judicially sanctioned. As to subsection (2)(A), *see United States v. Thomas*, 6 M.J. 573 (A.C.M.R. 1978). *Cf. United Sates v. Bertelson, supra.* Subsection (2)(B) is based on *United States v. Reynolds*, 2 M.J. 887 (A.C.M.R. 1976); *United States v. Tyson*, 2 M.J. 583 (N.C.M.R. 1976). *See also United States v. Chavez-Rey*, 1 M.J. 34 (C.M.A. 1975); *United States v. Stoltz*, 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964).

Subsection (2)(C) is based on *United States v. Callahan*, 8 M.J. 804 (N.C.M.R. 1980); *United States v. Brown*, 4 M.J. 654 (A.C.M.R. 1977). Enforcement of a restitution clause may raise problems if the accused, despite good faith efforts, is unable to comply. *See United States v. Brown, supra.*

Subsection (2)(D) is based on *United States v. Dawson*, 10 M.J. 142 (C.M.A. 1982). Although the post-trial misconduct provision in *Dawson* was rejected, a majority of the court was apparently willing to permit such provisions if adequate protections against arbitrary revocation of the agreement are provided. However, *see United States v. Connell*, 13 M.J. 156 (C.M.A. 1982) in which a post-trial misconduct provision was held unenforceable without detailed analysis. Subsection (D) provides the same protections as revocation of a suspended sentence requires. *See* R.C.M. 1109 and Analysis. Given such protections, there is no reason why an accused who has bargained for sentence relief such as a suspended sentence should enjoy immunity from revocation of the agreement before action but not afterward. Other decisions have suggested the validity of post-trial misconduct provisions. *See United States v. Goode*, 1 M.J. 3 (C.M.A. 1975); *United States v. Thomas, supra; United States v. French*, 5 M.J. 655 (N.C.M.R. 1978). *Cf. United States v. Lallande*, 22 U.S.C.M.A. 170, 46 C.M.R. 170 (1973).

Subsection (2)(E) is based on *United States v. Schaffer, supra; United States v. Mills, supra; United States v. Schmeltz*, 1 M.J. 8 (C.M.A. 1975). Note that the list is not exhaustive. The right to enlisted members may be waived, for example.

(d) *Procedure.* This subsection ensures that an offer to plead guilty pursuant to a pretrial agreement originates with the accused, and that the accused freely and voluntarily enters a pretrial agreement. At the same time it recognizes that a pretrial agreement is the product of negotiation and discussion on both sides, each of which is free to refuse to enter an agreement and go to trial. Subsection (1) is based on *United States v. Schaffer, supra.* This subsection, together with the prohibition against terms not freely and voluntarily agreed to by the accused and the requirement in R.C.M. 910 for an inquiry into the agreement, should prevent prosecutorial pressure or improper inducements to the accused to plead guilty or to waive rights against the accused's wish or interest. *See United States v. Schaffer, supra* at 428–29.

Subsection (2) provides that once plea discussions are initiated by the defense the convening authority or a representative may negotiate with the defense. This recognizes that while the offer must originate with the defense, the specific provisions in an agreement may be the product of discussions with the Government. *Schaffer, Mills, and Schmeltz* suggest that each term must originate with the defense. R.C.M. 705 is consistent with this insofar as it requires that the offer to plead guilty originate with the accused (subsection (d)(1)), that the written proposal be prepared by the defense (subsection (d)(3)), and that the accused enter or agree to each term freely and voluntarily (subsection (c)(1)(A)). It is of no legal consequence whether the accused's counsel or someone else conceived the idea for a specific provision as long as the accused, after thorough consultation with qualified counsel, can freely choose whether to submit a proposed agreement and what it will contain. *See United States v. Munt*, 3 M.J. 1082 (A.C.M.R. 1977), *pet. denied*, 4 M.J. 198 (C.M.A. 1978).

Subsection (3) ensures that all understandings be included in the agreement. This is in the interest of both parties. *See United States v. Cooke*, 11 M.J. 257 (C.M.A. 1981); *United States v. Lanzer*, 3 M.J. 60 (C.M.A. 1977); *United States v. Cox*, 22 U.S.C.M.A. 69, 46 C.M.R. 69 (1972). The last sentence is based on *United States v. Green, supra.* Note that the rule does not require the convening authority to sign the agreement. Although the convening authority must personally approve the agreement, (*see* subsection (a)) and has sole discretion whether to do so under subsection (4), the convening authority need not personally sign the agreement. In some circumstances, it may not be practicable or even possible to physically present the written agreement to the convening authority for approval. The rule allows flexibility in this regard. The staff judge advocate, trial counsel, or other person authorized by the convening authority to sign may do so. Authority to sign may be granted orally. Subsection (3) is not intended to preclude oral modifications in the agreement from being made on the record at trial, with the consent of the parties.

Subsection (5) makes clear that neither party is bound by a pretrial agreement until performance begins. *See United States v. Kazena*, 11 M.J. 28 (C.M.A. 1981). In *Shepardson v. Roberts*, 14 M.J. 354 (C.M.A. 1983), the Court stated that the convening authority may be bound by a pretrial agreement before entry of a plea of guilty if the accused has detrimentally relied on the agreement. The Court indicated, however, that not all forms of reliance by the accused rise to the level of detrimental reliance as it used that term. Thus the Court held in *Shepardson* that exclusion of statements allegedly made by the accused as a result of the agreement (but not necessarily pursuant to it) was an 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.*

(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 for 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).

Rule 707. Speedy trial

Introduction. This rule is based on *ABA Standards, Speedy Trial* (1978). It is generally similar to 18 U.S.C. § 3161 et seq. It differs from the latter in terms of specific requirements because of the different procedures in courts-martial and because of different conditions in the military.

The rule is intended to protect the speedy trial rights under the sixth amendment and Article 10 and to encourage protection of command and societal interest in prompt administration of justice. *See generally Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. Walls*, 9 M.J. 88 (C.M.A. 1980). The rule provides substantial guidance for assessing speedy trial claims while retaining reasonable flexibility to avoid rigid and arbitrary application. *Cf. United States v. Henderson*, 1 M.J. 421, 427 (C.M.A. 1976) (Fletcher, C.J., dissenting).

(a) *In general.* This subsection is based on *ABA Standards, supra* at § § 12-2.1, 12-2.2, *Cf.* 18 U.S.C. § 3161. The ABA Standards set no time limit, but leave the matter open depending on local conditions. The basic period from arrest or summons to trial under 18 U.S.C. § 3161 is 100 days. 120 days was selected for courts-martial as a reasonable outside limit given the wide variety of locations and conditions in which courts-martial occur. The rule applies to all cases, not just those in which the accused is in pretrial confinement. The experience with the 90-day rule under *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971) led to the conclusion that 120 days, coupled with greater flexibility in excludable time periods under subsection (c), is an appropriate limit. *See* the Analysis of subsection (d) for further discussion of the *Burton* rule.

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

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

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

★*1987 Amendment:* Subsection (3) was added to implement the legislative intent underlying passage of the "Military Justice Amendments of 1986," tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, 100 Stat. 3905 (1986). Congress created substantial procedural protections for members of reserve components who are involuntarily ordered to active duty pursuant to Article 2(d) and R.C.M. 204. Consistent with that intent, the speedy trial time will begin to run when the member reports for active duty in cases where charges have not been preferred prior to such activation.

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

Subsection (2) is based on *ABA Standards, supra* at § 12-2.2(b) and (c). *See also* 18 U.S.C. § 3161(d) and (3). The ABA Standards and 18 U.S.C. § 3161 provide that when charges are dismissed on motion of the defendant—not the prosecution—the Government is accountable only from the time charges are reinstituted. Subsection (b) makes no such distinction as to the movant for the dismissal. In the military, charges may be dismissed by a convening authority without a request or motion by either party. *See* R.C.M. 401(c)(1). To try to identify the "source" of such action by a convening authority would be extremely difficult, and would also tend to inhibit the broad authority a convening authority has to dismiss charges. *See* Article 34. *Cf.* Article 64.

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

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

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

★*1987 Amendment:* Subsection (c)(9) and its Discussion were added to implement the amendment to Article 2, UCMJ, contained in the "Military Justice Amendments of 1986," tit. VIII, § 804, National Defense Authorization Act for fiscal year 1987, Pub. L. No. 99-661, 100 Stat. 3905 (1986), to exclude not more than 60 days delay during the processing of a request to activate a member of a reserve component for disciplinary action. Because such a request must be forwarded to a regular component general court-martial convening authority or to the Secretary concerned, delays not contemplated by the prior speedy trial rule are likely to arise.

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

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

The *Burton* rule has undergone considerable evolution in a short time. *Compare United States v. Talavera, supra with United States v. Henderson, supra*. The rule has been questioned by at least one judge. *See United States v. Roman, supra* at 389 (Fletcher, C.J., concurring the result); *United States v. Henderson, supra* at 427 (Flecher, C.J., dissenting). Subsection (d), together with the speedy trial requirements of this rule provides a basis for further reexamination of the *Burton* presumption.

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

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

CHAPTER VIII. TRIAL PROCEDURE GENERALLY

Rule 801. Military judge's responsibility; other matters

(a) *Responsibilities of military judge.* This subsection is based on paragraphs 39*b* and 40*b*(2) and the first sentence of paragraph 57*a* of MCM, 1969 (Rev.). It is intened to provide the military judge or president of a special court-martial without a military judge broad authority to regulate the conduct of courts-martial within the framework of the code and the Manual, and to establish the outlines of their responsibilities. Much of the discussion is also derived from paragraphs 39*b*, 40*b*(2), and 53*g* of MCM, 1969 (Rev.). A few minor changes have been made. For instance, the military judge, not the president, determines the uniform to be worn, and the military judge is not required to consult with the president, nor is the president of a special court-martial without a military judge required to consult with trial counsel, concerning scheduling. As a practical matter, consultation or coordination among the participants concerning scheduling or uniform may be appropriate, but the authority for these decisions should rest with the presiding officer of the court, either military judge or president of a special court-martial without a military judge, without being required to consult with others.

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

United States v. Morris, supra at 324, 49 C.M.R. at 658. The discussion is based on *United States v. Butler*, 14 M.J. 72 (C.M.A. 1982); *United States v. Ward*, 3 M.J. 365 (C.M.A. 1977); *United States v. Bryant, supra.*

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

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

Subsection (2) is based on the fifth sentence of paragraph 39*e* and on paragraph 53*d* (2)(b) of MCM, 1969 (Rev.), and current practice.

(e) *Untimely requests.* This subsection is based on Articles 16 and 25, and *United States v. Jeanbaptiste*, 5 M.J. 374 (C.M.A. 1978); *United States v. Thorpe*, 5 M.J. 186 (C.M.A. 1978); *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978); *United States v. Bryant, supra. See also United States v. Holmen*, 586 F.2d 322 (4th Cir. 1978).

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

★*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 generally on Fed. R. Crim. P. 10 and paragraph 65*a* of MCM, 1969 (Rev.). The second sentence of Fed. R. Crim. P. 10 has been deleted as unnecessary since in military practice the accused will have been served with charges before arraignment. Article 35; R.C.M. 602. The discussion is based on paragraph 65 of MCM, 1969 (Rev.).

Rule 905. Motions generally

Introduction. This rule is based generally on Fed. R. Crim P. 12 and 47 and paragraphs 66 and 67 of MCM, 1969 (Rev.). Specific similarities and differences are discussed below.

(a) *Definitions and form.* The first sentence of this subsection is taken from the first sentence of paragraph 66*b* of MCM, 1969 (Rev.). It is consistent with the first sentence of Fed. R. Crim. P. 47 and the second sentence of Fed. R. Crim. P. 12(a). The second sentence is based on the second sentence of paragraph 67*c* of MCM, 1969 (Rev.), although to be consistent with Federal practice (*see* Fed. R. Crim. P. 12(b) (second sentence) and 47 (second sentence)) express authority for the military judge to exercise discretion over the form of motions has been added. The third sentence is based on the third sentence of Fed. R. Crim. P. 47 and is consistent with the first sentence of paragraph 67*c* and the fourth sentence of paragraph 69*a* of MCM, 1969 (Rev.). The last sentence in this subsection is based on the third sentence of paragraph 67*c* of MCM, 1969 (Rev.). Although no parallel provision appears in the Federal Rules of Criminal Procedure, this standard is similar to federal practice. *See Marteney v. United States*, 216 F.2d 760 (10th Cir. 1954); *United States v. Rosenson*, 291 F. Supp. 867 (E.D. La. 1968), *affd*, 417 F.2d 629 (5th Cir. 1969); *cert. denied*, 397 U.S. 962 (1970). The last sentence in Fed. R. Crim. P. 47, allowing a motion to be supported by affidavit, is not included here. *See* subsection (h) of this rule and Mil. R. Evid. 104(a). *See generally*, Fed. R. Crim. P. 47 *Notes of Advisory Committee on Rules* n. 3.

(b) *Pretrial motions.* This subsection, except for subsection (6), is based on Fed. R. Crim. P. 12(b). Subsections (1) and (2) have been modified to conform to military practice and are consistent with the first two sentences of paragraph 67*b* of MCM, 1969 (Rev.). Subsection (3) is consistent with Mil. R. Evid. 304(d)(2)(A); 311(d)(2)(A); 321(c)(2)(A). The discussion is based on paragraph 69A of MCM, 1969 (Rev.). Subsection (4) is new. *See* R.C.M. 701; 703; 1001(e). Subsection (5) is also new. Subsection (6) is based on paragraphs 46*d* and 48*b*(4) of MCM, 1969 (Rev.) and *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981).

(c) *Burden of proof.* This subsection is based on paragraphs 57*g*(1) and 67*e* of MCM, 1969 (Rev.). The assignment of the burden of persuasion to the moving party is a minor change from the language in paragraph 67*e* of MCM, 1969 (Rev.), which placed the burden on the accused "generally." The effect is basically the same, however, since the former rule probably was intended to apply to motions made by the accused. *See also United States v. Graham*, 22 U.S.C.M.A. 75, 46 C.M.R. 75 (1972). The exceptions to this general rule in subsection (B) are based on paragraphs 68*b*(1), 68*c*, and 215*e* of MCM, 1969 (Rev.). *See also United States v. McCarthy*, 2 M.J. 26, 28 n. 1 (C.M.A. 1976); *United States v. Graham, supra; United States v. Garcia*, 5 U.S.C.M.A. 88, 17 C.M.R. 88 (1954). The Federal Rules of Criminal Procedure are silent on burdens of proof.

Fed. R. Crim. P. 12(c) is not adopted. This is because in courts-martial, unlike civilian practice, arraignment does not necessarily, or even ordinarily, occur early in the criminal process. In courts-martial, arraignment usually occurs only a short time before trial and in many cases it occurs the same day as trial. Because of this, requiring a motions date after arraignment but before trial is not appropriate, at least as a routine matter. Instead, entry of pleas operates, in the absence of good cause, as the deadline for certain motions. A military judge could, subject to subsections (d) and (e), schedule an Article 39(a) session (*see* R.C.M. 803) for the period after pleas are entered but before trial to hear motions.

(d) *Ruling on motions.* This subsection is based on Fed. R. Crim. P. 12(e). It is consistent with the first sentence in paragraph 67*e* of MCM, 1969 (Rev.). The admonition in the second sentence of that paragraph has been deleted as unnecessary. The discussion is based on the third paragraph of paragraph 67*f* of MCM, 1969 (Rev.).

(e) *Effect of failure to raise defenses or objections.* The first two sentences in this subsection are taken from Fed. R. Crim. P. 12(f) and are consistent with paragraph 67*b* of MCM, 1969 (Rev.). The third sentence is based on paragraph 67*a* of MCM, 1969 (Rev.). The Federal Rules of Criminal Procedure do not expressly provide for waiver of motions other than those listed in Fed. R. Crim. P. 12(b). (*But see* 18 U.S.C. § 3162(a)(2) which provides that failure by the accused to move for dismissal on grounds of denial of speedy trial before trial or plea of guilty constitutes waiver of the right to dismissal under that section.) Nevertheless, it has been contended that because Fed. R. Crim. P. 12(b)(2) provides that lack of jurisdiction or failure to allege an offense "shall be noticed by the court at any time during the pendency of the proceedings," "it may, by negative implications be interpreted as foreclosing the other defense if not raised during the trial itself." 8A J. Moore, *Moore's Federal Practice* ¶ 12.03[1] (1982 rev. ed.). "Pendency of the proceedings" has been held to include the appellate process. *See United States v. Thomas*, 444 F.2d 919 (D.C. Cir. 1971). Fed. R. Crim. P. 34 tends to support this construction insofar as it permits a postrial motion in arrest of judgement only for lack of jurisdiction over the offense or failure to charge an offense. There is no reason why other motions should not be waived if not raised at trial. *Moore's, supra* at ¶ 12.03[1]; *accord* C. Wright, *Federal Practice and Procedure* § 193 (1969). *See also United States v. Scott*, 464 F.2d 832 (D.C. Cir. 1972); *United States v. Friedland*, 391 F.2d 378 (2d Cir. 1968). *cert. denied*, 404 U.S. 867 (1969). *See generally United States ex. rel. DiGiangiemo v. Regan*, 528 F.2d 1262 (2d Cir. 1975). Decisions of the United States Court of Military Appeals are generally consistent with this approach. *See United States v. Troxell*, 12 U.S.C.M.A. 6, 30 C.M.R. 6 (1960) [statute of limitations may be waived]; *United States v. Schilling*, 7 U.S.C.M.A. 482, 22 C.M.R. 272 (1957) (former jeopardy may be waived). *Contra United States v. Johnson*, 2 M.J. 541 (A.C.M.R. 1976).

★*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).

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

Subsection (g) differs from paragraph 71*b* in two significant respects. First, the term, "res judicata" is not used in R.C.M. 905(g) because the term is legalistic and potentially confusing. "Res judicata" generally includes several distinct but related concepts; merger, bar, direct estoppel, and collateral estoppel. *Restatement of Judgments*, Chapter 3 Introductory Note at 160 (1942). *But see* 1B J. Moore, *Moore's Federal Practice* ¶ 0.441[1] (1980 rev. ed.) which distinguishes collateral estoppel from res judicata generally. Second, unique aspects of the doctrine of collateral estoppel are recognized in the "except" clause of the first sentence in the rule. Earlier Manuals included the concept of collateral estoppel within the general discussion of res judicata (*see* paragraph 72*b* of MCM (Army), 1949; paragraph 71*b* of MCM, 1951; paragraph 71*b* of MCM, 1969 (Rev.); *see also United States v. Smith, supra*) without discussing its distinguishing characteristics. Unlike other forms of res judicata, collateral estoppel applies to determinations made in actions in which the causes of action were different. 1B J. Moore, *supra*, ¶ 0.441[1]. Because of this, its application is somewhat narrower. Specifically, parties are not bound by determinations of law when the causes of action in the two suits arose out of different transactions. *Restatement of Judgments, supra*, §§ 68, 70. *See also Commissioner v. Sunnen, supra.* This distinction is now recognized in the rule.

The absence of such a clarifying provision in earlier Manuals apparently caused the majority, despite its misgivings and over the dissent of Judge Brosman, to reach the result it did in *United States v. Smith, supra.* When paragraph 71*b* was rewritten in MCM, 1969 (Rev.), the result in *Smith* was incorporated into that paragraph, but neither the concerns of the Court of Military Appeals nor the distinguishing characteristics of collateral estoppel were addressed. *See Analysis of Contents of the Manual for Courts-Martial, United States, 1969, Revised Edition*, DA Pam 27-2 at 12-5 (July 1970). To the extent that *Smith* relied on the Manual, its result is no longer required. *But see United States v. Martin*, 8 U.S.C.M.A. 346, 352, 24 C.M.R. 156, 162 (1957) Quinn, C.J., joined by Ferguson, J. concurring in the result).

The discussion is based on the sources indicated above. *See also Restatement of Judgements, supra* § 49; *United States v. Guzman*, 4 M.J. 115 (C.M.A. 1977). As to the effect of pretrial determinations by a convening authority, *see* Analysis, R.C.M. 306(a).

(h) *Written motions.* This subsection is based on Fed. R. Crim. P. 47.

(i) *Service.* This subsection is baed on Fed. R. Crim. P. 49(a) and (b), insofar as those provisions apply to motions.

(j) *Application to convening authority.* This subsection is taken from paragraph 66*b* of MCM, 1969 (Rev.) although certain exceptions, provided elsewhere in these rules (*e.g.*, R.C.M. 906(b)(1)) have been established for the first time. It is consistent with the judicial functions of the convening authority under Article 64. It also provides a forum for resolution of disputes before referral and in the absence of the military judge after referral. It has no counterpart in the Federal Rules of Criminal Procedure.

Fed. R. Crim. P. 12(g) and (h) are not included. Fed. R. Crim. P. 12(g) is covered at R.C.M. 803 and 808. The matters in Fed. R. Crim. P. 12(h) would fall under the procedures in R.C.M. 304 and 305.

(k) *Production of statements on motion to suppress.* This subsection is based on Fed. R. Crim. P. 12(i).

Rule 906. Motions for appropriate relief

(a) *In general.* This subsection is based on the first sentence of paragraph 69*a* of MCM, 1969 (Rev.). The phrase concerning deprivation of rights is new; it applies to such pretrial matters as defects in the pretrial advice and the legality of pretrial confinement. Paragraph 69*a* of MCM, 1969 (Rev.) provided only for the accused to make motions for appropriate relief. This rule is not so restricted because the prosecution may also request appropriate relief. *See e.g., United States v. Nivens*, 21 U.S.C.M.A. 420, 45 C.M.R. 194 (1972). This change is not intended to modify or restrict the power of the convening authority or other officials to direct that action be taken notwithstanding the fact that such action might also be sought by the trial counsel by motion for appropriate relief before the military judge. Specific modifications of the powers of such officials are noted expressly in the rules or analysis.

(b) *Grounds for appropriate relief.* This subsection has the same general purpose as paragraph 69 of MCM, 1969 (Rev.). It identifies most of the grounds for motions for appropriate relief commonly raised in courts-martial, and provides certain rules for litigating and deciding such motions where these rules are not provided elsewhere in the Manual. Specific sources for the rules and discussion are described below.

Subsection (1) and the accompanying discussion are based on Article 40 and paragraphs 58*b* and *c* of MCM, 1969 (Rev.). The rule provides that only a military judge may grant a continuance. Paragraph 58*a* of MCM, 1969 (Rev.) which provided for "postponement" has been deleted. Reposing power to postpone proceedings in the convening authority is inconsistent with the authority of the military judge to schedule proceedings and control the docket. *See generally United States v. Wolzok*, 1 M.J. 125 (C.M.A. 1975). To the extent that paragraph 58*a* extended to the military judge the power to direct postponement, it was duplicative of the power to grant a continuance and unnecessary.

Subsection (2) is based on paragraph 48*b*(4) of MCM, 1969 (Rev.). *See also United States v. Redding*, 11 M.J. 100 (C.M.A. 1981).

Subsection (3) is based on paragraph 69*c* of MCM, 1969 (Rev.). *See also* Articles 32(d) and 34; *United States v. Johnson*, 7 M.J. 396 (C.M.A. 1979); *United States v. Donaldson*, 23 U.S.C.M.A. 293, 49 C.M.R. 542 (1975); *United States v. Maness*, 23 U.S.C.M.A. 41, 48 C.M.R. 512 (1974).

Subsection (4) is based on paragraph 69*b* of MCM, 1969 (Rev.). *See also* Article 30(a); paragraphs 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 Pleading*, 17 A.F.L. Rev. 17 (Fall, 1975). The discussion is based on *United States v. Mannino*, 480 F. Supp. 1182, 1185 (S.D.N.Y. 1979); *United States v. Deaton*, 448 F. Supp. 532 (N.D. Ohio, 1978); *see also United States v. Harbin*, 601 F.2d 773, 779 (5th Cir. 1979); *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979); *United States v. Davis*, 582 F. 2d 947, 951 (5th Cir. 1978), *cert. denied*, 441 U.S. 962 (1979). Concerning the contents of a bill, *see United States v. Diecidue*, 603 F. 2d 535, 563 (5th Cir. 1979); *United States v. Murray*, 527 F. 2d 401, 411 (5th Cir. 1976); *United States v. Mannino, supra; United States v. Hubbard*, 474 F. Supp. 64, 80–81 (D.D.C. 1979).

Subsection (7) is based on paragraphs 75*e* and 115*a* of MCM, 1969 (Rev.). *See also* Fed. R. Crim. P. 12(b)(4); *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980); *United States v. Chuculate*, 5 M.J. 143 (C.M.A. 1978).

Subsection (8) is new to the Manual although not to military practice. *See* Analysis, R.C.M. 305(j).

Subsection (9) is based on paragraphs 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).

Subsection (14) is based on paragraph 69*f* of MCM, 1969 (Rev.). *See* Analysis, R.C.M. 706, R.C.M. 909, and Analysis, R.C.M. 916(k).

Rule 907. Motions to dismiss

(a) *In general.* This subsection is based on paragraphs 68 and 214 of MCM, 1969 (Rev.).

Fed. R. Crim. P. 48(a) is inapposite because the trial counsel may not independently request dismissal of charges, and unnecessary because the convening authority already has authority to withdraw and to dismiss charges. *See* R.C.M. 306(c)(1); 401(c)(1); 604. The matters contained in Fed. R. Crim. P. 48(b) are addressed by R.C.M. 707 and 907(b)(2)(A).

(b) *Grounds for dismissal.* This subsection lists common grounds for motions to dismiss. It is not intended to be exclusive. It is divided into three subsections. These correspond to nonwaivable (subsection (1) and waivable (subsections (2) and (3)) motions to dismiss (*see* R.C.M. 905(e) and analysis), and to circumstances which require dismissal (subsections (1) and (2)) and those in which dismissal is only permissible (subsection (3)).

Subsection (1) is based on paragraph 68*b* of MCM, 1969 (Rev.). *See also* Fed. R. Crim. P. 12(b)(2) and 34.

Subsection (2)(A) is based on paragraph 68*i* of MCM, 1969 (Rev.). *See also* 18 U.S.C. § 3162(a)(2). The rules for speedy trial are covered in R.C.M. 707.

Subsection (2)(B) is based on the first two paragraphs in paragraph 68*c* of MCM, 1969 (Rev.); *United States v. Troxell*, 12 U.S.C.M.A. 6, 30 C.M.R. 6 (1960); *United States v. Rodgers*, 8 U.S.C.M.A. 226, 24 C.M.R. 36 (1957). The discussion is based on paragraphs 68*c* and 215*d* of MCM, 1969 (Rev.). *See also United States v. Arbic*, 16 U.S.C.M.A. 292, 36 C.M.R. 448 (1966); *United States v. Spann*, 10 U.S.C.M.A. 410, 27 C.M.R. 484 (1959); *United States v. Reeves*, 49 C.M.R. 841 (A.C.M.R. (1975).

★*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 trials (*Crist v. Bretz, supra*) at 37 n. 15; *Serfass v. United Stated*, 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 than requiring a mistrial. This provision is squarely at odds with civilian practice with respect to juries and, therefore, with the rationale in *Crist*.

Subsection (2)(C)(ii) is based on paragraph 56 of MCM, 1969 (Rev.). *See also Wade v. Hunter, supra; United States v. Perez*, 22 U.S. (9 Wheat) 579 (1824). "Manifest necessity" is the traditional justification for a mistrial. *Id. See United States v. Richardson, supra. Cf.*, Article 44(c), which does not prohibit retrial of a proceeding terminated on motion of the accused. *See also* Analysis, R.C.M. 915.

Subsection (2)(C)(iii) is taken from Article 44(b). *See United States v. Richardson, supra. See also* Article 63. *But see* R.C.M. 810(d).

Subsection (2)(C)(iv) is new. It is axiomatic that jeopardy does not attach in a proceeding which lacks jurisdiction. *Ball v. United States*, 163 U.S. 662 (1973). Therefore, if proceedings are terminated before findings because the court-martial lacks jurisdiction, retrial is not barred if the jurisdictional defect is corrected. For example, if during the course of trial it is discovered that the charges were not referred to the court-martial by a person empowered to do so, those proceedings would be terminated. This would not bar later referral of those charges by a proper official to a court-martial. *Cf. Lee v. United States*, 432 U.S. 23 (1977); *Illinois v. Somerville*, 410 U.S. 458 (1973). *See also United States v. Newcomb*, 5 M.J. 4 (C.M.A. 1977); *United States v. Hardy*, 4 M.J. 20 (C.M.A. 1977) authorizing re-referral of charges 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 nonconstitutional grounds.

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 of 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; *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* ¶ 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 an improvident 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 members' 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. 1986), *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.M.R. 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 clearly mark for all participants the point at which the opportunities to freely elect 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 impending 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 Prosectuion 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. Green*, 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* Articles 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). Paragraphs 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 personally question 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." This 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 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 preemptory 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 of 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 peremptory 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.

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 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 54*a* 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 Red. 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 54e 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 demanded 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-Feb 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.C.M.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) (statement in possession of commander); *United States v. Bosier*, 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. Bosier*, 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. 26.2(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 transciptions 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 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 the consent or lack thereof of 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,*

★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 a military judge to reconsider findings of guilty has been recognized. *United States v. Chatman*, 49 C.M.R. 319 (N.C.M.R. 1974). It is also implicit in Article 16 which empowers the military judge sitting alone to perform the functions of the members. *See* Article 52(c).

CHAPTER X. SENTENCING

Rule 1001. Presentencing procedure

Introduction. This rule is based on paragraph 75 of MCM, 1969 (Rev.). Additions, deletions, or modifications, other than format or style changes, are noted in specific subsections *infra.*

Sentencing procedures in Federal civilian courts can be followed in courts-martial only to a limited degree. Sentencing in courts-martial may be by the military judge or members. *See* Articles 16 and 52(b). The military does not have—and it is not feasible to create—an independent, judicially supervised probation service to prepare presentence reports. *See* Fed. R. Crim. P. 32(c). This rule allows the presentation of much of the same information to the court-martial as would be contained in a presentence report, but it does so within the protections of an adversarial proceeding, to which rules of evidence apply (*but cf. Williams v. New York*, 337 U.S. 241 (1949), although they may be relaxed for some purposes. *See* subsections (b)(4) and (5), (c)(3), (d), and (e) of this rule. The presentation of matters in the accused's service records (*see* subsection (b)(2) of this rule) provides much of the information which would be in a presentence report. Such records are not prepared for purposes of prosecution (*cf. United States v. Boles*), 11 M.J. 195 (C.M.A. 1981) and are therefore impartial, like presentence reports. In addition, the clarification of the types of cases in which aggravation evidence may be introduced (*see* subsection (b)(4) of this rule) and authorization for the trial counsel to present opinion evidence about the accused's rehabilitative potential (*see* subsection (b)(5) of this rule) provide additional avenues for presenting relevant information to the court-martial. The accused retains the right to present matters in extenuation and mitigation (*see* subsection (c) of this rule).

In addition to Fed. R. Crim. P. 32(c), several other subsections in Fed. R. Crim. P. 32 are inapplicable to courts-martial or are covered in other rules. Fed. R. Crim. P. 32 (a)(2) is covered in R.C.M. 1010. Fed. R. Crim. P. 32(b)(1) is inapposite; parallel matters are covered in R.C.M. 1114, Fed. R. Crim. P. 32(b)(2) is inapplicable as courts-martial lack power to adjudge criminal forfeiture of property. Fed. R. Crim. P. 32(d) is covered in R.C.M. 910(h). *See also* Article 45(a). As to Fed. R. Crim. P. 32(e), *see* R.C.M. 1108.

(a) *In general.* Subsection (a)(3) is based on the third sentence of paragraph 53*h* of MCM, 1969 (Rev.) and on the second sentence of Fed. R. Crim. P.32(a). *See also Hill v. United States*, 368 U.S. 424 (1962); *Green v. United States*, 365 U.S. 301 (1961). Subsection (a)(3) of paragraph 75 of MCM, 1969 (Rev.) is deleted as the convening authority is no longer required to examine the findings for factual sufficiency. Subsection (a)(2) is consistent with the first sentence of Fed. R. Crim. P.32(a). *See* Article 53. As to the last sentence of Fed. R. Crim. P. 32(a), *see* subsection (g) of this rule.

(b) *Matter to be presented by the prosecution.* Subsections (3) and (4) are modifications of paragraph 75*b*(3) and (4) of MCM, 1969 (Rev.), and subsection (5) is new.

February 1986 Amendment: The word "age" in subsection (1) was deleted to correct error in MCM, 1984.

The fourth sentence of subsection (2) is modified by substituting "a particular document" for "the information." This is intended to avoid the result reached in *United States v. Morgan*, 15 M.J. 128 (C.M.A. 1983). For reasons discussed above, sentencing proceedings in courts-martial are adversarial. Within the limits prescribed in the Manual, each side should have the opportunity to present, or not present, evidence. *Morgan* encourages gamesmanship and may result in less information being presented in some case because of the lack of opportunity to rebut.

★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 he offer all documents from that record.

Subsection (3) deletes the exclusion of convictions more than 6 years old. No similar restriction applies to consideration of prior convictions at sentencing proceedings in Federal civilian courts. There is no reason to forbid their consideration by courts-martial, subject to Mil. R. Evid. 403.

Subsection (3) also eliminates the requirement that a conviction be final before it may be considered by the court-martial on sentencing. No similar restriction applies in Federal civilian courts. This subsection parallels Mil. R. Evid. 609. An exception is provided for summary courts-martial and special courts-martial without a military judge. *See* Analysis, Mil. R. Evid. 609. Whether the adjudication of guilt in a civilian forum is a conviction will depend on the law in that jurisdiction.

February 1986 Amendment: The reference to "Article 65(c)" was changed to "Article 64" to correct an error in MCM, 1984.

Subsection (4) makes clear that evidence in aggravation may be introduced whether the accused pleaded guilty or not guilty, and whether or not it would be admissible on the merits. This is consistent with the interpretation of paragraph 75*b*(3) (later amended to be paragraph 75*b*(4) of MCM, 1969 (Rev.) by Exec. Order No. 12315 (July 29, 1981)) in *United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982). *See also* U.S. Dep't of Justice, Attorney General's Task Force on Violent Crime, Final Report Recommendation 14 (1981); Fed. R. Crim. P. 32(c)(2)(B) and (C). This subsection does not authorize introduction in general of evidence of bad character or uncharged misconduct. The evidence must be of circumstances directly relating to or resulting from an offense of which the accused has been found guilty. *See United States v. Rose*, 6 M.J. 754 (N.C.M.R. 1978), *pet. denied*, 7 M.J. 56 (C.M.A. 1979); *United States v. Taliaferro*, 2 M.J. 397 (A.C.M.R. 1975); *United States v. Peace*, 49 C.M.R. 172 (A.C.M.R. 1974).

Subsection (5) is new. (Paragraph 75*b*(5) of MCM, 1969 (Rev.) is deleted here, as it is now covered in R.C.M. 701(a)(5). *Cf.* Fed. R. Crim. P. 32(c)(3)). Subsection (5) authorizes the trial counsel to present, in the form of opinion testimony (*see* Mil. R. Evid., Section VII), evidence of the accused's character as a servicemember and rehabilitative potential. Note that inquiry into specific instances of conduct is not permitted on direct examination, but may be made on cross-examination. Subsection (5) will allow a more complete presentation of information about the accused to the court-martial. The accused's character is in issue as part of the sentencing decision, since the sentence must be tailored to the offender. *Cf. United States v. Lania*, 9 M.J. 100 (C.M.A. 1980). Therefore, introduction of evidence of this nature should not be contingent solely upon the election of the defense. Information of a similar nature, from the accused's employer or neighbors, is often included in civilian presentencing reports. *See, e.g.,* Fed. R. Crim. P. 32(c)(2). Subsection (5) guards against unreliable information by guaranteeing that the accused will have the right to confront and cross-examine such witnesses.

(e) *Production of witnesses.* The language of subsection (2)(C) has been modified to clarify that only a stipulation of fact permits nonproduction. *See United States v. Gonzalez,* 16 M.J. 58 (C.M.A. 1983).

(f) *Additional matters to be considered.* This subsection is based on the third and fourth sentences of paragraph 76*a*(2) of MCM, 1969 (Rev.) and on the first sentence of paragraph 123 of MCM 1969 (Rev.). The discussion is based on the last two sentences of paragraph 123 of MCM, 1969 (Rev.).

(g) *Argument.* The last sentence is new. *See* Analysis, R.C.M. 919(c). As to the second sentence, *see United States v. Grady*, 15 M.J. 275 (C.M.A. 1983).

Rule 1002. Sentence determination

This rule is based on the first sentence in paragraph 76*a*(1) of MCM, 1969 (Rev.).

Rule 1003. Punishments

Introduction. This rule lists the punishments a court-martial is authorized to impose, and presents general limitations on punishments not provided in specific rules elsewhere. Limitations based on jurisdiction (*see* R.C.M. 201(f); rehearings, other and new trials (*see* R.C.M. 810(d)); and on referral instructions (*see* R.C.M. 601(e)(1)) are contained elsewhere, but are referred to this rule. *See* subsection (c)(3) and discussion. The maximum punishments for each offense are listed in Part IV. The automatic suspension of limitations at paragraph 127*c*(5) of MCM, 1969 (Rev.) is deleted since the maximum punishments now include appropriate adjustments in the maximum authorized punishment in time of war or under other circumstances.

(a) *In general.* This subsection provides express authority for adjudging any authorized punishment in the case of any person tried by court-martial, subject only to specific limitations prescribed elsewhere. It does not change current law.

(b) *Authorized punishments.* This subsection lists those punishments which are authorized, rather than some which are prohibited. This approach is simpler and should eliminate questions about what punishments a court-martial may adjudge.

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

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

★*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).

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 paragraphs 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).

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. Teage*, 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 recognizes the standard of review exercised by the Courts of Military Review, the Court of Military Appeals, 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.

Rule 1102. Post-trial sessions

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 (2) is based on *United States v. Anderson, supra.*

(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 post-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 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. Whitney*, 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.).

1990 Amendment: The language "six months confinement or other punishments" was added to subsection (b)(2)(B)(i) to clarify that a verbatim record is not required in cases where a commissioned or warrant officer is sentenced to confinement for a period of six months or less. R.C.M. 1003(c)(2)(A)(ii) provides that only a general court-martial may sentence a commissioned or warrant officer, cadet, or midshipman to confinement. Article 54(c)(1)(A) requires a verbatim record of trial in cases where the sentence "exceeds that which may otherwise be adjudged by a special court-martial." This amendment negates the implication that any period of confinement adjudged against an officer requires a verbatim record of trial, a result not required by the statute.

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).

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).

(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.

1990 Amendment: Subsection (e) was amended in conjunction with the implementation of findings of not guilty only by reason of lack of mental responsibility provided for in Article 50a, UCMJ [Military Justice Amendments of 1986, tit. VIII, § 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, 100 Stat. 3905 (1986)]. The convening authority and higher authority were given specific permission to require a more complete record for further judicial or administrative action. Additional requirements may be prescribed in individual cases or types of cases.

(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 49b(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.

(a) *In general.* This subsection is based on Article 60(d), *as amended, see* Military Justice Act of 1983, Pub. L. No. 98-209, § 5(a)(1), 97 Stat. 1393 (1983). The first paragraph of paragraph 85*a* of MCM, 1969 (Rev.) was similar.

(b) *Disqualification.* This subsection is based on Article 6(c) and on the second paragraph of paragraph 85*a* of MCM, 1969 (Rev.). Legal officers have been included in its application based on Article 60(d). The discussion notes additional circumstances which have been held to disqualify a staff judge advocate. The first example is based on *United States v. Thompson*, 3 M.J. 966 (N.C.M.R. 1977), *rev'd on other grounds*, 6 M.J. 106 (C.M.A. 1978), *petition dismissed*, 7 M.J. 477 (C.M.A. 1979). The second example is based on *United States v. Choice*, 23 U.S.C.M.A. 329, 49 C.M.R. 663 (1975). *See also United States v. Cansdale*, 7 M.J. 143 (C.M.A. 1979); *United States v. Conn*, 6 M.J. 351 (C.M.A. 1979); *United States v. Reed*, 2 M.J. 64 (C.M.A. 1976). The third example is based on *United States v. Conn and United States v. Choice*, both *supra*, Cf. Articles 1(9); 6(c); 22(b); 23(b). The fourth example is based on *United States v. Collins*, 6 M.J. 256 (C.M.A. 1979); *United States v. Engle*, 1 M.J. 387 (C.M.A. 1976). *See also United States v. Newman*, 14 M.J. 474 (C.M.A. 1983) as to the disqualification of a staff judge advocate or convening authority when immunity has been granted to a witness in the case.

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

(c) *When the convening authority does not have a staff judge advocate or legal officer or that person is disqualified.* Subsection (1) is based on the third paragraph of paragraph 85*a* of MCM, 1969 (Rev.). Legal officers have been included in its application based on Article 60(d). Subsection (2) is new. It recognizes the advantages of having the recommendation prepared by a staff judge advocate. This flexibility should also permit more prompt disposition in some cases as well.

(d) *Form and content of recommendation.* This subsection is based on Article 60(d) and on S. Rep. No. 53, 98th Cong., 1st Sess. 20 (1983). As to the subsection (1), *see also* Article 60(c). Subsections (3), (4), and (5) conform to the specific guidance in S. Rep. No. 53, *supra*. Subsection (6) is based on S. Rep. No. 53, 98th Cong., 1st Sess. 21 (1983). The recommendation should be a concise statement of required and other matters. Summarization of the evidence and review for legal error is not required. Therefore paragraph 85*b* of MCM, 1969 (Rev.) is deleted.

Paragraph 85*c* of MCM, 1969 (Rev.) is also deleted. That paragraph stated that the convening authority should explain any decision not to follow the staff judge advocate's recommendation. *See also United States v. Harris*, 10 M.J. 276 (C.M.A. 1981); *United States v. Dixson*, 9 M.J. 72 (C.M.A. 1980); *United States v. Keller*, 1 M.J. 159 (C.M.A. 1976). The convening authority is no longer required to examine the record for legal or factual sufficiency. The convening authority's action is solely a matter of command prerogative. Article 60(c). Therefore the convening authority is not obligated to explain a decision not to follow the recommendation of the staff judge advocate or legal officer.

(e) *No findings of guilty.* This subsection is based on Articles 60 and 63. When no findings of guilty are reached, no action by the convening authority is required. Consequently, no recommendation by the staff judge advocate or legal officer is necessary. The last paragraph of paragraph 85*b* of MCM, 1969 (Rev.), which was based on Article 61 (before it was amended), was similar.

1990 Amendment: Subsection (e) was amended in conjunction with the implementation of findings of not guilty only by reason of lack of mental responsibility provided for in Article 50a, UCMJ [Military Justice Amendments of 1986, tit. VIII, § 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 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*, 3 M.J. 295 (C.M.A. 1977); *United States v. Goode, supra.*

1990 Amendment: Subsection (f)(1) was amended to make clear that the accused should be provided with a personal copy of the recommendation.

Subsection (2) makes clear who is to be served with the post-trial review. *See United States v. Robinson*, 11 M.J. 218, 223 n.2 (C.M.A. 1981). This issue has been a source of appellate litigation. *See e.g., United States v. Kincheloe*, 14 M.J. 40 (C.M.A. 1982); *United States v. Babcock*, 14 M.J. 34 (C.M.A. 1982); *United States v. Robinson, supra; United States v. Clark*, 11 M.J. 70 (C.M.A. 1981); *United States v. Elliot*, 11 M.J. 1 (C.M.A. 1981); *United States v. Marcoux*, 8 M.J. 155 (C.M.A. 1980); *United States v. Brown*, 5 M.J. (C.M.A. 1978); *United States v. Davis*, 5 M.J. 451 (C.M.A. 1978); *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978); *United States v. Annis*, 5 M.J. (C.M.A. 1978). The last sentence in this subsection is based on *United States v. Robinson, United States v. Brown*, and *United States v. Iverson*, all *supra*. The discussion is based on *United States v. Robinson, supra.*

Subsection (3) is based on *United States v. Babcock, supra; United States v. Cruz*, 5 M.J. 286 (C.M.A. 1978); *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976). Ordinarily the record will have been provided to the accused under R.C.M. 1104(b).

Subsections (4) and (5) are based on Article 60(d). *See also United States v. Goode, supra. See United States v. McAdoo*, 14 M.J. 60 (C.M.A. 1982).

1987 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).

Rule 1107. Action by convening authority

(a) *Who may take action.* This subsection is based on Article 60(c). It is similar to the first sentence of paragraph 84*b* and the first sentence of paragraph 84*c* of MCM, 1969 (Rev.) except insofar as the amendment of Article 60 provides otherwise. *See* Military Justice Act of 1983, Pub. L. No. 98-209, § 5(a)(1), 97 Stat. 1393 (1983). The first paragraph in the discussion is based on the last two sentences of paragraph 84*a* of MCM, 1969 (Rev.). The second paragraph of the discussion is based on the second and third sentences of paragraph 84*c* of MCM, 1969 (Rev.); *United States v. Conn*, 6 M.J. 351 (C.M.A. 1979); *United States v. Reed*, 2 M.J. 64 (C.M.A. 1976); *United States v. Choice*, 23 U.S.C.M.A. 329, 49 C.M.R. 663 (1975). *See also United States v. James*, 12 M.J. 944 (N.M.C.M.R.), *pet. granted*, 14 M.J. 235 (1982). The reference in the third sentence of paragraph 84*c* of MCM, 1969 (Rev.) to disqualification of a convening authority because the convening authority granted immunity to a witness has been deleted. *See United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). Note that although *Newman* held that a convening authority is not automatically disqualified from taking action by reason of having granted immunity, the Court indicated that a convening authority may be disqualified by granting immunity under some circumstances.

(b) *General considerations.* Subsection (1) and the discussion is based on Article 60(c). *See also* S. Rep. No. 53, 98th Cong., 1st Sess. 19 (1983).

Subsection (2) is based on Article 60(b) and (c).

Subsection (3)(A)(i) is based on Article 60(a). Subsection (3)(A)(ii) is based on Article 60(d). Subsection (3)(A)(iii) is based on Article 60(b) and (d). Subsection (3)(B) is based on Article 60 and on S. Rep. No. 53, 98th Cong., 1st Sess. 19-20 (1983). The second sentence in subsection (3)(B)(iii) is also based on the last sentence of paragraph 85*b* of MCM, 1969 (Rev.). *See also United States v. Vara*, 8 U.S.C.M.A. 651, 25 C.M.R. 155 (1958); *United States v. Lanford*, 6 U.S.C.M.A. 371, 20 C.M.R. 87 (1955).

Subsection (4) is based on Article 60(c)(3). *See also* Article 60(e)(3). This subsection is consistent with paragraph 86*b*(2) of MCM, 1969 (Rev.) except that it does not refer to examining the record for jurisdictional error.

1990 Amendment: Subsection (b)(4) was amended in conjunction with the implementation of findings of not guilty only by reason of lack of mental responsibility provided for in Article 50a, 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 considerably more credible evidence than merely an allegation of lack of capacity is required before further inquiry need by made. *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 2610 (1986) (Powell, J., concurring).

(c) *Action of findings.* This subsection is based on Article 60(c)(2). Subsection (2)(B) is also based on Article 60(e)(1) and (3). The first sentence in the discussion is based on *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*; 81st Cong., 1st Sess. 1182-85 (1949). The second sentence in the discussion is based on Article 60(e)(3). The remainder of the discussion is based on S. Rep. No. 53, 98th Cong., 1st Sess. 21 (1983).

(d) *Action on the sentence.* Subsection (1) is based on Article 60(c) and is similar to the first paragraph of paragraph 88*a* of MCM, 1969 (Rev.). The first paragraph of the discussion is based on paragraph 88*a* of MCM, 1969 (Rev.). The second paragraph of the discussion is based on *Jones v. Ignatius*, 18 U.S.C.M.A. 7, 39 C.M.R. 7 (1968); *United States v. Brown*, 13 U.S.C.M.A. 333, 32 C.M.R. 333 (1962); *United States v. Prow*, 13 U.S.C.M.A. 63, 32 C.M.R. 63 (1962); *United States v. Johnson*, 12 U.S.C.M.A. 640, 31 C.M.R. 226 (1962); *United States v. Christenson*, 12 U.S.C.M.A. 393, 30 C.M.R. 393 (1961); *United States v. Williams*, 6 M.J. 803 (N.C.M.R.), *pet. dismissed*, 7 M.J. 68 (C.M.A. 1979); *United States v. Berg*, 34 C.M.R. 684 (N.B.R. 1963). *See also United States v. McKnight*, 20 C.M.R. 520 (N.B.R. 1955).

Subsection (2) is based on Article 60(c) and S. Rep. No. 53, 98th Cong., 1st Sess. 19 (1983). The second sentence is also based on *United States v. Russo*, 11 U.S.C.M.A. 352, 29 C.M.R. 168 (1960). The second paragraph of the discussion is based on the third paragraph of paragraph 88*b* of MCM, 1969 (Rev.).

Subsection (3) is based on Articles 19 and 54(c)(1) and on the third sentence of paragraph 82*b*(1) of MCM, 1969 (Rev.).

(e) *Ordering rehearing or other trial.* Subsection (1)(A) is based on Article 60(e), and on paragraph 92*a* of MCM, 1969 (Rev.). Note that the decision of the convening authority to order a rehearing is discretionary. The convening authority is not required to review the record for legal errors. Authority to order a rehearing is, therefore, "designed solely to provide an expeditious means to correct errors that are identified in the course of exercising discretion under Article 60(c)." S. Rep. No. 53, 98th Cong., 1st Sess. 21 (1983). Subsection (1)(B) is based on Article 60(e). As to subsection (1)(B)(ii), *see* S. Rep. No. 53, *supra* at 22. Subsection (1)(B)(ii) is based on the second sentence of the second paragraph of paragraph 92*a* of MCM, 1969 (Rev.). The discussion is based on the second sentence of the fourth paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Subsection (1)(C)(i) is based on Article 62(e)(3) and on the first sentence of the third paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Subsection (1)(C)(ii) and the discussion are based on Article 60(e)(3) and on the first paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Subsection (1)(C)(ii) is based on the first sentence of the tenth paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Subsection (1)(D) is based on the sixth paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Subsection (1)(E) is based on the eighth paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Subsection (1)(F) is based on the third sentence of the third paragraph of paragraph 92*a* of MCM, 1969 (Rev.). Because of the modification of Article 71 (*see* R.C.M. 1113) and because the convening authority may direct a rehearing after action in some circumstances (*see* subsection (e)(1)(B)(ii) of this rule), the language is modified. The remaining parts of paragraph 92*a*, concerning procedures for a rehearing, are now covered in R.C.M. 810.

Subsection (2) is based on paragraph 92*b* of MCM, 1969 (Rev.). *See also* paragraph 89c(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 retrail. *See United States v. Culver*, 22 U.S.C.M.A. 141, 46 C.M.R. 141 (1973).

(f) *Contents of action and related matters.* Subsection (1) is based on paragraph 89*a* of MCM, 1969 (Rev.).

Subsection (2) is based on paragraph 89*b* of MCM, 1969 (Rev.). The second sentence is new. It is intended to simplify the procedure when a defect in the action is discovered in Article 65(c) review. There is no need for another authority to formally act in such cases if the convening authority can take corrective action. The accused cannot be harmed by such action. A convening authority may still be directed to take corrective action when necessary, under the third sentence. "Erroneous" means clerical error only. *See* subsection (g) of this rule. This new sentence is not intended to allow a convening authority to change a proper action because of a change of mind.

Subsection (3) is based on paragraph 89*c*(2) of MCM, 1969 (Rev.). The provision in paragraph 89*c*(2) of MCM, 1969 (Rev.) that disapproval of the sentence also constitutes disapproval of the findings unless otherwise stated is deleted. The convening authority must expressly indicate which findings, if any, are disapproved in any case. *See* Article 60(c)(3). The discussion is based on paragraph 89*c*(2) of MCM, 1969 (Rev.). Subsection (4)(A) is based on paragraph 89*c*(3) of MCM, 1969 (Rev.). The first sentence of paragraph 89*c*(2) is no longer accurate. Since no action on the findings is required, any disapproval of findings must be expressed. Subsection (4)(B) is taken from paragraph 89*c*(4) of MCM, 1969 (Rev.). Subsection (4)(C) is taken from paragraph 89*c*(5) of MCM, 1969 (Rev.). Subsection (4)(D) is based on paragraph 89*c*(6) of MCM, 1969 (Rev.). However, because that portion of the sentence which extends to confinement may now be ordered executed when the convening authority takes action (*see* Article 71(c)(2); R.C.M. 1113(b)), temporary custody is unnecessary in such cases. Therefore, this subsection applies only when death has been adjudged and approved. Subsection (4)(E) is taken from paragraph 89*c*(7) of MCM, 1969 (Rev.). Subsection (4)(F) is new. *See* Analysis, R.C.M. 305(k). *See also United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983). Subsection (4)(G) is taken from paragraph 89*c*(9) of MCM, 1969 (Rev.). Subsection (4)(H) is modified based on the amendment of Article 71 which permits a reprimand to be ordered executed from action, regardless of the other components of the sentence. Admonition has been deleted. *See* R.C.M. 1003(b)(1).

Subsection (5) is based on paragraph 89*c*(8) of MCM, 1969 (Rev.). *See also* R.C.M. 810(d) and Analysis. The provision in paragraph 89*c*(8) requiring that the accused be credited with time in confinement while awaiting a rehearing is deleted. Given the procedures for imposition and continuation of restraint while awaiting trial (*see* R.C.M. 304 and 305), there should not be a credit simply because the trial is a rehearing.

(g) *Incomplete, ambiguous, or erroneous action.* This subsection is based on paragraph 95 of MCM, 1969 (Rev.). *See generally United States v. Loft*, 10 M.J. 266 (C.M.A. 1981); *United States v. Lower*, 10 M.J. 263 (C.M.A. 1981).

(h) *Service on accused.* This subsection is based on Article 61(a), *as amended, see* Military Justice Act of 1983, Pub. L. No. 98–209, § 5(b)(1), 97 Stat. 1393 (1983).

Rule 1108. Suspension of execution of sentence

This rule is based on Articles 71(d) and 74, and paragraphs 88*e* and 97*a* of MCM, 1969 (Rev.). *See also* Fed. R. Crim. P. 32(e). The second paragraph of the discussion to subsection (b) is based on *United States v. Stonesifer*, 2 M.J. 212 (C.M.A. 1977); *United States v. Williams*, 2 M.J. 74 (C.M.A. 1976); *United States v. Occhi*, 2 M.J. 60 (C.M.A. 1976). Subsection (c) is new and based on Article 71; *United States v. Lallande*, 22 U.S.C.M.A. 170, 46 C.M.R. 170 (1973); *United States v. May*, 10 U.S.C.M.A. 258, 27 C.M.R. 432 (1959). Cf. 18 U.S.C. § 3651 ("upon such terms and conditions as the court deems best"). The notice provisions are designed to facilitate vacation when that becomes necessary. *See* the Analysis, R.C.M. 1109. The language limiting the period of suspension to the accused's current enlistment has been deleted. *See United States v. Thomas*, 45 C.M.R. 908 (N.C.M.R. 1972). *Cf. United States v. Clardy*, 13 M.J. 308 (C.M.A. 1982). *See also* subsection (e) of this rule.

1990 Amendment: The third sentence was amended to delete the limitation of Secretarial designation to an "officer exercising general court-martial jurisdiction over the command to which the accused is assigned" and to permit such designation to any "commanding officer." This comports with the language of Article 74(a), UCMJ and paragraphs 97a of MCM, 1951 and MCM, 1969. The specific designation of inferior courts-martial convening authorities to remit or suspend unexecuted portions was not intended to limit in any other respects the Secretarial designation power. Except for a sentence which has been approved by the President, remission or suspension authority is otherwise left entirely to departmental regulations.

The last sentence was added to clarify the authority of the officials named in section (b) to grant clemency or mitigating action on those parts of the sentence that have been approved and ordered executed but that have not actually been carried out. In the case of forfeiture the "carrying out" involves the actual collection after pay accures 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 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.

1987 Amendment: Several amendments were made to R.C.M. 1109 to specify that the notice to the probationer concerning the vacation proceedings must be in writing, and to specify that the recommendations concerning vacation of the suspension provided by the hearing officer must also be in writing. *Black v. Romano*, 471 U.S. 606, 105 S.Ct. 2254 (1985). Several references to "conditions of probation" were changed to "conditions of suspension" for consistency of terminology.

Rule 1110. Waiver or withdrawal of appellate review

Introduction. This rule is new and is based on Article 61, as amended, *see* Military Justice Act of 1983, Pub. L. No. 98-209, § 5(b)(1), 97 Stat. 1393 (1983). The rule provides procedures to ensure that a waiver or withdrawl 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.

(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).

1987 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 50a, UCMJ [Military Justice Amendments of 1986, tit. VIII, § 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, 100 Stat. 3905 (1986)].

Rule 1113. Execution of sentences

Introduction. Fed. R. Crim. P. 38 is inapplicable. The execution of sentences in the military is governed by the code. *See* Articles 57 and 71. *See also* Articles 60, 61, 64, 65, 66, and 69.

(a) *In general.* This subsection is based on Article 71(c)(2) and the first paragraph of paragraph 98 of MCM, 1969 (Rev.). *See also* Articles 60, 61, 64, 65, 66, and 67.

(b) *Punishments which the convening authority may order executed in the initial action.* This subsection is based on Article 71(d). *See also* the first paragraph of paragraph 88*d*(1) of MCM, 1969 (Rev.). Note that under the amendment of Article 71 (*see* Pub. L. No. 98-209, § 5(e), 97 Stat. 1393 (1983)), the convening authority may order parts of a sentence executed in the initial action, even if the sentence includes other parts (e.g., a punitive discharge) which cannot be ordered executed until the conviction is final.

(c) *Punishments which the convening authority may not order executed in the initial action.* This subsection is based on the sources noted below. The structure has been revised to provide clearer guidance as to who may order the various types of punishments executed. Applicable 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).

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.

1987 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*. 477 U.S. 399, 106 S.Ct. 2595, 2610 (1986) (Powell, J., concurring). The burden of showing the accused's lack of mental capacity is on the defense when the issue is before the court for adjudication. This is consistent with amendments to R.C.M. 909(c)(2) and R.C.M. 916(k)(3)(A) which shifted to the defense the burden of showing lack of mental capacity to stand trial and lack of mental responsibility. The rule also establishes a presumption of capacity and allows limits on the scope of the sanity board's examination.

Subsection (2)(A) is based on Articles 14 and 57(b) and paragraph 97*c* of MCM, 1969 (Rev.). *See also* paragraph 126*j* of MCM, 1969 (Rev.). Subsection (2)(B) is based on Article 58(b) and the third paragraph of paragraph 126*j* of MCM, 1969 (Rev.). Subsection (2)(C) is based on Article 58(a) and paragraph 93 of MCM, 1969 (Rev.). Note that if the Secretary concerned so prescribes, the convening authority need not designate the place of confinement. Because the 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.).

Subsection (3) is based on paragraph 126*h*(3) of MCM, 1969 (Rev.), but it is modified to avoid constitutional problems. *See Bearden v. Georgia*, 461 U.S 660 (1983); *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970). *See also United States v. Slubowski*, 5 M.J. 882 (N.C.M.R. 1978), *aff'd*, 7 M.J. 461 (1979); *United States v. Vinyard*, 3 M.J. 551 (A.C.M.R.), *pet. denied*, 3 M.J. 207 (1977); *United States v. Donaldson*, 2 M.J. 605 (N.C.M.R. 1977), *aff'd*, 5 M.J. 212 (1978); *United States v. Martinez*, 2 M.J. 1123 (C.G.C.M.R. 1976); *United States v. Kehrli*, 44 C.M.R. 582 (A.F.C.M.R. 1971), *pet. denied*, 44 C.M.R. 940 (1972); *ABA Standards, Sentencing Alternatives and Procedures* § 18-2.7 (1979).

Subsection (4) is new. *See* Article 57(c).

Subsection (5) is based on the last paragraph of paragraph 125 of MCM, 1969 (Rev.).

Paragraph 88*d*(3) of MCM, 1969 (Rev.) is deleted based on the amendment of Articles 57(a) and 71(c)(2) which eliminated the necessity for application or deferment of forfeitures. Forfeitures always may be ordered executed in the initial action.

Rule 1114. Promulgating orders

(a) *In general.* Subsections (1) and (2) are based on the first paragraph of paragraph 90*a* of MCM, 1969 (Rev.). Subsection (3) is based on paragraph 90*e* of MCM, 1969 (Rev.). This rule is consistent in purpose with Fed. R. Crim. P. 32(b)(1).

(b) *By whom issued.* Subsection (1) is based on paragraph 90*b*(1) of MCM, 1969 (Rev.) except that the requirement that the supervisory authority, rather than the convening authority, issue the promulgating order in certain special courts-martial has been deleted, since action by the supervisory authority is no longer required. *See* Article 65. The convening authority now issues the promulgating order in all cases. *See generally United States v. Shulthise*, 14 U.S.C.M.A. 31, 33 C.M.R. 243 (1963) (actions equivalent to publication). Subsection (2) is based on paragraphs 90*b*(2) and 107 of MCM, 1969 (Rev.).

(c) *Contents.* Subsection (1) is based on Appendix 15 of MCM, 1969 (Rev.) but modifies it insofar as the only item which must be recited verbatim in the order is the convening authority's action. The charges and specifications should be summarized to adequately describe each offense, including allegations which affect the maximum authorized punishments. *Cf.* Fed. R. Crim. P. 32(b)(1). *See also* Form 25, Appendix of Forms, Fed. R. Crim. P. Subsection (2) is based on the third, fourth, and fifth paragraphs of paragraph 90*a* of MCM, 1969 (Rev.) except that reference is no longer made to action by the supervisory authority. *See* Article 65. *See United States v. Veilleux*, 1 M.J. 811, 815 (A.F.C.M.R. 1976); *United States v. Hurlburt*, 1 M.J. 742, 744 (A.F.C.M.R. 1975), *rev'd on other grounds*, 3 M.J. 387 (C.M.A. 1977) (date of publication). Subsection (3) is based on the first sentence of the second paragraph of paragraph 90*a* of MCM, 1969 (Rev.).

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

1990 Amendment: Subsection (c)(2) was amended in conjunction with the implementation of findings of not guilty only by reason of lack of mental responsibility provided for in Article 50a, UCMJ [Military Justice Amendments of 1986, tit. VIII, § 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, 100 Stat. 3905 (1986)].

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

(e) *Authentication.* This subsection is based on forms at Appendix 15 of MCM, 1969 (Rev.) and clarifies the authentication of promulgating orders. *See* Mil. R. Evid. 902(10). Note that this subsection addresses authentication of the order, not authentication of copies.

(f) *Distribution.* This subsection is based on paragraph 90*d* of MCM, 1969 (Rev.). The matters in paragraph 96 of MCM, 1969 (Rev.) are deleted. These are administrative matters better left to service regulations.

1987 Amendment: Subsection (b)(2) was amended to clarify that actions taken subsequent to the initial action may also comprise the supplementary order. Section (c) was amended to simplify and shorten court-martial orders. *See* revisions to Appendix 17.

CHAPTER XII. APPEALS AND REVIEW

Rule 1201. Action by the Judge Advocate General

(a) *Cases required to be referred to a Court of Military Review.* This subsection is based on Article 66(b).

(b) *Cases reviewed by the Judge Advocate General.* Subsection (1) is based on Article 69(a). Subsection (2) is based on Article 64(b)(3) and Article 69(b). Subsection (3) is based on Article 69(b). Subsection (4) is based on Article 69(c). Subsection (b) is similar to paragraph 103 and the first two paragraphs of paragraph 110A of MCM, 1969 (Rev.) except insofar as the amendments of Articles 61, 64, and 69 dictate otherwise. *See* Military Justice Act of 1983, Pub. L. No. 98-209, §§ 4(b), 7(a), (e), 97 Stat. 1393 (1983). The last paragraph of paragraph 110A of MCM, 1969 (Rev.) was deleted as unnecessary.

1987 Amendment: Subsection (b)(3)(A) was changed to conform to the language of Article 69(b), as enacted by the Military Justice Act of 1983, which precludes review of cases previously reviewed under Article 69(a).

1990 Amendment: The discussion to subsection (b)(3)(A) was amended in conjunction with the implementation of Article 50a, UCMJ [Military Justice Amendments of 1986, tit. VIII, § 802, National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-611, 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 action. 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.

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

Rule 1202. Appellate counsel

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

(b) *Duties.* This subsection is based on Article 70(b) and (c). *See also* the first two paragraphs of paragraph 102*b* of MCM, 1969 (Rev.). The penultimate sentence in the rule is based on the penultimate sentence in the fourth paragraph of paragraph 102*b* of MCM, 1969 (Rev.). The last sentence in the fourth paragraph of paragraph 102*b* of MCM, 1969 (Rev.) is deleted as unnecessary. The last sentence in the rule is new. It is based on practice in Federal civilian courts. *See Rapp v. Van Dusen*, 350 F. 2d 806 (3d Cir. 1965); Fed. R. App. P.21(b). *See also* Rule 27, Revised Rules of the Supreme Court of the United States (Supp. IV 1980); *United States v. Haldeman*, 599 F. 2d 31 (D.C. Cir. 1976). *cert. denied*, 431 U.S. 933 (1977). *See generally* 9 J. Moore, B. Ward, and J. Lucas, *Moore's Federal Practice*, § 221.03 (2d ed. 1982).

The first two paragraphs in the discussion modify the third and fourth paragraphs of paragraph 102*b* of MCM, 1969 (Rev.). The Court of Military Appeals has held that appellate defense counsel is obligated to assign as error before the Court of Military Review all arguable issues unless such issues are, in counsel's professional opinion, clearly frivolous. In addition, appellate defense counsel must invite the attention of the court to issues specified by the accused, unless the accused expressly withdraws such issues, if these are not otherwise assigned as errors. Also, in a petition for review by the Court of Military Appeals, counsel must, in addition to errors counsel believes have merit, identify issues which the accused wants raised. *See United States v. Hullum*, 15 M.J. 261 (C.M.A. 1983); *United States v. Knight*, 15 M.J. 195 (C.M.A. 1982); *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See also United States v. Dupas*, 14 M.J. 28 (C.M.A. 1982); *United States v. Rainey*, 13 M.J. 462, 463 n. 1 (C.M.A. 1982) (Everett, C.J., dissenting). *But see Jones v. Barnes*, 463 U.S. 745 (1983) (no consitutional requirement for appointed counsel to raise every nonfrivolous issue requested by client). The third paragraph in the discussion is based on Article 70(d) and paragraph 102 of MCM, 1969 (Rev.). The fourth paragraph in the discussion is based on the establishment of review by the Supreme Court of certain decisions of the Court of Military Appeals. *See* Article 67(h) and 28 U.S.C. § 1259; Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393 (1983). The fifth paragraph in the discussion is based on *United*

States v. Patterson, 22 U.S.C.M.A. 157, 46 C.M.R. 157 (1973). *See also United States v. Kelker*, 4 M.J. 323 (C.M.A. 1978); *United State v. Bell*, 11 U.S.C.M.A. 306, 29 C.M.R. 122 (1960).

Rule 1203. Review by a Court of Military Review

(a) *In general.* This subsection is based on Article 66(a). The discussion is based on Article 66(a), (f), (g) and (h). *See also* the first paragraph of paragraph 100*a* and paragraph 100*d* of MCM, 1969 (Rev.).

(b) *Cases reviewed by a Court of Military Review.* This subsection is based on Article 66(b) and the third sentence of Article 69(a). Interlocutory appeals by the Government are treated in R.C.M. 908. The third through the fifth paragraphs in the discussion are based on Articles 59 and 66(c) and (d) and are taken from the second and third paragraphs of paragraph 100*a* and the first paragraph of paragraph 100*b* of MCM, 1969 (Rev.). *See also United States v. Darville*, 5 M.J. 1 (C.M.A. 1978). The last sentence in the first paragraph is based on *United States v. Brownd*, 6 M.J. 338 (C.M.A. 1979); *United States v. Yoakum*, 8 M.J. 763 (A.C.M.R.), *aff'd*, 9 M.J. 417 (C.M.A. 1980). *See also Corley v. Thurman*, 3 M.J. 192 (C.M.A. 1977). The sixth paragraph in the discussion is based on *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979); 28 U.S.C. § 1651(a). *See also United States v. LaBella*, 15 M.J. 228 (C.M.A. 1983); *United States v. Caprio*, 12 M.J. 30 (C.M.A. 1981); *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981); *United States v. Bogan*, 13 M.J. 768 (A.C.M.R. 1982). The establishment of a statutory right of the Government to appeal certain rulings at trial might affect some of these precedents. *See United States v. Weinstein*, 411 F.2d 622 (2d Cir. 1975), *cert. denied*, 422 U.S. 1042 (1976).

(c) *Action on cases reviewed by a Court of Military Review.* Subsection (1) is based on Article 67(b)(2). *See also* paragraph 100*b*(2) and the first sentence of paragraph 100*c*(1)(a) of MCM, 1969 (Rev.). *See also United States v. Leslie*, 11 M.J. 131 (C.M.A. 1981); *United States v. Clay*, 10 M.J. 269 (C.M.A. 1981).

Subsection (2) is based on Article 66(e). *See also United States v. Best*, 4 U.S.C.M.A. 581, 16 C.M.R. 155 (1954). The discussion is consistent with paragraph 100*b*(3) of MCM, 1969 (Rev.).

Subsection (3) modifies paragraph 100*c*(1)(a) of MCM, 1969 (Rev.). It allows each service to prescribe specific procedures for service of Court of Military Review Decisions appropriate to its own organization and needs, in accordance with the increased flexibility allowed under the amendment of Article 67(c). *See* Military Justice Amendments of 1981, Pub. L. 97–81; 95 Stat. 1090.

Subsection (4) is based on the first paragraph of paragraph 105*b* of MCM, 1969 (Rev.). *See also* Article 74.

Because R.C.M. 1203 is organized somewhat differently than paragraph 100 of MCM, 1969 (Rev.), the actions described in subsection (c) of this rule apply to cases referred by the Judge Advocate General to the Court of Military Review under Article 69 as well as Article 66. The actions described are appropriate for both types of cases, to the extent that they are applicable.

__________ *1986 Amendment:* Subsection (5) is based on the second paragraph of paragraph 124 of MCM, 1969 (Rev.). The fourth sentence is based, in part, on *United States v. Williams*, 18 M.J. 533 (A.F.C.M.R. 1984). *See also United States v. Korzeniewski*, 7 U.S.C.M.A. 314, 22 C.M.R. 104 (1956); *United States v. Bledsoe*, 16 M.J. 977 (A.F.C.M.R. 1983). The provision assigning the burden of proof is consistent with amendments to R.C.M. 909(c)(2) and R.C.M. 916(k)(3)(A) which shifted to the defense the burden of showing lack of mental capacity to stand trial and lack of mental responsibility.

(d) *Notification to accused.* This subsection is based on Article 67(c) (as amended, *see* Military Justice Amendments of 1981, Pub. L. 97–81, § 5, 95 Stat. 1088–89) and on the first paragraph of paragraph 100*c*(1)(a) of MCM, 1969 (Rev.) (*see* Exec. Order No. 12340 (Jan. 20, 1982)). The discussion is based on Article 67(b) and on the second paragraph of paragraph 100*c*(1)(a) of MCM, 1969 (Rev.).

(e) *Cases not reviewed by the Court of Military Appeals.* Subsection (1) is based on the first sentence of paragraph 100*c*(1)(b) of MCM, 1969 (Rev.). *See* Article 71(b). Subsection (2) is based on the last sentence of paragraph 100*c*(1)(*a*) of MCM, 1969 (Rev.). *See* Article 66(e).

(f) *Scope.* This subsection clarifies that the procedures for Government appeals of interlocutory rulings at trial are governed by R.C.M. 908.

Rule 1204. Review by the Court of Military Appeals

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

(b) *Petition by the accused for review by the Court of Military Appeals.* Subsection (1) is based on the last paragraph of paragraph 102*b* of MCM, 1969 (Rev.). Note that if the case reached the Court of Military Review by an appeal by the Government under R.C.M. 908, the accused would already have detailed defense counsel. Subsection (2) is based on C.M.A.R. 19(a)(3).

(c) *Action on decision by the Court of Military Appeals.* Subsection (1) substantially repeats Article 67(f) as did its predecessor, the fourth paragraph of paragraph 101 of MCM, 1969 (Rev.) except that paragraph did not address possible review by the Supreme Court. *See* Article 67(h); 28 U.S.C. § 1259. Subsections (2) and (3) are based on Article 71(a) and (b) and on the last paragraph of paragraph 101 of MCM, 1969 (Rev.). Subsection (4) is new and reflects the possibility of review by the Supreme Court. *See* Article 67(h); 28 U.S.C. § 1259. *See also* Article 71.

(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 caes 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

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 guard, watch, or duty section with the intent to abandon it." *See* subsections c(4)(c) and c(4)(d).

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 of 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 or 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.

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 had 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 absence 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 15c.

14. Article 90—Assaulting or willfully disobeying superior commissioned officer

c. *Explanation.* (1) *Striking or assaulting superior commissioned officer.* This subparagraph is based on paragraph 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 otherwise outside the role of an officer before self-defense may be in issue. *See United States v. Struckman*, 20 U.S.C.M.A. 493, 43 C.M.R. 333 (1971).

(2) *Disobeying superior commissioned officer.* This subparagraph is based on paragraph 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).

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. 1979), *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 subparagraph (5) is based on 18 U.S.C. § 1201. A parent taking a child in violation of a custody decree may violate state law or 18 U.S.C. § 1073. *See* 18 U.S.C.A. § 1073 Historical and Revision Note (West Supp. 1982). *See also* paragraph 60*c*(4).

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

93. Article 134 (Mail: taking, opening, secreting, destroying, or stealing)

c. *Explanation.* This paragraph is new and is based on *United States v. Gaudet*, 11 U.S.C.M.A. 672, 29 C.M.R. 488 (1960); *United States v. Manausa*, 12 U.S.C.M.A. 37, 30 C.M.R. 37 (1960). This offense is not preempted by Article 121. *See United States v. Gaudet, supra. See also* paragraph 60.

94. Article 134 (Mails: depositing or causing to be deposited obscene matters in)

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

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

95. Article 134 (Misprison of serious offense)

c. *Explanation.* This paragraph is based on paragraph 213*f*(6) of MCM, 1969 (Rev.). The term "serious offense" is substituted for "felony" to make clear that concealment of serious military offenses, as well as serious civilian offenses, is an offense. Subsection (1) is based on *Black's Law Dictionary* 902 (5th ed. 1979). *See also United States v. Daddano*, 432 F.2d 1119 (7th Cir. 1970); *United States v. Perlstein*, 126 F.2d 789 (3d Cir.), *cert. denied*, 316 U.S. 678 (1942); 18 U.S.C. § 4.

96. Article 134 (Obstructing justice)

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

97. Article 134 (Pandering and prostitution)

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

e. *Maximum punishment.* The maximum punishment for prostitution is based on 18 U.S.C. § 1384.

98. Article 134 (Perjury: subornation of)

c. *Explanation.* This paragraph is new. It is based on 18 U.S.C. § 1622 which applies to any perjury. *See* 18 U.S.C. § 1621. *See generally* R. Perkins, *Criminal Law* 466—67 (2d ed. 1969). *See also* the Analysis, paragraph 57; *United States v. Doughty*, 14 U.S.C.M.A. 540, 34 C.M.R. 320 (1964)(res judicata); *United States v. Smith*, 49 C.M.R. 325 (N.C.M.R. 1974) (pleading).

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

c. *Explanation.* This paragraph is new and is based on Mil. R. Evid. 803(8), but does not exclude certain types of records which are inadmissible under Mil. R. Evid. 803(8) for policy reasons. *See United States v. Maze*, 21 U.S.C.M.A. 260, 45 C.M.R. 34 (1972) for a discussion of one of these offenses in relation to the doctrine of preemption. *See generally* 18 U.S.C. § 2071.

f. *Sample specification.* The specification contained in Appendix 6c, no. 172, from MCM, 1969 (Rev.) was modified by deleting the word "steal" because this would be covered by "remove."

100. Article 134 (Quarantine: medical, breaking)

b. *Elements.* The word "duly" has been deleted from the elements of this offense for the same reasons explained in Analysis, paragraph 19.

c. *Explanation.* Putting a person "on quarters" or otherwise excusing a person from duty because of illness does not of itself constitute a medical quarantine.

f. *Sample specification.* Sample specification no. 173, Appendix 6c of MCM, 1969 (Rev.) was modified based on the deletion of the word "duly," as explained in the analysis to paragraph 19. *See* subparagraph b, above.

101. Article 134 (Requesting commission of an offense)

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

c. *Explanation.* This paragraph is based on *United States v. Benton, supra. See also United States v. Oakley*, 7 U.S.C.M.A. 733, 23 C.M.R. 197 (1957).

e. *Maximum punishment.* The maximum punishment is based on *United States v. Oakley, supra.*

★*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)

b. *Elements.* The word "duly" has been deleted from the elements of this offense, for the same reasons explained in Analysis, paragraph 19.

c. *Explanation.* This paragraph is new and is based on paragraph 20*b*, 126*g*, 131*c*, and 174*b* of MCM, 1969 (Rev.). *See also United States v. Haynes*, 15 U.S.C.M.A. 122, 35 C.M.R. 94 (1964).

f. *Sample specification.* Sample specification no. 175, appendix 6c of MCM, 1969 (Rev.) was modified based on the deletion of the word "duly," as explained in the analysis of paragraph 19. *See* subparagraph b, above.

103. Article 134 (Seizure: destruction, removal, or disposal of property to prevent)

Introduction. This offense is new. It is based on 18 U.S.C. § 2232. *See generally United States v. Gibbons*, 463 F.2d 1201 (3d Cir. 1972); *United States v. Bernstein*, 287 F.Supp. 84 (S.D. Fla. 1968); *United States v. Fishel*, 12 M.J. 602 (A.C.M.R. 1981), *pet. denied*, 13 M.J. 20 (C.M.A. 1982). *See also* the opinion in *United States v. Gibbons*, 331 F. Supp. 970 (D. Del. 1971).

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

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

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

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

e. *Maximum punishment.* The maximum punishment for loitering or wrongfully sitting on post by a sentinel or lookout was increased because of the potentially serious consequences of such misconduct. *Cf.* Article 113.

105. Article 134 (Soliciting another to commit an offense)

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

c. *Explanation. See* the Analysis, paragraph 6.

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

★*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.A. 1982).

c. *Explanation.* This paragraph is based on *Military Judges' Benchbook, supra* at paragraph 3–189.

e. *Maximum punishment.* The maximum punishment is based on 18 U.S.C. § 844(e).

110. Article 134 (Threat, communicating)

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

111. Article 134 (Unlawful entry)

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

112. Article 134 (Weapon: concealed, carrying)

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

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

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

PART V NONJUDICIAL PUNISHMENT PROCEDURE

1. General

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

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

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

f. *Limitations on nonjudicial punishment.* (1) *Double punishment prohibited.* This subparagraph is taken from the first paragraph of paragraph 128*d* of MCM, 1969 (Rev.). Note that what is prohibited is the service of punishment twice. Where nonjudicial punishment is set aside, this does not necessarily prevent reimposition of punishment and service of punishment not previously served.

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

(3) *Multiple punishment prohibited.* This paragraph is based on the guidance for court-martial offenses, found in paragraphs 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.

February 1986 Amendment: Subparagraph (c)(2) was amended to state clearly that a servicemember has no absolute right to refuse to appear personally before the person administering the nonjudicial punishment proceeding. In addition, Part V was amended throughout to use the term "nonjudicial punishment authority" in circumstances where the proceeding could be administered by a commander, officer in charge, or a principal assistant to a general court-martial convening authority or general or flag officer.

5. Punishments.

This paragraph is taken from paragraph 131 of MCM, 1969 (Rev.). Subparagraph b(2)(b)4 is also based on S. Rep. 1911, 87th Cong., 1st Sess. 7 (1962). Subparagraph c(4) is also based on *id.* at 6–7 and *Hearings Before a Subcomm. of the House Comm. on Armed Services,* 87th Cong., 1st Sess. 33 (1962). Detention of pay was deleted as a punishment because under current centralized pay systems, detention of pay is cumbersome, ineffective, and seldom used. The concept of apportionment, authorized in Article 15(b) and set forth in paragraph 131*d* of MCM, 1969 (Rev.), was eliminated as unnecessary and confusing. Accordingly, the Table of Equivalent Punishments is no longer necessary. Subparagraph d, in concert with the elimination of the apportionment concept, will ease the commanders burden of determining an appropriate punishment and make the implementation of that punishment more efficient and understandable.

★*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 1986, tit. VIII, 804, National Defense Authorization Act of Fiscal Year 1987, Pub. L. 99-661, 100 Stat. 3905 (1986).

6. Suspension, mitigation, remission, and setting aside

This paragraph is taken from Article 15, paragraph 134 of MCM, 1969 (Rev.), and service regulations. *See, e.g.*, AR 27-10, paras. 3-23 through 3-28 (1 Sep. 1982); JAGMAN sec. 0101; AFR 111-9, para 7 (31 Aug 1979). Subparagraph a dealing with suspension was expanded to: require a violation of the code during the period of suspension as a basis for vacation action, and to explain that vacation action is not in itself nonjudicial punishment and does not preclude the imposition of nonjudicial punishment for the offenses upon which the vacation action was based. Subparagraph a(4) provides a procedure for vacation of suspended nonjudicial punishment. This procedure parallels the procedure found sufficient to make admissible in courts-martial records of vacation of suspended nonjudicial punishment. *United States v. Covington*, 10 M.J. 64 (C.M.A. 1980).

★*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 Sept. 1982); JAGMAN 0101; AFR 111-9, para. 8 (31 Aug. 1981). Subparagraph (d) requires an appeal to be filed within 5 days or the right to appeal will be waived, absent unusual circumstances. This is a reduction from the 15 days provided for in paragraph 135 and is intended to expedite the appeal process. Subparagraph f(2) is intended to promote sound practice, that is, the superior authority should consider many factors when reviewing an appeal, and not be limited to matters submitted by the appellant or the officer imposing the punishment. Subparagraph f(3) provides for "additional proceedings" should a punishment be set aside due to a procedural error. This is consistent with court-martial practice and intended to ensure that procedural errors do not prevent appropriate disposition of a disciplinary matter.

8. Records of nonjudicial punishment

This paragraph is taken from Article 15(g) and paragraph 133*c* of MCM, 1969 (Rev.).

(c) *Release of evidence.* Rule 302(c) is new and is intended to provide the trial counsel with sufficient information to reply to an insanity defense raised via expert testimony. The Rule is so structured as to permit the defense to choose how much information will be available to the prosecution by determining the nature of the defense to be made. If the accused fails to present an insanity defense or does so only through lay testimony, for example, the trial counsel will not receive access to the report. If the accused presents a defense, however, which includes specific incriminating statements made by the accused to the sanity board, the military judge may order disclosure to the trial counsel of "such statement . . . as may be necessary in the interest of justice."

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

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

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

Rule 303. Degrading questions

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

A specific application of Rule 303 is in the area of sexual offenses. Under prior law, the victims of such offenses were often subjected to a probing and degrading cross-examination related to past sexual history—an examination usually of limited relevance at best. Rule 412 of the Military Rules of Evidence now prohibits such questioning, but Rule 412 is, however, not applicable to Article 32 hearings as it is only a rule of evidence; *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.

Rule 304. Confessions and admissions

(a) *General rule.* The exclusionary rule found in Rule 304(a) is applicable to Rules 301—305, and basically restates prior law which appeared in paragraphs 140*a*(6) and 150*b*, MCM, 1969 (Rev.). Rule 304(b) does permit, however, limited impeachment use of evidence that is excludable on the merits. A statement that is not involuntary within the meaning of Rule 304(c)(3), Rule 305(a) or Rule 302(a) is voluntary and will not be excluded under this Rule.

The seventh paragraph of ¶ 150*b* of the 1969 Manual attempts to limit the derivative evidence rule to *statements* obtained through *compulsion* that is "applied by, or at the instigation or with the participation of, an *official or agent of the United States, or any State thereof or political subdivision of either, who was acting in a governmental capacity* . . ." (emphasis added). Rule 304, however, makes all derivative evidence inadmissible. Although some support for the 1969 Manual limitations can be found in the literal phrasing of Article 31(d), the intent of the Article as indicated in the commentary presented during the House hearings, *The Uniform Code of Military Justice, Hearing on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 984 (1949), was to exclude "evidence" rather than just "statements." Attempting to allow admission of evidence obtained from statements which were the product of coercion, unlawful influence, or unlawful inducement would appear to be both against public policy and unnecessarily complicated. Similarly, the 1969 Manual's attempt to limit the exclusion of derivative evidence to that obtained through compulsion caused by "Government agents" has been deleted in favor of the simpler exclusion of all derivative evidence. This change, however, does not affect the limitation, as expressed in current case law that the warning requirements apply only when the interrogating individual is either a civilian law enforcement officer or an individual subject to the Uniform Code of Military Justice acting in an official disciplinary capacity or in a position of authority over a suspect or accused. The House hearings indicate that all evidence obtained in violation of Article 31 was to be excluded and all persons subject to the Uniform Code of Military Justice may violate Article 31(a). Consequently, the attempted 1969 Manual restriction could affect at most only derivative evidence obtained from involuntary statements compelled by private citizens. Public policy demands that private citizens not be encouraged to take the law into their own hands and that law enforcement agents not be encouraged to attempt to circumvent an accused's rights via proxy interrogation.

It is clear that truly spontaneous statements are admissible as they are not "obtained" from an accused or suspect. An apparently volunteered statement which is actually the result of coercive circumstances intentionally created or used by interrogators will be involuntary. *Cf. Brewer v. Williams*, 430 U.S. 387 (1977); Rule 305(b)(2). Manual language dealing with this area has been deleted as being unnecessary.

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

★*February 1986 Amendment:* Rule 304(b)(2) was added to incorporate the "inevitable discovery" exception to the exclusionary rule based on *Nix v. Williams*, 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 or coercion, unlawful influence, or unlawful inducements are involuntary and thus inadmissible, because of their untrustworthiness, even as impeachment evidence. *See Mincy v. Arizona*, 437 U.S. 385 (1978).

(c) *Definitions.*

(1) *Confession and admission.* Rules 304(c)(1) and (2) express without change the definitions found in ¶ 140*a*(1), MCM, 1969 (Rev.). Silence may constitute an admission when it does not involve a reliance on the privilege against self-incrimination or related rights. Rule 301(f)(3). For example, if an imputation against a person comes to his or her attention under circumstances that would reasonably call for a denial of its accuracy if the imputation were not true, a failure to utter such a denial could possibly constitute an admission by silence. Note, however, in this regard, Rule 304(h)(3), and Rule 801(a)(2).

(2) *Involuntary.* The definition of "involuntary" in Rule 304(c)(3) summarizes the prior definition of "not voluntary" as found in ¶ 140*a*(2), MCM, 1969 (Rev.). The examples in ¶ 140*a*(2) are set forth in this paragraph. A statement obtained in violation of the warning and waiver requirements of Rule 305 is "involuntary." Rule 305(a).

The language governing statements obtained through the use of "coercion, unlawful influence, and unlawful inducement," found in Article 31(d) makes it clear that a statement obtained by any person, regardless of status, that is the product of such conduct is involuntary. Although it is unlikely that a private citizen may run afoul of the prohibition of unlawful influence or inducement, such a person clearly may coerce a statement and such coercion will yield an involuntary statement.

A statement made by the accused during a mental examination ordered under ¶ 121, MCM, 1969 (Rev.) (now R.C.M. 706, MCM, 1984) is treated as an involuntary statement under Rule 304. *See* Rule 302(a). The basis for this rule is that ¶ 121 and Rule 302 compel the accused to participate in the Government examination or face a judicial order prohibiting the accused from presenting any expert testimony on the issue of mental responsibility.

Insofar as Rule 304(c)(3) is concerned, some examples which may by themselves or in conjunction with others constitute coercion, unlawful influence, or unlawful inducement in obtaining a confession or admission are:

Infliction of bodily harm including questioning accompanied by deprivation of the necessities of life such as food, sleep, or adequate clothing;

Threats of bodily harm;

Imposition of confinement or deprivation of privileges or necessities because a statement was not made by the accused, or threats thereof if a statement is not made;

Promises of immunity or clemency as to any offense allegedly committed by the accused;

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

There is no change in the principle, set forth in the fifth paragraph of ¶ 140*a*(2), MCM, 1969 (Rev.), that a statement obtained "in an interrogation conducted in accordance with all applicable rules is not involuntary because the interrogation was preceded by one that was not so conducted, if it clearly appears that all improper influences of the preceding interrogations had ceased to operate on the mind of the accused or suspect at the time that he or she made the statement." In such a case, the effect of the involuntary statement is sufficiently attenuated to permit a determination that the latter statement was not "*obtained* in violation of" the rights and privileges found in Rules 304(c)(3) and 305(a) (emphasis added).

(d) *Procedure.* Rule 304(d) makes a significant change in prior procedure. Under ¶ 140*a*(2), MCM, 1969 (Rev.), the prosecution was required to prove a statement to be voluntary before it could be admitted in evidence absent explicit defense waiver. Rule 304(d) is intended to reduce the number of unnecessary objections to evidence on voluntariness grounds and to narrow what litigation remains by requiring the defense to move to suppress or to object to evidence covered by this Rule. Failure to so move or object constitues a waiver of the motion or

Although the witness spouse ordinarily has a privilege to refuse to testify against the accused spouse, under certain circumstances no privilege may exist, and the spouse may be compelled to testify. *See* Rule 504(c).

(b) *Confidential communication made during marriage.* Rule 504(b) deals with communications made during a marriage and is distinct from a spouse's privilege to refuse to testify pursuant to Rule 504(a). *See* 1969 Manual paragraph 151*b*(2).

(1) *General rule of privilege.* Rule 504(b)(1) sets forth the general rule of privilege for confidential spousal communications and provides that a spouse may prevent disclosure of any confidential spousal communication made during marriage even though the parties are no longer married at the time that disclosure is desired. The accused may always require that the confidential spousal communication be disclosed. Rule 504(b)(3).

No privilege exists under subdivision (b) if the communication was made when the spouses were legally separated.

(2) *Definition.* Rule 504(b)(2) defines "confidential" in a fashion similar to the definition utilized in Rules 502(b)(4) and 503(b)(2). The word "privately" has been added to emphasize that the presence of third parties is not consistent with the spousal privilege, and the reference to third parties found in Rules 502 and 503 has been omitted for the same reason. Rule 504(b)(2) extends the definition of "confidential" to statements disclosed to third parties who are "reasonably necessary for transmission of the communication." This recognizes that circumstances may arise, especially in military life, where spouses may be separated by great distances or by operational activities, in which transmission of a communication via third parties may be reasonably necessary.

(3) *Who may claim the privilege.* Rule 504(b)(3) is consistent with 1969 Manual paragraph 151*b*(2) and gives the privilege to the spouse who made the communication. The accused may, however, disclose the communication even though the communication was made to the accused.

(c) *Exceptions.*

(1) *Spouse incapacity only.* Rule 504(c)(1) provides exceptions to the spousal incapacity rule of Rule 504(a). The rule is taken from 1969 Manual paragraph 148*e* and declares that a spouse may not refuse to testify against the other spouse when the marriage has been terminated by divorce or annulment. Annulment has been added to the present military rule as being consistent with its purpose. Separation of spouses via legal separation or otherwise does not affect the privilege of a spouse to refuse to testify against the other spouse. For other circumstances in which a spouse may be compelled to testify against the other spouse, *see* Rule 504(c)(2).

Confidential communications are not affected by the termination of a marriage.

(2) *Spousal incapacity and confidential communications.* Rule 504(c)(2) prohibits application of the spousal privilege, whether in the form of spousal incapacity or in the form of a confidential communication, when the circumstances specified in paragraph (2) are applicable. Subparagraphs (A) and (C) deal with anti-marital acts, *e.g.*, acts which are against the spouse and thus the marriage. The Rule expressly provides that when such an act is involved a spouse may not refuse to testify. This provision is taken from proposed Federal Rule 505(c)(1) and reflects in part the Supreme Court's decision in *Wyatt v. United States*, 362 U.S. 525 (1960). *See also Trammel v. United States*, 445 U.S. 40 at n. 7 (1980). The Rule thus recognizes society's overriding interest in prosecution of anti-marital offenses and the probability that a spouse may exercise sufficient control, psychological or otherwise, to be able to prevent the other spouse from testifying voluntarily. The Rule is similar to 1969 Manual paragraph 148*e* but has deleted the Manual's limitation of the exceptions to the privilege to matters occurring after marriage or otherwise unknown to the spouse as being inconsistent with the intent of the exceptions.

Rule 504(c)(2)(B) is derived from paragraphs 148*e* and 151*b*(2) of the 1969 Manual. The provision prevents application of the privileges as to privileged communications if the marriage was a sham at the time of the communication, and prohibits application of the spousal incapacity privilege if the marriage was begun as a sham and is a sham at the time the testimony of the witness is to be offered. Consequently, the Rule recognizes for purposes of subdivision (a) that a marriage that began as a sham may have ripened into a valid marriage at a later time. The intent of the provision is to prevent individuals from marrying witnesses in order to effectively silence them.

Rule 505. Classified Information

Rule 505 is based upon H.R. 4745, 96th Cong., 1st Sess. (1979), which was proposed by the Executive Branch as a response to what is known as the "graymail" problem in which the defendant in a criminal case seeks disclosure of sensitive national security information, the release of which may force the government to discontinue the prosecution. The Rule is also based upon the Supreme Court's discussion of executive privilege in *United States v. Reynolds*, 345 U.S. 1 (1953) and *United States v. Nixon*, 418 U.S. 683 (1974). The rule attempts to balance the interests of an accused who desires classified information for his or her defense and the interests of the government in protecting that information.

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

(b) *Definitions.*

(1) Classified information. Rule 505(b)(1) is derived from section 2 of H.R. 4745. The definition of "classified information" is a limited one and includes only that information protected "pursuant to an executive order, statute, or regulation," and that material which constitutes restricted data pursuant to 42 U.S.C. 2014(y) (1976).

(2) *National security.* Rule 505(b)(2) is derived from section 2 of H.R. 4745.

(c) *Who may claim the privilege.* Rule 505(c) is derived from paragraph 151 of the 1969 Manual and is consistent with similar provisions in the other privilege rules. *See e.g.,* Rule 501(c). The privilege may be claimed *only* "by the head of the executive or military department or government agency concerned" and then only upon "a finding that that 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.

(h) *Notice of the accused's intention to disclose classified information.* Rule 505(h) is derived from section 5 of H.R. 4745. The intent of the provision is to prevent disclosure of classified information by the defense until the government has had an opportunity to determine what position to take concerning the possible disclosure of that information. Pursuant to Rule 505(h)(5), failure to comply with subdivision (h) may result in a prohibition on the use of the information involved.

(i) *In camera proceedings for cases involving classified information.* Rule 505(i) is derived generally from section 5 of H.R. 4745. The "in camera" procedure utilized in subdivision (i) is generally new to military law. Neither the accused nor defense counsel may be excluded from the in camera proceeding. However, nothing within the Rule requires that the defense be provided with a copy of the classified material in question when the government submits such information to the military judge pursuant to Rule 505(i)(3) in an effort to obtain an in camera proceeding under this Rule. If such information has not been disclosed previously, the government may describe the information by generic category, rather than by identifying the information. Such description is subject to approval by the military judge, and if not sufficiently specific to enable the defense to proceed during the in camera session, the military judge may order the government to release the information for use during the proceeding or face the sanctions under subdivision (i)(4)(E).

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

(k) *Security procedures to safeguard against compromise of classified information disclosed to courts-martial.* Rule 505(k) is derived from section 9 of H.R. 4745.

Rule 506. Government information other than classified information

(a) *General rule of privilege.* Rule 506(a) states the general rule of 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 paragraphs 151*b*(1) and 151*b*(3). Under Rule 506(a) information is privileged only if its disclosure would be "detrimental to the public interest." It is important to note that pursuant to Rule 506(c) the privilege may be claimed only "by the head of the executive or military department or government agency concerned" unless investigations of the Inspectors General are concerned.

Under Rule 506(a) there is no privilege if disclosure of the information concerned is required by an Act of Congress such as the Freedom of Information Act, 5 U.S.C. § 552 (1976). Disclosure of information will thus be broader under the Rule than under the 1969 Manual. *See United States v. Nixon*, 418 U.S. 683 (1974).

(b) *Scope.* Rule 506(b) defines "Government information" in a nonexclusive fashion, and expressly states that classified information and information relating to the identity of informants are solely within the scope of other Rules.

(c) *Who may claim the privilege.* Rule 506(c) distinguishes between government information in general and investigations of the Inspectors General. While the privilege for the latter may be claimed "by the authority ordering the investigation or any superior authority," the privilege for other government information may be claimed *only* "by the head of the executive or military department or government agency concerned." *See generally* the Analysis to Rule 505(c).

★*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, memorandums, 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 paragraphs (1)-(4) of subdivision (d) cannot be made "without causing *identifiable* damage to the public interest." (Emphasis added.)

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